NORTH CAROLINA COURT OF APPEALS REPORTS

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THE COURT OF APPEALS
OF
NORTH CAROLINA

Chief Judge

JOHN C. MARTIN

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Kimberly Woodell Sieredzki

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1	Jerry R. Tillett	Manteo
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3A	W. Russell Duke, Jr.	Greenville
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4B	Charles H. Henry	Jacksonville
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	Phyllis M. Gorham	Wilmington
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	Ronald L. Stephens	Durham
	Kenneth C. Titus	Durham
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15B	Carl R. Fox	Chapel Hill
	R. Allen Baddour	Pittsboro

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11B	Thomas H. Lock	Smithfield
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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
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17A	Edwin Graves Wilson, Jr.	Eden
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	Andy Cromer	King
18	Catherine C. Eagles	Greensboro
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	R. Stuart Albright	Greensboro
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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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20B	W. David Lee	Monroe
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22B	Mark E. Klass	Lexington
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	Linwood O. Foust	Charlotte
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	Timothy L. Patti	Gastonia
27B	Forrest Donald Bridges	Shelby
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	Alan Z. Thornburg	Asheville
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29B	Mark E. Powell	Hendersonville
30A	James U. Downs	Franklin
30B	Bradley B. Letts	Sylva

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	RALPH A. WALKER, JR.	Raleigh

1. Resigned 21 December 2009.
2. Appointed and sworn in 26 October 2009.
3. Appointed and sworn in 17 November 2009.
4. Resigned 29 October 2009.

DISTRICT COURT DIVISION

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1	C. Christopher Bean (Chief)	Edenton
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	Richard Russell Davis	Wilmington
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	Theodore Wright McEntire	Newland
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	Charlotte Brown-Williams	Charlotte
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	Theofanis X. Nixon	Charlotte
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Harley B. Gaston, Jr.	Gastonia
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Edward H. McCormick	Lillington
J. Bruce Morton	Greensboro
Stanley Peele	Hillsborough
Margaret L. Sharpe	Winston-Salem
Samuel M. Tate	Morganton
John L. Whitley	Wilson

1. Appointed and sworn in 31 December 2009.
2. Appointed and sworn in 30 November 2009.
3. Appointed and sworn in 30 October 2009.
4. Resigned 6 November 2009.
5. Appointed and sworn in 30 November 2009.
6. Resigned 3 December 2009.

ATTORNEY GENERAL OF NORTH CAROLINA

Attorney General
ROY COOPER

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Deputy Chief of Staff
NELS ROSELAND

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JUDICIAL STANDARDS COMMISSION ADVISORY OPINION

CASES REPORTED WITHOUT PUBLISHED OPINIONS

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GENERAL STATUTES CITED

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UNITED STATES CONSTITUTION 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

WAKE CARES, INC., PATRICE LEE, INDIVIDUALLY AND AS GUARDIAN AD LITEM OF HER MINOR CHILDREN, IAN LEE, DELANEY LEE, MARGARET LEE AND BAILEY LEE; KATHLEEN BRENNAN, INDIVIDUALLY AND AS GUARDIAN AD LITEM OF HER MINOR CHILD, ELIZABETH BRENNAN; SCOTT P. HAVILAND AND GIHAN I. EL-HABBAL, INDIVIDUALLY AND AS GUARDIANS AD LITEM OF THEIR CHILDREN, AHMED HAVILAND, AYAH HAVILAND AND IMAN HAVILAND; MICHAEL JOHN STANTON AND ANGELA MARIE STANTON, INDIVIDUALLY AND AS GUARDIANS AD LITEM OF THEIR CHILDREN, JACOB STANTON, ALEXIS STANTON, DANIELLE STANTON, DALLAS STANTON AND JORDAN STANTON; AND KIMBERLY SINNOTT AND JOHN NADASKY, INDIVIDUALLY AND AS GUARDIANS AD LITEM OF THEIR CHILDREN, REID NADASKY, SEAN NADASKY, AND JAMES NADASKY, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED, PLAINTIFFS v. WAKE COUNTY BOARD OF EDUCATION AND LORI MILBERG, HORACE J. TART, CAROL PARKER, ROSA GILL, SUSAN PARRY, PATTIE HEAD, ELEANOR GOETTEE, RON MARGIOTTA, AND BEVERLEY CLARK, IN THEIR OFFICIAL CAPACITY AS MEMBERS OF THE WAKE COUNTY BOARD OF EDUCATION, DEFENDANTS

No. COA07-810

(Filed 6 May 2008)

1. Associations; Schools and Education— standing—nonprofit organization—associational basis inapplicable

Wake Cares, Inc., a nonprofit organization, did not have associational standing to bring a declaratory judgment action challenging a county board of education's plan to convert traditional calendar schools to year-round schools and then to assign students to those schools on a mandatory basis because the organization has no members and could not seek relief "on behalf of its members." Furthermore, the organization could not rely on

the constituency theory of *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333 (1977), to establish standing where it made no attempt to show that it meets the constituency test of that case.

2. Declaratory Judgments; Schools and Education— standing—challenge to mandatory year-round schools—parents of students

The individual plaintiffs, parents of public school students, have standing to bring a declaratory judgment action individually and as guardians ad litem of their children challenging a county board of education's plan to assign students to year-round schools on a mandatory basis because the individual plaintiffs were directly affected by the board's action where each of the students was initially assigned to a year-round school, and even though some of the students were ultimately reassigned to traditional calendar schools, they may still be assigned to year-round schools in the future.

3. Declaratory Judgment; Schools and Education— subject matter jurisdiction—exhaustion of administrative remedies

The trial court did not err by denying the board of education's motion to dismiss plaintiffs' complaint for a declaratory judgment based on an alleged failure to exhaust administrative remedies because: (1) N.C.G.S. § 115C-369 provides no means for determining whether a plan for mandatory year-round schools is statutorily or constitutionally permitted; (2) the statute focuses on the individual assignment of a student and would not supply the relief sought in plaintiffs' complaint regarding the board's plan and regulations; and (3) the board has not pointed to any other statute that would provide an administrative remedy encompassing that sought by plaintiffs.

4. Appeal and Error— appealability—mootness

The trial court did not err in a declaratory judgment action by concluding that plaintiffs' challenge to defendant board of education's plan to assign public school students to year-round schools on a mandatory basis was not rendered moot even though all the plaintiffs who were initially assigned to a year-round school under its 2007-2008 assignment plan and subsequently applied for transfer had been reassigned to a traditional calendar or magnet

school because plaintiffs' individual reassignments do not terminate the uncertainty and controversy giving rise to this action as would a declaration that the board does or does not have the authority to implement the plan.

5. Appeal and Error— preservation of issues—failure to argue at trial—failure to cross-assign error

Although plaintiffs contend the trial court's order in a declaratory judgment action should be affirmed based on the rhetoric of constitutional rights, this argument is not properly before the appellate court because: (1) the trial court based its decision solely on the board of education's lack of statutory authority and its conclusion that mandatory year round schools are not authorized under the law; and (2) plaintiffs did not cross-assign error on the grounds that those constitutional arguments present alternative bases for upholding the trial court's decision.

6. Schools and Education— board of education's authority—operation of year-round schools

Local boards of education have the authority to create and operate year-round schools because: (1) in the scheme of public education adopted by the General Assembly, the general control and supervision of all matters pertaining to the public schools in their respective administrative units is delegated to the county and city boards of education subject to any paramount powers vested by law in the State Board of Education or any other authorized agency; (2) the General Assembly has also set out a list of specific powers and duties vested in local school boards under N.C.G.S. § 115C-47 including granting local school boards broad authority to set the school calendar in accordance with N.C.G.S. § 115C-84.2, which in turn encourages local school boards to consider calendar flexibility as a means of achieving educational standards; and (3) the express language exempting year-round schools from the calendar-design restrictions demonstrated that the General Assembly recognized a year-round calendar as a valid alternative to the traditional calendar.

7. Schools and Education— assignment of students to year—round schools—informed parental consent not required

The trial court erred by concluding the local board of education may not assign students to year-round schools without informed parental consent because: (1) the conclusion is precluded by N.C.G.S. § 115C-366(b); (2) the only restrictions

placed on a board's assignment authority are set forth in N.C.G.S. § 115C-367 which prohibits local school boards from assigning students to a given school on account of race, creed, color or national origin; (3) the board has the authority to operate schools in the county school system on a year-round calendar, and thus N.C.G.S. § 115C-366(b) grants full and complete authority to the board to assign children to such schools; (4) there was no contention that plaintiffs are being denied equal access to a sound basic education by being assigned to year-round calendar schools, and thus, N.C.G.S. § 115C-1 does not provide plaintiffs with a right to equal opportunity to attend a school with a traditional calendar; (5) N.C.G.S. § 115C-84.2 does specifically exempt year-round schools from the statute's requirement regarding opening and closing dates of school calendars, and the apparent protection of a teacher's summer vacation; (6) the language of N.C.G.S. § 115C-84.2 is clear, and thus legislative history cannot be relied upon to force a construction on that statute inconsistent with the plain language; (7) the trial court's and plaintiffs' legislative history analysis overlooks the General Assembly's adoption in 1997 of the exemption for year-round schools in the calendar limitation regarding teacher vacation days; (8) neither the trial court nor plaintiffs have presented any other statutory basis for a requirement of informed parental consent prior to assignment of a child to a year-round school; (9) a duty to consult under N.C.G.S. § 115C-84.2(a) cannot be changed to impose a duty to obtain consent; and (10) under N.C.G.S. § 115C-366(b), when a local school board exercises its full and complete authority to assign a student to a year-round school, that decision is final subject only to an application by the student under N.C.G.S. § 115C-369 for reassignment.

Appeal by defendant from order entered 3 May 2007 by Judge Howard E. Manning, Jr. in Wake County Superior Court. Heard in the Court of Appeals 9 January 2008.

Hunter, Higgins, Miles, Elam & Benjamin, PLLC, by Robert N. Hunter, Jr.; and William Peaslee, for plaintiffs-appellees.

Tharrington Smith, L.L.P., by Ann L. Majestic and Curtis H. Allen III, for defendants-appellants.

Kelly & Rowe, P.A., by Robert F. Orr, for amicus curiae North Carolina Association of School Administrators.

Roberts & Stevens, P.A., by Christopher Z. Campbell and K. Dean Shatley, II, for amicus curiae North Carolina Council of School Attorneys.

Poyner & Spruill, LLP, by Edwin M. Speas, Jr.; and Allison Schafer for amicus curiae North Carolina School Boards Association.

UNC Center for Civil Rights, by Ashley Osment, for amici curiae The Wake County Voters Education Coalition, Eugene Weeks, Jennifer A. Bowden, Gerald Wright, Calla Wright, Erica Edwards, Quanta Edwards and Denise Winters.

GEER, Judge.

Defendant Wake County Board of Education ("the Board") appeals from the trial court's order concluding that the Board "lacks the statutory authority to convert traditional calendar schools to *mandatory* year round schools," but ruling that the Board "is authorized by law to operate, *on a voluntary consensual basis*, year round calendar schools," so long as it obtains "*informed parental consent*."[1] (Emphasis original.) Based, however, upon our review of the controlling statutes, we hold that the Board is authorized by the General Assembly to establish year-round schools and to assign students to attend those schools without obtaining their parents' prior consent. We, therefore, reverse the decision below.

Facts

The facts in this case are essentially undisputed.[2] The Wake County Public School System ("WCPSS" or "the school system") is one of the fastest growing public school systems in the nation. In recent years, its student population has increased more than 30 percent from 98,000 students in 2000 to over 128,000 students in school year 2006-2007. The Wake County Planning Department estimated that the school system would add another 8,000 students in the 2007-2008 school year and an additional 65,000 students by 2015. Since July 2000, the Board has opened more than 33 new schools and renovated others to deal with the burgeoning student population.

1. The trial court dismissed plaintiffs' claims against the individual school board members asserted against them only in their official capacity as members of the Board on the ground that those claims were redundant. Plaintiffs have not appealed that dismissal. Therefore, the only remaining defendant is the Board.

2. The facts set forth in this opinion were recited by the trial court. The parties have not contested these facts on appeal.

The Board's building plan has not, however, been able to keep pace with the influx of students. Many schools are overcrowded and use cafeterias, libraries, auditoriums, offices, common areas, teacher lounges, and converted storage rooms as classrooms. In addition, there are more than 1,100 mobile classrooms being used, as compared to 584 mobile units used in the 2002-2003 school year. The 1,100 mobile classrooms seat 25,300 students. Almost one fourth of WCPSS elementary school students are educated in mobile classrooms, a situation that overtaxes facilities such as restrooms, media centers, and cafeterias. At several WCPSS elementary schools, the first lunch period begins as early as 10:30 a.m., while other students end their lunch period just before going home for the day.

Beginning in late 2005, the Board worked with the Wake County Board of County Commissioners and county staff to develop a long-term construction plan that would address the school system's increasing facility needs. The overall plan included five different alternatives, each varying in cost based on the level of construction. All five scenarios contemplated converting some existing schools to a year-round calendar and building new schools that would also operate on a year-round calendar. In developing this plan, the Board considered information from school staff, the results of community surveys, input from county commissioners, and communications from parents, teachers, and community members. It was apparent that a majority of the community would not support a school bond for construction and renovation of schools that exceeded $1 billion.

Presently, the WCPSS has approximately 147 public schools. The schools have three different calendars: a traditional calendar, a multi-track year-round calendar, or a modified calendar (a single-track year-round calendar). All calendars have a total of 180 school days. The traditional calendar begins school in late August and continues until a summer vacation in early June. The modified calendar begins in late July and ends in late May. In the multi-track year-round schools, students are divided into four tracks, each with its own class schedule. Track schedules are then staggered so that three tracks are in school and one track is on break at all times. With the multi-track year-round calendar, 1,000 students can be assigned to a school that would have a traditional-calendar capacity of only 750 students.

As of the 2006-2007 school year, WCPSS operated 16 year-round elementary schools and four year-round middle schools. In that school year, 91,426 students were enrolled in WCPSS elementary and middle schools with 17,174 attending year-round schools. Although

most of the year-round schools were considered "voluntary," and students had to apply to attend them, each year-round school has had a portion of students involuntarily assigned to it since 2003. For the 2006-2007 school year, there were 6,929 students involuntarily assigned to a year-round school. In addition to the multi-track year-round schools, WCPSS operates six magnet schools on the single-track year-round calendar. For the 2006-2007 school year, there were 1,320 students involuntarily assigned to magnet schools.

In September 2006, the Board voted to convert 19 elementary and 3 middle schools to a year-round calendar starting in the 2007-2008 school year, adding approximately 5,000 seats. In making this decision, the Board weighed the risk of a failed bond referendum against a preference for more expensive traditional calendar schools. On 7 November 2006, Wake County voters approved a $970 million bond to fund the Board's capital improvement plan. Beginning on 8 December 2006, the Board began considering proposals for student assignments for the 2007-2008 school year based on its capital improvement plan.

Prior to approving a final assignment plan, the Board notified the parents of potentially affected students that their child could be assigned to a mandatory year-round school and gave them the opportunity to select which "track" they preferred for their child's schedule. On 6 February 2007, after holding three public hearings, the Board approved its final student assignment plan for the 2007-2008 school year. Under that plan, 20,717 students were assigned to newly-converted or newly-built year-round schools. 17,855 of those students had previously been assigned to traditional calendar schools.

On 13 March 2007, plaintiffs filed a class action lawsuit in Wake County Superior Court challenging the Board's plan. The plaintiffs include Wake Cares, Inc., a non-profit organization, and eight parents of WCPSS students, individually and as guardians ad litem for their children. No class was certified prior to the trial court's final order. In their complaint, plaintiffs asserted that the Board lacked the constitutional and statutory authority to convert traditional calendar schools to year-round schools and then assign WCPSS students to those schools on a mandatory basis. Plaintiffs further claimed that the Board's plan to establish mandatory year-round schools for some students while maintaining traditional calendar schools for other students violated plaintiffs' federal due process and equal protection rights; violated plaintiffs' fundamental right to a "uniform and regular education on equal terms" as protected by the North Carolina

Constitution and Chapter 115C of the General Statutes; and violated plaintiffs' right to procedural due process. Plaintiffs sought a declaratory judgment as well as an injunction prohibiting the Board from implementing its plan.

On 4 April 2007, the Board moved to dismiss plaintiffs' claims pursuant to Rule 12(b)(1) and (6) of the Rules of Civil Procedure based on a lack of standing, failure to exhaust available administrative remedies, mootness, and failure to state a claim for relief. Because the trial court chose to consider affidavits submitted by the Board in opposition to plaintiffs' motion for a preliminary injunction, the court converted the Board's Rule 12(b)(6) motion to dismiss into a motion for summary judgment under Rule 56.

After rejecting the Board's arguments regarding standing, exhaustion of administrative remedies, and mootness, the trial court concluded that "the Wake County Board of Education is authorized by law to operate, *on a voluntary consensual basis*, year round calendar schools, modified year round calendar schools, and magnet schools operating as modified or year round calendar schools." According to the trial court, however, the Board "lacks the legal authority from the General Assembly to force children to attend mandatory year round schools." Specifically, the court concluded "[t]hat the Wake County Board of Education *may not require* the attendance of students at year round calendar schools *without informed parental consent*." (Emphasis original.) Finally, the court asserted: "Having made the legal determination that mandatory year round schools are not authorized under the law, there is no need to go further." The court, therefore, entered summary judgment in favor of plaintiffs, but left for the Board "[t]he nuts and bolts of obtaining informed parental consent, determining how many Wake County students and families are willing *to accept assignment* to the newly converted and formerly mandatory year round *assignments*[,] and the aftermath of such determinations . . . ." (Emphasis added.)

The Board timely appealed to this Court. Plaintiffs did not cross-assign error to any portion of the trial court's order. On 25 July 2007, however, plaintiffs filed with the Supreme Court a petition for by-pass of the Court of Appeals pursuant to N.C. Gen. Stat. § 7A-31 (2007) and N.C.R. App. P. 15. That petition was denied on 8 November 2007.

I

We first address the jurisdictional issues raised by the Board. The Board claims that the trial court should have dismissed plaintiffs'

complaint based on (1) lack of standing, (2) a failure to exhaust administrative remedies, and (3) mootness. While we agree that Wake Cares lacks standing, and the motion to dismiss should have been granted as to that organization, we hold that the trial court properly denied the motion as to the Board's remaining arguments.

A. Standing

[1] With respect to Wake Cares' standing, the trial court stated: "Wake Cares, Inc., a non-profit organization, has standing to assert the claims which its members and constituents might have asserted." It is undisputed that Wake Cares in fact has no "members." The Board contends that controlling authority, which does not address "constituents," requires dismissal of Wake Cares as a plaintiff.

An association may have standing to sue " 'in its own right to seek judicial relief from injury to itself,' " *River Birch Assoc. v. City of Raleigh*, 326 N.C. 100, 129, 388 S.E.2d 538, 555 (1990) (quoting *Warth v. Seldin*, 422 U.S. 490, 511, 45 L. Ed. 2d 343, 362, 95 S. Ct. 2197, 2211-12 (1975)), or may assert associational standing to seek relief "on behalf of its members." *Id.* at 130, 388 S.E.2d at 555. With respect to associational standing, our Supreme Court has held:

> "[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."

Id. (quoting *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343, 53 L. Ed. 2d 383, 394, 97 S. Ct. 2434, 2441 (1977)).

In this case, the trial court did not base its conclusion that Wake Cares had standing on any injury to Wake Cares itself, but instead relied solely upon associational standing. Yet, it is undisputed that Wake Cares has no members and, thus, it could not be seeking relief "on behalf of its members." *Id.*

Nevertheless, the United States Supreme Court in *Hunt* recognized a form of associational standing that would permit an organization "to assert the claims of its constituents." 432 U.S. at 345, 53 L. Ed. 2d at 395, 97 S. Ct. at 2442. In *Hunt*, the Washington State Apple Advertising Commission, a state agency, did not have "members," but the Court concluded that it still had standing to "assert[] the claims of

the Washington apple growers and dealers who form its constituency," *id.* at 344, 53 L. Ed. 2d at 395, 97 S. Ct. at 2442, because these growers and dealers "possess[ed] all of the indicia of membership in an organization." *Id.*

Neither the parties nor the trial court specifically address *Hunt's* constituency basis for standing, which has also not been previously addressed by North Carolina's appellate courts. *See Goldston v. State*, 361 N.C. 26, 35, 637 S.E.2d 876, 882 (2006) ("While federal standing doctrine can be instructive as to general principles . . . and for comparative analysis, the nuts and bolts of North Carolina standing doctrine are not coincident with federal standing doctrine.").

We need not, however, decide whether North Carolina should adopt *Hunt's* constituency basis for standing because even assuming, without deciding, that *Hunt's* test should apply to a private organization like Wake Cares, Wake Cares has made no attempt to show that it meets that test. *See, e.g.*, *In re Holocaust Victim Assets Litig.*, 225 F.3d 191, 196 (2d Cir. 2000) ("In evaluating the Commission's claim of standing, the *Hunt* Court listed a number of ways in which the Commission functioned effectively as a membership organization."); *Washington Legal Found. v. Leavitt*, 477 F. Supp. 2d 202, 208 (D.D.C. 2007) (setting forth test that must be met for organization to be deemed "functional equivalen[t]" of traditional membership organizations). Since Wake Cares has not demonstrated that it would qualify as an organization entitled to represent its constituents, it cannot rely on that theory as a basis for establishing standing, and its claims must be dismissed. *See Holocaust Victim Assets Litig.*, 225 F.3d at 196 (dismissing appeal of organization for lack of standing because organization "ha[d] not provided any information that would indicate whether it meets these requirements" of *Hunt*).

Although plaintiffs propose additional theories of standing for Wake Cares, the trial court did not address any theory other than associational standing, and plaintiffs have not cross-assigned error to the court's failure to find standing on those bases. Consequently, those contentions are not properly before this Court. *See Harllee v. Harllee*, 151 N.C. App. 40, 51, 565 S.E.2d 678, 685 (2002) ("[P]laintiff failed to cross-assign error pursuant to Rule 10(d) to the trial court's failure to render judgment on these alternative grounds. Therefore, plaintiff has not properly preserved for appellate review these alternative grounds."). We, therefore, hold that the trial court erred in not granting the Board's motion to dismiss Wake Cares' claims for lack of standing.

[2] The Board also argues that the individual plaintiffs lack standing to sue, contending that none of the plaintiffs have taxpayer standing and that five of the children and three of the parents cannot establish an injury in fact. The trial court did not specifically analyze whether the individual plaintiffs had standing, stating only: "The Court has considered all other arguments in relation to the [Board]'s motion to dismiss pursuant to Rule 12(b)(1) for lack of jurisdiction and standing and rejects those arguments without further discussion." We hold that the individual plaintiffs have sufficiently established their standing to bring a declaratory judgment action.

In pertinent part, the Declaratory Judgment Act provides:

> Any person . . . whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise, and obtain a declaration of rights, status, or other legal relations thereunder.

N.C. Gen. Stat. § 1-254 (2007). Thus, "[t]he Declaratory Judgment Act permits any person affected by a statute or municipal ordinance to obtain a declaration of his rights thereunder." *Bland v. City of Wilmington*, 278 N.C. 657, 659, 180 S.E.2d 813, 815 (1971).

Our Supreme Court has further specified that "[a]n action may not be maintained under the Declaratory Judgment Act to determine rights, status, or other relations unless the action involves a present actual controversy between the parties." *Town of Emerald Isle v. State*, 320 N.C. 640, 645-46, 360 S.E.2d 756, 760 (1987). "A declaratory judgment may be used to determine the construction and validity of a statute," *id.* at 646, 360 S.E.2d at 760, but the plaintiff must be "directly and adversely affected" by the statute, *id.* Most recently, our Supreme Court has explained that a declaratory judgment should issue " '(1) when [it] will serve a useful purpose in clarifying and settling the legal relations at issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity and controversy giving rise to the proceeding.' " *Goldston*, 361 N.C. at 33, 637 S.E.2d at 881 (quoting *Augur v. Augur*, 356 N.C. 582, 588, 573 S.E.2d 125, 130 (2002)).

In this case, the individual plaintiffs challenge the Board's authority to require students to attend year-round schools. Each of the students involved in this action was initially assigned to a year-round

school. The individual plaintiffs were, therefore, directly affected by the action of the Board. While some of the students were ultimately re-assigned to attend traditional calendar schools for the calendar year 2007-2008, they may still be assigned to year-round schools in the future. As a result, an actual controversy still exists, and a declaratory judgment as to the authority of the Board and the rights of the parents and students would terminate and afford relief from the uncertainty, insecurity, and controversy currently existing. *See Charlotte-Mecklenburg Hosp. Auth. v. N.C. Indus. Comm'n*, 336 N.C. 200, 214, 443 S.E.2d 716, 725 (1994) (plaintiffs could seek declaratory judgment that Industrial Commission's rule limiting amounts paid hospital was unlawful even though rule allowed plaintiffs to seek exception from rule because plaintiffs were "not required to sustain actual losses in order to make a test case"). Accordingly, the individual plaintiffs have standing to seek a declaratory judgment.

Because of our disposition of this appeal, we need not address whether plaintiffs have standing to seek injunctive relief. We also are not required to address whether the individual plaintiffs have taxpayer standing as set forth in *Goldston*.

B. Exhaustion of Administrative Remedies

[3] The Board next contends that the trial court should have dismissed the complaint based on plaintiffs' failure to exhaust their administrative remedies under N.C. Gen. Stat. § 115C-369 (2007). If a plaintiff has failed to exhaust his or her administrative remedies, the court lacks subject matter jurisdiction and the action must be dismissed. *Shell Island Homeowners Ass'n v. Tomlinson*, 134 N.C. App. 217, 220, 517 S.E.2d 406, 410 (1999).

N.C. Gen. Stat. § 115C-369(a) provides:

> The parent or guardian of any child, or the person standing in loco parentis to any child, who is dissatisfied with the assignment made by a local board of education may, within 10 days after notification of the assignment, or the last publication thereof, apply in writing to the local board of education for the reassignment of the child to a different public school. . . . If the application for reassignment is disapproved, the local board of education shall give notice to the applicant by registered or certified mail, and the applicant may within five days after receipt of such notice apply to the local board for a hearing. The applicant shall be entitled to a prompt and fair hearing *on the question of reassignment of such child to a different school.*

(Emphasis added.) The local board of education at the hearing "shall consider the best interest of the child, the orderly and efficient administration of the public schools, the proper administration of the school to which reassignment is requested and the instruction, health, and safety of the pupils there enrolled, and shall assign said child in accordance with such factors." N.C. Gen. Stat. § 115C-369(c).

We believe that this case is analogous to *Charlotte-Mecklenburg Hosp. Auth.*, 336 N.C. at 209, 443 S.E.2d at 722, in which the plaintiffs sought a declaration that a rule of the Industrial Commission regarding reimbursement of hospitals was invalid. The defendants contended that because the General Assembly had provided a remedy by which any matter, including charges for hospital services, could be resolved in the Industrial Commission, the plaintiff hospitals had failed to exhaust their administrative remedies by not first pursuing that avenue. *Id.*

The Supreme Court confirmed that even in a declaratory judgment action, " '[w]hen an *effective* administrative remedy exists, that remedy is exclusive.' " *Id.* (quoting *Lloyd v. Babb*, 296 N.C. 416, 428, 251 S.E.2d 843, 852 (1979)). Nonetheless, it pointed out:

> Plaintiff hospitals, however, do not seek review of an award of any *specific claims* for compensation before defendant Commission; rather, they seek a declaratory ruling that the *per diem* reimbursement rule is invalid, and injunctive relief therefrom. [The statutes] only provide for hearings, awards, and review of awards in disputes between employees and employers with respect to specific claims for compensation, and do not address challenges to rules and regulations promulgated by the Commission pursuant to the [Workers' Compensation] Act.

Id. at 209-10, 443 S.E.2d at 722. Because the General Assembly had not provided any procedures to challenge a rule or regulation of the Commission, it had "not provided, within the Act, an adequate remedy for plaintiffs." *Id.* at 211, 443 S.E.2d at 723. The Court, therefore, concluded that the plaintiff hospitals were not barred from proceeding for failure to exhaust administrative remedies. *Id.*

In this case, plaintiffs' complaint did not simply address the assignment of individual students. The complaint challenges the "2007-2008 Growth Management Plan" adopted by the Board that, according to plaintiffs, shifts from using year-round schools as a "stop-gap measure" on an emergency basis for overcrowding to using

it as part of "a long range 'plan for growth.' " Plaintiffs assert in their complaint that this plan "creat[es] a structural defect in the operation of [the local school system] which, once implemented, cannot be readily changed by operation of normal political processes, nor which other branches of government can correct." In their request for declaratory relief, plaintiffs seek a declaration regarding the validity of the Board's plan "and other associated regulations which, if implemented, will assign its members or children of its members to mandatory year-round schools and will expend funds in such a manner so that traditional schools will not be reasonably available now or in the future to its members." Further, plaintiffs contend that they are entitled to injunctive relief prohibiting implementation of the plan.

These claims regarding the validity of the Board's plan to use year-round schools to alleviate overcrowding do not fall within the scope of N.C. Gen. Stat. § 115C-369. Plaintiffs are not challenging specific assignment decisions, but rather an overall plan and accompanying regulations. The question presented by this case is thus not the reassignment of a particular child from one school to another school, as set forth in § 115C-369(a), and none of the factors specified in § 115C-369(c) for consideration by the Board in making a decision under this statute would address the issues regarding the validity of the plan.

The Board, however, asserts that *Cameron v. Wake County Bd. of Educ.*, 36 N.C. App. 547, 244 S.E.2d 497 (1978), dictates the outcome in this case. In *Cameron*, the plaintiffs filed a class action against the Wake County Board of Education, seeking a preliminary injunction against the enforcement of the 1977-1978 student assignment plan and a declaratory judgment that the plan was unconstitutional on the grounds that it is arbitrary and capricious. *Id.* at 547, 244 S.E.2d at 497-98. The named plaintiffs alleged "that the defendant has abdicated its student assignment responsibilities to federal bureaucrats, should have made its assignments on the basis of the welfare of the pupils, and since this was not done, the court should act on behalf of the plaintiffs." *Id.* at 550, 244 S.E.2d at 499.

In concluding that the plaintiffs had improperly failed to exhaust their administrative remedies, this Court held that plaintiffs could not disregard the predecessor statute to N.C. Gen. Stat. § 115C-369 by failing to request reassignment and "tak[e] a route wholly inconsistent with the statutes enacted by the General Assembly." *Id.* at 551, 244 S.E.2d at 500. Significantly, however, the reassignment statute would have provided precisely the relief sought by the plaintiffs:

determination by the Board, and not any federal entity, of " 'the best interests of the child' " regarding school assignment. *Id.* at 549, 244 S.E.2d at 499 (quoting N.C. Gen. Stat. § 115-178).

In this case, N.C. Gen. Stat. § 115C-369 provides no means for determining whether a plan for mandatory year-round schools is statutorily or constitutionally permitted.[3] The statute focuses on the individual assignment of a student and would not supply the relief sought in plaintiffs' complaint regarding the Board's plan and regulations. Since the Board has not pointed to any other statute that would provide an administrative remedy encompassing that sought by plaintiffs, *Charlotte-Mecklenburg Hosp. Auth.* controls, and the trial court properly denied the motion to dismiss based on failure to exhaust administrative remedies.

C. Mootness

[4] Finally, the Board argues that plaintiffs' challenge to its plan to assign WCPSS students to year-round schools on a mandatory basis has been rendered moot due to the fact that all the plaintiffs who were initially assigned to a year-round school under its 2007-2008 assignment plan and subsequently applied for transfer have been reassigned to a traditional calendar or magnet school. "[A]ctions filed under the Declaratory Judgment Act, N.C. Gen. Stat. §§ 1-253 through -267 (2005), are subject to traditional mootness analysis." *Citizens Addressing Reassignment & Educ., Inc. v. Wake County Bd. of Educ.*, 182 N.C. App. 241, 246, 641 S.E.2d 824, 827 (2007), *disc. review denied*, 362 N.C. 234, 659 S.E.2d 438, (2008). "A case is considered moot when 'a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy.' " *Lange v. Lange*, 357 N.C. 645, 647, 588 S.E.2d 877, 879 (2003) (quoting *Roberts v. Madison County Realtors Ass'n*, 344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996)). "Courts will not entertain such cases because it is not the responsibility of courts to decide abstract propositions of law." *Id.* (internal quotation marks omitted). "Conversely, when a court's determination can have a practical effect on a controversy, the court may not dismiss the case as moot." *Id.*

In determining whether plaintiffs' claims may be considered moot, we are bound by *Goldston*. Because we hold that plaintiffs have standing to pursue a declaratory judgment regarding the Board's

3. We do not address whether plaintiffs' equal protection and due process claims would be barred for failure to exhaust their administrative remedies. Nothing in this decision should be viewed as expressing any opinion on that issue.

authority to establish year-round schools and to assign students to those schools on a mandatory basis, the fact that individual plaintiffs have been reassigned does not address the unsettled controversy concerning the Board's authority. *See Goldston*, 361 N.C. at 34-35, 637 S.E.2d at 882 (holding "declaratory judgment remains an appropriate remedy" despite plaintiffs' abandoning their claim "to compel return of the challenged assets" because "[i]f plaintiffs ultimately prevail, their point is made"). Stated differently, the plaintiffs' individual reassignments do not "terminate the uncertainty and controversy giving rise to th[is] action" as would a declaration that the Board does, or does not, have the authority to implement its plan. *Id.* at 34, 637 S.E.2d at 881. As a consequence, plaintiffs' claims are not moot.

II

[5] We now turn to the trial court's decision on the merits. We first note that plaintiffs, in arguing that the trial court's order should be affirmed, couch their contentions in the rhetoric of constitutional rights. The trial court, however, based its decision solely on the Board's lack of "statutory authority" and its conclusion "that mandatory year round schools are not authorized under the law." It then concluded that "there is no need to go further." The court did not address plaintiffs' state and federal constitutional claims. Since plaintiffs have not cross-assigned error on the grounds that those arguments present alternative bases for upholding the trial court's decision, they are not properly before us. *Harllee*, 151 N.C. App. at 51, 565 S.E.2d at 685.

The trial court identified the merits issue as "whether or not the Wake County Board of Education, or for that matter, any Board of Education, has the legal authority to establish mandatory year round schools? This is the critical determination in this case." We believe that the trial court's articulation of the issue actually presents two questions: (1) Does the Board have authority to establish year-round schools, and (2) does the Board have authority to assign students to such schools without their parents' consent?

With respect to the authority of the Board to establish year-round schools, the trial court's order ultimately seems to conclude that the Board does have such authority. The court specifically concluded that the Board is "authorized by law to operate, *on a voluntary consensual basis*, year round calendar schools . . . ." Even plaintiffs, in their brief to this Court, assert that the Board "misstate[s] Plaintiffs' position as an argument that school boards do not have authority to

operate year-round schools . . . .” The trial court’s order, however, appears to base its requirement that attendance at such schools be only on “a voluntary consensual basis” on a lack of express statutory authority to operate such schools except as a program supplemental to traditional calendar schools. We, therefore, first address the Board’s authority to create and operate year-round schools.

[6] The North Carolina Constitution specifies that “[t]he General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools, which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students.” N.C. Const. art. IX, § 2(1). The Constitution, however, further provides that “[t]he State Board of Education shall supervise and administer the free public school system . . . and shall make all needed rules and regulations in relation thereto, subject to laws enacted by the General Assembly.” N.C. Const. art. IX, § 5. The General Assembly has codified this constitutional authority of the State Board of Education in N.C. Gen. Stat. § 115C-12 (2007), which states: “The general supervision and administration of the free public school system shall be vested in the State Board of Education. *The State Board of Education shall establish policy for the system of free public schools*, subject to laws enacted by the General Assembly.” (Emphasis added.)

Nevertheless, as our Supreme Court has explained, the General Assembly “may delegate to local administrative units the power to make such rules and regulations as may be deemed necessary or expedient, and when so delegated it is peculiarly within the province of the administrative officers of the local unit to determine what things are detrimental to the successful management, good order, and discipline of the schools in their charge and the rules required to produce those conditions.” *Coggins v. Bd. of Educ. of Durham*, 223 N.C. 763, 767, 28 S.E.2d 527, 530 (1944). Consistent with *Coggins*, the General Assembly has exercised its right to delegate power to local school boards by providing a broad grant of authority:

> All powers and duties conferred and imposed by law respecting public schools, which are not expressly conferred and imposed upon some other official, are conferred and imposed upon local boards of education. *Said boards of education shall have general control and supervision of all matters pertaining to the public schools in their respective administrative units* and they shall enforce the school law in their respective units.

N.C. Gen. Stat. § 115C-36 (2007) (emphasis added). *See also* N.C. Gen. Stat. § 115C-40 (2007) ("Local boards of education, subject to any paramount powers vested by law in the State Board of Education or any other authorized agency shall have general control and supervision of all matters pertaining to the public schools in their respective local school administrative units . . . ."); *Hughey v. Cloninger*, 297 N.C. 86, 94, 253 S.E.2d 898, 903 (1979) ("In the scheme of public education adopted by the General Assembly, the 'general control and supervision of all matters pertaining to the public schools in their respective administrative units' is delegated to the county and city boards of education, subject to any paramount powers vested by law in the State Board of Education or any other authorized agency." (quoting N.C. Gen. Stat. § 115-27)).

In addition to this broad grant of authority, the General Assembly has also set out a list of specific powers and duties vested in local school boards. *See* N.C. Gen. Stat. § 115C-47 (2007). These enumerated powers complement the "general control and supervision" vested in local school boards by §§ 115C-36 and -40, with the result that "[e]ach County Board of Education is vested with authority to fix and determine the method of conducting the public schools in its county so as to furnish the most advantageous method of education available to the children attending its public schools." *Coggins*, 223 N.C. at 767, 28 S.E.2d at 530.

N.C. Gen. Stat. § 115C-47(11) specifies that "[l]ocal boards of education shall determine the school calendar under G.S. 115C-84.2." N.C. Gen. Stat. § 115C-84.2(a) (2007), in turn, requires that each local board of education "adopt a school calendar consisting of 215 days all of which shall fall within the fiscal year." In addition, the statute mandates "[a] minimum of 180 days and 1,000 hours of instruction covering at least nine calendar months." *Id.* The local board, however, "shall designate when the 180 instructional days shall occur." *Id.* Significantly, subsection (a) of § 115C-84.2 concludes by stressing: "Local boards and individual schools are encouraged to use the calendar flexibility in order to meet the annual performance standards set by the State Board." *Id.* Thus, local school boards have been granted the flexibility to adopt the school calendars best suited to fulfilling the State's educational mandates.

N.C. Gen. Stat. § 115C-84.2 does, however, place some limitations on the design of a school calendar, including a mandate that the calendar include 42 consecutive days when teacher attendance is not required "unless . . . the school is a year-round school." N.C. Gen.

Stat. § 115C-84.2(b)(2). Further, although reiterating that "[l]ocal boards of education shall determine the dates of opening and closing the public schools under subdivision (a)(1) of this section," the statute specifies that "[*e*]*xcept for year-round schools*, the opening date for students shall not be before August 25, and the closing date for students shall not be after June 10." N.C. Gen. Stat. § 115C-84.2(d) (emphasis added).

Thus, N.C. Gen. Stat. § 115C-47 grants local school boards broad authority to set the school calendar in accordance with N.C. Gen. Stat. § 115C-84.2, which, in turn, encourages local school boards to consider calendar flexibility as a means of achieving educational standards. N.C. Gen. Stat. § 115C-84.2 does require 180 days of instruction over "at least nine calendar months," but exempts "year-round schools" from the requirement of a 42-day break for teachers and from the restrictions on opening and closing dates. The express language exempting year-round schools from the calendar-design restrictions demonstrates that the General Assembly recognized a year-round calendar as a valid alternative to the traditional calendar (which includes a significant summer vacation).

Although the issues in this case have been discussed in terms of "traditional" calendar schools versus "year-round" calendar schools, both of these school calendar options comply with the requirements set out in § 115C-84.2(a) and (b). Indeed, there has been no suggestion that a year-round calendar such as the one adopted by the Board in this case fails to comply with N.C. Gen. Stat. § 115C-84.2. Thus, the Board has authority under these statutes to operate year-round schools.

[7] While the trial court seemed to agree that the Board has this authority, it also concluded that the Board cannot assign students to year-round schools without informed parental consent. This conclusion is precluded by N.C. Gen. Stat. § 115C-366(b) (2007), which provides:

> Each local board of education shall assign to a public school each student qualified for assignment under this section. Except as otherwise provided by law, *the authority of each board of education in the matter of assignment of children to the public schools shall be full and complete, and its decision as to the assignment of any child to any school shall be final.*

(Emphasis added.) The only restrictions placed on a Board's assignment authority are set forth in N.C. Gen. Stat. § 115C-367 (2007),

which prohibits local school boards from assigning students to a given school "on account of race, creed, color or national origin."

If, as we have held, the Board has authority to operate schools in the WCPSS on a year-round calendar, then N.C. Gen. Stat. § 115C-366(b) grants "full and complete" authority to the Board to assign children to such schools. Indeed, the Board's decision to assign a child to "any school"—which by its plain language must include all lawfully-operated schools—"shall be final." *Id.*

It appears that the trial court and plaintiffs base their requirement that any assignment to a year-round school be voluntary on a strained reading of N.C. Gen. Stat. § 115C-84.2 combined with N.C. Gen. Stat. § 115C-1 (2007). According to the trial court, N.C. Gen. Stat. § 115C-1 provides a right for students to attend a traditional calendar school:

> The text of [§ 115C-1] makes mandatory what the text of the constitution leaves discretionary. Because the constitution references the phrase "uniform school term" as being at least nine months, and the legislature has required that the term be nine months, the school term is a feature of public school uniformity inherent in the constitutional mandate of a general and uniform school system. A nine month term is therefore mandatory upon local school administrative units throughout the state. Equal access to a nine month school term is part of the constitutional privilege of a general and uniform system of free public schools and a part of "the property right" of an education.

The trial court and plaintiffs attempt to reconcile this "right" with N.C. Gen. Stat. § 115C-84.2 by reading that statute as equating "year-round schools" with voluntary "supplemental or additional educational programs or activities," as provided for in § 115C-84.2(e).

According to the trial court, "[t]he permissive use of the term year round schools in G.S. 115C-84.2(d) does not alter the force or effect of the mandatory language in G.S. 115C-1 relating to a uniform nine month term." The trial court's construction of the statutes and plaintiffs' contentions cannot be reconciled with the plain language of the statutes or prior appellate opinions.

N.C. Gen. Stat. § 115C-1 states:

> A general and uniform system of free public schools shall be provided throughout the State, wherein equal opportunities shall

> be provided for all students, in accordance with the provisions of Article IX of the Constitution of North Carolina. . . . There shall be operated in every local school administrative unit a uniform school term of nine months, without the levy of a State ad valorem tax therefor.

This Court has previously held that "§ 115C-1 simply codifies the 'general and uniform' and 'equal opportunities' clauses of the Constitution . . . ." *Leandro v. State*, 122 N.C. App. 1, 14, 468 S.E.2d 543, 552 (1996), *aff'd in part and rev'd in part*, 346 N.C. 336, 488 S.E.2d 249 (1997).

Initially, we note that there is no dispute regarding whether the Constitution provides the right to a uniform nine-month term asserted by plaintiffs and recognized by the trial court; it does not. Article IX provides for a "uniform system" that "shall be maintained *at least* nine months in every year . . . ." N.C. Const. art. IX, § 2(1) (emphasis added). "[T]he word 'uniform' modifies the word 'system,' not the word 'term.' The Constitution, therefore, does not require a uniform 180 day term." *Morgan v. Polk County Bd. of Educ.*, 74 N.C. App. 169, 174, 328 S.E.2d 320, 324 (1985) (citing *Bd. of Educ. v. Bd. of Comm'rs of Granville County*, 174 N.C. 469, 473, 93 S.E. 1001, 1002 (1917)).

The language of art. IX, § 2(1) does not explicitly require uniformity with respect to the opening and closing dates. It requires the State to maintain a free public school system with a minimum quantum of instruction of nine months each year. *Frazier v. Bd. of Comm'rs of Guilford County*, 194 N.C. 49, 63, 138 S.E. 433, 440 (1927) (prior N.C. Const. art. IX, § 3, now N.C. Const. art. IX, § 2(1), "is not a limitation as to the length of the school term; it is the minimum required by the Constitution").

Our Supreme Court has also specifically considered what the references to a "uniform system" and "equal opportunities" mean:

> [The North Carolina Constitution] places upon the General Assembly the duty of providing for "a general and uniform system of free public schools . . . wherein equal opportunities shall be provided for all students." N.C. Const. art. IX, § 2(1). *We conclude that at the time this provision was originally written in 1868 providing for a "general and uniform" system but without the equal opportunities clause, the intent of the framers was that every child have a fundamental right to a sound basic educa-*

> *tion* which would prepare the child to participate fully in society as it existed in his or her lifetime. *The 1970 amendment adding the equal opportunities clause ensured that all the children of this state would enjoy this right.*

Leandro v. State, 346 N.C. 336, 348, 488 S.E.2d 249, 255-56 (1997) (emphasis added) (internal citations omitted). As § 115C-1 is a codification of the constitutional provision, this analysis necessarily also controls as to § 115C-1.

Leandro established that the requirement of "equal opportunities" was added to ensure that all children had equal access to a sound basic education. The Court stressed: "Although we have concluded that the North Carolina Constitution requires that access to a sound basic education be provided equally in every school district, we are convinced that the equal opportunities clause of Article IX, Section 2(1) does not require substantially equal funding *or educational advantages* in all school districts." *Leandro*, 346 N.C. at 349, 488 S.E.2d at 256 (emphasis added). Since there is no contention that plaintiffs are being denied equal access to a sound basic education by being assigned to year-round calendar schools,[4] N.C. Gen. Stat. § 115C-1 does not provide plaintiffs with a right to "equal opportunity" to attend a school with a traditional calendar.

Further, we cannot agree with the trial court's assumption that § 115C-1's reference to a "uniform school term of nine months" necessarily means a term of no more and no less than nine months. The statute, especially as a codification of the Constitution, can equally be read as setting a floor for the quantum of education required. Any other construction of the statute would place § 115C-1 in conflict with § 115C-84.2(a)(1)'s requirement that a school calendar include "[a] minimum of 180 days and 1,000 hours of instruction covering *at least nine calendar months*." (Emphasis added.)

Our Supreme Court has held that the statutes governing education "are to be construed *in pari materia*" and, "[i]f possible, they are to be reconciled and harmonized." *Bd. of Educ. of Onslow County v. Bd. of County Comm'rs of Onslow County*, 240 N.C. 118, 126, 81 S.E.2d 256, 262 (1954). In order to do so, the Court directed the following "judicial approach":

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4. The trial court acknowledged in its order that "there is no contention that the educational opportunity offered by a year round school is better or worse than the educational opportunity offered by a traditional elementary or middle school . . . ."

> "The different sections should be regarded, not as prior and subsequent acts, but as simultaneous expressions of the legislative will; but, where every means of reconciling inconsistencies has been employed in vain, the section last adopted will prevail, regardless of their relative positions in the code or revision. An unnecessary implication arising from one section, inconsistent with the express terms of another on the same subject, yields to the expressed intent, and the two sections are not repugnant."

Id. (quoting 82 C.J.S. *Statutes* § 385(b)). *See also Whittington v. N.C. Dep't of Human Res.*, 100 N.C. App. 603, 606, 398 S.E.2d 40, 42 (1990) ("[W]hen one statute speaks directly and in detail to a particular situation, that direct, detailed statute will be construed as controlling other general statutes regarding that particular situation, absent clear legislative intent to the contrary. . . . [S]tatutes relating to the same subject should be construed *in pari materia*, in such a way as to give effect, if possible, to all provisions without destroying the meaning of the statutes involved.").

Here, construing § 115C-1, a general statute codifying the constitutional provision, as mandating a term of precisely nine months rather than establishing a minimum term of nine months (as set out in the constitution) would conflict with the later-enacted § 115C-84.2. That more recent statute, however, specifically addresses the requirements for school calendars and requires "at least nine months." The construction of § 115C-1 adopted by the trial court is unnecessary and should, therefore, "yield[]" to the express intent in § 115C-84.2. *Bd. of Educ. of Onslow County*, 240 N.C. at 126, 81 S.E.2d at 262.

We hold, therefore, that § 115C-1, consistent with the purpose of the constitutional provision it was designed to implement, does not mandate equal access to a school term of nine consecutive months, but rather refers to the minimum quantum of educational instruction required. How that minimum quantum of instruction is translated into an annual school calendar is then prescribed by § 115C-84.2, which sets out certain requirements, but otherwise mandates that "[t]he local board shall designate when the 180 instructional days shall occur" and specifically recognizes "year-round school[s]" as a permissible calendaring scheme. N.C. Gen. Stat. § 115C-84.2(a)(1), (b)(2), (d).

The trial court and plaintiffs, however, construe § 115C-84.2 as denying local school boards the authority to operate schools on a year-round calendar except, according to the trial court, as part of

"supplemental or additional programs which supplement or add to the uniform school calendar," referencing § 115C-84.2(e). N.C. Gen. Stat. § 115C-84.2(e) states: "Nothing in this section prohibits a local board of education from offering supplemental or additional educational programs or activities outside the calendar adopted under this section." The trial court apparently believed that this subsection of § 115C-84.2 permitted year-round schools as "supplemental" to the nine-month calendar, but because such schools were merely supplemental programs, students could not be assigned to them without parental consent. We cannot accept this reading of the statute.

It is, of course, fundamental "that when construing a statutory provision, the words in the statute are to be given their natural or ordinary meaning, unless the context of the provision indicates that they should be interpreted differently." *Whittington*, 100 N.C. App. at 606, 398 S.E.2d at 42. In this case, § 115C-84.2(d) expressly exempts "year-round schools" from the statute's requirement regarding opening and closing dates of school calendars: "*Except for year-round schools*, the opening date for students shall not be before August 25, and the closing date for students shall not be after June 10." (Emphasis added.) N.C. Gen. Stat. § 115C-84.2(e) relates only to "supplemental or additional educational programs or activities *outside the calendar adopted under this section*." (Emphasis added.) Since the provision in § 115C-84.2(d) referencing "year-round schools" governs calendars permitted under the statute, "year-round schools" necessarily do not constitute programs "outside the calendar" permitted by the statute.

Nonetheless, the trial court ruled that "it is clear the way to reconcile this exception in the opening and closing of schools [in N.C. Gen. Stat. § 115C-84.2(d)] with N.C. Gen. Stat. § 115C-1 is to define year round schools or modified calendar schools as schools which are 'additional' or 'supplemental' and having a voluntary aspect to participation by students." The court then added: "[T]he only way the Legislature would allow school[] boards to operate schools which did not adhere to its protection of summer vacation provisions was to allow a school board to have 'supplemental' or 'additional' school programs."

Contrary to this assumption by the trial court, N.C. Gen. Stat. § 115C-84.2(b)(2), in fact, does specifically exempt year-round schools from the statute's apparent protection of a teacher's summer vacation: "The calendar shall include at least 42 consecutive days when teacher attendance is not required unless: (i) the school is a

year-round school . . . ." This provision—within the portions of the statute setting out standards for school calendars and unrelated to "supplemental" programs—runs counter to the trial court's construction of the statute. Indeed, the General Assembly could not have intended in this reference to "year-round schools" to equate such schools with "supplemental" or "additional" programs as set forth in N.C. Gen. Stat. § 115C-84.2(e). Subsection (b)(2) was added in 1997, 1997 N.C. Sess. Laws 443, s. 838, while subsection (e), addressing supplemental programs, did not come into existence until 2004, 2004 N.C. Sess. Laws 180, s. 1.

As support for its construction of § 115C-84.2, the trial court relied upon legislative history regarding the General Assembly's amendments to § 115C-84.2 in 2004. That legislation added the limitation on opening and closing dates (with the exception for year-round schools) and added subsection (e) discussing supplemental educational programs. 2004 N.C. Sess. Laws 180, s. 1. According to plaintiffs, the fact that the House and Senate Conference Committee that produced 2004 N.C. Sess. Law 180 chose to remove proposed definitions of "year-round schools" from the Act while adding the authorization in subsection (e) of supplemental programs necessarily means that year-round schools are supplemental or additional programs under § 115C-84.2(e).

The Supreme Court has, however, stressed that "where the language of a statute expresses the legislative intent in clear and unambiguous terms, the words employed must be taken as the final expression of the meaning intended unaffected by its legislative history." *Piedmont Canteen Serv., Inc. v. Johnson*, 256 N.C. 155, 161, 123 S.E.2d 582, 586 (1962). We believe that the language of N.C. Gen. Stat. § 115C-84.2(a)(1) and (d) is clear and unambiguous. Legislative history cannot, therefore, be relied upon to force a construction on that statute inconsistent with the plain language.

In any event, the inference drawn by the trial court and plaintiffs from the events in 2004 is at best tenuous. One can just as readily infer that the General Assembly felt that it was unnecessary to define "year-round schools" and that any such definition would inappropriately constrain local school boards from "us[ing] the calendar flexibility in order to meet the annual performance standards set by the State Board," as encouraged by N.C. Gen. Stat. § 115C-84.2(a).

Moreover, the trial court's and plaintiffs' legislative history analysis overlooks the General Assembly's adoption in 1997 of the exemp-

tion for "year-round school[s]" in the calendar limitation regarding teacher vacation days. This prior amendment adding an exception for year-round schools, long before a subsection relating to supplemental programs existed, undercuts the inference drawn by the trial court from the—at best—ambiguous legislative history.

Neither the trial court nor plaintiffs have presented any other statutory basis for a requirement of informed parental consent prior to assignment of a child to a year-round school. We note further that the trial court's approach is inconsistent with N.C. Gen. Stat. § 115C-84.2(a)'s requirement that "[l]ocal boards of education shall consult with parents and the employed public school personnel in the development of the school calendar." While this provision requires only consultation, the trial court's order requires agreement by parents in their children's calendar. "[W]hen confronted with a clear and unambiguous statute, courts 'are without power to interpolate, or superimpose, provisions and limitations not contained therein.' " *In re R.L.C.*, 361 N.C. 287, 292, 643 S.E.2d 920, 923 (quoting *In re Banks*, 295 N.C. 236, 239, 244 S.E.2d 386, 388-89 (1978)), *cert. denied*, —– U.S. —–, 169 L. Ed. 2d 396, 128 S. Ct. 615 (2007). Thus, we cannot impose a duty to obtain consent when the statute provides only a duty to consult.

We, therefore, hold that the Board has the authority under N.C. Gen. Stat. § 115C-84.2 to create and operate year-round schools. Further, no authority exists to support the trial court's requirement of informed parental consent prior to assignment to such schools. To the contrary, under N.C. Gen. Stat. § 115C-366(b), when a local school board exercises its "full and complete" authority to assign a student to a year-round school, that decision is "final" subject only to an application by the student under N.C. Gen. Stat. § 115C-369 for reassignment.

Conclusion

We note that much of the trial court's decision as well as the materials submitted by the parties to the trial court addressed the advantages and disadvantages of a year-round calendar. Such questions are for the local boards of education, the State Board of Education, and the General Assembly to decide. As our Supreme Court stressed in its landmark education decision:

> The legislature, unlike the courts, is not limited to addressing only cases and controversies brought before it by litigants. The

> legislature can properly conduct public hearings and committee meetings at which it can hear and consider the views of the general public as well as educational experts and permit the full expression of all points of view as to what curricula will best ensure that every child of the state has the opportunity to receive a sound basic education.

Leandro, 346 N.C. at 355, 488 S.E.2d at 259. The Court "reemphasize[d] [its] recognition of the fact that the administration of the public schools of the state is best left to the legislative and executive branches of government." *Id.* at 357, 488 S.E.2d at 261.

The Court also recognized more than 60 years ago that "[i]f the opinion of court or jury is to be substituted for the judgment and discretion of the board at the will of a disaffected pupil, the government of our schools will be seriously impaired, and the position of school boards in dealing with such cases will be most precarious." *Coggins*, 223 N.C. at 769, 28 S.E.2d at 531. As the Court stated then, "complaints of disaffected pupils of the public schools against rules and regulations promulgated by school boards for the government of the schools raise questions essentially political in nature, and the remedy, if any, is at the ballot box." *Id.*

Thus, if plaintiffs disagree with mandatory assignment to year-round schools, their remedy lies with the electoral process or through communications with the legislative and executive branches of government. We cannot improve upon the incisive statement contained in the amicus brief filed on behalf of the North Carolina Association of School Administrators:

> To the extent that the General Assembly wanted to limit or even eliminate "year round" calendar schools, it has the power to do so. It has not done so, obviously recognizing the importance of giving school boards the necessary flexibility to deal with diverse student populations and the particular challenges faced during a school year by different districts from the mountains to the coast, from small rural districts to large urban districts. To allow the trial court's order and reasoning to stand would significantly impair the ability of boards and school administrators to tailor school calendars and assignment policies of each district so as to provide each student an opportunity for a sound basic education and to prudently utilize the tax resources which fund that opportunity.

Accordingly, we reverse the decision below and remand for entry of judgment in favor of the Board.

Reversed.

Judges McCULLOUGH and STEELMAN concur.

HARLEYSVILLE MUTUAL INSURANCE COMPANY, PLAINTIFF v. BUZZ OFF INSECT SHIELD, L.L.C., A NORTH CAROLINA LIMITED LIABILITY COMPANY, INTERNATIONAL GARMENT TECHNOLOGIES, L.L.C., A NORTH CAROLINA LIMITED LIABILITY COMPANY, ERIE INSURANCE EXCHANGE, ERIE INSURANCE COMPANY, DEFENDANTS

No. COA07-1002

(Filed 6 May 2008)

1. **Appeal and Error— appealability—interlocutory order—insurer's duty to defend—substantial right**

   Although an appeal from a grant of partial summary judgment is generally an appeal from an interlocutory order, the issue of whether an insurer has a duty to defend the insured in the underlying action affects a substantial right and is immediately appealable.

2. **Insurance— liability insurers—duty to defend—comparison test**

   Liability insurance carriers had a duty to defend IGT in an action against IGT for trademark infringement and false advertising because: (1) utilization of the comparison test revealed that the allegations disclosed a possibility that IGT was liable and that the carriers had a duty to defend IGT against the action since the allegations in the complaint claim that IGT made false, negative comparative statements about the pertinent goods in the course of its advertising; (2) the conduct giving rise to the cause of action occurred within the coverage dates of the carriers' policies; and (3) the allegations did not fall within the carriers' "Quality or Performance of Goods—Failure to Conform to Statements" exclusion.

   Judge GEER dissenting.

Appeal by plaintiff and defendants Erie Insurance Exchange and Erie Insurance Company from judgments entered 24 May 2007 and 25

June 2007 by Judge John O. Craig, III in Guilford County Superior Court. Heard in the Court of Appeals 7 February 2008.

Pinto, Coates, Kyre & Brown, P.L.L.C., by David L. Brown and John I. Malone, Jr., for plaintiff-appellant.

Cozen O'Connor, by Michael A. Hamilton, Philadelphia, Pennsylvania, pro hac vice; and Burton & Sue, L.L.P., by Gary K. Sue, for defendant-appellants Erie Insurance Exchange and Erie Insurance Company.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Mack Sperling and John S. Buford; and Latham & Watkins, L.L.P., by Cecilia O'Connell Miller, San Diego, California, pro hac vice, for defendant-appellees International Garment Technologies, L.L.C. and Buzz Off Insect Shield, L.L.C.

TYSON, Judge.

Harleysville Mutual Insurance Company ("Harleysville") and Erie Insurance Exchange and Erie Insurance Company ("Erie") (collectively, "the Carriers") appeal from orders entered by the superior court, which: (1) granted International Garment Technologies, L.L.C.'s ("IGT") motion for partial summary judgment and granted in part and denied in part the Carriers' motions for partial summary judgment; and (2) denied the Carriers' motions to alter, amend, or vacate judgment. We affirm.

I. Background

On 22 February 2005, S.C. Johnson & Son, Inc. ("S.C. Johnson"), filed a complaint in the United States District Court for the Northern District of Illinois and alleged claims against Buzz Off Insect Shield, L.L.C. ("BOIS") for: (1) trademark infringement; (2) false advertising; (3) unfair competition; (4) unjust enrichment; and (5) other related violations of Illinois state law. On 26 April 2005, BOIS and IGT filed a complaint in the United States District Court for the Middle District of North Carolina and sought a declaration: (1) of trademark rights and non-infringement; (2) that S.C. Johnson's claims are barred; (3) that BOIS and IGT have not engaged in false advertising; and (4) of no unjust enrichment. The Honorable P. Trevor Sharp of the United States District Court for the Middle District of North Carolina consolidated the two cases. S.C. Johnson amended its original complaint and added IGT as a defendant.

On 18 May 2006, Harleysville filed a complaint in Guilford County Superior Court and sought a declaratory judgment that the policies of insurance issued by Harleysville to IGT do not provide coverage to BOIS or IGT for any of the claims or damages resulting from the allegations contained in the underlying lawsuit. In the alternative, Harleysville sought to have the superior court declare that Erie: (1) is afforded coverage to BOIS or IGT for the damages resulting from the allegations in the underlying lawsuit; (2) is required to defend BOIS and/or IGT in the underlying lawsuit; and (3) is obligated to pay any damages that BOIS and/or IGT may become legally obligated to pay as a result of the underlying lawsuit.

On 20 July 2006, IGT and BOIS answered Harleysville's complaint and IGT filed crossclaims and counterclaims against the Carriers that: (1) sought a declaratory judgment that the Carriers had a duty to defend IGT; (2) alleged the Carriers breached their duty to defend BOIS and IGT; and (3) alleged the Carriers breached their duty to defend in bad faith. On 9 August 2006, Erie answered Harleysville's complaint and filed crossclaims and a counterclaim asserting that it owed no duty to defend or indemnify BOIS and IGT with respect to the underlying action. In the alternative, Erie "request[ed] that the [superior] [c]ourt declare that Harleysville has an obligation to defend and indemnify BOIS and IGT for any costs they, or anyone on their behalf, incur in connection with the underlying lawsuit."

On 8 March 2007, IGT moved for "partial summary judgment as to its duty to defend and breach of duty to defend claims against [the Carriers]." On 24 May 2007, the superior court granted IGT's motion for partial summary judgment and "retain[ed] jurisdiction over any future determination regarding whether any disputed fee, expense, or costs incurred by IGT in its defense of the *S.C. Johnson* action is reasonable and/or otherwise incurred in the defense of IGT in the *S.C. Johnson* action." (Emphasis original). The superior court also found "that BOIS is not an 'insured' under the relevant Harleysville or Erie policies and that neither Harleysville nor Erie has a duty to defend or to indemnify BOIS regarding the *S.C. Johnson* action." (Emphasis original). BOIS did not appeal the superior court's judgment.

On 5 June 2007, the Carriers moved to alter, amend, or vacate the 24 May 2007 judgment. On 25 June 2007, the superior court filed its order, which denied the Carriers' motions to alter, amend, or vacate judgment. The Carriers appeal both the 24 May 2007 judgment and the 25 June 2007 denial of their motions to alter, amend, or vacate judgment.

II. Interlocutory Appeal

[1] As a preliminary matter, we note that because the trial court granted partial summary judgment, the trial court's order did not dispose of the entire case and this appeal is interlocutory. *See Johnson v. Lucas*, 168 N.C. App. 515, 518, 608 S.E.2d 336, 338 ("[T]he order granting partial summary judgment is interlocutory."), *aff'd*, 360 N.C. 53, 619 S.E.2d 502 (2005); *see also Ratchford v. C.C. Mangum, Inc.*, 150 N.C. App. 197, 199, 564 S.E.2d 245, 247 (2002) ("A final judgment is one that determines the entire controversy between the parties, leaving nothing to be decided in the trial court."). Our Supreme Court has stated:

> Generally, a party cannot immediately appeal from an interlocutory order unless failure to grant immediate review would affect[] a substantial right pursuant to N.C.G.S. sections 1-277 and 7A-27(d).
>
> A party may appeal an interlocutory order under two circumstances. First, the trial court may certify [pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b) (2007)] that there is no just reason to delay the appeal after it enters a final judgment as to fewer than all of the claims or parties in an action. Second, a party may appeal an interlocutory order that affects some substantial right claimed by the appellant and will work an injury to him if not corrected before an appeal from the final judgment.

Davis v. Davis, 360 N.C. 518, 524-25, 631 S.E.2d 114, 119 (2006) (internal citations and quotations omitted).

In *Lambe Realty Inv., Inc. v. Allstate Ins. Co.*, this Court "conclude[d] that the order of partial summary judgment on the issue of whether [an insurer] has a duty to defend [the insured] in the underlying action affects a substantial right that might be lost absent immediate appeal." 137 N.C. App. 1, 4, 527 S.E.2d 328, 331 (2000). Based on this Court's holding in *Lambe Realty*, the trial court's order is immediately appealable. *Id.*

III. Issue

[2] The Carriers argue the superior court erred when it granted IGT's motion for partial summary judgment.

IV. Motion for Summary Judgment

The Carriers argue the superior court erred when it found the allegations in S.C. Johnson's complaint triggered the Carriers' duty to defend IGT. We disagree.

A. Standard of Review

> Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. The party moving for summary judgment ultimately has the burden of establishing the lack of any triable issue of fact.
>
> A defendant may show entitlement to summary judgment by (1) proving that an essential element of the plaintiff's case is nonexistent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot 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

1. Covered Claim

Our Supreme Court has stated:

> Generally speaking, the insurer's duty to defend the insured is broader than its obligation to pay damages incurred by events covered by a particular policy. An insurer's duty to defend is ordinarily measured by the facts as alleged in the pleadings; its duty

> to pay is measured by the facts ultimately determined at trial. When the pleadings state facts demonstrating that the alleged injury is covered by the policy, then the insurer has a duty to defend, whether or not the insured is ultimately liable.

Waste Management of Carolinas, Inc. v. Peerless Ins. Co., 315 N.C. 688, 691, 340 S.E.2d 374, 377 (1986) (citation omitted). "[A]llegations of facts that describe a hybrid of covered and excluded events or pleadings that disclose a mere possibility that the insured is liable (and that the potential liability is covered) suffice to impose a duty to defend upon the insurer." *Id.* at 691 n.2, 340 S.E.2d at 377 n.2. "[W]hen the pleadings allege facts indicating that the event in question is not covered, and the insurer has no knowledge that the facts are otherwise, then it is not bound to defend." *Id.* at 691, 340 S.E.2d at 377; *see also Roman Cath. Diocese of Springfield v. Maryland Cas. Co.*, 139 F.3d 561, 567 (7th Cir. 1998) ("The complaint need not allege or use language affirmatively bringing the claims within the scope of the policy, as the question of coverage should not hinge exclusively on the draftsmanship skills or whims of the plaintiff in the underlying action." (Quotation omitted)).

In order to determine whether the allegations as alleged by S.C. Johnson are covered by the provisions of IGT's liability insurance with the Carriers, the policy provisions must be analyzed and compared with the allegations. *Waste Management of Carolinas, Inc.*, 315 N.C. at 693, 340 S.E.2d at 378. "This is widely known as the 'comparison test': the pleadings are read side-by-side with the policy to determine whether the events as alleged are covered or excluded. Any doubt as to coverage is to be resolved in favor of the insured." *Id.* (citation omitted).

Both of the Carriers' policies contained identical provisions and definitions:

> COVERAGE B PERSONAL AND ADVERTISING INJURY LIABILITY
>
> 1. Insuring Agreement
>
> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal and advertising injury" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking dam-

ages for "personal and advertising injury" to which this insurance does not apply.

. . . .

SECTION V—DEFINITIONS

. . . .

14. "Personal and advertising injury" means injury, including consequential "bodily injury", arising out of one or more of the following offenses:

    . . . .

    d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;

    . . . .

    g. Infringing upon another's copyright, trade dress or slogan in your "advertisement."

S.C. Johnson's complaint alleged BOIS and IGT made false advertising claims through the BOIS website and the websites and materials of the BOIS partners. S.C. Johnson also alleged that one such false advertising claim specifically named its OFF! Deep Woods® product. All other alleged false advertising S.C. Johnson complained of was directed toward the whole market of skin-applied insect repellents, a market in which S.C. Johnson asserts it is the "leading sell[er] . . . ."

The allegations contained in S.C. Johnson's complaint "disclose a . . . possibility that [IGT] is liable (and that the potential liability is covered) [and] suffice to impose a duty to defend upon the [Carriers]." *Id.* at 691 n.2, 340 S.E.2d at 377 n.2; *see also Winklevoss Consultants, Ins. v. Federal Ins. Co.*, 11 F. Supp. 2d 995, 1000 (N.D. Ill. 1998) (holding that because "[t]he [complaint filed by the plaintiff in the underlying action] . . . includes factual allegations that [the insured] made false negative comparative statements about [the underlying plaintiff's] goods, causing [the underlying plaintiff] to lose sales[] [i]t d[id] not matter that the[] allegations [made by the plaintiff in the underlying action] may not meet the technical requisites for stating a commercial disparagement claim.").

The Carriers have a duty to defend IGT against the S.C. Johnson action because the allegations in that complaint claim that IGT made

false, negative comparative statements about S.C. Johnson's goods in the course of its advertising. The Carriers have failed to show the trial court erred when it found the Carriers had a duty to defend.

2. Prior Publication Exclusion

Having determined that S.C. Johnson's complaint contained sufficient allegations to trigger the Carriers' duty to defend, we address whether the conduct giving rise to S.C. Johnson's cause of action occurred within the coverage dates of the Carriers' policies.

Again, both of the Carriers' policies contain identical provisions, which state:

> 2. Exclusions
>
> This insurance does not apply to:
>
> . . . .
>
> c. Material Published Prior To Policy Period
>
> "Personal and advertising injury" arising out of oral or written publication of material whose first publication took place before the beginning of the policy period.

S.C. Johnson's complaint alleges the false advertising began in August of 2003. Erie's policy initially provided coverage from 25 April 2003 through 25 April 2004. The policy was renewed and later cancelled 4 July 2004. The false advertising is not alleged to have occurred prior to the beginning of Erie's policy period, and is alleged to have specifically occurred within the coverage and term dates of the policy. The superior court did not err when it found Erie incurred a duty to defend IGT.

Harleysville's policy provided coverage from 20 June 2004 though 20 June 2005. While S.C. Johnson's complaint alleged that the false advertising began in August 2003, it also alleged that new press releases on the BOIS website contained false advertising claims as late as 15 September 2004. The superior court did not err when it found Harleysville's policy incurred a duty to defend IGT.

3. Quality or Performance of Goods Exception

The dissenting opinion erroneously concludes that S.C. Johnson's allegations fall within the Carriers' "Quality Or Performance Of Goods—Failure To Conform To Statements" exclusion. Both of the Carriers' policies contain identical provisions, which state:

2. Exclusions

This insurance does not apply to:

. . . .

g. Quality Or Performance Of Goods—Failure To Conform To Statements

"Personal and advertising injury" arising out of the failure of goods, products or services to conform with any statement of quality or performance made in your "advertisement".

The crux of S.C. Johnson's allegations assert that statements IGT made during the course of advertisements disparaged S.C. Johnson's products, and not that IGT's goods fail to conform with IGT's statements of quality or performance. S.C. Johnson's complaint alleges IGT made false, negative comparative statements about S.C. Johnson's goods and the whole market of skin-applied topical insect repellants in IGT's advertising. The allegations contained in S.C. Johnson's complaint do not fall within the "Quality Or Performance Of Goods—Failure To Conform To Statements" exclusion and the superior court did not err when it found the Carriers' policies imposed a duty to defend IGT.

V. Conclusion

S.C. Johnson's complaint contains allegations asserting and giving rise to a possibility that IGT is liable and that IGT's potential liability is covered under the Carriers' policies. S.C. Johnson's complaint was sufficient to impose a duty to defend upon the Carriers. *Waste Management of Carolinas, Inc.*, 315 N.C. at 691 n.2, 340 S.E.2d at 377 n.2. The superior court did not err when it granted IGT's motion for partial summary judgment. The superior court's partial summary judgment order is affirmed.

Affirmed.

Judge STROUD concurs.

Judge GEER dissents by separate opinion.

GEER, Judge, dissenting.

While an insurer has a duty to defend whenever pleadings "disclose a mere possibility that the insured is liable (and that the poten-

tial liability is covered)," *Waste Mgmt. of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 691 n.2, 340 S.E.2d 374, 377 n.2 (1986), this obligation is not so expansive as to require defense based upon references in a complaint immaterial to that action. That is, however, precisely the result of the majority opinion's holding. When, as required by *Waste Management*, we consider the factual allegations of the S.C. Johnson & Son, Inc. ("S.C. Johnson") complaint providing the actual basis for imposing liability on defendants,[1] I believe, based on an exclusion contained in both of the policies at issue in this case, that "the facts are not even arguably covered by" the policies. *Id.* at 692, 340 S.E.2d at 378. I would, therefore, hold that Harleysville Mutual Insurance Company and Erie Insurance Company have no duty to defend, and I must respectfully dissent.

I find it unnecessary to address whether the allegations of the S.C. Johnson complaint constitute an "advertising injury" within the meaning of the policies because I believe the policies contain an exclusion that is, in any event, dispositive. The policies of Harleysville and Erie specifically provide that their insurance "does not apply to": " 'Personal and advertising injury' arising out of the failure of goods, products or services to conform with any statement of quality or performance made in your 'advertisement.' "

S.C. Johnson's complaint asserted claims for trademark infringement and false advertising under state and federal law. IGT acknowledges that only the allegations relating to false advertising could trigger the duty to defend. At the beginning of the complaint, S.C. Johnson described its false advertising claims as alleging that BOIS and IGT had made "materially false and misleading advertising claims about the efficacy, use, and product attributes of BUZZ OFF Insect Repellent Apparel . . . ." In the allegations common to all claims, S.C. Johnson explained: "Because of the potential morbidity of the health problems caused by West Nile virus and other mosquito-borne diseases, any false or misleading claims about the efficacy of insect repellent or insect killing products could have serious public health consequences."

In the section of the complaint entitled "Allegations Relating to Defendants' False Advertising," S.C. Johnson first described "False Efficacy Claims on BOIS's Website." It alleged:

---

1. Buzz Off Insect Shield, LLC ("BOIS") and International Garment Technologies, LLC ("IGT").

> 90. BOIS's website . . . makes several claims that falsely and unambiguously communicate that (a) by wearing BUZZ OFF Insect Repellent Apparel, consumers can reduce or eliminate the need to apply an insect-repellent product on the skin, (b) BUZZ OFF Insect Repellent Apparel protects uncovered skin from mosquito bites, (c) if you wear BUZZ OFF Insect Repellent Apparel, you will not receive any mosquito bites, and (d) BUZZ OFF Insect Repellent Apparel is equivalent to or superior in performance to topical insect repellents, such as those containing DEET. The BOIS website reinforces these claims by emphasizing the "hassle" of applying "messy" insect-repellent products directly to the skin.

S.C. Johnson then quoted examples of various assertions on the BOIS website that supported this allegation.

S.C. Johnson next alleged that similar claims were made on the websites of companies partnering with BOIS:

> 92. These websites falsely and unambiguously communicate that (a) by wearing BUZZ OFF Insect Repellent Apparel, consumers can reduce or eliminate the need to apply an insect-repellent product on the skin, (b) BUZZ OFF Insect Repellent Apparel protects uncovered skin from mosquito bites, (c) if you wear BUZZ OFF Insect Repellent Apparel, you will not receive any mosquito bites, and (d) BUZZ OFF Insect Repellent is equivalent to or superior in performance to topical insect repellents, such as those containing DEET. The BOIS Partner websites reinforce these claims by emphasizing the "hassle" of applying "messy" insect-repellent products directly to the skin.

The complaint again quoted examples from the BOIS partners' websites that supported this allegation. The complaint similarly alleged, with quoted examples, that BOIS partners' catalog and print advertisements "falsely and unambiguously communicate that, by wearing BUZZ OFF Insect Repellent Apparel, consumers can reduce or eliminate the need to apply an insect-repellent product on the skin and that BUZZ OFF apparel protects uncovered skin."

S.C. Johnson also alleged that BOIS and its partners made the false and misleading claim (1) "that BUZZ OFF Insect Repellent Apparel is highly effective through 25 washings" and (2) "that BUZZ OFF Insect Repellent Apparel contains a version of a natural insecticide that is derived from chrysanthemum flowers" causing customers to be deceived "into believing that BUZZ OFF Insect Repellent

Apparel, or its active ingredient, is a natural product rather than a synthetic chemical, when it in fact is the latter." After quoting examples of these claims, S.C. Johnson explained that BOIS was falsely communicating "to consumers that BUZZ OFF Insect Repellent Apparel is a more natural option than traditional insect-repellent products, like those marketed under SC Johnson's OFF! brand, which contain chemical repellents, such as DEET. This claim also falsely communicates that BUZZ OFF Insect Repellent Apparel and/or the active ingredient in the apparel is made from chrysanthemums or is natural." S.C. Johnson then continued:

> 113. The claim exploits the desire of consumers for natural products, including insect repellents. Consumers who rely on such misleading and deceptive statements are likely to use BUZZ OFF Insect Repellent Apparel to the exclusion of DEET-containing products such as OFF!, despite the fact that BUZZ OFF Insect Repellent Apparel provides protection from mosquitoes that is clearly inferior to the protection provided by topical repellents containing DEET, and thus potentially endangers the user's health.
>
> 114. Consumers could also be encouraged by these false and misleading claims to ignore the safe storage and disposal instructions required by law to be disclosed on BUZZ OFF apparel.

The S.C. Johnson complaint concluded its false advertising allegations with a series of allegations under the heading of "The Falsity of the Claims on Websites and in the Print Advertising":

> 121. The BOIS website, BOIS Partner websites, websites of companies that are upon information and belief, BOIS Partner Affiliates and the BOIS Partner catalogs and other print advertisements intentionally mislead, confuse and deceive consumers by communicating that (a) by wearing BUZZ OFF Insect Repellent Apparel, consumers can reduce or eliminate the need to apply an insect-repellent product on the skin, (b) BUZZ OFF Insect Repellent Apparel protects uncovered skin from mosquito bites, (c) if you wear BUZZ OFF Insect Repellent Apparel, you will not receive any mosquito bites, and (d) BUZZ OFF Insect Repellent Apparel is equivalent to or superior in performance to topical insect repellents, such as those containing DEET.
>
> 122. These claims are materially false and deceptive, and pose a significant health and safety risk to consumers because

wearing BUZZ OFF Insect Repellent Apparel does not reduce or eliminate the need to apply an insect-repellent product on the skin, BUZZ OFF Insect Repellent Apparel does not protect adjacent, uncovered and untreated skin from mosquito bites, BUZZ OFF Insect Repellent Apparel does not prevent consumers who wear it from receiving mosquito bites, and BUZZ OFF Insect Repellent Apparel is not equivalent to or superior in performance to topical insect repellents, such as those containing DEET.

123. The BOIS website, BOIS Partner websites, websites of companies that are upon information and belief, BOIS Partner Affiliates and the BOIS Partner catalogs and other print advertisements also intentionally mislead, confuse and deceive consumers by communicating that BUZZ OFF Insect Repellent Apparel is effective through 25 washings.

124. This claim is materially false and deceptive, and poses a significant health and safety risk to consumers because BUZZ OFF Insect Repellent Apparel does not prevent mosquito bites on covered skin through 25 washings.

125. The BOIS website, BOIS Partner websites, websites of companies that are upon information and belief, BOIS Partner Affiliates and the BOIS Partner catalogs and other print advertisements also intentionally mislead, confuse and deceive consumers by communicating that the active ingredient in BUZZ OFF Insect Repellent Apparel is made from chrysanthemum flowers and/or contains a version of a natural insect repellent that is derived from chrysanthemum flowers and/or is a more natural option than traditional repellants such as SC Johnson's OFF! Brand, which contain the chemical DEET.

126. These claims are materially false and deceptive because the active ingredient in BUZZ OFF Insect Repellent Apparel is a synthetic chemical that is not derived from chrysanthemum flowers nor does it contain a version of a natural insect repellent that is derived from chrysanthemum flowers, nor is it a more natural option than topical repellents containing DEET.

The complaint contains no other allegations regarding BOIS' and IGT's advertising.

IGT argues that S.C. Johnson's allegations constitute "advertising injury," as defined by the policies, because those allegations essentially assert that BOIS and IGT disparaged S.C. Johnson's products by

making false comparisons between the BOIS/IGT products and S.C. Johnson's products. When, however, it comes time to consider the applicability of the failure to conform exclusion, IGT overlooks the fact that S.C. Johnson contended that the comparisons were false and misleading *because BOIS and IGT were making false assertions about the BOIS/IGT products*. Review of S.C. Johnson's actual allegations reveals no contention by S.C. Johnson that BOIS and IGT were making false statements about S.C. Johnson's products, contrary to the assertion otherwise in the majority opinion.

S.C. Johnson alleged in its complaint that BOIS and IGT were falsely asserting that their apparel protected uncovered skin, eliminated the need for topical insect repellents, resulted in no mosquito bites, was effective for 25 washings, and was a natural product. S.C. Johnson also expressed concern that these false claims of the efficacy of BOIS/IGT products could create a public health hazard. These allegations all relate to the quality and performance of BOIS/IGT apparel. I cannot see how these allegations can be viewed as anything other than a claim that S.C. Johnson was injured by "the failure of [BOIS/IGT] goods, products or services to conform with any statement of quality or performance made in [BOIS/IGT's] 'advertisement.' " The allegations thus fall squarely within the exclusion in the carriers' policies for non-conforming products.

I note that IGT asserts generally that the S.C. Johnson complaint "references multiple allegedly false and disparaging statements regarding S.C. Johnson products and topical repellents (which IGT does not manufacture)," but does not cite specifically to the complaint, choosing instead to refer back to another section of its brief. In that other section—discussing "advertising injury"—IGT primarily relies upon S.C. Johnson's quotations of actual advertisements following each of the above allegations.[2] Even if those quoted advertisements could be viewed by someone as making false statements about S.C. Johnson's products, the fact remains that S.C. Johnson did not make that claim. Its lawsuit was based on its contention that BOIS and IGT were making false claims about the quality and performance of BOIS/IGT's products. These false claims in turn made it seem like BOIS/IGT's products were superior to and eliminated the need for S.C. Johnson's products. No actual allegations of S.C. Johnson's complaint suggested that S.C. Johnson was asserting

2. With respect to IGT's citation to the complaint's allegations, as opposed to supporting quotations, I do not agree that they include false and disparaging statements about S.C. Johnson products and topical repellants.

any injury from false claims by BOIS and IGT regarding S.C. Johnson's products.

I know of no authority that imposes a duty to defend a lawsuit simply because the plaintiff in that lawsuit could have relied upon certain facts as a basis for recovery, but chose not to do so. *See Superformance Int'l, Inc. v. Hartford Cas. Ins. Co.*, 332 F.3d 215, 223 (4th Cir. 2003) (refusing to conclude that underlying complaints alleged claim of product disparagement when, even though the insured's marketing of its motor vehicles "could possibly be seen as a form of deceit underlying false advertising, the complaint does not allege false advertising but rather trademark infringement, trade dress infringement, trademark dilution, and related unfair competition"); *Winklevoss Consultants, Inc. v. Fed. Ins. Co.*, 991 F. Supp. 1024, 1033 (N.D. Ill. 1998) (in determining whether a duty to defend existed, noting "[a]lthough we must construe the [underlying] complaint liberally in favor of [the insured], we cannot read into it words or claims that do not appear"). Plaintiffs not infrequently include in complaints background material providing a context for a dispute or other allegations extraneous to the merits of the dispute. If those allegations are not relied upon as a basis for recovery, I do not see how they can trigger a duty to defend when there is no potential for liability based on those immaterial allegations.

Our Supreme Court stated in *Waste Mgmt.*, 315 N.C. at 691, 340 S.E.2d at 377 (emphasis added): "When the pleadings state facts demonstrating that *the alleged injury is covered by the policy*, then the insurer has a duty to defend, whether or not the insured is ultimately liable." Here, S.C. Johnson's complaint alleged an injury because BOIS and IGT's advertising made false claims about the quality and performance of BOIS/IGT's products. Given the exclusions of the policies, that injury is "not even arguably covered by the polic[ies]," and, therefore, the carriers had no duty to defend. *Id.* at 692, 340 S.E.2d at 378.

Significantly, of the cases relied upon by IGT in contending that the complaint alleges "advertising injury" when it contends that the defendant made false comparisons, only two involved policies containing a similar exclusion to the one at issue in this case. The published decision of *DecisionOne Corp. v. ITT Hartford Ins. Group*, 942 F. Supp. 1038, 1043 (E.D. Pa. 1996), rejected the carrier's claim that the allegations by the plaintiff in the underlying action fell within the exclusion for failure of the goods or services of the defendant

insured to conform with the quality or performance advertised by that defendant. As the district court stressed, however, "[the plaintiff] *was not claiming that [the defendant's] quality did not rise to the level advertised*. It was claiming that [the defendant] made misleading and false comparisons with [the plaintiff's] products and services." *Id.* (emphasis added). In the unpublished opinion, *PCB Piezotronics, Inc. v. Kistler Instrument Corp.*, 1997 WL 800874, *3 (W.D.N.Y. Dec. 31, 1997), the district court concluded that the exclusion "arguably applies to the fourth counterclaim to the extent that it alleges that [the defendant's] advertisement misrepresented the nature, characteristics and qualities of [the defendant's] products, but it is wholly inapplicable to the counterclaim's allegation that the advertisement was equally misleading with respect to [the plaintiff's] products."

In contrast, in this case, according to S.C. Johnson's complaint, any falseness in the comparison of products arose not out of misstatements in BOIS and IGT's advertising about S.C. Johnson's products, but rather solely because the quality and performance of BOIS/IGT products was not as advertised. It thus more closely resembles *R.C. Bigelow, Inc. v. Liberty Mut. Ins. Co.*, 287 F.3d 242 (2d Cir. 2002).

In *R.C. Bigelow*, Celestial Seasonings, Inc. had sued the Bigelow tea company for a variety of claims, including false advertising based on Celestial's claim that Bigelow failed to disclose that its teas were artificially flavored and in promoting its teas "convey[ed] the false and misleading impression that those herbal teas were all natural." *Id.* at 244. As in this case, the insurance policy at issue excluded claims based on " '[t]he failure of goods, products or services to conform with advertised quality or performance[.]' " *Id.* at 245. The Second Circuit concluded that the false advertising allegations "did not trigger a duty to defend under the advertising injury provision because they concerned allegedly false claims about *Bigelow's* products, and such false claims about the insured products are explicitly excluded by the policy." *Id.* at 246. *See also Superformance Int'l, Inc. v. Hartford Cas. Ins. Co.*, 203 F. Supp. 2d 587, 598 (E.D. Va. 2002) (holding that false advertising allegations in underlying complaint that insured made false statements suggesting that the vehicles it produced were equivalent to the vehicles that the plaintiff produced fell within exclusion for failure of products to conform with advertised quality or performance), *aff'd on other grounds*, 332 F.3d 215 (4th Cir. 2003).

Like the Second Circuit in *R.C. Bigelow*, I would conclude in this case that S.C. Johnson's allegations did not trigger a duty to defend under the advertising injury coverage because those allegations only asserted that BOIS and IGT had made false assertions about their own products—claims expressly excluded from coverage by the policies. *See Waste Mgmt.*, 315 N.C. at 700, 340 S.E.2d at 383 (holding that no obligation to defend arose when the allegations of the pleadings, as supported by a deposition, "fit squarely within the language of the exclusion clause"). As this Court has phrased the test set forth in *Waste Management*, "if the pleadings allege any facts which disclose a possibility that the insured's potential liability is covered under the policy, then the insurer has a duty to defend." *Wilkins v. Am. Motorists Ins. Co.*, 97 N.C. App. 266, 269, 388 S.E.2d 191, 193, *disc. review denied*, 327 N.C. 145, 394 S.E.2d 189 (1990). In this case, there is no possibility that the "potential liability," as alleged by S.C. Johnson in its complaint, is covered by the carriers' policies. I would, therefore, reverse the decision below.

STATE OF NORTH CAROLINA, PLAINTIFF v. JOSHUA DAVID SMITH, DEFENDANT

No. COA07-172

(Filed 6 May 2008)

1. Sexual Offenses— first-degree sexual offense—motion to dismiss—sufficiency of evidence—extrajudicial statement without corroborating evidence

The trial court erred by denying defendant's motion to dismiss the charge of first-degree sexual offense with a child under thirteen because: (1) when the State relies on a defendant's extrajudicial statement to establish guilt of a felony, the extrajudicial statement alone is not sufficient to sustain a conviction; (2) none of the evidence relied on by the State to corroborate defendant's statement to a detective was sufficient when a witness's testimony as to what defendant told him after defendant left the detective's office was not independent of defendant's confession, the testimony that a visit with the victim did occur and that defendant drank until he passed out corroborated some of the circumstances of defendant's confession but was not strongly corroborative of any essential fact, and defendant's own trial

testimony did not provide evidence of the corpus delicti for sexual offense but only served to clarify what defendant meant; and (3) the victim failed to testify as to any sexual encounter with defendant and never made any prior statement that any sexual act ever occurred with defendant.

2. Indecent Liberties— motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of indecent liberties under N.C.G.S. § 14-202.1, because viewing the evidence in the light most favorable to the State revealed that even though the jury's acquittal of defendant of rape showed that they disbelieved at least part of the victim's account of the facts, the evidence supported a finding that defendant undressed the victim and exposed his penis to her at his home.

3. Indecent Liberties— plain error analysis—identification of alleged acts—jury instructions

The trial court committed plain error by failing to require the State to identify the alleged acts by defendant which were the basis of the indecent liberties charges and by not identifying the basis to the jury in its instructions, and the case is remanded for a new trial on the issue of indecent liberties, because: (1) a consideration of the entire record, the instructions as a whole, and the fact that the trial court erred in its failure to grant defendant's motion to dismiss the first-degree sexual offense charge, the jury probably would have reached a different verdict if it had been instructed properly; (2) the State itself did not even identify the evidentiary basis which the Court of Appeals found for the indecent liberties conviction, but instead was relying on an act of fellatio which was not a proper basis for conviction under the corpus delicti rule; and (3) the jury was confused by the instructions and contentions, particularly in light of the distinct possibility that it considered fellatio as defendant's main criminal sexual act with the victim.

Judge TYSON dissenting.

Appeal by defendant from judgment entered on or about 27 July 2006 by Judge Linwood O. Foust in Cleveland County Superior Court. Heard in the Court of Appeals 18 October 2007.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Sarah Y. Meacham, for the State.

McCotter, Ashton & Smith, P.A., by Rudolph A. Ashton, III, and Kirby H. Smith, III, for defendant-appellant.

STROUD, Judge.

Defendant appeals from judgment entered 27 January 2006 sentencing him to 196 to 245 months for first degree sexual offense and indecent liberties with a child. We conclude: (1) the State did not present sufficient evidence to convict defendant of first degree sexual offense, and (2) defendant was prejudiced by errors such that he did not receive a fair trial for indecent liberties. Accordingly, we reverse defendant's conviction for first degree sexual offense, and we grant defendant a new trial on the charge of indecent liberties with a child.

I. Background

The testimony presented at trial tended to show the following: In December 2002, defendant, then twenty-one years old, lived in Lawndale, North Carolina, with his girlfriend Cassie and their three-month old daughter, "Kathy". The prosecutrix, "Karen",[1] who was twelve years old at the time, lived in Lawndale with her grandmother, mother and her nineteen year-old brother Jonathan. Karen knew Cassie prior to December 2002, as Jonathan and Cassie had previously had a romantic relationship. Karen first met defendant shortly before Christmas 2002, when Cassie introduced them. Defendant was also Jonathan's friend, and defendant, Cassie and Jonathan often socialized together in the evenings.

Around Christmas 2002, defendant and Cassie visited in Jonathan and Karen's home on two consecutive evenings.[2] On one of the visits ("Visit 1"), defendant brought alcohol which he shared with Jonathan and a fifteen year-old neighbor while they smoked marijuana; defendant drank until he passed out. On the other visit ("Visit 2"), the evidence is conflicting as to whether defendant was sober or drunk.

Defendant asserted that during Visit 1 he awoke from his drunken stupor to find Karen sitting between his legs with her hands on his

1. In order to protect the identity of minors, we will refer to them by pseudonym.

2. Karen asserted that the visits were on December 25 and 26; defendant asserted that the visits were on December 26 and 27.

penis, preparing to perform fellatio. Karen asserted that defendant made lewd comments to her during Visit 1, but she had no sexual contact with him.

During Visit 2, defendant, accompanied by Karen and Kathy, left Cassie and Jonathan to return home in order to pick up milk and diapers for Kathy. Karen testified that once they were inside defendant's home, he pushed her down on the bed, removed her clothing and inserted his penis into her vagina. To the contrary, defendant testified that he had told Karen to stay in the truck with Kathy while he went inside the house to get the milk and diapers, and that even though she came into the house briefly, they had no physical contact.

On 14 April 2003, the Cleveland County Grand Jury indicted defendant for first degree rape of a child pursuant to N.C. Gen. Stat. § 14-27.2(a)(1), first degree sexual offense pursuant to N.C. Gen. Stat. § 14-27.4, and indecent liberties with a child pursuant to N.C. Gen. Stat. § 14-202.1, each with a stated offense date of 26 December 2002. The indictments referenced the statutes under which defendant was charged and identified the date of offense for each crime as 26 December 2002, but did not allege any specific sexual acts upon which defendant was charged, as allowed by N.C. Gen. Stat. § 15-144.1 and § 15-144.2(b) (2001).

Defendant was tried before a jury from 24 to 27 July 2006. At trial, at the close of the State's evidence and at the close of all the evidence, defendant moved to dismiss all of the charges against him, and these motions were denied. The trial court instructed the jury on first degree rape of a child under the age of thirteen, first degree sexual offense with a child under the age of thirteen, attempted first degree sexual offense, and taking indecent liberties with a minor child.

On 27 July 2006, the jury found defendant guilty of first degree sexual offense with a child under thirteen and guilty of taking indecent liberties with a child, but not guilty of first degree rape of a child. The trial court consolidated the offenses for sentencing and ordered that defendant be imprisoned for a minimum of 196 and a maximum of 245 months in the North Carolina Department of Corrections. Defendant gave notice of appeal in open court.

II. First Degree Sexual Offense

[1] Defendant first assigns error to the trial court's denial of his motion to dismiss the charge of first degree sexual offense. He contends that the State failed to present substantial evidence that he had

been involved in a sexual act with Karen. Specifically, he relies on the *corpus delicti* rule as stated in *State v. Sinclair*, 43 N.C. App. 709, 259 S.E.2d 808 (1979), contending that "a felony conviction may not be based upon or sustained by a naked extrajudicial confession of guilt uncorroborated by any other evidence," *id.* at 711, 259 S.E.2d at 809 (citation and quotation omitted).

> A criminal defendant may
>
> > 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, 523, 644 S.E.2d 615, 621 (2007) (internal citations, brackets and quotation marks omitted). On review of a motion to dismiss, "[t]he defendant's evidence, unless favorable to the State, is not to be taken into consideration, [although if] it is consistent with the State's evidence, the defendant's evidence may be used to explain or clarify that offered by the State." *State v. Denny*, 361 N.C. 662, 665, 652 S.E.2d 212, 213 (2007) (internal citations and quotation marks omitted).

When the State relies on a defendant's extrajudicial statement to establish guilt of a felony, the extrajudicial statement alone is not sufficient to sustain a conviction. *Sinclair*, 43 N.C. App. at 711, 259 S.E.2d 809. An extrajudicial statement must be supported by (1) "corroborative evidence, independent of defendant's confession, which tends to prove the commission of the charged crime[,]" *State v. Sloan*, 316 N.C. 714, 725, 343 S.E.2d 527, 534 (1986); or (2) "*strong* [independent] corroboration of *essential* facts and circumstances embraced in the defendant's confession" which tends to establish the trustworthiness of the confession, *State v. Parker*, 315 N.C. 222, 236, 337 S.E.2d 487, 495 (1985) (emphasis in original). In a prosecution for a sexual offense, corroboration need not necessarily come from the victim herself, *State v. Cooke*, 318 N.C. 674, 679, 351 S.E.2d 290, 292 (1987) ("[T]here is no requirement that the victim testify before the accused may be convicted."), but whatever the source, the corroborating evidence must do more than merely "raise a suspicion or con-

jecture" as to the commission of the offense. *State v. Mueller*, 184 N.C. App. 553, 560, 647 S.E.2d 440, 447, *cert. denied*, 362 N.C. 91, —— S.E.2d —— (2007).

> A person is guilty of a sexual offense in the first degree if the person engages in a sexual act:
>
> (1) With a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim[.]

N.C. Gen. Stat. § 14-27.4(a)(1) (2001).

> "Sexual act" means cunnilingus, fellatio, analingus, or anal intercourse, but *does not include vaginal intercourse*. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person's body[.]

N.C. Gen. Stat. § 14-27.1(4) (2001) (emphasis added). "[F]ellatio is any touching of the male sexual organ by the lips, tongue, or mouth of another person." *State v. Johnson*, 105 N.C. App. 390, 393, 413 S.E.2d 562, 564, *disc. review denied and appeal dismissed*, 332 N.C. 348, 421 S.E.2d 158 (1992).

The State relied on the following extrajudicial statement of defendant, as testified to by Detective Debbie Arrowood:

> Joshua stated to me that he was at [Karen's] house a couple of days before [Visit 2] and he had been drinking. Joshua stated he was in Jonathan's bedroom, who is [Karen's] brother, and he was lying on the bed. Joshua stated [Karen] came in the room and was coming on to him. Joshua told me that [Karen] took her pants off, [and] laid down beside him on the bed. Joshua stated [Karen] wanted him to do oral sex on her, but he wouldn't do it. Joshua stated [Karen] unzipped his pants, took out his penis, and tried to give him a blow job. Joshua stated he couldn't get it up because he had been drinking, so [Karen] stopped.

The State contends that defendant's extrajudicial statement was corroborated by (1) Jonathan's testimony that "[defendant] was upset when he come [sic] out of Ms. Arrowood's office . . . . I asked him what happened, you know, and he told me that he had, you know, failed, and he admitted to having oral sex with [Karen;]" (2) testimony from Karen, Jonathan and defendant that Visit 1 did in fact occur and that defendant passed out from excessive drinking at Karen's home; and (3) defendant's own trial testimony.

The relevant portion of defendant's trial testimony is as follows:

I passed out . . . fully clothed.

. . . .

I was awakened a couple hours after I had passed out.

. . . .

When I came to, I felt something on me. I didn't know what it was, who it was. I panicked. I was frightened, shocked, and all in one motion, I rose up and kicked. And when I kicked, I looked in the floor and it was [Karen] sitting in the floor. I jumped up and I asked her what the hell she was doing. I zipped my pants up. I remember rubbing my eyes, rubbing my head, trying to collect myself and still, still drunk, not collected, hung over, and she was begging me not to say anything to her mother: "Please don't tell mama; please don't tell Cassie; please don't tell Jonathan."

. . . .

It was a feeling that—it's not like being tapped on the shoulder. It's a feeling not being tapped on your forehead, being shook. It's a private position—a private place that's a sensitive area, and I felt something on my penis.

. . . .

I jumped and kicked and pushed with my leg all at once, and it knocked [Karen] back into the dresser that was across from the bed, on the floor.

We conclude that none of the evidence relied on by the State to corroborate defendant's statement to Detective Arrowood is sufficient to survive defendant's motion to dismiss the charge of first degree sexual offense. Jonathan's testimony as to what defendant told him after defendant left the office of Detective Arrowood was not "independent of defendant's confession," *Sloan*, 316 N.C. at 725, 343 S.E.2d at 534, therefore it has no more probative value than the more detailed statement which defendant gave to Detective Arrowood and does nothing to corroborate defendant's statement to Detective Arrowood. The testimony of Karen, Jonathan and defendant that Visit 1 did indeed occur, and that defendant drank until he passed out corroborates some of the circumstances of defendant's confession, but it does not *strongly* corroborate any *essential* fact. *See Parker*, 315 N.C. at 236, 337 S.E.2d at 495 (holding that when the

victim's dead body and the clothes the defendant wore while committing the murder were the same as described in the defendant's confession and the victim's blood stains were found in a second victim's stolen car, the evidence contained sufficient corroboration of the defendant's confession to support the defendant's conviction for armed robbery even though there was no evidence of the missing property). Defendant's own trial testimony does not provide evidence of the *corpus delicti* for sexual offense in the case *sub judice*—that Karen's mouth, tongue or lips touched defendant's penis. It serves only to clarify what defendant meant by "[Karen] . . . tried to give [me] a blow job[,]" in his statement to Detective Arrowood.

In reviewing the cases decided since *Parker*, we find no set of facts with so very little corroborative weight or substantial independent evidence to establish the trustworthiness of a defendant's extrajudicial statement. *See, e.g.*, *State v. Johnson*, 317 N.C. 343, 373-74, 346 S.E.2d 596, 613 (1986) (bruises, marks and torn clothing on the victim's body, semen in the victim's vagina, bloodstains in the defendant's car and on his knife were sufficient to corroborate the defendant's admission); *Sloan*, 316 N.C. at 725-26, 343 S.E.2d at 534 (discovery of the victim naked from the waist down, discovery of the victim's shorts and panties with semen on them on the kitchen floor, and the victim's testimony that she had been beaten and stripped of her clothing were sufficient to support a rape conviction when the defendant admitted "[he] did it"); *State v. Sims*, 174 N.C. App. 829, 833, 622 S.E.2d 132, 135 (2005) (a controlled buy of twenty-six grams of cocaine from the defendant in his home before arrest and discovery of 181 grams of cocaine on the defendant's person at arrest were sufficient to corroborate the defendant's confession to trafficking in more than 400 grams of cocaine), *disc. review denied*, 360 N.C. 367, 630 S.E.2d 451 (2006).

Many of the events which were occurring in Karen's home around Christmas 2002 were appalling, and no doubt the jury found them so as well. The evidence indicates that defendant was drinking to excess, providing alcohol to persons who were underage, driving while impaired by alcohol, permitting teenagers to use marijuana in his presence, and making lewd comments to a young girl. Karen was apparently mistreated by many, including defendant. However, we also recognize that "[n]o matter how disgusting and degrading defendant's conduct as depicted by the witness may have been, his conviction should not be sustained unless the evidence suffices to prove the existence of each essential ingredient of the *crimes for*

which he was being tried." *State v. Robinson*, 310 N.C. 530, 534, 313 S.E.2d 571, 574 (1984) (citation and quotation marks omitted) (emphasis added).

We hold that where the victim did testify at trial but failed to testify as to any sexual act[3] with defendant and where the victim never made any prior statement that any sexual act ever occurred with defendant, and where no other strong corroborating evidence of the defendant's extrajudicial statement is offered by the State, the defendant's extrajudicial statement alone is not sufficient to support his conviction for first degree sexual offense. The judgment of the trial court as to first degree sexual offense is reversed with instructions to dismiss the charge of first degree sexual offense against defendant.

III. Indecent Liberties

[2] Defendant also moved to dismiss the charge under N.C. Gen. Stat. § 14-202.1 for indecent liberties. To survive a motion to dismiss for indecent liberties, the State must present substantial evidence of each of the following elements:

> (1) the defendant was at least 16 years of age, (2) he was five years older than his victim, (3) he willfully took or attempted to take an indecent liberty with the victim, (4) the victim was under 16 years of age at the time the alleged act or attempted act occurred, and (5) the action by the defendant was for the purpose of arousing or gratifying sexual desire.

State v. Stanford, 169 N.C. App. 214, 216-17, 609 S.E.2d 468, 470 (citation omitted), *disc. review denied and appeal dismissed*, 359 N.C. 642, 617 S.E.2d 657 (2005).

> [I]t is not necessary that defendant touch his victim to commit an immoral, improper, or indecent liberty within the meaning of the statute. Thus it has been held that the photographing of a naked child in a sexually suggestive pose is an activity contemplated by the statute, as is masturbation within a child's sight, and a defendant's act of exposing his penis and placing his hand upon it while in close proximity to a child. These decisions demonstrate that a variety of acts may be considered indecent and may be performed to provide sexual gratification to the actor. Indeed, the legislature

3. Vaginal intercourse is expressly excluded from the definition of "sexual act" for purposes of defining the elements of first degree sexual offense. N.C. Gen. Stat. § 14-27.1(4) (2001).

> enacted section 14-202.1 to encompass more types of deviant behavior, giving children broader protection than available under other statutes proscribing sexual acts.

State v. Etheridge, 319 N.C. 34, 49, 352 S.E.2d 673, 682 (1987) (internal citations and quotations omitted).

Viewing the evidence in the light most favorable to the State, even though the jury's acquittal of defendant of rape shows that they disbelieved at least part of Karen's account of the facts, the evidence does support a finding that defendant undressed Karen and exposed his penis to her at his home. This evidence is sufficient to support defendant's conviction for indecent liberties with a child. *Etheridge*, 319 N.C. at 49, 352 S.E.2d at 682 (defendant's actions in ordering his victim to undress and lie down, then exposing his penis before proceeding with the act of intercourse fell "well within the broad category of indecent liberties"). This assignment of error is therefore overruled.

[3] Defendant next contends that the trial court committed plain error by not requiring the State to identify the alleged acts by defendant which were the basis of the sex offense and indecent liberties charges and by not identifying the basis for these charges to the jury in its instructions. Due to our ruling as to the sex offense charge above, we need only address defendant's assignment of error as to indecent liberties. Defendant failed to object to the jury instructions, so we review the instructions only for plain error. N.C.R. App. P. 10(c)(4).

> Plain error with respect to jury instructions requires the error be so fundamental that (i) absent the error, the jury probably would have reached a different verdict; or (ii) the error would constitute a miscarriage of justice if not corrected. Further, in deciding whether a defect in the jury instruction constitutes plain error, the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt.

State v. Wood, 185 N.C. App. 227, 232, 647 S.E.2d 679, 684, *disc. review denied*, 361 N.C. 703, 655 S.E.2d 402 (2007) (internal citations, brackets and quotation marks omitted). As we noted above, defendant argues that the State never clearly identified which acts it claimed constituted indecent liberties. Certainly, after exhaustive review of

the transcript and record, we have been unable to discern which acts the State claimed at trial constituted indecent liberties. Even the State notes in its brief that "[t]he evidence below showed a single incident when Defendant allegedly received fellatio from [Karen] on Defendant's overnight stay in [Karen's home]. *There was no other evidence which would tending [sic] to prove a first degree sexual offense or indecent liberty*[.]" (Emphasis added.)

However, we have determined above that there was other evidence of indecent liberties, based upon defendant's undressing Karen and exposing himself to her. When we consider the entire record, the instructions as a whole, and the fact that the trial court erred in its failure to grant defendant's motion to dismiss the first degree sexual offense charge, we conclude that the jury probably would have reached a different verdict if it had been instructed properly. Since the State itself did not even identify the evidentiary basis which we have found for the indecent liberties conviction, but instead was relying upon an act of fellatio which we have determined is not a proper basis for conviction under the *corpus delicti* rule, we conclude that the jury was also confused by the instructions and contentions.

Certainly the jury found that something bad involving defendant was going on at Karen's home around Christmas 2002, but the jury instructions as given simply do not delineate the issues clearly enough that we can find an absence of plain error, particularly in light of the distinct possibility that the jury considered fellatio as defendant's main criminal sexual act with Karen. We therefore remand for new trial on the issue of indecent liberties by defendant.

IV. Conclusion

Based upon our rulings on the above issues, we need not address any of the other issues raised by defendant, as they will probably not occur at a new trial. Defendant's conviction for first degree sexual offense is reversed, and the case is remanded for new trial on the issue of indecent liberties.

Reversed in part, remanded in part.

Judge McCULLOUGH concurs.

Judge TYSON dissents in a separate opinion.

TYSON, Judge dissenting.

The majority's opinion erroneously: (1) reverses defendant's first-degree sexual offense conviction and (2) grants defendant a new trial on the issue of indecent liberties. I disagree and find no error in defendant's convictions. I respectfully dissent.

I. First-Degree Sexual Offense

Defendant argues and the majority's opinion agrees that the trial court erred by denying defendant's motions to dismiss the first-degree sexual offense charge at the close of the State's evidence and again at the close of all the evidence. Defendant asserts the State failed to meet its burden under the *corpus delicti* rule, which requires the introduction of independent substantial evidence tending to establish the trustworthiness of defendant's extrajudicial confession. *State v. Parker*, 315 N.C. 222, 229, 337 S.E.2d 487, 491 (1985). I disagree.

A. Standard of Review

> The standard for ruling on a motion to dismiss is whether there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense. Substantial evidence is relevant evidence which a reasonable mind might accept as adequate to support a conclusion. In ruling on a motion to dismiss, the trial court must consider all of the evidence in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence. Any contradictions or discrepancies arising from the evidence are properly left for the jury to resolve and do not warrant dismissal.

State v. Wood, 174 N.C. App. 790, 795, 622 S.E.2d 120, 123 (2005) (internal citations and quotations omitted).

B. Analysis

> A person is guilty of a sexual offense in the first degree if the person engages in a sexual act:
>
> (1) With a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim[.]

N.C. Gen. Stat. § 14-27.4(a)(1) (2001).

A "sexual act" is defined as:

> cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person's body: provided, that it shall be an affirmative defense that the penetration was for accepted medical purposes.

N.C. Gen. Stat. § 14-27.1(4) (2001). The majority's opinion holds the State failed to present any corroborating evidence beyond defendant's confession that established the victim ("K.L.C.") performed fellatio on defendant.

In support of its holding, the majority's opinion states, "[w]hen the State relies on a defendant's extrajudicial statement to establish guilt, the extrajudicial statement alone is not sufficient to sustain a conviction." *See Parker*, 315 N.C. at 229, 337 S.E.2d at 491 ("Our research reveals that the rule is quite universal that an extrajudicial confession, standing alone, is not sufficient to sustain a conviction of a crime.").

The historical justifications for the *corpus delicti* rule include:

> first, the shock which resulted from those rare but widely reported cases in which the "victim" returned alive after his supposed murderer had been convicted . . .; and secondly, the general distrust of extrajudicial confessions stemming from the possibilities that a confession may have been erroneously reported or construed . . ., involuntarily made . . ., mistaken as to law or fact, or falsely volunteered by an insane or mentally disturbed individual . . . and, thirdly, the realization that sound law enforcement requires police investigations which extend beyond the words of the accused.

Id. at 233, 337 S.E.2d at 493 (citation omitted).

In *Parker*, our Supreme Court enunciated a more flexible version of the *corpus delicti* rule applicable in North Carolina:

> We adopt a rule in non-capital cases that when the State relies upon the defendant's confession to obtain a conviction, it is no longer necessary that there be independent proof tending to establish the *corpus delicti* of the crime charged if the accused's confession is supported by *substantial independent evidence tending to establish its trustworthiness, including facts that*

> *tend to show the defendant had the opportunity to commit the crime.*
>
> We wish to emphasize, however, that when independent proof of loss or injury is lacking, there must be strong corroboration of essential facts and circumstances embraced in the defendant's confession. Corroboration of insignificant facts or those unrelated to the commission of the crime will not suffice. We emphasize this point because although we have relaxed our corroboration rule somewhat, we remain advertent to the reason for its existence, that is, to protect against convictions for crimes that have not in fact occurred.

Id. at 236, 337 S.E.2d at 495 (emphasis supplied).

Here, in response to K.L.C.'s rape allegation, defendant gave a voluntary statement to Cleveland County Sheriff's Detective Debbie Arrowood ("Detective Arrowood"). Defendant stated that on the night of 27 December 2002 defendant drove himself, K.L.C., and his child to his residence in order to obtain diapers and formula. Defendant stated he told K.L.C. to stay inside the vehicle with the child, but K.L.C. did not comply with his request and brought the child inside the residence. Defendant stated that he was only inside the residence for approximately ten minutes and vehemently denied having any sexual contact with K.L.C.

Approximately two hours later, Detective Arrowood interviewed defendant a second time. Defendant stated that a few days prior to 27 December 2002 he had consumed alcohol at K.L.C.'s brother's ("J.J.") residence and laid down in J.J.'s bed. K.L.C. came into the room, removed her pants, and laid down beside defendant. Defendant stated K.L.C. wanted him to perform oral sex on her, but defendant refused. K.L.C. unzipped defendant's pants and attempted to perform fellatio on him. Defendant was unable to obtain an erection due to his consumption of alcohol so K.L.C. stopped. Defendant specifically stated to Detective Arrowood, "Yes, it was a stupid mistake and it has ruined my life."

The majority's opinion argues the State failed to introduce sufficient corroborating evidence to establish the trustworthiness of defendant's extrajudicial and voluntary confession. I disagree.

At trial, J.J., the victim's brother, testified that he accompanied defendant to the police station because he did not believe "[his] friend would have done something like that[.]" J.J. specifically testi-

fied to the events that occurred after defendant had finished his interview and provided his confession to Detective Arrowood:

> [ADA]: What happened on that day that changed your mind? Did he talk to you about what happened?
>
> [J.J.]: *He just admitted that he had let [K.L.C.] give him oral sex.*
>
> [ADA]: That's what he said to you?
>
> [J.J.]: Yes, ma'am.
>
> [ADA]: What else did he say?
>
> [J.J.]: That was it. We didn't speak much more after that. I just went back to [his] house and got my stuff and went home.
>
> [ADA]: I mean, how did that conversation take place? Did he—was he upset?
>
> [J.J.]: He was upset when he come [sic] out of Ms. Arrowood's office.
>
> [ADA]: And did you ask him a question? Did he say something to you?
>
> [J.J.]: I asked him what happened, you know, and he told me that he had, you know, failed, and he admitted to having oral sex with [K.L.C.].
>
> [ADA]: Did he say anything like he was sorry or he shouldn't have done that?
>
> [J.J.]: He said he was sorry, that it wasn't right, but it still don't [sic] change the fact.

(Emphasis supplied).

The majority's opinion states, "[J.J.'s] testimony as to what defendant told him after defendant left the office of Detective Arrowood was not "independent of defendant's confession," . . . therefore it has no more probative value than the more detailed statement which defendant gave to Detective Arrowood and does nothing to corroborate defendant's statement[.]" I disagree.

Defendant was under no duty or obligation to tell J.J. what had transpired during his interview with Detective Arrowood. The fact that defendant: (1) admitted he allowed K.L.C. to perform fellatio on

him; (2) had a somber demeanor after the interview; and (3) apologized to J.J. for his behavior, tends to establish the trustworthiness of and corroborate defendant's extrajudicial confession.

Further, although defendant changed his version of the events that had occurred at trial, he testified to the same time, place, and circumstances surrounding the incident. Defendant testified that on the night of 26 December 2002 at approximately 8:00 p.m., he arrived at J.J.'s residence in order to "continue drinking." By the end of the evening defendant had allegedly consumed twenty-four beers and was unable to walk by himself. At approximately 10:00 p.m., J.J. helped defendant up the stairs and defendant "passed out" in J.J.'s bed. Defendant testified:

> [Defendant]: Yes, I was awakened. I was awakened a couple of hours after I had passed out.
>
> [Defense Attorney]: Tell the jury, if you will, what awakened you.
>
> [Defendant]: When I came to, I felt something on me. I didn't know what it was, who it was. I panicked. I was frightened, shocked, and all in one motion, I rose up and kicked. And when I kicked, I looked in [sic] the floor and it was [K.L.C.] sitting in [sic] the floor. I jumped up and I asked her what the h-ll she was doing. I zipped my pants up. I remember rubbing my eyes, rubbing my head, trying to collect myself and still, still drunk, not collected, hung over, and she was begging me not to say anything to her mother: "Please don't tell mama; please don't tell Cassie; please don't tell [J.J.]." . . . .
>
> . . . .
>
> It was a feeling that—it's not like being tapped on the shoulder. It's a feeling not being tapped on your forehead, being shook. It's a private position—a private place that's a sensitive area, and I felt something on my penis.

By defendant's own testimony, it is undisputed that: (1) defendant was lying in J.J's bed on the night in question; (2) K.L.C. came into the bedroom and unzipped defendant's pants; and (3) defendant "felt something on [his] penis."

Although defendant's testimony does not exactly mirror his earlier confession, these variances do not warrant a reversal of his first-degree sexual offense conviction and the issue was for the jury to decide. Our Supreme Court has adopted a flexible *corpus delicti* rule:

"we need not adhere to our strict rule requiring independent *proof* of the *corpus delicti* in order to guard against the possibility that a defendant will be convicted of a crime that has not been committed." *Id.* at 235, 337 S.E.2d at 494 (emphasis supplied). All that is required is "substantial independent evidence tending to establish [the] trustworthiness [of defendant's extrajudicial confession], including facts that tend to show the defendant had the opportunity to commit the crime." *Id.* at 236, 337 S.E.2d at 495.

Based upon J.J.'s and defendant's own testimony at trial, the State presented sufficient evidence to meet its burden under the *corpus delicti* rule. This is not a case where a defendant's confession was "erroneously reported," "involuntarily made," or "falsely volunteered by an insane or mentally disturbed individual." *Id.* at 233, 337 S.E.2d at 493.

This case involves a young adult male who made a bad decision to involve himself sexually with a minor female. An alleged rape victim's decision not to testify about a prior incident in which she voluntarily performed a sexual act on her alleged attacker does not establish a lack of trustworthiness of defendant's confession. Viewing the evidence in the light most favorable to the State, the trial court properly denied defendant's motions to dismiss. Defendant's first-degree sexual offense conviction should be sustained.

II. Indecent Liberties

Defendant argues the trial court erred by denying his motions to dismiss the indecent liberties charge. I disagree.

The majority's opinion holds that the evidence presented at trial supports defendant's conviction for indecent liberties based upon: (1) defendant undressing K.L.C. and (2) exposing his penis to her at his residence. However, the majority's opinion awards defendant a new trial on the issues of indecent liberties and states:

> Since the State itself did not even identify the evidentiary basis which we have found for the indecent liberties conviction, but instead was relying upon an act of fellatio which we have determined is not a proper basis for conviction under the *corpus delicti* rule, we conclude that the jury was also confused by the instructions and contentions.

Because the "act of fellatio" was a proper basis for defendant's first-degree sexual offense conviction, it is also a proper basis for

defendant's indecent liberties conviction. *See State v. Lawrence*, 360 N.C. 368, 375, 627 S.E.2d 609, 613 (2006) ("[A] defendant may be unanimously convicted of indecent liberties even if: (1) the jurors considered a higher number of incidents of immoral or indecent behavior than the number of counts charged, and (2) the indictments lacked specific details to identify the specific incidents."). The trial court properly denied defendant's motions to dismiss.

III. Conclusion

Based upon J.J.'s and defendant's own testimony at trial, the State presented substantial independent evidence tending to establish the trustworthiness of defendant's extrajudicial confession to meet its burden under the *corpus delicti* rule. *Parker*, 315 N.C. at 229, 337 S.E.2d at 491. The trial court properly denied defendant's motions to dismiss his first-degree sexual offense and indecent liberties charges. I find no error in defendant's convictions and respectfully dissent.

SUE ELLEN ESTROFF, PLAINTIFF v. SROBONA TUBLU CHATTERJEE, DEFENDANT

No. COA07-384

(Filed 6 May 2008)

1. Child Support, Custody, and Visitation— child custody—domestic partners—focus on legal parent's intentions

The trial court did not err in a domestic partner's child custody case when applying the test under *Price*, 346 N.C. 68 (1997), by basing its determination in part on defendant biological mother's intentions as to plaintiff domestic partner's role in the children's lives because: (1) the court's focus must be on whether the legal parent has voluntarily chosen to create a family unit and to cede to the third party a sufficiently significant amount of parental responsibility and decision-making authority to create a permanent parent-like relationship with his or her child; (2) the legal parent's intentions are not required to be disclosed to the third party; and (3) the trial court properly considered defendant's intentions at the various stages prior to her decision to terminate her relationship with plaintiff, it was for the trial court to decide the credibility of current expressions of the mother's past

intent in light of the mother's actual conduct, and those credibility determinations cannot be revisited on appeal.

2. Child Support, Custody, and Visitation— child custody—domestic partners—sufficiency of findings of fact—third-party's burden of proof

The trial court did not err in a child custody case brought by a domestic partner by determining that plaintiff failed to meet her burden of proof under *Price*, 346 N.C. 68 (1997), even though she contends various testimony and exhibits warranted a ruling in her favor, because: (1) although plaintiff did assign error to a number of findings of fact, many of those assignments of error were not argued in her appellate brief, and thus her objections to those findings are deemed abandoned; (2) plaintiff has not argued how she was harmed by any mislabeling of findings of fact she claims are in fact conclusions of law; (3) plaintiff has not demonstrated that any of the trial court's findings of fact are unsupported by competent evidence, and thus they are binding on appeal; (4) there are no specific set of factors that must be found or analyzed in order for the standard in both *Price* and *Mason*, 190 N.C. App. —— (2008), to be met, and the absence from the trial court's order of the factors identified by plaintiff do not require reversal even though they may be relevant to the question required to be answered by those cases; (5) the findings reflect that defendant did not choose to create a family unit with two parents, did not intend for plaintiff to be a de facto parent, did not allow plaintiff to function fully as a parent, but instead saw plaintiff as a significant loving adult caretaker as modeled on the roles of adults to which defendant was accustomed as a result of her Indian upbringing; (6) the fact that a third party provides caretaking and financial support, engages in parent-like duties and responsibilities, and has a substantial bond with the children does not necessarily meet the requirements of *Price* and *Mason*, (7) the fact that a person has the necessary relationship for standing purposes does not establish, without more, that the requirements of *Price* have been met; and (8) the findings are sufficient to support the trial court's determination that plaintiff did not establish that defendant engaged in conduct inconsistent with her paramount constitutionally-protected status as a parent.

3. Appeal and Error— preservation of issues—parent by estoppel—de facto parent—doctrines not recognized by North Carolina

Although plaintiff domestic partner contends the trial court erred in a child custody case by concluding that plaintiff domestic partner was neither a parent by estoppel nor a de facto parent, this argument does not need to be addressed because those doctrines, as adopted in other states, have not been recognized in North Carolina and thus are not appropriately considered on appeal.

Appeal by plaintiff from orders entered 17 November 2006 and 20 December 2006 by Judge Joseph Moody Buckner in Orange County District Court. Heard in the Court of Appeals 11 October 2007.

Lewis, Anderson, Phillips & Hinkle, PLLC, by Susan H. Lewis and Brian C. Johnston, for plaintiff-appellant.

Northen Blue, L.L.P., by Carol J. Holcomb and Samantha H. Cabe, for defendant-appellee.

Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene and Tobias S. Hampson, for amicus curiae Elizabeth MacLean.

GEER, Judge.

Plaintiff Sue Ellen Estroff appeals from the district court's 17 November 2006 order dismissing her claim for joint custody of two children born to her former domestic partner, defendant Srobona Tublu Chatterjee. This appeal is resolved by the principles set forth in our opinion filed this same date in *Mason v. Dwinnell*, 190 N.C. App. 209, 660 S.E.2d 58 (2008).

As in many custody cases, the struggling of adults over children raises concern regarding the consequences of the rulings for the children involved. Our General Assembly acted on this concern by mandating that disputes over custody be resolved solely by application of the "best interest of the child" standard. *See* N.C. Gen. Stat. § 50-13.2(a) (2007). Nevertheless, our federal and state constitutions, as construed by the United States and North Carolina Supreme Courts, do not allow this standard to be used as between a legal parent and a third party unless the evidence establishes that the legal parent acted in a manner inconsistent with his or her constitutionally-

protected status as a parent.[1] *See Price v. Howard*, 346 N.C. 68, 484 S.E.2d 528 (1997). No litmus test or set of factors can determine whether this standard has been met. Instead, the legal parent's "conduct would, of course, need to be viewed on a case-by-case basis . . . ." *Id.* at 83, 484 S.E.2d at 537.

In this case, we hold that the trial court was entitled to conclude, based on the evidence presented at trial and its findings of fact, that Chatterjee did not engage in conduct inconsistent with her constitutionally-protected status. As a result, we affirm the trial court's order dismissing Estroff's custody action.

Facts

The custody dispute in this case arises from the relationship between Estroff and Chatterjee, who were domestic partners for approximately eight years. The trial court made the following findings of fact.

Estroff is a university professor and Chatterjee is a medical doctor. The two met when Chatterjee, a graduate student at the time, took a seminar taught by Estroff. After Chatterjee completed the seminar, the two women entered into an intimate relationship. At the time the relationship began, Estroff was 44 years old and Chatterjee was 30.

The women lived together from June 1996 until January 2003. In May 1997, the couple bought a house together. Prior to the purchase of the residence, Estroff and Chatterjee signed an agreement establishing each person's rights and responsibilities with respect to the residence and identifying each individual's personal property. Simultaneously, each woman signed a document appointing the other as her attorney-in-fact. Estroff executed a health care power of attorney naming Chatterjee as her attorney-in-fact; Chatterjee did not do the same. Although they never discussed having a commitment ceremony, the two women identified themselves as a couple, and it was well-known by their families and select friends that the women were in an intimate relationship.

In 1997, Chatterjee, who was then 32, decided that she wanted to conceive a child. Estroff had previously chosen not to have children herself. When Chatterjee asked whether Estroff had any objection, Estroff responded that because it was Chatterjee's body, it was her

1. We use the phrase "legal parent" to reference both biological and adoptive parents.

choice. As the trial court phrased it, "[u]ltimately, [Estroff] agreed that [Chatterjee] could raise a child within the context of their relationship and in their jointly owned home."

Chatterjee first asked a long-time friend to be the sperm donor because it was important to her that her child know and have a relationship with his or her biological father. When the friend declined, Chatterjee decided to use an anonymous sperm donor from a particular sperm bank. While family and friends helped Chatterjee review several profiles, Chatterjee ultimately chose the donor. Among her reasons for selecting the particular donor was the donor's willingness to meet any child when he or she became an adult.

A joint credit card for the couple paid for the purchase of the sperm. Estroff also went to medical appointments with a reproductive specialist and with an obstetrician for pre-natal care. Estroff learned how to perform the artificial insemination and did so when Chatterjee's physician could not.

After a miscarriage, Chatterjee became pregnant in September 2000 with twins. When Chatterjee was required to go on bed rest in March 2001, her mother came to stay with her and became her primary caretaker. During this time, Chatterjee began to feel concerned about her relationship with Estroff. Estroff, however, announced to her colleagues and friends that Chatterjee was going to have twins and that they would be raising the children together. The trial court found that Chatterjee never made similar pronouncements to her colleagues and was uncomfortable when Estroff did so. Nonetheless, Chatterjee did not express her objections or feelings to Estroff.

Before the twins' birth, Estroff requested and Chatterjee agreed to give the children Estroff's last name as their middle names. When it came time for the twins to be born, Estroff and Chatterjee's mother both accompanied Chatterjee to the hospital. Estroff was in the delivery room when the children were born and held them before Chatterjee did. When, however, hospital staff referred to Estroff as the other "mom," Chatterjee objected to Estroff's being called a "mom," and, as a result, Estroff asked the staff to stop referring to her as a "mom."

Because the children were born prematurely, they required around-the-clock care. When they first came home from the hospital, both Chatterjee's mother and Estroff helped Chatterjee care for the twins. After Chatterjee's mother left, Estroff and Chatterjee shared

the daily care of the children. In addition, in the early days, Estroff's family came to help care for the children.

Estroff took the children to university events and held the children out as her own. Estroff helped financially support and care for the children. The women jointly interviewed applicants for a nanny and decided who to hire. Chatterjee, however, reminded Estroff that Estroff was not the mother of the children and that Chatterjee was and always would be their only mother.

In early 2002, Chatterjee finally decided to terminate her relationship with Estroff and began looking for a separate residence. After moving to a new house in January 2003, approximately 18 months after the birth of the twins, Chatterjee worked with a parental coach to develop a structured schedule so that the children were in Estroff's custody approximately half of every week. According to the trial court's findings, "[i]t was [Chatterjee's] intent to gradually reduce the time the children would spend with [Estroff] as they became settled and at ease in their new home."

In the spring of 2005, Chatterjee told Estroff that she would no longer be allowed to spend time with the twins more than one night a week. In response, on 26 May 2005, Estroff sued seeking joint custody, recognition of her parental status, and reinstatement of the original visitation schedule. Chatterjee subsequently moved to dismiss for lack of standing and failure to state a claim. The trial court denied the motion to dismiss in a 3 August 2005 order. Beginning on 17 April 2006, the trial court held a two-week trial and ultimately dismissed Estroff's claims.

The trial court entered its order on 17 November 2006. With respect to Estroff's status, the trial court found:

> While [Estroff] has played a unique and special role in the lives of [Chatterjee's] children, she is neither a biological nor an adoptive parent of [the twins]. [Estroff] is not a "parent by estoppel" nor a "de facto parent". There was never a legal nor contractual written or verbal agreement between [Estroff] and [Chatterjee] that [Estroff] was a parent, custodian or legal guardian. Moreover, [Estroff] and [Chatterjee] never discussed entering into a parenting or custodial agreement or filing a friendly lawsuit to attempt to formally provide [Estroff] with parental or custodial rights. [Chatterjee] never would have agreed to such a request if it had been made by [Estroff]. [Chatterjee] would never have agreed to

> bestow on [Estroff] or anyone else any parental or custodial rights with regard to her children.

With respect to Chatterjee, the trial court found that she had "not conveyed or relinquished custody or parental status to [Estroff] by her conduct and/or by her actions."

The court then concluded that "[Chatterjee], as the biological parent of [the twins] has a constitutionally-protected right to the care, custody, and control of her children under the Fourteenth Amendment to the Constitution of the United States." Further, according to the trial court, "[Estroff] has failed to establish by clear and convincing evidence that [Chatterjee] has engaged in conduct inconsistent with her constitutionally-protected status as a parent or otherwise forfeited her constitutionally-protected status as a parent."

On 27 November 2006, Estroff filed a motion for a new trial and/or relief from the judgment. That motion primarily argued that a new trial was warranted based on misconduct by Chatterjee. According to the motion, although Chatterjee had "repeatedly and consistently represent[ed] to the Court throughout the proceedings until June 5, 2006 that she would never cut off contact between the Minor Children and [Estroff], [she] cut off all contact between the Minor Children and [Estroff]" once the trial court indicated it was dismissing the case. The trial court denied the motion in an order filed 20 December 2006. Estroff timely appealed from both the 17 November 2006 order and the 20 December 2006 order.

Discussion

Estroff primarily challenges the trial court's ultimate determination, pursuant to *Price v. Howard*, 346 N.C. 68, 484 S.E.2d 528 (1997), that Chatterjee did not engage in conduct inconsistent with her constitutionally-protected status as a parent. As we recognized in *Mason*, *Price* holds that the General Assembly's "best interest of the child" standard, N.C. Gen. Stat. § 50-13.2(a), has constitutional limitations. 190 N.C. App. at 219, 660 S.E.2d at 65. Our Supreme Court determined in *Price* that in a custody dispute between a legal parent and a third party, the following test applies in determining whether the "best interest of the child" standard governs:

> [T]he parent may no longer enjoy a paramount status if his or her conduct is inconsistent with this presumption [that he or she will act in the best interest of the child] or if he or she fails to shoulder the responsibilities that are attendant to rearing a child. If a

> natural parent's conduct has not been inconsistent with his or her constitutionally protected status, application of the "best interest of the child" standard in a custody dispute with a nonparent would offend the Due Process Clause.

346 N.C. at 79, 484 S.E.2d at 534. When a trial court finds conduct inconsistent with the parent's constitutionally-protected status, "custody should be determined by the 'best interest of the child' test mandated by statute." *Id.*, 484 S.E.2d at 535.

This determination must be based on clear, cogent, and convincing evidence. *Adams v. Tessener*, 354 N.C. 57, 63, 550 S.E.2d 499, 503 (2001). Under our standard of review of custody proceedings, "the trial court's findings of fact are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary." *Owenby v. Young*, 357 N.C. 142, 147, 579 S.E.2d 264, 268 (2003). Whether these findings support the trial court's conclusions of law is reviewable de novo. *Hall v. Hall*, 188 N.C. App. 527 530, 655 S.E.2d 901, 904 (2008).

I

[1] As an initial matter, Estroff contends that the trial court erred as a matter of law, when applying the *Price* test, by basing its determination in part on Chatterjee's "intentions" as to Estroff's role in the children's lives. According to Estroff, in making the determination mandated by *Price*, courts should apply the "well settled" principle of civil legal responsibility "that it is not a party's intention that controls whether he is to be held legally accountable, but his conduct and the reasonably foreseeable consequences of his conduct." This case is not, however, a contract or tort action, but rather involves a legal parent's "constitutionally protected paramount interest in the companionship, custody, care, and control of his or her child." *Price*, 346 N.C. at 79, 484 S.E.2d at 534.

Estroff further argues, however, that *Price* supports her view that only manifested intentions are relevant. She asserts that, in *Price*, "the Supreme Court held that the mother needed to have made it clear at the time she left the child with the Plaintiff that the placement was temporary." (Emphasis omitted.) We disagree with Estroff's reading of *Price*. To the contrary, the Court noted that the biological mother "*chose* to rear the child in a family unit with plaintiff being the child's *de facto* father." *Id.* at 83, 484 S.E.2d at 537 (emphasis added). "Choice" is a volitional factor that necessarily incorporates a person's intent.

In addition, although the mother in *Price* had relinquished custody to the plaintiff for a period of time, the Court observed that the testimony was disputed "whether defendant's voluntary relinquishment of custody to plaintiff was intended to be temporary or indefinite and whether she informed plaintiff and the child that the relinquishment of custody was temporary." *Id.* Thus, both conduct and intent are relevant. The language referenced by Estroff stated that if a parent finds it necessary to relinquish custody of his or her child to a third party, "to preserve the constitutional protection of parental interests in such a situation, the parent should notify the custodian upon relinquishment of custody that the relinquishment is temporary . . . ." *Id.* This recommendation—in effect, setting out the better practice for parents—does not require that only conduct and manifested intentions be considered.

In our decision in *Mason*, we held that the specific question to be answered in cases such as this one is: "Did the legal parent act inconsistently with her fundamental right to custody, care, and control of her child and her right to make decisions concerning the care, custody, and control of that child?" *Mason*, 190 N.C. App. at 222, 660 S.E.2d at 67. We believe that in answering this question, it is appropriate to consider the legal parent's intentions regarding the relationship between his or her child and the third party during the time that relationship was being formed and perpetuated.

Indeed, in *Mason*, we pointed out that the trial court had found that the legal parent and her domestic partner had "intentionally" taken steps to identify Mason as a parent of the child and that the legal parent "intended that [the] parent-like relationship [between her partner and child] be a permanent relationship for her child." *Id.* at 223, 660 S.E.2d at 67. We also concluded that the trial court properly considered a parenting agreement executed by the couple because it "constitute[d] admissions by [the legal parent] regarding her intentions and conduct in creating a permanent parent-like relationship between [her partner] and her biological child." *Id.* at 224, 660 S.E.2d at 68.

Our analysis of the trial court's findings of fact stressed:

> While this case does not involve the biological mother's leaving the child in the care of a third person, we still have the circumstances of [the mother's] *intentionally* creating a family unit composed of herself, her child and, to use the Supreme Court's words, a "*de facto* parent." [*Price*, 346 N.C. at 83, 484 S.E.2d at

> 537]. . . . Even though [the mother] did not completely relinquish custody, she fully shared it with [her partner], including sharing decision-making, caretaking, and financial responsibilities for the child. And, in contrast to *Price*, the findings establish that [the mother] *intended*—during the creation of this family unit—that this parent-like relationship would be permanent, such that she "induced [her partner and the child] to allow that family unit to flourish in a relationship of love and duty with no expectations that it would be terminated." *Id.* [at 83, 484 S.E.2d at 537.]

Id. at 225-26, 660 S.E.2d at 68-69 (emphasis added). We concluded that once a parent chooses to forego as to a third party his or her constitutionally-protected parental rights, he or she "cannot now assert those rights in order to unilaterally alter the relationship between her child and the person whom she transformed into a parent." *Id.* at 227, 660 S.E.2d at 70.

Thus, as *Mason* holds, the court's focus must be on whether the legal parent has voluntarily chosen to create a family unit and to cede to the third party a sufficiently significant amount of parental responsibility and decision-making authority to create a permanent parent-like relationship with his or her child. *Id.* at 226, 660 S.E.2d at 69. The parent's intentions regarding that relationship are necessarily relevant to that inquiry. By looking at both the legal parent's conduct and his or her intentions, we ensure that the situation is not one in which the third party has assumed a parent-like status on his or her own without that being the goal of the legal parent.

In *V.C. v. M.J.B.*, 163 N.J. 200, 224, 748 A.2d 539, 552, *cert. denied*, 531 U.S. 926, 148 L. Ed. 2d 243, 121 S. Ct. 302 (2000), the New Jersey Supreme Court applied an analysis similar to that in *Mason* in concluding that a third party may be entitled to custody if "the legal parent ceded over to the third party a measure of parental authority and autonomy and granted to that third party rights and duties vis-a-vis the child that the third party's status would not otherwise warrant." With respect to this determination, the court concluded that "the intent of the legally recognized parent is critical." *Id.*

We agree with the New Jersey Supreme Court that the focus must, however, be on the legal parent's "intent during the formation and pendency of the parent-child relationship" between the third party and the child. *Id.* Intentions after the ending of the relationship between the parties are not relevant because "the right of the legal parent '[does] not extend to erasing a relationship between her part-

ner and her child which she voluntarily created and actively fostered simply because after the party's separation she regretted having done so.' " *Id.* at 224-25, 748 A.2d at 552 (quoting *J.A.L. v. E.P.H.*, 453 Pa. Super. 78, 92-93, 682 A.2d 1314, 1322 (1996)).

Estroff also complains that the sole evidence to support the trial court findings of fact regarding Chatterjee's intentions was Chatterjee's own testimony and that none of those intentions were disclosed to Estroff. Our authority does not, however, require that the intentions be disclosed to the third party, although if they were, it might make resolution of the *Price* issue easier, as *Price* pointed out. Estroff's emphasis on the harm to her from the lack of disclosure—including her concerns about Chatterjee's deceit towards her and Chatterjee's "us[ing]" her—reflects Estroff's mistaken belief that principles of civil liability should be imported into the custody context. Estroff's approach implies that she has rights and has suffered harm, but harm to the third party is immaterial to the standard set forth in *Price* and further discussed in *Mason*.

Estroff also argues that "there is ample evidence to contradict [Chatterjee's] statements of her intentions . . . ." Even if so, such evidence simply presented questions of credibility and weight for the trial court to resolve. *Phelps v. Phelps*, 337 N.C. 344, 357, 446 S.E.2d 17, 25 (1994). We, therefore, hold that the trial court properly considered Chatterjee's intentions at the various stages prior to her decision to terminate her relationship with Estroff. It was for the trial court to decide the credibility of current expressions of the mother's past intent in light of the mother's actual conduct. We cannot revisit those credibility determinations on appeal.

II

[2] Estroff next argues that the trial court's determination that she failed to meet her burden of proof under *Price* is not supported by the evidence, citing testimony and exhibits that she asserts warrant a ruling in her favor. Findings of fact are, however, binding on appeal—regardless of the sufficiency of the evidence—unless assigned as error. *Koufman v. Koufman*, 330 N.C. 93, 98, 408 S.E.2d 729, 731 (1991) ("Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal."). Although Estroff did assign error to a number of findings of fact, many of those assignments of error were not then argued in her appellate brief. Her objections to those findings are, therefore, deemed abandoned. N.C.R. App. P. 28(b)(6)

("Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.").

Estroff does argue in her brief that no evidence supports the trial court's finding that "[Estroff] agreed that [Chatterjee] could raise a child within the context of their relationship and in their jointly owned home." While Estroff urges that this finding "attributes to [Estroff] *her agreement* to view [Chatterjee] as a single parent," we cannot accept that construction of the court's finding. We believe a more reasonable reading of the finding is that it was intended to convey that although the couple did not make a joint decision to have a child, Estroff did not object to Chatterjee's raising the child while the women continued to have a relationship. The evidence may not explicitly support this finding, but it is a reasonable inference from the evidence as to Chatterjee's conversations with Estroff regarding Chatterjee's decision to have a child. The trial court is entitled to draw all reasonable inferences from the evidence. *NationsBank of North Carolina v. Baines*, 116 N.C. App. 263, 269, 447 S.E.2d 812, 815 (1994) (holding that trial court decides what reasonable inferences may be drawn from the evidence, and appellate court may not substitute its view for that of the trial court).

Estroff next challenges findings of fact that actually appear favorable to her. Finding of fact 22 states that "[Chatterjee] needed [Estroff's] help and depended on it." Finding of fact 24 states: "[Chatterjee] was grateful for [Estroff's] presence and her help in the care of the children." Third, finding of fact 33 states: "[Estroff] supported [Chatterjee] in many ways both before and during the pregnancy." Estroff's argument as to these findings is based on her belief that the trial court was portraying Estroff as only a "handmaiden" and "helper" to Chatterjee rather than a joint caretaker of the children. We do not believe this is a necessary inference from the findings; nor is such an inference consistent with other findings of the trial court.

Finally, Estroff objects to the trial court's findings of fact that (1) Estroff was not a parent by estoppel or a *de facto* parent, (2) Chatterjee had not voluntarily relinquished custody of her children, and (3) Chatterjee had not conveyed or relinquished custody or parenthood status to Estroff by her conduct or her actions. Estroff argues only that these assertions are in fact conclusions of law. While the first statement may be a conclusion of law, we believe the other two are mixed questions of law and fact. In any event, Estroff has not

argued how she was harmed by any mislabeling of these findings. *See In re Faircloth*, 153 N.C. App. 565, 569, 571 S.E.2d 65, 68 (2002) (deeming the mislabeling of findings of fact and conclusions of law "not fatal" to the trial court's order).

Thus, Estroff has not demonstrated that any of the trial court's findings of fact were unsupported by competent evidence. Those findings are, therefore, binding on appeal. The question remains whether the findings are sufficient to support the trial court's conclusion that Estroff failed to establish that Chatterjee engaged in behavior inconsistent with her constitutionally-protected status as a parent.

Estroff lists in her brief eight findings that she contends were necessary in order to reach the trial court's conclusion, but were not made. Estroff argues that in order to rule in favor of Chatterjee, the trial court was required to find the following: (1) that there was no parent-child bond, (2) that the children were not attached to Estroff, (3) that Estroff was not involved in performing parent-like duties and responsibilities with the children, (4) that Estroff did not provide substantial financial support and caretaking for the children, (5) that Estroff was not viewed as a co-parent by family and friends, (6) that Estroff was not seen by the children as one of their parents, (7) that Chatterjee had not engaged in "any conduct inconsistent with her claim to exclusive control of the children," and (8) that Estroff was not viewed as a co-parent by professionals and medical providers. Estroff then argues that "[t]here were no such findings because they could not have been made. The evidence was overwhelmingly to the contrary."

We pointed out in *Mason* that *Price* "declined to specify the universe of conduct that would 'constitute conduct inconsistent with the protected status parents may enjoy,' but rather directed that a parent's conduct 'be viewed on a case-by-case basis.' " *Mason*, 190 N.C. App. at 218, 660 S.E.2d at 64 (quoting *Price*, 346 N.C. at 79, 484 S.E.2d at 534). There is thus no specific set of factors that must be found or analyzed in order for the standard in *Price* and *Mason* to be met. While the factors identified by Estroff may be relevant to the question required to be answered by *Price* and *Mason*, their absence from the trial court's order in this case does not require reversal.

Here, the trial court's findings establish that Chatterjee did not jointly decide with Estroff to create a family, but rather made the decision on her own and asked only if Estroff had any objection to sharing her home with children. Chatterjee chose the sperm donor

herself based on her desire that the donor be willing to meet the children when they became adults. According to the trial court's findings of fact, Chatterjee—in contrast to Estroff—did not announce to others that the couple was going to raise the twins together. Then, after the twins were born and while the couple lived together, Chatterjee objected to Estroff's being called the children's "mom" and reminded Estroff "that [Estroff] was not the mother of the children; that she, [Chatterjee,] was and always would be their only mother." Finally, as the trial court found, the parties never entered into any written or verbal agreement that Estroff was a parent, custodian, or legal guardian. Indeed, the couple never discussed entering into a parenting or custodial agreement or taking other action to provide Estroff with parental or custodial rights.

The trial court's findings reflect that Chatterjee did not choose to create a family unit with two parents, did not intend that Estroff would be a "*de facto* parent," *Price*, 346 N.C. at 83, 484 S.E.2d at 537, and did not allow Estroff to function fully as a parent. Instead, according to the trial court's findings, Chatterjee saw Estroff as "a significant, loving adult caretaker but not as a parent." As the trial court found, this role was modeled on the roles of adults to which Chatterjee was accustomed as a result of her Indian upbringing.

Consistent with that role, the trial court found that Estroff assisted in the care of the children, financially supported the children, and joined with Chatterjee in interviewing and hiring the children's nanny. Contrary to Estroff's contention, these facts do not preclude the trial court's ultimate determination in Chatterjee's favor. The fact that a third party provides caretaking and financial support, engages in parent-like duties and responsibilities, and has a substantial bond with the children does not necessarily meet the requirements of *Price* and *Mason*. Those factors could exist just as equally for a person such as the plaintiff in *Mason* (who was found to have met the standard in *Price*) as for a step-parent or simply a significant friend of the family, who might not meet the *Price* standard.

These facts establish the existence of a relationship "in the nature of a parent and child relationship" and are sufficient to support a finding of standing to bring a custody action. *Ellison v. Ramos*, 130 N.C. App. 389, 394, 502 S.E.2d 891, 894, *appeal dismissed and disc. review denied*, 349 N.C. 356, 517 S.E.2d 891 (1998). But, simply because a person has the necessary relationship for standing purposes does not establish without more that the requirements of *Price* have been met. In *Seyboth v. Seyboth*, 147 N.C. App. 63, 68, 554 S.E.2d 378, 382

(2001), this Court stressed: "Regardless of the compelling and significant relationship between the stepfather and ex-stepchild in the case *sub judice*, the trial court could not grant the stepfather visitation solely based on the best interest analysis." Further evidence and findings—beyond just the parent-like relationship and strong parent-child bond between the stepfather and child—were necessary to comply with the standard in *Price*. *Id.* at 68-69, 554 S.E.2d at 382.[2]

As the Pennsylvania Supreme Court has stated, "[w]hat is relevant . . . is the method by which the third party gained authority" to assume a parent-like status and perform parental duties. *T.B. v. L.R.M.*, 567 Pa. 222, 232, 786 A.2d 913, 919 (2001). Thus, the focus is not on what others thought of the couple or what responsibility Estroff elected to assume, but rather whether Chatterjee "cho[se] to cede to [Estroff] a sufficiently significant amount of parental responsibility and decision-making authority to create a permanent parent-like relationship with her child." *Mason*, 190 N.C. App. at 226, 660 S.E.2d at 69.

The trial court's findings of fact—although made without benefit of our opinion in *Mason*—essentially decide that Chatterjee did not choose to do so. The findings are, therefore, sufficient to support the trial court's determination that Estroff did not establish that Chatterjee engaged in conduct inconsistent with her paramount constitutionally-protected status. *Compare id.* at 223-25, 660 S.E.2d at 67-70 (holding *Price* standard met when couple jointly decided to create family; intentionally acted to identify third party as parent (through multiple means); mother repeatedly identified partner publicly as child's parent; mother stipulated that couple and child lived together as family unit; mother shared her decision-making authority as to child with partner; mother signed medical power of attorney allowing partner to participate in child's medical decisions; and mother entered into parenting agreement providing that partner was a *de facto* parent and setting out provisions for continued custody by partner if couple's relationship ended).

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2. We note, in passing, that Estroff has also argued that the trial court erred by finding that she did not have standing to seek custody in this case. The trial court, however, in its 3 August 2005 order, denied Chatterjee's motion to dismiss for lack of standing and, in its 17 November 2006 order, concluded that it "ha[d] personal *and subject matter jurisdiction*." (Emphasis added.) *See Estate of Apple v. Commercial Courier Express, Inc.*, 168 N.C. App. 175, 177, 607 S.E.2d 14, 16 ("If a party does not have standing to bring a claim, a court has no subject matter jurisdiction to hear the claim."), *disc. review denied*, 359 N.C. 632, 613 S.E.2d 688 (2005). Thus, the trial court necessarily concluded twice that Estroff had standing, and there is no need for us to address the issue.

III

[3] Finally, Estroff argues that the trial court erred in concluding that she was neither a parent by estoppel nor a *de facto* parent because the court failed to make the necessary findings of fact to support that conclusion. We need not address this argument since those doctrines, as adopted in other states, have not yet been recognized in North Carolina and are not appropriately considered in this appeal.

During the oral argument in this case, Estroff's counsel represented that her client was not seeking parental status, but rather was only seeking visitation. Our Supreme Court has set out in *Price* the standard, under the federal and state constitutions, for determining whether a third party is entitled to custody, including visitation. This Court, in light of *Price* and subsequent Supreme Court decisions following *Price*, does not have authority to adopt a different standard as to custody. *See Seyboth*, 147 N.C. App. at 68, 554 S.E.2d at 382 (declining to adopt approach towards stepparents employed in other states because "[o]ur case law as enunciated in *Peterson* and refined in *Price* . . . is very clear"). Accordingly, we affirm the trial court's order of 17 November 2006.[3]

Affirmed.

Judges BRYANT and STEELMAN concur.

STATE OF NORTH CAROLINA v. LORI SHANNON ICARD

No. COA07-610

(Filed 6 May 2008)

1. Search and Seizure— Fourth Amendment—evidence seized from defendant's purse—show of authority—consent

The trial court erred in a simple possession of methamphetamine case by failing to find that the search of defendant's purse was governed by the Fourth Amendment because: (1) combined with the other circumstances of the pertinent night, the officer's actions were a show of authority such that the encounter lost its

3. Although Estroff appealed from the trial court's denial of her motion for a new trial, she has not addressed that order on appeal.

consensual nature when defendant had shown she was not willing to listen to the officer's questions and had essentially refused to cooperate by ignoring the officer's taps on the car window, and the officer opened the door and insisted that defendant produce identification, thus transforming the encounter from the mere approach of an officer in a public place into a seizure of defendant within the meaning of the Fourth Amendment; (2) the officer did not stop the pertinent vehicle based on a traffic violation or some reasonable suspicion that its occupants were engaged in unlawful activity; (3) at the moment the officer opened the passenger door of the vehicle and began questioning defendant, there was still no evidence that either defendant or the driver was engaged in any unlawful activity; (4) the only evidence of a crime came later from the search of defendant's purse and the lawful search of the vehicle subsequent to the driver's arrest for drug possession and assault on a police officer; and (5) in light of the totality of circumstances surrounding the incident, a reasonable person in defendant's position would not have believed that she was free to leave, although the vehicle could have left the parking lot by driving forward, when to do so would have placed the driver in violation of traffic laws since the officer had his license, and any passenger, particularly a female, would have felt uncomfortable or unsafe by attempting to leave the parking lot on foot at 12:30 am in an area known for drug activity and prostitution. Having found that the Fourth Amendment did apply to the search of defendant's purse, the case is remanded to the trial court for additional findings as to the voluntariness of defendant's consent to the search.

2. Discovery— violation—providing exculpatory information in middle of trial—failure to show prejudicial error

The trial court did not err in a simple possession of methamphetamine case by failing to dismiss the case or order a new trial after the State allegedly failed to provide defendant with exculpatory information in a timely manner because: (1) although the State conceded it had committed a discovery violation by failing to disclose an officer's handwritten notes until the middle of trial, the violation was not a violation under *Brady*, 373 U.S. 83 (1963), nor was the discovery violation prejudicial to defendant when defense counsel was allowed the final argument at trial as well as the opportunity to impeach the officer with the notes; (2) the transcript reflects that defense counsel had adequate time to pre-

pare and change his cross-examination with respect to the caliber of bullets found in defendant's purse, and therefore he had the same opportunity concerning the location of the methamphetamine; (3) defense counsel could have conducted its own investigation into where the methamphetamine was when it was recovered since counsel was aware there was some confusion as to its location and that the same officer was going to be a witness; and (4) the discovery violation was not sufficiently material or prejudicial as to undermine confidence in the outcome of the trial when defendant had the handwritten notes while the officer was still being cross-examined.

3. Evidence— location of methamphetamine—statement made outside presence of jury—general confusion

The trial court did not commit plain error in a simple possession of methamphetamine case by failing to order a new trial or to strike evidence that the prosecutor admitted that he reasonably believed to be false regarding the location of the methamphetamine because, given that the prosecutor's statement was made outside the presence of the jury, and the record and transcript reflect general confusion as to where the methamphetamine was recovered, the trial court acted properly in allowing the officer to testify and clarify where each piece of evidence was recovered.

Judge BRYANT concurring in part and dissenting in part.

Appeal by defendant from judgment entered 1 December 2006 by Judge Robert C. Ervin in Superior Court, Catawba County. Heard in the Court of Appeals 8 January 2008.

Attorney General Roy Cooper, by Assistant Attorney General Marc X. Sneed, for the State.

Brock, Payne & Meece, P.A., by C. Scott Holmes, for defendant-appellant.

WYNN, Judge.

In determining whether Fourth Amendment protections apply to a search or seizure by the police, we consider whether, under the totality of the circumstances, a reasonable person would have felt that she was not free to decline the police request or otherwise ter-

minate the encounter with them.[1] Here, because we find that a reasonable person in Defendant Lori Shannon Icard's position would not have felt "free to . . . terminate the encounter" with the police, we hold that the police search of her purse was governed by the Fourth Amendment. However, noting that Defendant also consented to the search, we remand to the trial court for findings as to the voluntariness of Defendant's consent.

At 12:30 a.m. on 21 September 2004, Officer Curt Moore of the Maiden Police Department noticed a pickup truck parked in the lot adjacent to the Fairview Market. After checking the front of the building, Officer Moore drove by the front of the pickup truck, noticed a silhouette in the driver's seat, and activated his blue flashing strobe lights. Thereafter, he approached the pickup truck and asked the individual in the driver's seat, later identified as Carmen Coleman, for his license and registration. Officer Moore asked Mr. Coleman why he was parked at the Market; Mr. Coleman responded that he had come from a neighboring area to meet a friend. After engaging in a short conversation with Mr. Coleman about this answer, Officer Moore returned to his own vehicle to verify Mr. Coleman's license and registration information. Officer Moore acknowledged at trial that the pickup truck was not illegally parked and was violating no traffic laws at the time he approached the vehicle; he likewise confirmed that his check of Mr. Coleman's license and registration returned no outstanding warrants for Mr. Coleman or problems with the ownership of the truck.

In response to Officer Moore's request for back-up assistance, made while he was checking Mr. Coleman's license and registration, Officer Darby Hedrick soon arrived and parked his marked vehicle on the right side of the pickup truck, with his headlights and take-down spotlights illuminating the passenger side of the truck. At that point, Officer Moore turned off his blue flashing lights and approached the passenger side of the truck.

When Defendant, sitting in the passenger seat, failed to respond to Officer Moore's repeated taps on the passenger-side window, Officer Moore opened the passenger-side door and asked her for identification. Defendant stated that she did not have any identification with her, but Officer Moore noticed a bag at her feet and asked if she had identification in the bag. Defendant then picked up the purse and unzipped it, revealing a wallet which contained her identification

1. *State v. Brooks*, 337 N.C. 132, 142, 446 S.E.2d 579, 586 (1994).

card. Officer Moore then asked Defendant to step to the rear of the vehicle and for permission to look through her purse. Defendant agreed and got out of the pickup truck and moved to its rear; in searching her purse, Officer Moore found several bullets and a piece of glass that appeared burned at one end. Officer Moore testified at trial that he also found a clear plastic bag with a stamp of a skunk on the outside in Defendant's purse; the substance inside the bag later tested positive for methamphetamine.

While standing with Defendant at the rear of the pickup truck, Officer Moore saw Mr. Coleman moving in the cab of the pickup, and he went to investigate. After more questioning, Mr. Coleman gave Officer Moore a lockblade clip-type knife that was in his pocket, as well as a clear plastic bag containing marijuana and another clear bag containing a white- and tan-colored powder. An altercation between Mr. Coleman and Officer Moore then ensued, and Officer Hedrick assisted Officer Moore in subduing Mr. Coleman. A subsequent search of the pickup truck turned up glass pipes used to inhale controlled substances, a crack pipe, a digital scale, a loaded .357 Magnum revolver, and a clear plastic bag with what was later determined to be residue from methamphetamine on the inside.

Defendant was initially indicted on charges of resisting a public officer, carrying a concealed weapon, possession with intent to sell and deliver cocaine, possession with intent to sell and deliver methamphetamine, possession with intent to sell and deliver marijuana, and possession of drug paraphernalia. Prior to trial, the State dismissed the cocaine-related charge. At trial, upon Defendant's motion at the close of the State's evidence, the trial court dismissed the concealed weapon and marijuana-related charges, as well as the charge of possession with intent to sell and deliver methamphetamine. However, the State was allowed to proceed with the lesser-included charge of simple possession of methamphetamine, of which Defendant was found guilty by the jury. The jury also found Defendant not guilty of the charges of resisting a public officer and of possession of drug paraphernalia. Upon the jury's conviction for simple possession, the trial court sentenced Defendant to a term of five to six months' imprisonment, which was then suspended, as well as twenty-four months of supervised probation, sixty hours of community service, a fine, and restitution.

Defendant now appeals, arguing that the trial court erred by (I) denying her motion to suppress and instead allowing evidence from an unlawful search and seizure; (II) failing to dismiss the case or to

order a new trial after the State did not provide her with exculpatory information in a timely manner; and (III) failing to order a new trial or to strike evidence that the prosecutor admitted that he reasonably believed to be false.

I.

[1] In her first argument, Defendant contends that the trial court erred by failing to suppress evidence that was obtained through the search of her purse, as the search and seizure violated the protections afforded by the Fourth Amendment.

Our standard of review to determine whether a trial court properly denied a motion to suppress is "whether the trial court's findings of fact are supported by the evidence and whether the findings of fact support the conclusions of law." *State v. Cockerham*, 155 N.C. App. 729, 736, 574 S.E.2d 694, 699 (citing *State v. Wynne*, 329 N.C. 507, 522, 406 S.E.2d 812, 820 (1991)), *disc. review denied*, 357 N.C. 166, 580 S.E.2d 702 (2003). The trial court's findings of fact "are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001) (citations omitted). The conclusions of law, however, are reviewed *de novo* by this Court. *State v. Brooks*, 337 N.C. 132, 141, 446 S.E.2d 579, 585 (1994).

In the instant case, Defendant challenges both findings of fact and the trial court's conclusions of law that Defendant was in a public place, such that Officer Moore's approach and subsequent interactions with Defendant did not fall within the Fourth Amendment's protections against unreasonable search and seizure. *See, e.g.*, *United States v. Drayton*, 536 U.S. 194, 200, 153 L. Ed. 2d 242, 251 (2002) ("Law enforcement officers do not violate the Fourth Amendment's prohibition of unreasonable seizures merely by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen."); *Brooks*, 337 N.C. at 142, 446 S.E.2d at 585-86 ("The Supreme Court of the United States recently reaffirmed that police officers may approach individuals in public to ask them questions and even request consent to search their belongings, so long as a reasonable person would understand that he or she could refuse to cooperate." (citations omitted)). According to our state Supreme Court, "[t]he test for determining whether a seizure has occurred is whether under the totality of the circumstances a reasonable person would feel that he was not free to decline the officers' request or otherwise terminate the encounter." *Id.*, 446 S.E.2d at 586

(citations omitted). Thus, our task is to determine whether the circumstances on the night of 21 September 2004 were such that a reasonable person would have felt free to decline Officer Moore's requests and to leave the premises.

Under the facts of this case, Officer Moore did not need probable cause or reasonable suspicion to approach the pickup truck, which was parked in a public place. Nor did he need probable cause or reasonable suspicion to ask Mr. Coleman and Defendant questions, for their identification, or even for consent to search their belongings, if they were "willing to listen." *Drayton*, 536 U.S. at 200, 153 L. Ed. 2d at 251. Nevertheless, Officer Moore was barred from "induc[ing] cooperation by coercive means." *Id.*; *see also Brooks*, 337 N.C. at 141, 446 S.E.2d at 585 ("[C]ommunication between the police and citizens involving no coercion or detention . . . [falls] outside the compass of the Fourth Amendment." (citation omitted)). More specifically, "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *State v. Campbell*, 359 N.C. 644, 662, 617 S.E.2d 1, 13 (2005) (quoting *Florida v. Bostick*, 501 U.S. 429, 434, 115 L. Ed. 2d 389, 398 (1991) (citations omitted)), *cert. denied*, 547 U.S. 1073, 164 L. Ed. 2d 523 (2006); *see also Bostick*, 501 U.S. at 434, 115 L. Ed. 2d at 398 ("The encounter will not trigger Fourth Amendment scrutiny unless it loses its consensual nature.").

The evidence offered at trial in the instant case supports each of the trial court's findings of fact as to the chain of events that unfolded from the time that Officer Moore pulled his vehicle behind the pickup truck at the Fairview Market until Defendant and Mr. Coleman were arrested. As noted by the trial court, the Fairview Market "is located in a high crime area where numerous complaints of drug activity and prostitution have been received by law enforcement authorities." Moreover, although the pickup truck "was not being operated in violation of any traffic laws[,]" Officer Moore parked his vehicle behind the pickup truck, such that it could not back up but "could have driven away by going forward[,]" and he had his headlights and blue flashing visor lights on at that time. Officer Moore requested, and received, Mr. Coleman's license and registration, which his *voir dire* testimony showed that he kept for the duration of his encounter with Mr. Coleman and Defendant. The blue flashing lights remained on until Officer Moore asked for Defendant's identification, after Officer Hedrick had arrived and parked his marked vehicle such that his

headlights and take-down spotlights were shining on the passenger side of the pickup truck.

Most notably, as found by the trial court in its order, Officer Moore knocked twice on the passenger-side window of the pick-up truck, where Defendant was sitting; she did not respond either time. At that point, Officer Moore "opened the passenger door of the truck." He told Defendant who he was, "which she could see [he] was in uniform," and "asked her if she had any type of identification on her." She answered that she did not, because it was in her other purse; however, seeing a handbag at Defendant's feet in the truck, Officer Moore "asked her if there was some identification in that purse." After unzipping the purse and "fumbling through" a wallet on top, Defendant produced a North Carolina identification card with her name on it. Officer Moore then "asked [Defendant], if she would, to step to the rear of the vehicle with Officer Hedrick and [himself]."

Combined with the other circumstances of that night, we find these actions to be a "show of authority," *Campbell*, 359 N.C. at 662, 617 S.E.2d at 13, such that this encounter "los[t] its consensual nature." *Bostick*, 501 U.S. at 434, 115 L. Ed. 2d at 398. By ignoring Officer Moore's taps on the window, Defendant had shown that she was not "willing to listen" to Officer Moore's questions, *Drayton*, 536 U.S. at 200, 153 L. Ed. 2d at 251, and had essentially "refuse[d] to cooperate." *Brooks*, 337 N.C. at 142, 446 S.E.2d at 585-86. Officer Moore's opening the door and insistence that Defendant produce identification were a show of authority that transformed this encounter from " 'the mere approach of police officers in a public place,' " *id.* at 141, 446 S.E.2d at 585 (citation omitted), into a seizure of Defendant within the meaning of the Fourth Amendment. As noted by this Court in a previous case, "[w]ere we to conclude otherwise, we would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches which the Fourth Amendment is specifically designed to protect against." *State v. Fleming*, 106 N.C. App. 165, 171, 415 S.E.2d 782, 786 (1992) (citing *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889 (1968)).

Had Officer Moore stopped the pickup truck due to a traffic violation or some reasonable suspicion that its occupants were engaged in unlawful activity, he would have been "authorized to take such steps as reasonably necessary to protect [his] personal safety and to maintain the status quo during the course of the stop." *United States v. Hensley*, 469 U.S. 221, 235, 83 L. Ed. 2d 604, 616 (1985). Indeed, had

he had probable cause for a stop, Officer Moore could have ordered the driver, Mr. Coleman, to exit the vehicle, *State v. McGirt*, 122 N.C. App. 237, 239, 468 S.E.2d 833, 834-35 (1996), *aff'd per curiam*, 345 N.C. 624, 481 S.E.2d 288, *cert. denied*, 522 U.S. 869, 139 L. Ed. 2d 121 (1997), or even ordered Defendant, a passenger, to exit despite having no probable cause or reasonable suspicion with respect to her. *State v. Pulliam*, 139 N.C. App. 437, 440, 533 S.E.2d 280, 283 (2000). Likewise, had Officer Moore had a "reasonable suspicion based on articulable facts under the circumstances" that Defendant, as a passenger, was armed and dangerous, he would have been constitutionally permitted to conduct a pat-down safety search of Defendant. *Id.* at 441, 533 S.E.2d at 283.

However, Officer Moore had no probable cause or reasonable suspicion when he approached the pickup truck, such that these cases are inapplicable to the facts at hand. Likewise, at the moment that Officer Moore opened the passenger door of the pickup truck and began questioning Defendant, there was still no evidence that either Defendant or Mr. Coleman was engaged in any unlawful activity. Indeed, the only evidence of a crime came later, from the search of Defendant's purse and the lawful search of the pickup truck subsequent to Mr. Coleman's arrest for drug possession and assault on a police officer.

As found by the trial court, the pickup truck "was not being operated in violation of any traffic laws." Officer Moore's check of Mr. Coleman's license and registration showed no outstanding warrants or issues with ownership of the truck; he also maintained possession of Mr. Coleman's license and registration throughout the encounter. Additionally, his blue flashing lights had remained on until another marked police vehicle parked with its headlights and take-down spotlights directed at the passenger side of the truck. Although the pickup truck, blocked from behind by Officer Moore's vehicle, could have left the parking light by driving forward, to do so would have placed Mr. Coleman in violation of traffic laws, as he would have been driving without a license. At 12:30 a.m. in an area known for drug activity and prostitution, any passenger, particularly a female, would undoubtedly have felt uncomfortable or unsafe by attempting to leave the parking lot on foot.

Accordingly, in light of the totality of the circumstances surrounding the incident, we conclude that a reasonable person in Defendant's position would not have believed that she was free to leave. *See Campbell*, 359 N.C. at 662, 617 S.E.2d at 13 ("Seizure of a

person within the meaning of the Fourth Amendment occurs only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." (quotation and citation omitted)); *see also Bostick*, 501 U.S. at 437, 115 L. Ed. 2d at 400 ("We have consistently held that a refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure."). As such, Defendant was entitled to the protections of the Fourth Amendment at the time Officer Moore asked her to exit the pickup truck.

Respectfully, contrary to the assertions of the dissent, we reach this conclusion based on the totality of the circumstances of the encounter between Defendant and Officer Moore, not solely on Officer Moore's words and actions in approaching Defendant and requesting that she produce identification. Officer Moore's vehicle, with its blue lights flashing, was parked behind the pickup truck. Moreover, even if the pickup truck could have pulled forward to exit the parking lot, Officer Moore maintained possession of Mr. Coleman's license and registration for the duration of this encounter, essentially preventing him from leaving. Another officer arrived and parked his vehicle to the right of the truck, with his takedown lights shining on the passenger side. Combined with Officer Moore's words and actions in opening the door to the pickup truck after Defendant had essentially refused to cooperate with his requests for information, we conclude that an objective evaluation of the totality of these circumstances "would have conveyed . . . to a reasonable person[,]" including one who was a passenger in the pickup truck, that "[s]he was being ordered to restrict [her] movement." *California v. Hodari*, 499 U.S. 621, 628, 113 L. Ed. 2d 690, 698 (1991). As such, the police in this instance "restrained the liberty of a citizen," *Bostick*, 501 U.S. at 434, 115 L. Ed. 2d at 398, and the encounter was subject to the protections of the Fourth Amendment.

Nevertheless, we observe that the record and transcripts before us indicate that Officer Moore asked Defendant if he could search her purse, and she agreed. A police officer may search an individual or her property at any time with the person's consent. *State v. Graham*, 149 N.C. App. 215, 218, 562 S.E.2d 286, 288 (2002), *disc. review denied and appeal dismissed*, 356 N.C. 685, 578 S.E.2d 315 (2003). However, our United States Supreme Court has also noted that, " '[c]onsent' that is the product of official intimidation or harassment is not consent at all. Citizens do not forfeit their constitutional rights when they are coerced to comply with a request that they would pre-

fer to refuse." *Bostick*, 501 U.S. at 438, 115 L. Ed. 2d at 401. Further, "[t]here must be a clear and unequivocal consent before a defendant can waive his constitutional rights." *State v. Pearson*, 348 N.C. 272, 277, 498 S.E.2d 599, 601 (1998) (citation omitted). "To be voluntary, it must be shown that the waiver was free from coercion, duress or fraud, and not given merely to avoid resistance." *State v. Little*, 270 N.C. 234, 239, 154 S.E.2d 61, 65 (1967) (citation omitted). The burden is on the State to show that consent was voluntary. *State v. Morocco*, 99 N.C. App. 421, 429, 393 S.E.2d 545, 549 (1990). As held by our state Supreme Court, voluntariness is a question of fact to be determined from all of the surrounding circumstances. *State v. Williams*, 314 N.C. 337, 344, 333 S.E.2d 708, 714 (1985).

Here, the trial court concluded in its order denying Defendant's motion to suppress that the search was not subject to the provisions of the Fourth Amendment because it was the mere approach of police officers in a public place. *Campbell*, 359 N.C. at 662, 617 S.E.2d at 13. As such, the trial court did not include findings of fact as to whether Defendant's consent to search her purse was voluntary or coerced. Having found that the Fourth Amendment did apply to the search of Defendant's purse, we remand this matter to the trial court for additional findings as to Defendant's consent. *See General Specialties Co. v. Nello L. Teer Co.*, 41 N.C. App. 273, 275, 254 S.E.2d 658, 660 (1979) (emphasizing that, where a trial judge sits as the trier of the facts, the appellate court cannot substitute itself for the trial judge in this task).

II.

[2] Defendant next argues that the trial court erred by failing to dismiss the case or to order a new trial after the State did not provide her with exculpatory information in a timely manner. She contends that this discovery violation, conceded by the State, violated her right to due process and therefore warranted a dismissal or new trial. We disagree.

Under *Brady v. Maryland*, "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87, 10 L. Ed. 2d 215, 218 (1963). Evidence is "favorable" if it "tends to exculpate the accused, as well as 'any evidence adversely affecting the credibility of the government's witnesses.' " *State v. McGill*, 141 N.C. App. 98, 102, 539 S.E.2d 351, 355 (2000) (quoting *United States*

v. Trevino, 89 F.3d 187, 189 (4th Cir. 1996)). Further, evidence is "material" where "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682, 87 L. Ed. 2d 481, 494 (1985); *see also State v. Strickland*, 346 N.C. 443, 456, 488 S.E.2d 194, 202 (1997), *cert. denied*, 522 U.S. 1078, 139 L. Ed. 2d 757 (1998). However, "[a] defendant is not entitled to a new trial based on trial errors unless such errors were material and prejudicial." *State v. Alston*, 307 N.C. 321, 339, 298 S.E.2d 631, 644 (1983). The State must demonstrate that the violation of a defendant's constitutional rights was harmless beyond a reasonable doubt, or the violation is presumed to have been prejudicial. N.C. Gen. Stat. § 15A-1443(b) (2005).

Here, although the State conceded it had committed a discovery violation by failing to disclose Officer Moore's handwritten notes until the middle of the trial, the violation was not a *Brady* violation. *See*, *e.g.*, *State v. Shedd*, 117 N.C. App. 122, 124, 450 S.E.2d 13, 14 (1994) ("Because the evidence was disclosed at trial, we find no *Brady* violation."). Nor was the discovery violation prejudicial to Defendant. The trial court allowed defense counsel the final argument at trial, regardless of whether Defendant put on any evidence of her own, as well as the opportunity to impeach Officer Moore with his handwritten notes. Indeed, defense counsel used the notes to highlight the inconsistencies between Officer Moore's testimony and his earlier notes as to the caliber of the bullets found in Defendant's purse. For some reason, defense counsel elected not to do the same with respect to inconsistencies as to where the methamphetamine that was recovered was found. Thus, the transcript reflects that defense counsel had adequate time to prepare and change his cross-examination with respect to the caliber of the bullets; he must therefore have had the same opportunity concerning the location of the methamphetamine.

Moreover, defense counsel was also aware prior to trial that there was some confusion as to where the methamphetamine was located and that Officer Moore was going to be a witness. As noted by the trial court, defense counsel could therefore have conducted his own investigation into where the methamphetamine was when it was recovered. Given that Defendant had the handwritten notes while Officer Moore was still being cross-examined, we find that the discovery violation was not sufficiently material nor prejudicial as to

undermine confidence in the outcome of the trial. *Alston*, 307 N.C. at 339, 298 S.E.2d at 644; *Bagley*, 473 U.S. at 682, 87 L. Ed. 2d at 494. Accordingly, this assignment of error is overruled.

III.

[3] Finally, Defendant argues that the trial court plainly erred by failing to order a new trial or to strike evidence that the prosecutor admitted that he reasonably believed to be false. Specifically, Defendant objects to the prosecutor's statement, made outside the presence of the jury, as to his "understanding from speaking with the officer that the evidence will show that the methamphetamine was in a container located in a common area of . . . the front seat of the vehicle[,]" when Officer Moore later testified that the methamphetamine was found in a small pouch located in Defendant's purse. We disagree.

The plain error rule is "always to be applied cautiously and only in the exceptional case where, after reviewing the entire record," the error is found to have been "so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (internal citation and quotation omitted). Here, given that the prosecutor's statement was made outside the presence of the jury, and the record and transcript reflect general confusion as to where the methamphetamine was recovered, we find that the trial court acted properly in allowing Officer Moore to testify and clarify where each piece of evidence was recovered. This assignment of error is overruled.

Remanded in part; no error in part.

Judge ELMORE concurs.

Judge BRYANT concurs in part and dissents in part in a separate opinion.

BRYANT, Judge concurring in part and dissenting in part.

The majority holds that the police search of Defendant's purse was governed by the Fourth Amendment. However, because I find the search was not governed by the Fourth Amendment, I respectfully dissent.

"A seizure does not occur simply because a police officer approaches an individual and asks a few questions. So long as a rea-

sonable person would feel free to disregard the police and go about his business the encounter is consensual and no reasonable suspicion is required." *Florida v. Bostick*, 501 U.S. 429, 434, 111 L. Ed. 2d 389, 398 (1991) (citation and quotation omitted). "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a seizure has occurred." *Id.* (citation and quotation omitted). Communication between the police and citizens involving no coercion or detention falls outside the compass of the Fourth Amendment. *State v. Sugg*, 61 N.C. App. 106, 108, 300 S.E. 3d 248, 250 (1983). "[T]he test for existence of a 'show of authority' is an objective one: not whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a reasonable person." *California v. Hodari D.*, 499 U.S. 621, 628, 113 L. Ed. 2d 690, 698 (1991).

The majority concludes the search of Defendant's purse was governed by the Fourth Amendment because Officer Moore's "opening the door and insistence that Defendant produce identification were a show of authority" transforming the encounter into a seizure of Defendant. The majority rests its conclusion that Office Moore's opening the door and requesting Defendant's identification was a show of force due to the other circumstances that night which placed Defendant in a position where "at 12:30 a.m., in an area known for drug activity and prostitution, any passenger, particularly a female, would undoubtedly have felt uncomfortable or unsafe by attempting to leave the parking lot on foot." However, the inquiry regarding the totality of circumstances for Fourth Amendment purposes is not whether a reasonable person was uncomfortable leaving because of the surrounding environment, but whether "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave," *State v. Campbell*, 359 N.C. 644, 662, 617 S.E.2d 1, 13 (2005), because of "the officer's words and actions," *Hodari D.*, 499 U.S. at 628, 113 L. Ed. 2d at 698.

Officer Moore's words and actions in this case would not cause a reasonable person to believe he was not free to leave. After back-up assistance arrived, Officer Moore approached the passenger-side of the pickup truck and tapped on the window. When Defendant ignored his taps on the window, Officer Moore opened the passenger-side door and asked Defendant to produce identification. Although persistent, at no time during the beginning of his encounter with Defendant did Officer Moore' actions or words constitute a show of

authority amounting to a restraint on Defendant's liberty. For these reasons, I respectfully dissent on the issue of whether the search of Defendant's purse was within the realm of the Fourth Amendment.

I concur with the majority as to the remaining issues raised by Defendant.

Z.A. SNEEDEN'S SONS, INC., PLAINTIFF v. ZP No. 116, L.L.C., DEFENDANTS AND THIRD-PARTY PLAINTIFF, AND LOWE'S HOME CENTERS, INC., AND MCDONALD'S CORPORATION, DEFENDANTS v. STUART SNEEDEN AND Z.A. SNEEDEN, L.L.C., THIRD-PARTY DEFENDANTS AND THIRD-PARTY PLAINTIFFS v. JEFFREY ZIMMER, THIRD-PARTY DEFENDANT

No. COA07-1031

(Filed 6 May 2008)

1. Easements; Estoppel— consideration—mutual benefit—quasi-estoppel—summary judgment

The trial court did not err in an easement case by granting defendants' motion for summary judgment even though plaintiffs contend that defendants trespassed on plaintiffs' land by constructing four exit lanes across plaintiffs' property because: (1) quasi-estoppel does not require detrimental reliance per se by anyone, but is directly grounded instead upon a party's acquiescence or acceptance of payment or benefits by virtue of which that party is thereafter prevented from benefitting by taking two clearly inconsistent positions; (2) plaintiffs were paid and accepted $150,000 in consideration for the easement, and ZP and Lowe's also agreed to pay all costs required to reconfigure the intersection of the pertinent roads; and (3) plaintiffs are estopped from now asserting the easement did not give ZP and Lowe's access over the pertinent property when plaintiffs accepted payment for and have enjoyed the mutual benefits of the easement and reconfiguration of the pertinent road for over five years.

2. Easements— summary judgment—sufficiency of description

The trial court did not err in an easement case by granting defendants' motion for summary judgment even though plaintiffs contend the easement did not contain a sufficient description because: (1) although calls were missing within the easement's metes and bounds description, this omission does not

cause the easement to become ineffective and void; (2) Exhibit D3 clearly showed the location and path of the easement in relation to the adjoining properties; and (3) the Court of Appeals was able to derive the intention of the parties as to what land was to be conveyed based upon a review of the easement and its attached exhibits.

3. Easements— separate agreement—amendment to declaration—summary judgment

The trial court did not err in an easement case by granting defendants' motion for summary judgment even though plaintiffs contend defendants improperly granted rights over the Lowe's access easement to Wal-Mart in a separate agreement between defendants and Wal-Mart because: (1) the amendment to the declaration recognized that Wal-Mart had no rights at the time the document was executed and included a specific limitation that stated at such time as all of the Wal-Mart property is granted the benefit and the use of the access road, Wal-Mart will be required to pay a pro-rata share of costs to expand the road; and (2) the amendment evidenced the parties' intention that, as a third-party owner of an adjoining tract and stranger to the easement between the parties, Wal-Mart would not receive any easement rights across the pertinent property by virtue of the agreement between defendants and Wal-Mart.

4. Easements— summary judgment—genuine issue of material fact—intention of parties—extrinsic evidence impermissible

The trial court erred in an easement case by granting defendants' motion for summary judgment based on the issue of whether the easement between plaintiffs and defendants permitted defendants to pave a portion creating passage off defendants' property directly onto the pertinent road, and the case is remanded to the trial court to hear parol evidence regarding the meaning of the terms of the easement and to rule on whether the easement between the parties allowed for defendants to pave a portion of the Lowe's access easement not adjoining their property, and rule on whether defendants' actions overburdened the easement over plaintiffs' property.

Appeal by plaintiff, Z.A. Sneeden's Sons, Inc., and third-party plaintiffs, Stuart Sneeden and Z.A. Sneeden, L.L.C., from or-

der entered 30 April 2007 by Judge Russell J. Lanier, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 21 February 2008.

Boxley, Bolton, Garber & Haywood, L.L.P., by Ronald H. Garber, for plaintiff-appellant and for third-party defendants and third-party plaintiff-appellants Stuart Sneeden and Z.A. Sneeden, L.L.C.

Ward and Smith, P.A., by Ryal W. Tayloe and Thomas S. Babel, for defendant and third-party plaintiff-appellee ZP No. 116, L.L.C. and for third-party defendant-appellee Jeffrey Zimmer.

Hunton & Williams, L.L.P., by Robert C. Van Arnam, for defendant-appellee McDonald's Corporation.

Hogue, Hill, Jones, Nash & Lynch, L.L.P., by Wayne A. Bullard and Anna J. Averitt, for defendant-appellees Lowe's Home Centers, Inc.

TYSON, Judge.

Z.A. Sneeden's Sons, Inc. and Z.A. Sneeden, L.L.C. (collectively, "plaintiffs") appeal order entered granting summary judgment in favor of ZP No. 116, Lowe's Home Centers, Inc., McDonald's Corporation, and Jeffrey Zimmer (collectively, "defendants"). We affirm in part, reverse in part, and remand.

I. Background

In early 2000, Jeffery Zimmer and ZP No. 116 ("ZP") contemplated the development of several tracts of property near a shopping center located at the intersection of College Road and U.S. 421 in Wilmington. On 5 June 2000, the New Hanover County Board of Commissioners granted ZP a special use permit for retail uses in a conditional use B-2 Highway business zoning district. The special use permit was conditioned upon, *inter alia*, ZP "[i]ncorporat[ing] the existing Sneeden center into the design as much as possible through orientation and aligning drive aisles and entrances to existing uses." To satisfy this condition, ZP was required to partially gain access to its property through adjoining property owned by Z.A. Sneeden's Sons, Inc. ("Sneeden").

On 26 October 2000, Sneeden, ZP, and Lowe's Home Centers, Inc. ("Lowe's") entered into an easement agreement ("easement"), recorded in Book 2825, Page 276 of the New Hanover County

Registry. The easement granted Lowe's and ZP a non-exclusive access easement for "vehicular and pedestrian ingress and egress between Carolina Beach Road, South College Road, the Sneeden Property, the Zimmer Property, and the Lowe's Property . . . ." In consideration for the easement, Sneeden was paid $150,000.00. ZP and Lowe's also agreed to finance and complete the required construction needed to improve traffic flow on Sneeden Road.

Subsequently, construction on the reconfiguration of Sneeden Road commenced. ZP made various improvements to the easement area including: (1) relocating a portion of, widening, and paving the road and (2) installing curbing, stormwater drainage, and a new traffic light. ZP completed these improvements at a cost in excess of $1,000,000.00. Upon completion in February 2002, the general public began using the new access driveway on Sneeden Road to access Lowe's, McDonald's, and other businesses located on Sneeden's property.

On 12 December 2002, ZP applied to the New Hanover County Planning and Inspection Department for a building permit to construct a 28,000 square foot shopping center on ZP's tract of land, which is adjacent to Sneeden's and Lowe's tracts. ZP planned to construct the shopping center as retail shops and lease them to various tenants. The New Hanover County Planning and Inspection Department approved the building permit upon the condition that an access roadway be constructed between Sneeden Road and property located to the west of Sneeden's property, owned by Wal-Mart Stores East, Inc. ("Wal-Mart"). ZP complied with this condition and also installed an additional access driveway, which connected Sneeden Road to its property.

On 13 August 2003, Sneeden filed a complaint against ZP and Lowe's alleging: (1) ZP was attempting to extend its easement rights to Wal-Mart and Lowe's causing their invitees and guests to trespass on Sneeden Road; (2) Lowe's or Wal-Mart had no right to lay or maintain asphalt, curbing, or driveways near the western edge of Sneeden Road; (3) Sneeden was entitled to have the easement reformed to reflect Sneeden's, ZP's, and Lowe's intent based upon mutual mistake, mistake of a draftsman, and fraud; and (4) an unfair and deceptive trade practice claim against ZP.

On 30 October 2003, ZP filed an answer denying the material allegations therein and asserted the affirmative defenses of latches, estoppel, and waiver. On 1 December 2003, ZP amended its answer

and asserted three counterclaims against Sneeden including: (1) slander of title and (2) breach of contract. ZP also sought to permanently enjoin Sneeden from "obstructing or interfering with [ZP's] right to use, enjoyment, and benefits of such Access Easement Areas." On 4 February 2004, Sneeden filed an amended complaint joining third party plaintiff Z.A. Sneeden, LLC and sought to have the easement declared null and void.

On 30 August 2005, plaintiffs filed an additional motion to amend their complaint. Plaintiffs' motion stated, "it has recently come to the attention of [plaintiffs], through discovery in this case that a portion of land involved in this case is involved in this controversy and dispute where it has not been previously apparent that it was involved in the controversy and dispute." Plaintiffs' motion also sought to add two additional claims for relief: (1) an injunction to prohibit and prevent ZP's and Lowe's guests and invitees from entry upon plaintiffs' land and (2) a declaratory judgment as to the rights of the parties involving the private road connection from College Road to Lowe's business location. ZP and Lowe's subsequently filed amended answers again asserting the affirmative defenses of laches, estoppel, and waiver.

On 13 March 2006, the trial court ordered McDonald's Corporation to be joined as a necessary party. On 22 March 2006, plaintiffs filed a complaint against McDonald's Corporation as a party defendant. On 6 October 2006, McDonald's Corporation filed their answer and asserted the affirmative defense of laches, estoppel, and waiver. By 22 March 2007, defendants had moved for summary judgment.

On 30 April 2007, the trial court entered an order granting defendants' motions for summary judgment. The trial court dismissed ZP's counterclaims for slander of title and breach of contract without prejudice. Plaintiffs appeal.

II. Issues

Plaintiffs argue the trial court erred by granting defendants' motion for summary judgment because evidence was presented that tended to show: (1) defendants agreed to a reformation of the easement agreement based on mutual mistake or mistake of the draftsman; (2) defendants had trespassed on plaintiffs' land; (3) the easement agreement failed to contain a sufficient description; and (4) defendants attempted to extend the right to access and use Sneeden Road to a tract of land not named in the easement agreement.

III. Standard of Review

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

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

IV. Equitable Estoppel

[1] Plaintiffs argue the trial court erred by granting defendants' motion for summary judgment because defendants trespassed on plaintiffs' land by constructing four exit lanes across plaintiffs' property.

The physical area of land in controversy lies within the exit lanes of the main access driveway into the shopping center where Sneeden Road intersects with South College Road. The tract of property measures 56 feet by 107 feet. Plaintiffs allege they did not discover that a portion of the driveway was located on their property until 2005. Plaintiffs argue the easement does not grant Lowe's and ZP easement rights over this tract of property.

Equitable estoppel has been recognized in North Carolina as a valid legal doctrine. *Whiteacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 16, 591 S.E.2d 870, 881 (2004). Equitable estoppel should be applied:

> when any one, by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts exist, and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts.

Id. at 17, 591 S.E.2d at 881 (citation and quotation omitted).

North Carolina has also adopted the doctrine of quasi-estoppel. *Id.* at 18, 591 S.E.2d at 881. Quasi-estoppel "does not require detrimental reliance *per se* by anyone, but is directly grounded instead upon a party's acquiescence or acceptance of payment or benefits, by virtue of which that party is thereafter prevented from maintaining a position inconsistent with those acts." *Godley v. County of Pitt*, 306 N.C. 357, 361, 293 S.E.2d 167, 170 (1982) (citations omitted). "In comparison to equitable estoppel, quasi-estoppel is inherently flexible and cannot be reduced to any rigid formulation." *Whiteacre*, 358 N.C. at 18, 591 S.E.2d at 882. "[T]he essential purpose of quasi-estoppel . . . is to prevent a party from benefitting by taking two clearly inconsistent positions." *B & F Slosman v. Sonopress, Inc.*, 148 N.C. App. 81, 88, 557 S.E.2d 176, 181 (2001), *disc. rev. denied*, 355 N.C. 283, 560 S.E.2d 795 (2002).

Here, plaintiffs were paid and accepted $150,000.00 in consideration for the easement. ZP and Lowe's also agreed to pay all costs required to reconfigure the intersection of Sneeden Road and South College Road. ZP and Lowe's agreed to "rework the intersection" by widening the road thirty-six feet with two foot concrete curb and gutter, to account for the extra flow of traffic and to accommodate access to McDonald's and Sneeden's other tenants and property. Stormwater drainage and a traffic light were also installed. The total cost to reconfigure and improve Sneeden Road exceeded $1,000,000.00. ZP and Lowe's further agreed to maintain the newly configured roadway pursuant to the easement agreement. Subsequently, the general public, including plaintiffs' and defendants' tenants and their customers, began using Sneeden Road to access the shopping centers.

Plaintiffs accepted payment for and have enjoyed the mutual benefits of the easement and reconfiguration of Sneeden Road for over

five years. Plaintiffs are estopped from now asserting the easement did not give ZP and Lowe's access over the property in controversy. *Id*. This assignment of error is overruled. In light of our holding, it is unnecessary to review the remaining assignments of error addressing this tract of property.

V. Easement Description

[2] Plaintiffs argue the trial court erred by granting defendants' motion for summary judgment because the easement did not contain a sufficient description. We disagree.

> When an easement is created by an express grant:
>
> No particular words are necessary to constitute a grant, and any words which clearly show the intention to give an easement, which is by law grantable, are sufficient to effect that purpose, provided the language is certain and definite in its terms. . . . *The instrument should describe with reasonable certainty the easement created and the dominant and servient tenements.*

Hensley v. Ramsey, 283 N.C. 714, 730, 199 S.E.2d 1, 10 (1973) (emphasis supplied) (citations and quotations omitted). The description of the easement "must either be certain in itself or capable of being reduced to a certainty by a recurrence to something extrinsic to which it refers." *Allen v. Duvall*, 311 N.C. 245, 249, 316 S.E.2d 267, 270 (1984) (citation and quotation omitted).

> A grant of an easement will only be held as void:
>
> when there is such an uncertainty appearing on the face of the instrument itself that the court—reading the language in the light of all the facts and circumstances *referred to in the instrument*—is yet unable to derive therefrom the intention of the parties as to what land was to be conveyed.

Id. (emphasis original) (citation omitted).

It is undisputed that the servient and dominant estates are clearly described within the easement. Therefore, the dispositive issue before us is whether the agreement contains a sufficient description of the easement created. We hold that it does.

Here, the easement agreement granted ZP and Lowe's an access easement "over and across the 'Lowe's Access Easement Area' " located on the Site Plan attached as Exhibit D. Three separate maps were attached to and recorded with the easement. Exhibits D1 and

D3 designated the property to be known as "Sneeden's Access Easement" and "Lowe's Access Easement."

Plaintiffs' main contention both in their brief and during oral arguments was that because certain calls were missing from the easement's metes and bounds description on the recorded map labeled Exhibit D3, the easement description was insufficient. Plaintiffs repeatedly asserted that if one was to plot the calls located on Exhibit D3, the easement would have no starting or end point.

Although calls were missing within the easement's metes and bounds description, this omission does not cause the easement to become ineffective and void. *See Kaperonis v. Highway Commission*, 260 N.C. 587, 598, 133 S.E.2d 464, 472 (1963) (citation and quotation omitted) ("Where a deed contains two descriptions, one by metes and bounds and the other by lot and block according to a certain plat or map, the controlling description is the lot according to the plan, rather than the one by metes and bounds."). Accordingly, Exhibit D3 determines whether the easement description is sufficient.

Exhibit D3 clearly shows the location and path of the easement in relation to the adjoining properties. Based upon a review of the easement and its attached exhibits, we are able "to derive therefrom the intention of the parties as to what land was to be conveyed." *Allen*, 311 N.C. at 249, 316 S.E.2d at 270. The description of the easement is sufficient. This assignment of error is overruled.

VI. Easement Rights

[3] Plaintiffs also argue that the trial court erred in granting defendant's motion for summary judgment because defendants: (1) improperly granted rights over the Lowe's Access easement to Wal-Mart in a separate agreement between defendants' and Wal-Mart and (2) the easement between plaintiffs and defendants did not permit defendants to pave a portion of the Lowe's Access easement in any area unless the paved portion created passage off defendants' property directly onto Sneeden Road. We find genuine issues of material fact regarding plaintiffs' second argument.

As a general matter, easements are "granted for the benefit of the particular land, and its use is limited to such land. Its use cannot be extended to other land, nor can the way be converted into a public way without the consent of the owner of the servient estate." *Wood v. Woodley*, 160 N.C. 17, 19-20, 75 S.E. 719, 720 (1912)

(citation and quotation omitted). To resolve these issues we review the easement itself.

"An easement deed is a contract. When such contracts are plain and unambiguous, their construction is a matter of law for the courts." *Lovin v. Crisp*, 36 N.C. App. 185, 188, 243 S.E.2d 406, 409 (1978) (citations omitted). In order to construe the intent of the parties, "we are required to look to the instrument in its totality." *Id.* at 189, 243 S.E.2d at 409. "We are additionally required to give the terms used therein their plain, ordinary and popular construction, unless it appears the parties used them in a special sense." *Id.*

Plaintiffs cite an amendment to the Declarations of Covenants, Conditions, and Restrictions entered into between defendants and Wal-Mart in support of its argument that such rights have been granted to Wal-Mart. The "grantees" and "grantors" in this document refer to Wal-Mart and defendants, respectively. In relevant part, that document states:

> Each Party hereby grants to the other Parties easements for pedestrian and vehicular traffic in those strips of land on its (Grantor's) Parcel which are shown on the Site Plan and the Revised Site Plan (hereinafter collectively referred to as "Access Roads") for the purpose of providing ingress to and egress from Grantees' Parcels and each of N.C. Highway 132 (South College Road), the "Sneeden Access Road" (as designed on the Revised Site Plan), and U.S. Highway 421 (Carolina Beach Road)[.]

Plaintiffs fail to note that the access easements granted between defendants and Wal-Mart contain an important limitation: Subparagraph (a) of the same section on which plaintiffs rely, limits the effect of the language plaintiffs cited by expressly restricting the use of the access road easements to "any person entitled to the use thereof[.]" There is no dispute that Wal-Mart does not have rights to use the Lowe's Access easement or the area known as Sneeden Road. Defendants confirmed during oral argument that they make no claims that Wal-Mart is or was ever entitled to use the easement granted by plaintiffs to defendants.

Further, the amendment to the declaration recognizes Wal-Mart had no rights at the time the document was executed and includes a specific limitation that states, "at such time as all of the Wal-Mart Property *is granted the benefit* . . . and the *use of Sneeden Access Road*," Wal-Mart will be required to pay a pro-rata share of costs to expand Sneeden Road. (Emphasis supplied)). Although that provi-

sion dealt with the costs associated with improvements made by defendants to Sneeden Road and the Lowe's Access easement, it evidences the parties' intent that, as a third-party owner of an adjoining tract and stranger to the easement between the parties, Wal-Mart would not receive any easement rights across Sneeden's property by virtue of the agreement between defendants and Wal-Mart.

[4] Plaintiffs next argue that defendants, by paving a portion of the Lowe's Access easement so that it adjoins Wal-Mart's property, exceeded the scope of the easement agreement.

"[A]n easement holder may not increase his use so as to increase the servitude or increase the burden upon the servient tenement. If the easement holder makes an unwarranted use of the land in excess of the easement rights held, such use will constitute an excessive use and may be enjoined." *Hundley v. Michael*, 105 N.C. App. 432, 435, 413 S.E.2d 296, 298 (1992) (citation omitted). "[P]laintiffs [only] have the right to use their property within the easement consistent with the purpose for which the easement was created." *Id.* at 436, 413 S.E.2d at 298. We must determine whether the agreement allowed defendants to pave and use a portion of the Lowe's Access easement that was not a direct access off of defendants' property.

Two provisions in the easement between the parties are illustrative. The first states that, the Lowe's Access easement was granted "for the sole purposes of allowing . . . (ii) such maintenance, repair, . . . *and other improvements constructed by [defendants] . . . [on the Lowe's Access easement]*." Here, defendants, by paving a portion of the Lowe's Access easement, improved that easement—fulfilling one of the "sole purposes" of the easement. (Emphasis supplied). However, in the same section, the grant states that the easement "shall be for the benefit of [defendants'] [p]roperty or any part thereof[.]"

Defendants argue that providing an ingress and egress at Wal-Mart's property benefits defendants' property because defendants are able to access Sneeden Road at multiple locations. Plaintiffs, however, argue that the easement was never intended to allow defendants to access the easement from Wal-Mart's property and defendants' actions overburdened plaintiffs' property in a way not intended by the easement agreement.

Reading the easement as a whole, we are unable to determine whether the parties intended to allow defendants to pave and use portions of the Lowe's Access easement that did not adjoin defendants'

property. When the intent of the party is not clear from the written agreement, "extrinsic evidence is not permitted in order to add to, detract from, or vary the terms of an integrated written agreement, extrinsic evidence is admissible in order to explain what those terms are." *Century Communications v. Housing Authority of the City of Wilson*, 313 N.C. 143, 146, 326 S.E.2d 261, 264 (1985) (citation and quotation omitted). "[E]xtrinsic evidence as to the circumstances under which a written instrument was made has been held to be admissible in ascertaining the parties' expressed intentions, subject to the limitation that extrinsic evidence is not admissible in order to give the terms of a written instrument a meaning of which they are not reasonably susceptible." *Id.* at 147, 326 S.E.2d at 264 (citation and quotation omitted).

Because we are unable to determine the meaning of those terms, we reverse the trial court's grant of summary judgment for defendants and remand to the trial court to: (1) hear parol evidence regarding their meaning and to rule on whether the easement between the parties allowed for defendants to pave a portion of the Lowe's Access easement not adjoining their property and (2) rule on whether defendants' actions overburdened the easement over plaintiffs' property.

VII. Conclusion

Based upon plaintiffs' acceptance of payment in consideration of the easement and the enjoyment of the mutual benefits derived from the reconfiguration and improvements to Sneeden Road, plaintiffs are estopped from now asserting that the easement agreement did not give ZP and Lowe's access over the 56 feet by 107 feet tract of property in controversy. The recorded easement and its attached exhibits clearly show where the easement is located in relation to the adjoining properties. The description of the easement is sufficient.

Finally, we find genuine issues of material fact exist regarding whether defendants were allowed to pave a portion of the Lowe's Access easement that did not adjoin their property and whether defendants' actions overburdened plaintiffs' property. The trial court's order is affirmed in part, reversed in part, and remanded for proceedings not inconsistent with this opinion.

Affirmed in Part; Reversed in Part; and Remanded.

Judges HUNTER and McCULLOUGH concur.

STATE OF NORTH CAROLINA, PLAINTIFF v. RANDY BASKIN, DEFENDANT

No. COA07-832

(Filed 6 May 2008)

1. Larceny; Possession of Stolen Property— two charges based on taking of same goods erroneous

The trial court erred by entering judgment for both larceny and possession of stolen goods based on the taking of the same goods, and the conviction for possession of stolen goods is vacated.

2. Criminal Law— judicial notice—codefendant's guilty plea—relevancy

The trial court did not err in a breaking or entering a motor vehicle, larceny, possession of stolen goods, and habitual felon case by refusing to take judicial notice of a coparticipant's guilty plea because: (1) generally, it is improper to make reference to the disposition of charges against a codefendant, and the codefendant did not testify at defendant's trial; and (2) there was no relevance to defendant's trial of the guilty plea, and it is not proper to place irrelevant facts before a jury by judicial notice or otherwise. N.C.G.S. § 8C-1, Rule 201(a).

3. Evidence— testimony—motion to recall officer—coparticipant's guilty plea—relevancy

The trial court did not err in a breaking or entering a motor vehicle, larceny, possession of stolen goods, and habitual felon case by denying defendant's motion to recall an officer to testify regarding a coparticipant's guilty plea because: (1) the coparticipant's guilty plea was irrelevant in defendant's trial; and (2) defendant's motion was for the sole purpose of the officer testifying to irrelevant facts which he did not personally observe.

4. Burglary and Unlawful Breaking or Entering; Motor Vehicles— felony breaking or entering a motor vehicle—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of felony breaking or entering a motor vehicle because: (1) even if defendant is not observed entering a vehicle, defendant's unlawful possession of property which had been in the vehicle a short time before is sufficient to support an inference of entry, the intent to commit larceny may be inferred from the fact that defendant committed larceny, and a defendant's pos-

session of stolen goods soon after the theft is a circumstance tending to show him guilty of the larceny; and (2) the evidence was sufficient for the jury to find that defendant shared a common purpose with his coparticipant to open the door of a truck, reach inside to wrongfully take out the victim's satchel with the intent to deprive the victim of the satchel and its contents and appropriate them to defendant's own use, which in turn was sufficient to support a conviction for breaking or entering a motor vehicle with the intent to commit larceny therein.

5. Aiding and Abetting— instruction—allegations not required in indictment

The trial court did not abuse its discretion or commit plain error in a breaking or entering a motor vehicle case by instructing the jury on the theory of aiding and abetting because: (1) allegations of aiding and abetting are not required in an indictment since it is not a substantive offense but just a theory of criminal liability; (2) it is not necessary for any of the pertinent elements to be proven to the trial court beyond a reasonable doubt before the trial court may instruct on aiding and abetting, but there need only be evidence supporting the instruction with the jury determining whether the State has proved the elements beyond a reasonable doubt; and (3) all three elements of the aiding and abetting instruction were supported by the evidence.

6. Sentencing— habitual felon—argument predicated on reversal of conviction

Although defendant argues that his guilty plea to habitual felon status must be set aside if his conviction for felony breaking or entering a motor vehicle is set aside for the reasons set forth in his appeal, this assignment of error is dismissed because the Court of Appeals concluded all of defendant's assignments of error relating to the felony breaking or entering a motor vehicle conviction were without merit.

Appeal by defendant from judgment entered on or about 29 March 2007 by Judge Robert P. Johnston in Catawba County Superior Court. Heard in the Court of Appeals 12 December 2007.

Attorney General Roy A. Cooper, III, by Associate Attorney General Catherine F. Jordan, for the State.

Richard Croutharmel, for defendant-appellant.

STROUD, Judge.

Defendant Randy Baskin appeals from judgment entered upon jury verdicts finding him guilty of breaking or entering a motor vehicle, larceny, possession of stolen goods, and upon his guilty plea to habitual felon status. Defendant contends that the trial court erred by: (1) entering judgment for both larceny and possession of stolen goods based on the taking of the same goods, (2) refusing to take judicial notice of Jay Henderson's guilty plea, (3) denying defendant's motion to recall Officer Blackwood to the witness stand, (4) denying defendant's motion to dismiss the charge of felony breaking or entering a motor vehicle, (5) instructing the jury on the theory of aiding and abetting, and (6) sentencing defendant as an habitual felon. After careful review of the record we conclude that the trial court did not err when it: (1) refused to take judicial notice of Jay Henderson's guilty plea, (2) denied defendant's motion to recall Officer Blackwood to the witness stand, (3) denied defendant's motion to dismiss the charge of felony breaking or entering a motor vehicle, and (4) sentenced defendant as an habitual felon. Defendant received a fair trial, free of reversible error as to the charges of felony breaking or entering a motor vehicle and larceny. Because defendant's assignment of error to his sentencing as an habitual felon was predicated on reversal of his conviction for felony breaking or entering a motor vehicle, we dismiss that assignment of error. However, we conclude that the trial court erred when it convicted defendant for possession of stolen goods. Accordingly, we vacate that conviction, and remand for resentencing.

I. Background

At trial, the State's evidence tended to show the following: On 27 September 2004, Christopher Cook ("the victim"), parked a pick-up truck belonging to his mother, Verna Miller, at Main Event Billiards Hall ("Main Event") in Catawba County. While the truck was parked at Main Event, Jay Henderson opened the door of the truck and removed a black satchel belonging to the victim from the passenger side floorboard. Henderson, with the satchel slung over his shoulder, walked toward a white Pontiac. Henderson got into the passenger side of the Pontiac, which was hastily driven away from the scene by defendant. A friend of defendant, Judd, followed the Pontiac and got its license tag number. A few minutes later, the satchel was thrown out of the Pontiac into the middle of the road. Judd stopped to pick up the satchel and reported the crime to the police.

On 1 May 2006, the Catawba County Grand Jury indicted defendant for breaking or entering a motor vehicle, misdemeanor larceny, possession of stolen goods, and for attaining the status of habitual felon. Defendant was tried before a jury in Superior Court, Catawba County on 28 and 29 March 2007. On 29 March 2007, the jury found defendant guilty of breaking or entering a motor vehicle, larceny, and possession of stolen goods. Defendant plead guilty to attaining the status of habitual felon. Upon the jury verdict and defendant's guilty plea, the trial court sentenced defendant to 93 to 120 months in the North Carolina Department of Corrections. Defendant appeals.

II. Larceny and Possession of Stolen Goods

[1] Defendant, citing *State v. Perry*, contends that "though a defendant may be indicted and tried on charges of larceny . . . and possession of [stolen goods for] the same property, he may be convicted of only one of those offenses." 305 N.C. 225, 236-37, 287 S.E.2d 810, 817 (1982). The State concedes that the trial court erred when it convicted defendant for possession of the same goods for which defendant was convicted of larceny. Accordingly, we vacate defendant's conviction for possession of stolen goods.

III. Felony Breaking or Entering a Motor Vehicle

A. Co-defendant's Guilty Plea

[2] Defendant next assigns error to the trial court's denial of his motion to take judicial notice of the guilty plea of Jay Henderson. Defendant contends that "[a] court shall take judicial notice if requested by a party and supplied with the necessary information." N.C. Gen. Stat. § 8C-1, Rule 201(d). The State contends that Henderson's guilty plea was irrelevant in defendant's trial and was properly excluded. We agree with the State.

The scope of Rule 201 is expressly limited to *adjudicative* facts. N.C. Gen. Stat. § 8C-1, Rule 201(a). "Adjudicative facts are facts that are *relevant* to a determination of the claims presented in a case." *Dippin' Dots, Inc. v. Frosty Bites Distribution*, 369 F.3d 1197, 1204 (11th Cir. 2004) (emphasis added) (applying Fed. R. Evid. 201), *cert. denied*, 543 U.S. 1054, 160 L. Ed. 2d 777 (2005); *State v. Morrison*, 84 N.C. App. 41, 48, 351 S.E.2d 810, 814 ("As our rules are based on the Federal Rules of Evidence, we turn for guidance to decisions of the federal courts which address this issue."), *cert. denied*, 319 N.C. 408, 354 S.E.2d 724 (1987).

Generally, "it is improper to make reference to the disposition of charges against a codefendant." *State v. Campbell*, 296 N.C. 394, 399, 250 S.E.2d 228, 230 (1979); *see also State v. McCullough*, 50 N.C. App. 184, 188, 272 S.E.2d 613, 616 (1980) ("[T]he acquittal of third persons arrested with the accused for the crime is not relevant evidence at defendant's trial.") Defendant contends that *State v. Rothwell* recognized an exception to this rule, stating "if a *testifying* co-defendant's guilty plea is introduced for a *legitimate* purpose, it is proper to admit it." 308 N.C. 782, 786, 303 S.E.2d 798, 801 (1983) (emphasis in original). *Rothwell*, however, held that admission of evidence that co-defendant pled guilty was *error* but that it did not prejudice the defendant. *Id.* at 786-87, 303 S.E.2d at 801-02. In so holding, *Rothwell* distinguished *State v. Potter*, 295 N.C. 126, 136, 244 S.E.2d 397, 404 (1978), which held that if a co-defendant's credibility has been attacked, evidence of the testifying co-defendant's guilty plea is admissible to bolster his credibility. *Rothwell*, 308 N.C. at 786, 303 S.E.2d at 801-02; *Potter*, 295 N.C. at 136, 244 S.E.2d at 404.

Defendant's reliance on *Rothwell* is misplaced. We perceive no relevance to defendant's trial of the guilty plea of Jay Henderson, who unlike the co-defendant in *Potter* did not testify at defendant's trial. It is not proper to place irrelevant facts before a jury, by judicial notice or otherwise. *See* N.C. Gen. Stat. § 8C-1, Rule 402 ("Evidence which is not relevant is not admissible."); *see also United States v. Wolny*, 133 F.3d 758, 765 (10th Cir. 1998) (holding that the trial court did not err by refusing to take judicial notice of irrelevant information). Accordingly, we decline defendant's invitation to expand the *Rothwell/Potter* exception on the facts *sub judice*. The trial court's denial of defendant's motion to take judicial notice of Jay Henderson's guilty plea was not error.

[3] Defendant next assigns error to the trial court's denial of his motion to recall Officer Blackwood to testify regarding Henderson's guilty plea. Defendant relies on *Washington v. Texas*, 388 U.S. 14, 18 L. Ed. 2d 1019 (1967), to contend that the trial court violated his federal constitutional right to compulsory process. We disagree.

Washington held that the right to compulsory process was violated when the defendant was "*arbitrarily* denied . . . the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had *personally observed*, and whose testimony would have been *relevant* and material to the defense." *Washington*, 388 U.S. at 23, 18 L. Ed. 2d at 1025 (emphasis added). Because the holding of *Washington* was grounded in the arbitrary

denial of the right to put on a witness, *id.*, it is not contrary to our settled law that "the trial court has the discretion to allow either party to recall witnesses to offer additional evidence," *State v. Goldman*, 311 N.C. 338, 350, 317 S.E.2d 361, 368 (1984), which will not be disturbed on appeal unless the trial court's discretion is exercised arbitrarily or without reason, *id.*; *see also State v. Bagley*, 183 N.C. App. 514, 524, 644 S.E.2d 615, 622 (2007) (defining abuse of discretion).

We concluded *supra* that Henderson's guilty plea was irrelevant in defendant's trial. Further, when defendant's motion to recall Officer Blackwood for the sole purpose of testifying to Henderson's guilty plea was heard at trial, the trial court directly asked defense counsel, "[W]hat would the officer's testimony be? Would it be something that he observed?" Defense counsel responded, "It would be nothing that the officer observed." Because defendant's motion to recall Officer Blackwood to the witness stand was for the sole purpose of Officer Blackwood testifying to irrelevant facts which he had not personally observed, we conclude that the trial court did not deny his motion arbitrarily or without reason. This assignment of error is without merit.

B. Motion to Dismiss

[4] Defendant contends that "[s]ince the State failed to prove th[e] essential element [that defendant broke or entered the vehicle] beyond a *reasonable doubt*, the law . . . required the trial court to grant [d]efendant's motion to dismiss. (Emphasis added.) Defendant further relies on a *dissent* from over 80 years ago to contend "that where the State relies for a conviction upon circumstantial evidence alone, the facts established or adduced on the hearing must . . . exclude every rational hypothesis of innocence." *State v. Melton*, 187 N.C. 481, 483, 122 S.E. 17, 18 (1924) (Stacy, J., concurring in the finding of error and in the grant of a new trial for the reasons cited by the Court, but dissenting on the grounds that the proper outcome was for the charges to be dismissed for insufficient evidence). Defendant offers two hypotheses of innocence and reasons "the State's evidence did not exclude every rational hypothesis of innocence as *Melton* requires [therefore] the trial court should have granted [d]efendant's motion to dismiss[.]" We disagree with defendant.[1]

1. Even if defendant's statement of the law from *Melton* was correct in 1924, it has not been for at least fifty years. *State v. Stephens*, 244 N.C. 380, 383-84, 93 S.E.2d 431, 433 (1956) ("To hold that the court must grant a motion to dismiss unless, in the opinion of the court, the evidence excludes every reasonable hypothesis of innocence would in effect constitute the presiding judge the trier of the facts. Substantial evi-

We first note that consideration of a motion to dismiss a criminal charge is not based on evidence beyond a reasonable doubt. Rather, a motion to dismiss must be denied "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." *Bagley*, 514 N.C. App. at 522-23, 644 S.E.2d at 623 (internal citations and quotation marks omitted) (emphasis added). Conversely, "if the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion should be allowed." *State v. Blizzard*, 169 N.C. App. 285, 289, 610 S.E.2d 245, 249 (2005) (citation and internal quotation marks omitted).

On review of the denial of a motion to dismiss, this Court is "concerned only about whether the evidence is sufficient for jury consideration, not about the weight of the evidence." *State v. Fritsch*, 351 N.C. 373, 379, 526 S.E.2d 451, 456, *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000).

> The test for sufficiency of the evidence is the same whether the evidence is direct or circumstantial or both. *Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence.* If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then *it is for the jury to decide* whether the facts, taken singly or in combination, satisfy it beyond a *reasonable doubt* that the defendant is actually guilty.

Fritsch at 379, 526 S.E.2d at 455. (internal citations, brackets, quotation marks and emphasis in original omitted) (emphasis added).

The essential elements of N.C. Gen. Stat. § 14-56 relevant to the case *sub judice* are: (1) breaking or entering a motor vehicle, (2) with the intent to commit larceny therein. N.C. Gen. Stat. § 14-56 (2003);

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dence of guilt is required before the court can send the case to the jury. Proof of guilt beyond a reasonable doubt is required before the jury can convict. What is substantial evidence is a question of law for the court. What that evidence proves or fails to prove is a question of fact for the jury.").

see also State v. Harrington, 15 N.C. App. 602, 604, 190 S.E.2d 280, 281 (1972).

> Breaking is defined as any act of force, however slight, employed to effect an entrance through any usual or unusual place of ingress, whether open, partly open, or closed. A breaking may be actual or constructive. A defendant has made a constructive breaking when another person who is acting in concert with the defendant actually makes the opening. Acting in concert means that the defendant is present at the scene of the crime and acts together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime.

State v. Graham, 186 N.C. App. 182, 196-97, 650 S.E.2d 639, 649 (2007) (citations, ellipses and quotation marks omitted). Inserting an arm through a door or window is sufficient to constitute entering. *State v. Yarborough*, 55 N.C. App. 52, 56, 284 S.E.2d 550, 552 (1981). Even if defendant is not observed entering the vehicle, defendant's unlawful possession of property which had been in the vehicle a short time before is sufficient to support an inference of entry. *State v. Durham*, 74 N.C. App. 201, 203-04, 328 S.E.2d 304, 306 (1985).

Larceny is "a wrongful taking and carrying away of the personal property of another without his consent with intent to deprive the owner of his property and to appropriate it to the taker's use fraudulently." *State v. Carswell*, 296 N.C. 101, 103, 249 S.E.2d 427, 428 (1978) (citation, ellipses and quotation marks omitted). "Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred." *State v. Bell*, 285 N.C. 746, 750, 208 S.E.2d 506, 508 (1974).

"[T]he intent to commit larceny may be inferred from the fact that defendant committed larceny." *State v. Thompkins*, 83 N.C. App. 42, 43, 348 S.E.2d 605, 606 (1986). Further, "[a] defendant's possession of stolen goods soon after the theft is a circumstance tending to show him guilty of the larceny." *State v. Greene*, 30 N.C. App. 507, 511, 227 S.E.2d 154, 156 (1976).

Viewing the evidence in the light most favorable to the State in the case *sub judice*, we find the victim testified that he had left his satchel in the floorboard of his mother's truck. Officer Blackwood positively identified Henderson as the person in the passenger seat and defendant as the person in the driver's seat of the Pontiac when

it was parked near Main Event shortly before the incident. Judd testified that he had seen the dome light of the truck on and a man wearing a baseball cap carrying the satchel towards a white Pontiac. The man carrying the satchel entered the passenger side of the Pontiac. The Pontiac was hastily driven away from the scene. Judd followed the Pontiac and observed the satchel being thrown from the window. This evidence was sufficient for the jury to find that defendant shared a common purpose with Jay Henderson to open the truck, reach inside to wrongfully take out the victim's satchel with the intent to deprive the victim of the satchel and its contents and appropriate them to defendant's own use, which in turn was sufficient to support a conviction for breaking or entering a motor vehicle with the intent to commit larceny therein. This assignment of error is without merit.

C. Jury Instructions

[5] Defendant contends that the trial court committed plain error when it instructed the jury on the theory of aiding and abetting. In sum, he argues that when two co-defendants are accused of a crime and they are prosecuted in separate trials, one of them must be indicted as the principal and the other indicted for aiding and abetting, and the guilt of the principal must be established beyond a reasonable doubt before the jury can be instructed on a theory of aiding and abetting in the trial of the person accused of aiding and abetting. We disagree.

Defendant's somewhat confusing argument appears to rely on *State v. Cassell*, 24 N.C. App. 717, 212 S.E.2d 208, *cert. denied and appeal dismissed*, 287 N.C. 261, 214 S.E.2d 433 (1975), to argue that where a criminal defendant is not indicted on the theory of aiding and abetting, he may not be convicted of aiding and abetting. However, "[b]ecause aiding and abetting is not a substantive offense but just a theory of criminal liability, allegations of aiding and abetting are not required in an indictment[.]" *State v. Madry*, 140 N.C. App. 600, 602, 537 S.E.2d 827, 829 (2000); *see also State v. Leggett*, 135 N.C. App. 168, 176, 519 S.E.2d 328, 334 (1999) ("Because only the co-defendants know who actually fired the fatal shots at each victim, it was appropriate for the State to argue alternative but not mutually inconsistent theories at different trials."), *disc. review denied and appeal dismissed*, 351 N.C. 365, 542 S.E.2d 650 (2000).

Defendant further cites *State v. Woods*, 307 N.C. 213, 218, 297 S.E.2d 574, 577 (1982), for the proposition that the State must prove the principal's guilt beyond a reasonable doubt before the jury may be

instructed on aiding and abetting at the trial of the co-defendant. However, on careful reading of *Woods*, we conclude that the question before the North Carolina Supreme Court was whether there was sufficient evidence to survive a motion to dismiss and submit the case to the jury on the theory of accessory before the fact. *Id.* at 217-18, 297 S.E.2d at 577-78. *Woods* held that the principal's admission that he was in fact the principal was sufficient evidence to survive the motion to dismiss on the element "that the principal had committed the offense." *Id.* at 218, 297 S.E.2d at 577-78. However, *Woods* does not suggest that the State was required to establish the guilt of the principal beyond a reasonable doubt in order for the trial court to instruct the jury on the theory of accessory before the fact, or the theory of aiding and abetting. *See id.*

"This Court reviews jury instructions only for abuse of discretion. Abuse of discretion means manifestly unsupported by reason or so arbitrary that [the instructions] could not have been the result of a reasoned decision." *Bagley*, 183 N.C. App. at 520, 644 S.E.2d at 622 (internal citations, ellipses and quotation marks omitted). Our task therefore is to determine whether or not there was evidence to support the jury instructions. *Id.*; *State v. Brown*, 80 N.C. App. 307, 311, 342 S.E.2d 42, 44 (1986) ("It is generally error, prejudicial to defendant, for the trial court to instruct the jury upon a theory of a defendant's guilt which is not supported by the evidence.").

An instruction on aiding and abetting is supported by the evidence if there is evidence: "(1) that the crime was committed by another; (2) that the defendant knowingly advised, instigated, encouraged, procured, or aided the other person; and (3) that the defendant's actions or statements caused or contributed to the commission of the crime by the other person." *State v. Bond*, 345 N.C. 1, 24, 478 S.E.2d 163, 175 (1996), *cert. denied*, 521 U.S. 1124, 138 L. Ed. 2d 1022 (1997); *see also State v. Beach*, 283 N.C. 261, 269, 196 S.E.2d 214, 220 (1973) ("The fact that one mistakenly supposed to have committed a crime was tried therefor and acquitted does not affect the guilt of one proven to have been present aiding and abetting, so long as it is established that the crime was committed by someone." (Citation and quotation marks omitted.)), *overruled on other grounds*, *State v. Adcock*, 310 N.C. 1, 33, 310 S.E.2d 587, 605-06 (1984); *State v. Cassell*, 24 N.C. App. 717, 722, 212 S.E.2d 208, 212 (1975). It is not necessary for any of those elements to be proven to the trial court beyond a reasonable doubt before the trial court may instruct on aiding and abetting; there needs only to be evidence supporting the instructions, and the jury is

to determine whether the State has proved the elements beyond a reasonable doubt. *Bagley*, 183 N.C. App. at —, 644 S.E.2d at 622.

In the case *sub judice*, there was evidence before the trial court that Jay Henderson committed a crime when he broke into the victim's mother's truck and stole the victim's satchel. This evidence supports an instruction on the first element of aiding and abetting. There was also evidence that defendant hastily drove away from the scene with Henderson in the passenger seat, holding victim's satchel. This evidence supports a conclusion that defendant aided Henderson in the theft of the victim's satchel and contributed to the commission of the crime, the second and third elements of aiding and abetting. Because all three elements of the aiding and abetting instruction were supported by evidence, we conclude that the trial court did not abuse its discretion, and therefore did not err, when it instructed the jury on the theory of aiding and abetting.

In sum, we conclude that all of defendant's assignments of error to his conviction for felony breaking or entering a motor vehicle are without merit.

IV. Habitual Felon

[6] Finally, defendant argues that if his conviction for felony breaking or entering a motor vehicle is set aside for the reasons set forth in his appeal, defendant's guilty plea to habitual felon status must also be set aside. Because we concluded that all of defendant's assignments of error to his conviction for felony breaking or entering a motor vehicle were without merit, we dismiss this assignment of error.

V. Conclusion

For the foregoing reasons, we conclude that the trial court did not err when it: (1) refused to take judicial notice of Jay Henderson's guilty plea, (2) denied defendant's motion to recall Officer Blackwood to the witness stand, (3) denied defendant's motion to dismiss the charge of felony breaking or entering a motor vehicle, and (4) sentenced defendant as an habitual felon. Defendant received a fair trial, free of reversible error as to the charges of felony breaking or entering a motor vehicle and larceny. Because defendant's assignment of error to his sentencing as an habitual felon was predicated on reversal of his conviction for felony breaking or entering a motor vehicle, we dismiss that assignment of error. However, we conclude that the trial court erred when it convicted defendant for posses-

sion of stolen goods. Accordingly, we vacate that conviction and remand for resentencing.

No error in part, vacate in part, remand for resentencing.

Judges HUNTER and CALABRIA concur.

BENNIE LEON CORBETT, PETITIONER v. NORTH CAROLINA DIVISION OF MOTOR VEHICLES, RESPONDENT

No. COA07-791

(Filed 6 May 2008)

1. Public Officers and Employees— contested case based on racial discrimination—jurisdiction—constructive discharge

The trial court did not err by concluding the Office of Administrative Hearings had jurisdiction to hear petitioner state employee's contested case under N.C.G.S. § 126-34.1 because: (1) constructive discharge is recognized as grounds for jurisdiction over an employee's claim where an employee alleges his choices are limited to working under conditions in violation of the law or be deemed to have resigned; (2) petitioner's contested case was based on his resignation under protest; (3) petitioner alleged he was forced to either resign or withdraw from a campaign for sheriff, and he alleged his treatment was discriminatory since only African-American employees were given the choice to withdraw from a campaign or resign from employment; and (4) petitioner's letter of resignation stated he resigned under protest and his resignation was not voluntary.

2. Administrative Law— judicial review of administrative decision—scope of review

When the Court of Appeals reviews appeals from the superior court either affirming or reversing the decision of an administrative agency, its scope of review is twofold including whether the superior court used the appropriate standard of review and, if so, whether the superior court properly applied this standard.

3. Public Officers and Employees— racial discrimination— prima facie case—pretext for discrimination

The trial court appropriately applied the de novo standard of review required by N.C.G.S. § 150B-51(c) in a contested case hearing regarding employment discrimination when it determined that the Administrative Law Judge's (ALJ) findings and conclusions were supported by the record because: (1) petitioner employee met his initial burden of establishing that the adverse employment action was motivated by race by presenting evidence showing that African-American employees who were candidates for political office were treated differently from Caucasian employees who were candidates for political office; (2) although respondent presented evidence of nondiscriminatory reasons for its actions to rebut a presumption of discrimination, petitioner proved the Hatch Act was a pretext for discrimination when it was disproportionately applied to respondent's African-American employees; (3) the trial court is under no obligation to adopt the findings of the State Personnel Commission even where there is some evidence to support those findings; and (4) there was substantial evidence to support the ALJ's findings which in turn supported his conclusions of law.

Appeal by respondent from order entered 29 June 2007 by Judge A. Leon Stanback in Wake County Superior Court. Heard in the Court of Appeals 15 January 2008.

Ferguson, Stein, Chambers, Gresham and Sumter, by Julius L. Chambers, for petitioner-appellee.

Attorney General Roy Cooper, by Special Deputy Attorney General Neil Dalton, for respondent-appellant.

CALABRIA, Judge.

The North Carolina Division of Motor Vehicles ("NCDMV") appeals an order affirming an administrative law judge's determination that respondent discriminated against Bennie Leon Corbett ("Corbett"). We affirm.

Corbett, an African-American employee of NCDMV, began employment as a vehicle enforcement officer with the motor carrier program ("motor carrier officer") on 1 December 1997. A motor carrier officer inspects commercial vehicles for safety on the highways. Shortly after Corbett began employment, he was transferred to a

weight officer position under Captain J.F. Jones ("Capt. Jones"). In September 2000, Corbett requested and was granted a transfer to return to the motor carrier program. Capt. Jones remained Corbett's district supervisor.

On 22 February 2002, Corbett notified Col. David Richards ("Col. Richards"), the supervising director of the enforcement division of NCDMV, of his intention to run for Sheriff of Pender County ("Sheriff"). Corbett informed Col. Richards he would not use any state-owned equipment during his campaign, in accordance with NCDMV's policy regarding employees' candidacy for public office. Corbett was told by his district supervisor, Capt. Jones, that NCDMV did not "foresee any problems." Corbett paid his filing fee and began to campaign.

In June of 2002, Amber Bell ("Bell") of the Office of Special Counsel ("OSC") in Washington, D.C., learned that Corbett may have violated the Hatch Act. The Hatch Act prohibits employees who are employed by a state agency that receives federal funding from participating as candidates in partisan elections. 5 U.S.C.A. §§ 1501-1503 (2007). After unsuccessful attempts to contact Corbett directly, Bell notified Col. Mike Sizemore ("Col. Sizemore"), Col. Richards' successor and the acting colonel of the enforcement division, of OSC's investigation of Corbett. Col. Sizemore believed that if OSC found Corbett to be in violation of the Hatch Act, then NCDMV "would be at risk to lose all its federal highway dollars." Bell asked about Corbett's duties and the source of funding for his salary and equipment. Col. Sizemore told her "essentially everything in the fifty-eight positions . . . in the motor carrier program came from federal highway money, the equipment and the personnel." Bell told Col. Sizemore that "it appeared that . . . Corbett was in violation," if Corbett continued employment with NCDMV and continued to be a candidate. Bell also told Col. Sizemore that violators of the Hatch Act have a choice to "either . . . drop out of the election that they were in, or . . . resign from the position they held with the state."

Col. Sizemore notified Corbett's district supervisor, Capt. Jones, of the violation and asked Capt. Jones whether any other employees under his supervision were candidates for public office or held a public office. Capt. Jones named Officer Hubert Sealey ("Sealey"), an African-American employee who was a candidate for commissioner of Robeson County. Capt. Jones also supervised Lynn McCall ("McCall"), a Caucasian employee who held an elected city council position in Brunswick County. Capt. Jones mentioned Sealey's name

but not McCall's to Col. Sizemore. Col. Sizemore instructed Capt. Jones to contact Sealey and Corbett regarding the Hatch Act limitations. Both Sealey and Corbett received memos from Capt. Jones directing them to either resign or withdraw from their campaigns. After further investigation of Sealey's position, the OSC determined his position did not receive the level of federal funding to render him subject to the Hatch Act.

Corbett was given ten days to decide whether to resign or withdraw from the race. He submitted an oral request to Capt. Jones for a leave of absence without pay, intending to resume his job once the campaign was over. Capt. Jones denied the request. Capt. Jones testified his denial was based on Corbett's failure to give seven days notice in advance of using vacation time. Corbett also asked for a transfer to the weight officer position, but was denied. On 21 July 2002, Corbett resigned under protest.

On 3 September 2002, Corbett applied to the Office of Administrative Hearings ("OAH") to contest his resignation. On 26 April 2004, Senior Administrative Law Judge Fred G. Morrison, Jr. ("Judge Morrison") found in favor of Corbett. On 17 June 2004, the State Personnel Commission ("SPC") considered Judge Morrison's recommendation. On 6 August 2004, the SPC dismissed Corbett's case for lack of jurisdiction.

On 28 February 2005, the SPC entered another decision and order. This order was not included in the record. Corbett requested judicial review of the SPC's 28 February 2005 decision in Wake County Superior Court. Wake County Superior Court Judge Kenneth Titus ("Judge Titus") reviewed the SPC's second order and determined the SPC did not cite reasons for not adopting Judge Morrison's findings as required by N.C. Gen. Stat. § 150-36(b)(1) (2007). Judge Titus remanded the matter to the SPC for further findings.

On 15 November 2005, the SPC reversed the OAH decision and found NCDMV's actions to be non-discriminatory. Corbett appealed to Wake County Superior Court.

In an order entered 29 June 2007, Wake County Superior Court Judge A. Leon Stanback ("Judge Stanback") reversed the SPC's 15 November 2005 decision and order, adopted the findings of the OAH, ordered Corbett to be reinstated to the same or similar position from which he resigned, and awarded attorneys' fees to Corbett. NCDMV appeals.

I. Jurisdiction

[1] NCDMV argues resignation is not one of the grounds for appeal of a contested case under N.C. Gen. Stat. § 126-34.1. Therefore, NCDMV contends the OAH lacked grounds to hear Corbett's contested case. We disagree.

N.C. Gen. Stat. § 126-34.1(e) (2007) specifies that any issue for appeal through filing of a contested case that "has not been specifically authorized by this section shall not be grounds for a contested case under Chapter 126." *See also University of N.C. at Chapel Hill v. Feinstein*, 161 N.C. App. 700, 703, 590 S.E.2d 401, 403 (2003). N.C. Gen. Stat. § 126-34.1(a) allows State employees to file in the Office of Administrative Hearings a contested case

> only [for] the following personnel actions or issues:
>
> . . . .
>
> (2) An alleged unlawful State employment practice constituting discrimination, as proscribed by G.S. 126-36, including:
>
> a. Denial of a promotion, transfer, or training, on account of the employee's . . . race . . . .
>
> b. Demotion, reduction in force, or termination of an employee in retaliation for the employee's opposition to alleged discrimination on account of the employee's . . . race. . . .
>
> . . . .
>
> (10) Harrassment in the workplace based upon . . . race, color, national origin . . . whether the harassment is based upon the creation of a hostile work environment or upon a quid pro quo.

Constructive discharge is recognized as grounds for jurisdiction over an employee's claim where an employee alleges his or her choices are limited to working under conditions in violation of the law or be deemed to have resigned. In *Campbell v. N.C. Dep't of Transp.*, 155 N.C. App. 652, 661, 575 S.E.2d 54, 60 (2003), this Court concluded that when an employee is "deemed to have voluntarily resigned" for his or her inability or unwillingness to work in conditions that may constitute discrimination, such resignation may constitute a constructive discharge entitling the employee to file a contested case alleging termination pursuant to N.C. Gen. Stat. § 126-34.1(a)(2)(b).

Corbett's contested case hearing was based on his resignation under protest.[1] Corbett alleged he was forced to either resign or withdraw from the campaign for Sheriff. Corbett alleged this treatment was discriminatory because only African-American employees were given the choice to withdraw from the campaign or resign from employment. Corbett's letter of resignation stated he resigned under protest and his resignation was not voluntary. We hold this was sufficient to establish a claim under N.C. Gen. Stat. § 126-34.1.

II. Standard of Review

[2] "When this Court reviews appeals from superior court either affirming or reversing the decision of an administrative agency, our scope of review is twofold . . . : (1) whether the superior court applied the appropriate standard of review and, if so, (2) whether the superior court properly applied this standard." *Mayo v. N.C. State Univ.*, 168 N.C. App. 503, 507, 608 S.E.2d 116, 120 (2005) (citation omitted). N.C. Gen. Stat. § 150B-51(c) (2007) provides the standard of review of a final decision in a contested case in which the agency does not adopt the ALJ's decision:

> [T]he [superior] court shall review the official record, de novo, and shall make findings of fact and conclusions of law. In reviewing the case, the court shall not give deference to any prior decision made in the case and shall not be bound by the findings of fact or the conclusions of law contained in the agency's final decision. The court shall determine whether the petitioner is entitled to the relief sought in the petition, based upon its review of the official record. The court reviewing a final decision under this subsection may adopt the administrative law judge's decision; may adopt, reverse, or modify the agency's decision; may remand the case to the agency for further explanations under G.S. 150B-36(b1), 150B-36(b2), or 150B-36(b3), or reverse or modify the final decision for the agency's failure to provide the explanations; and may take any other action allowed by law.

See also N.C. Dep't of Env't & Natural Res., 358 N.C. 649, 663, 599 S.E.2d 888, 897 (2004) (recognizing the superior court's authority to make alternative findings from the agency where the agency does not adopt the ALJ's findings).

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1. We note that Corbett also alleges denial of his transfer request was discriminatory. Denial of a transfer may also be grounds for a contested case hearing. N.C. Gen. Stat. § 126-34.1(a)(2)(a).

Here, the trial court applied the appropriate standard of review. The trial court reviewed the record *de novo* and adopted the findings of the ALJ. We next determine whether the trial court properly applied the standard of review when it reversed the agency's decision after reviewing the entire record *de novo*. *Ramsey v. N.C. Div. of Motor Vehicles*, 184 N.C. App. 713, 717-18, 647 S.E.2d 125, 128 (2007).

III. Discrimination

[3] NCDMV contends the ALJ's finding that NCDMV's Caucasian employees who were candidates for political office were treated differently from Corbett is not supported by the evidence. NCDMV also argues that the ALJ's conclusion of law that Corbett has met the *prima facie* burden of establishing that he and another African-American employee were treated differently from other Caucasian employees is not supported by the evidence. NCDMV further argues that Caucasian employees were not the subject of investigation because (1) they either were not subject to the Hatch Act since their positions did not receive federal funding, or (2) because they were candidates for office years prior to NCDMV's knowledge of the Hatch Act. NCDMV argues that since the Caucasian employees were not similarly situated to Corbett, the conclusion of law that Corbett met his *prima facie* burden is also not supported by the record. We disagree.

Our appellate review of the superior court's order under N.C. Gen. Stat. § 150B-51(c) is the same as appellate review in other civil cases. *Ramsey*, 184 N.C. App. at 717, 647 S.E.2d at 127 (citing N.C. Gen. Stat. § 150B-52 (2007)). The trial court's findings of fact should be upheld if supported by substantial evidence. *Id.* "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Comr. of Insurance v. Rating Bureau*, 292 N.C. 70, 80, 231 S.E.2d 882, 888 (1977) (internal citation omitted).

A. Prima Facie Case

In employment discrimination cases, the employee has the initial burden of establishing that the adverse employment action was motivated by an employee's race. *Curtis v. N.C. Dep't of Transp.*, 140 N.C. App. 475, 479, 537 S.E.2d 498, 501-02 (2000). "A prima facie case of discrimination may also be made . . . by showing the discharge of a black employee and the retention of a white employee under apparently similar circumstances." *Dept. of Correction v. Gibson*, 308 N.C. 131, 137, 301 S.E.2d 78, 83 (1983) (citation omitted). The employee

may meet that burden when he proves that he was treated less favorably than other employees of a different race. *N.C. Dept. of Correction v. Hodge*, 99 N.C. App. 602, 611, 394 S.E.2d 285, 290 (1990) (citing *Watson v. Ft. Worth Bank and Trust*, 487 U.S. 977, 986, 101 L. Ed. 2d 827, 839 (1988)) (SPC properly applied a disparate treatment analysis to determine that petitioner met the *prima facie* case of discrimination).

Corbett presented evidence showing that African-American employees who were candidates for political office were treated differently from Caucasian employees who were candidates for political office. When Capt. Jones was asked about other employees who held public office or who were candidates for public office, the only employee he mentioned was another African-American employee named Sealey. Capt. Jones did not give Col. Sizemore the name of a Caucasian employee, McCall, who was also employed under Capt. Jones. More importantly, McCall held a public office at the same time he was employed by NCDMV in a federally funded position.

NCDMV presented evidence that it reported a Caucasian employee to the OSC. Col. Sizemore reported Inspector Mike Smith ("Smith"), a Caucasian officer, to Bell. Smith was a candidate for the office of Sheriff of Davie County and Smith's position was state-funded. Bell determined Smith was not in violation of the Hatch Act because his position was not federally funded. Nevertheless, Smith did not receive the same directive as Sealey and Corbett. In fact, no directive was given to Smith. Only Corbett and Sealey, the two African-American employees who were candidates for political office, were given the order to either resign from their employment or withdraw from their campaigns. In addition, it was ultimately determined that Sealey was not in violation. However, that was determined only after Sealey received the directive to either resign or withdraw from office. Even though NCDMV alleges it was only recently made aware of the Hatch Act, this does not negate the fact that African-American employees were treated differently from their Caucasian counterparts. We conclude there is substantial evidence to support the ALJ's conclusion of law that Corbett met his *prima facie* burden of discrimination.

B. Pretext

NCDMV next argues the superior court erred in concluding that NCDMV's reliance on the Hatch Act was a pretextual reason for racial discrimination. We disagree.

Once the employee has met the burden of establishing that an adverse employment action was motivated by race, the burden then shifts to the employer to articulate a non-discriminatory reason for the adverse action. *Curtis*, 140 N.C. App. at 479, 537 S.E.2d at 502. The employer's burden is one of production and not persuasion. *Id.* at 481, 537 S.E.2d at 503. "The employer is not required to prove that its action was actually motivated by the proffered reasons . . . . [I]t is sufficient if the evidence raises a genuine issue of fact as to whether the claimant is a victim of intentional discrimination." *Gibson*, 308 N.C. at 138, 301 S.E.2d at 83. To rebut this presumption of discrimination, the employer must "clearly explain by admissible evidence, the nondiscriminatory reasons for [the adverse employment action]. The explanation must be legally sufficient to support a judgment for employer." *Id.* at 139, 301 S.E.2d at 84 (internal citation omitted).

In the case *sub judice*, evidence presented showed that NCDMV rebutted the presumption of discrimination. Smith, a Caucasian employee, was reported to the OSC. Ultimately the OSC determined that Smith's position was not federally funded. Evidence was also presented that showed Capt. Jones responded to Col. Sizemore's request to name other employees who were candidates for or held political office, and named only the African-American employees. NCDMV presented a non-discriminatory reason for the unequal treatment because the Caucasian employee, McCall, was not subject to the Hatch Act because he was not a candidate for office. McCall already held the position and it was a non-partisan position. Smith was not subject to the Hatch Act because his position was not federally funded. Corbett's position did violate the Hatch Act because his position was federally funded and he was a candidate in a partisan election. These are non-discriminatory reasons for NCDMV's action and rebut a presumption of discrimination. The burden is shifted to Corbett to prove NCDMV's reasons were pretextual. *Curtis*, 140 N.C. App. at 479, 537 S.E.2d at 502 (If the employer articulates a non-discriminatory reason for the adverse action, then the burden shifts to the employee to prove the reason given is pretext.).

"[T]he plaintiff may rely on evidence offered to establish his prima facie case to carry his burden of proving pretext." *Gibson*, 308 N.C. at 139, 301 S.E.2d at 84. Some of the factors helpful in determining whether the employer's stated reasons were pretext are:

(1) Evidence that white employees involved in acts against the employer of comparable seriousness were retained or rehired,

(2) Evidence of the employer's treatment of the employee during his term of employment,

(3) Evidence of the employer's response to the employee's legitimate civil rights activities, and

(4) Evidence of the employer's general policy and practice with respect to minority employees.

Id. at 139-40, 301 S.E.2d at 84. The focus is whether the employer's decision was motivated by race. *Id.* To prove pretext, a petitioner can show he did not deserve the adverse employment action and/or present evidence that the employer's decision was racially motivated. In *Hodge*, the State appealed an award by the State Personnel Commission in favor of Edward Hodge ("Hodge"), a correctional officer, 99 N.C. App. at 604, 394 S.E.2d at 286. Hodge, who is African-American, applied for a vacancy previously held by an African-American. *Id.* The prison employment commission recommended a Caucasian employee for the promotion. *Id.* This Court concluded that the State Personnel Commission "had a 'rational basis in the evidence' for deciding that the State's decision was pretextual" given that the DOC was sensitive to criticisms that an African-American would be promoted and the DOC's disregard for Hodge's qualifications for the promotion. *Id.* at 613, 394 S.E.2d at 291.

In the instant case, we conclude there was substantial evidence to support the ALJ's conclusion that the Hatch Act was a pretext for discrimination. Evidence was presented that the Hatch Act was disproportionately applied to NCDMV's African-American employees. Sealey, like Smith, was not subject to the Hatch Act, however he received a directive to resign or withdraw from the campaign, while Smith, a Caucasian employee, did not. This evidence of unequal treatment of an African-American employee compared to a Caucasian employee supports the ALJ's conclusion that "[p]etitioner met his ultimate burden in establishing . . . that his resignation was the result of racial discrimination."

C. Findings of Fact

NCDMV next argues that the superior court erred in finding that certain findings of fact and conclusions of law made by the SPC were not supported by the record. Even where there is some evidence to support the SPC's findings, this alone is not grounds for reversal. The superior court is under no obligation to adopt the findings of the SPC. N.C. Gen. Stat. § 150B-51(c). Since there is substantial evidence to

support the ALJ's findings, and those findings support the ALJ's conclusions of law, the superior court's order adopting the ALJ's decision should be affirmed. *Ramsey*, 184 N.C. App. at 717, 647 S.E.2d at 127. "Establishing the probative value of evidence is a determination best made by the administrative body." *Enoch v. Alamance Cty. DSS*, 164 N.C. App. 233, 245, 595 S.E.2d 744, 753 (2004) (citation omitted). This assignment of error is overruled.

IV. Conclusion

The superior court correctly applied the standard of review required by N.C. Gen. Stat. § 150B-51(c) in determining that the ALJ's findings and conclusions are supported by the record. Therefore, we affirm the order.

Affirmed.

Judges WYNN and McGEE concur.

STATE OF NORTH CAROLINA v. JAMES ALLEN TURNAGE, JR.

No. COA07-562

(Filed 6 May 2008)

1. Burglary and Unlawful Breaking or Entering— first-degree burglary—motion to dismiss—sufficiency of evidence

The trial court erred by denying defendant's motion to dismiss the charge of first-degree burglary because: (1) the direct and circumstantial evidence at trial showed only that one of the panes in the front door of the victim's house had been broken and defendant was near the victim's house on the night in question and had left his thumbprint on the exterior front door of the house at some point in time; (2) although the fact of entry may be a reasonable inference from the broken glass, the State did not offer proof that it was defendant who committed the entry aside from a single thumbprint that was on the exterior of the door; and (3) taken together, the evidence only gave rise to mere speculation as to either the commission of the offense or the identity of the perpetrator.

2. Evidence— lay opinion testimony—invasion of province of jury—not plain error

A police officer's lay opinion testimony in a prosecution for possession of implements of housebreaking that officers searched defendant and found a screwdriver and a metal rod in his pockets "indicating that he was probably in the process of breaking into a residence" constituted an impermissible expression of opinion as to defendant's guilt. However, the admission of this testimony was not plain error where the jury had sufficient circumstantial evidence to conclude that defendant possessed the tools as implements of housebreaking.

3. Criminal Law— failure to instruct on voluntary intoxication—not a defense for general intent crimes

The trial court did not commit plain error in a possession of implements of housebreaking case by failing to instruct the jury on the defense of voluntarily intoxication, nor did defendant receive ineffective assistance of counsel based on the failure to request such an instruction despite testimony that defendant had been drinking alcohol and smoking crack cocaine during the hours preceding the alleged break-in and had also gotten little to no sleep in the days prior to the incident, because, although voluntary intoxication may be a defense for specific intent crimes, it provides no such defense against crimes necessitating only general intent such as possession of implements of housebreaking.

Judge BRYANT concurring in part and dissenting in part.

Appeal by defendant from judgment entered 10 March 2004 by Judge Robert H. Hobgood in Superior Court, Wake County. Heard in the Court of Appeals 27 November 2007.

Attorney General Roy Cooper, by Assistant Attorney General David W. Boone, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Emily H. Davis, for defendant-appellant.

WYNN, Judge.

To sustain a conviction for first-degree burglary, "the least entry with the whole or any part of the body . . . or with any instrument . . ., introduced for the purpose of committing a felony, is

sufficient[.]"[1] In the instant case, because we find that the State failed to present substantial evidence that Defendant James Allen Turnage, Jr. either entered the residence in question or was the perpetrator of an entry if it did occur, we reverse his conviction for first-degree burglary. However, we affirm Defendant's conviction for possession of implements of housebreaking.

In the early morning hours of 29 April 2003, Kristina Coleman was asleep in her home at 508 Calloway Drive in Raleigh, North Carolina, with the house locked and secured. Shortly before 4:00 a.m., Ms. Coleman was awakened to the sound of breaking glass at the front entrance to her home; she called 911 to report that someone was attempting to break into the house.

When police responded, they found Defendant running up an embankment at the rear of the house, toward a fence that ran along Highway 440. Raleigh Police Officer R.J. Armstrong apprehended Defendant, at which point a screwdriver-like object with an eyelet at one end, a seven-inch metal rod, and a pen lighter were found in and taken from Defendant's pockets. Officer Armstrong and Officer Jason Bloodworth also observed that Defendant had cuts and blood on the inside of his hand. Defendant later testified that he had also had a crack pipe in his pocket that he threw away as he ran from the officers.

Defendant was subsequently indicted for first-degree burglary, possession of burglary tools, and habitual felon status. At his trial in March 2004, the State presented evidence that one of Defendant's fingerprints had been found on the exterior of the front door to the Coleman house. Additionally, one of the panes of glass in the door was broken completely through, and glass was found both inside and outside of the house. Although the edges of the broken window were "jagged," no blood was found. There was structural damage to the exterior of the door but none to the interior, and none of the fingerprints on the inside of the door matched Defendant's. Defendant testified that he had been at the Coleman house that night with an acquaintance, Artis Barber, but had not participated when Mr. Barber attempted to break into the house. Defendant further stated that he had slept very little in the days preceding the attempted break-in and had smoked crack cocaine and consumed at least a liter of Richard's Wild Irish Rose wine on the night in question.

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1. *State v. Sneed*, 38 N.C. App. 230, 231, 247 S.E.2d 658, 659 (1978) (quoting Black's Law Dictionary 627 (4th ed. rev. 1968)).

At the conclusion of the trial, the jury found Defendant guilty of first-degree burglary, possession of implements of housebreaking, and habitual felon status. The verdict sheet also listed the lesser-included offenses of attempted first-degree burglary, felonious breaking or entering, and non-felonious breaking or entering. After this Court granted his petition for writ of certiorari in May 2005 to restore his right of appeal, Defendant appealed his March 2004 convictions, arguing that the trial court (I) erred by denying his motion to dismiss for insufficient evidence; (II) committed plain error by allowing impermissible opinion testimony from a police officer; and (III) committed plain error by failing to instruct the jury on voluntary intoxication as a defense. Defendant also asserts he received ineffective assistance of counsel because his trial counsel failed to request an instruction on voluntary intoxication.

I.

[1] First, Defendant contends that the trial court erred by denying his motion to dismiss the first-degree burglary charge for insufficient evidence, given that the State failed to present substantial evidence that he actually entered the residence in question. We agree.

To survive a motion to dismiss, the State must have presented "substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Garcia*, 358 N.C. 382, 412, 597 S.E.2d 724, 746 (2004) (citation and quotations omitted), *cert. denied*, 543 U.S. 1156, 161 L. Ed. 2d 122 (2005). "Substantial evidence" is "relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion." *Id.* (citations omitted). In considering a motion to dismiss by the defense, such evidence "must be taken in the light most favorable to the state . . . [which] is entitled to all reasonable inferences that may be drawn from the evidence." *State v. Sumpter*, 318 N.C. 102, 107, 347 S.E.2d 396, 399 (1986).

Moreover, "[c]ircumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence." *State v. Fritsch*, 351 N.C. 373, 379, 526 S.E.2d 451, 455 (citation and quotation omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). Although a jury may properly base "inferences on inferences" from either direct or circumstantial evidence, *State v. Childress*, 321 N.C. 226, 232, 362 S.E.2d 263, 267 (1987), "our analysis of sufficiency of the evidence must be based on the 'evidence introduced in each case, as a whole, and adju-

dications in prior cases are rarely controlling as the evidence differs from case to case[.]' " *State v. Myers*, 181 N.C. App. 310, 314, 639 S.E.2d 1, 4 (2007) (quoting *State v. Cutler*, 271 N.C. 379, 383, 156 S.E.2d 679, 682 (1967)). As such, if the evidence is "sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator, the motion to dismiss must be allowed." *State v. Malloy*, 309 N.C. 176, 179, 305 S.E.2d 718, 720 (1983) (citation omitted). "This is true even though the suspicion aroused by the evidence is strong." *Id.* (citation omitted).

In North Carolina, a conviction for burglary requires proof beyond a reasonable doubt that a defendant (1) broke and (2) entered (3) at night (4) the occupied dwelling house (5) of another (6) with the intent to commit a felony therein. N.C. Gen. Stat. § 14-51 (2005); *see also State v. Parker*, 350 N.C. 411, 425, 516 S.E.2d 106, 117 (1999), *cert. denied*, 528 U.S. 1084, 145 L. Ed. 2d 681 (2000). Our courts have long held that even the slightest entry is sufficient to satisfy the second element: "the least entry with the whole or any part of the body, hand, or foot, or with any instrument or weapon, introduced for the purpose of committing a felony, is sufficient to complete the offense." *State v. Sneed*, 38 N.C. App. 230, 231, 247 S.E.2d 658, 659 (1978) (quoting Black's Law Dictionary 627 (4th ed. rev. 1968)).

In the instant case, the State presented evidence at trial that tended to show that: one of the windows in the exterior front door to the Coleman house was broken; Defendant was apprehended on an embankment behind the Coleman house shortly after Ms. Coleman heard breaking glass and called 911; Defendant had blood on his hand; Defendant's fingerprint was found on the outside of the exterior door; and broken glass was found inside and outside of the front door. However, none of the fingerprints found on the interior of the door or of the house were matched to Defendant. According to Mr. Coleman, although the "window was broken all the way through," with a hole large enough to accommodate a hand, the damage to the exterior door was restricted to the outside panel and did not make it "all the way to the inside panel." Moreover, despite the "jagged edges" of the broken glass, no blood was found on the edges, and a police detective at the scene testified that he searched Defendant "pretty good" but did not find any glass on him, including on the soles of his shoes. No eyewitness testimony placed Defendant inside the house; indeed, no evidence—either direct or circumstantial—was offered to prove that any part of Defendant's body entered the Coleman house.

Rather, the State suggested through its questioning and closing arguments that Defendant, or a tool used by Defendant, must necessarily have crossed the plane of the exterior door, into the interior of the house, when breaking the glass.

We find this evidence to be insufficient to withstand Defendant's motion to dismiss and therefore conclude the trial court erred by refusing to dismiss the charge of first-degree burglary. Even viewing the evidence in the light most favorable to the State—and giving the State every reasonable inference—the direct and circumstantial evidence at trial showed only that Defendant was near the Coleman house on the night in question and had left his thumbprint on the exterior front door of the house at some point in time. Although the fact of entry may be a reasonable inference from the broken glass, in that a body part or instrument may have crossed the plane of the door at the moment the glass broke, the State did not offer proof that it was Defendant who committed the entry, aside from a single thumbprint that was on the exterior of the door. Taken together, this evidence gives rise to mere speculation, "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[.]" *Malloy*, 309 N.C. at 179, 305 S.E.2d at 720 (internal citation omitted). Accordingly, the motion to dismiss should have been allowed.[2] We therefore reverse Defendant's conviction for first-degree burglary.

II.

[2] Next, Defendant argues that the trial court committed plain error by allowing testimony from Officer Armstrong that was an impermissible opinion as to Defendant's guilt. We disagree.[3]

The North Carolina General Statutes provide:

> If any person shall be found armed with any dangerous or offensive weapon, with the intent to break or enter a dwelling, or other building whatsoever, and to commit any felony or larceny therein;

2. Indeed, we note that the trial court initially granted the motion to dismiss before reversing that decision and sending the charge to the jury due to the "reasonable inference that the defendant's hand had to go inside the home to the extent it did break the plain [sic][.]" The State likewise indicated that it wanted to proceed only with either attempted first-degree burglary or a lesser-included charge of breaking or entering; however, defense counsel objected to amending the indictment, and the trial court determined to let the charge stand.

3. Because we have already reversed Defendant's conviction for first-degree burglary, we consider this argument only with respect to his conviction for possession of implements of housebreaking.

> or shall be found having in his possession, without lawful excuse, any picklock, key, bit, or other implement of housebreaking; or shall be found in any such building, with intent to commit any felony or larceny therein, such person shall be punished as a Class I felon.

N.C. Gen. Stat. § 14-55 (2005). To sustain a conviction for the possession of implements of housebreaking, the State must prove both possession and that such possession was without lawful excuse. *State v. Beard*, 22 N.C. App. 596, 598, 207 S.E.2d 390, 391 (1974). Although the charge "does not require proof of any specific intent to break into a particular building at a particular time and place," the State must prove possession "with a general intent to use it at some time for the purpose of facilitating a breaking. Such a showing will of necessity depend upon the strength of circumstantial evidence." *State v. Bagley*, 300 N.C. 736, 740-41, 268 S.E.2d 77, 79-80 (1980) (internal citation omitted).

Here, the indictment identified the alleged implements of housebreaking as "a [seven-inch] metal rod, a screwdriver with a pinhole opening on the end, and a red pen/lighter[,]" items that were found on Defendant on the night of the break-in at the Coleman house. At trial, Officer Armstrong stated that, "[w]e searched him and found . . . a screwdriver and a metal rod in his pockets indicating that he was just probably in the process of breaking into a residence. Those types of tools used [sic] to break into residences." Officer Armstrong testified as a lay witness, such that his opinions were properly limited to those "(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). Nevertheless, we find Officer Armstrong's statements, particularly the first, to have impermissibly invaded the province of the jury, as he drew inferences from the evidence—a task reserved for the jury—to express an opinion as to Defendant's guilt. *See State v. White*, 154 N.C. App. 598, 605, 572 S.E.2d 825, 831 (2002) ("The jury is charged with drawing its own conclusions from the evidence, and without being influenced by the conclusion of [a law enforcement officer].").

Having concluded that the admission of the testimony was error, we must determine whether the error was plain error, as Defendant did not object to its admission at trial. *See* N.C. R. App. P. 10(c)(4) (providing that, in criminal cases, "a question which was not preserved by objection noted at trial" may still be argued on appeal if it

is "specifically and distinctly contended to amount to plain error."). We find that it was not.

Aside from Officer Armstrong's statements, the State presented evidence that Defendant had a long criminal history, including several charges of breaking and entering, as well as that Defendant was at the Coleman house on the night in question, his fingerprint was found on the door of the house, and the door to the house had broken glass. Although Defendant offered a competing explanation for the purpose of the tools in his possession, namely, to abuse drugs, the jury had sufficient circumstantial evidence to conclude that he possessed the tools as implements of housebreaking. *See Bagley*, 300 N.C. at 740-41, 268 S.E.2d at 79-80 (noting that the State's showing of the requisite general intent with respect to possession of implements of housebreaking "will of necessity depend upon the strength of circumstantial evidence").

Accordingly, we conclude that Defendant has failed to show that, but for the erroneous admission of Officer Armstrong's statements, the jury would have reached a different verdict on this charge. *See State v. Gardner*, 315 N.C. 444, 450, 340 S.E.2d 701, 706 (1986) (noting that, to find plain error, "the appellate court must determine that the error in question 'tilted the scales' and caused the jury to reach its verdict convicting the defendant." (citation omitted)). This assignment of error is overruled.

III.

[3] Finally, Defendant asserts that the trial court committed plain error by failing to instruct the jury on voluntary intoxication as a defense. Defendant further contends that he received ineffective assistance of counsel because his defense attorney failed to request such an instruction, despite testimony that Defendant had been drinking alcohol and smoking crack cocaine during the hours preceding the alleged break-in and had also gotten little to no sleep in the days prior to the incident.

Because we have already reversed his conviction for first-degree burglary on other grounds, we decline to consider these arguments in the context of that conviction. Additionally, we note that, although voluntary intoxication may be a defense for specific intent crimes, *see State v. Bunn*, 283 N.C. 444, 458, 196 S.E.2d 777, 786 (1973) ("Although voluntary intoxication is no excuse for crime, where a specific intent is an essential element of the offense charged, the fact of intoxication may negate the existence of that intent."), it

provides no such defense against crimes necessitating only general intent, such as the possession of implements of housebreaking. *See State v. Harvell*, 334 N.C. 356, 368, 432 S.E.2d 125, 131 (1993); *Bagley*, 300 N.C. at 740-41, 268 S.E.2d at 79-80. This assignment of error is overruled.

Reversed in part; no prejudicial error in part.

Judge ELMORE concurs.

Judges BRYANT concurs in part and dissents in part in a separate opinion.

BRYANT, Judge concurring in part and dissenting in part.

Because I believe the trial court did exactly as the law requires by denying defendant's motion to dismiss the first-degree burglary charge and allowing the case to go to a jury, and because I believe defendant received a fair trial free from error, prejudicial or otherwise, I respectfully dissent from the majority opinion. However, as to that portion of the opinion holding no error in defendant's conviction for possession of implements of housebreaking, I concur.

The majority reverses defendant's conviction for first-degree burglary, holding the trial court erred in not dismissing the charge due to insufficient evidence. The majority argues that "viewing the evidence in the light most favorable to the State—and giving the State every reasonable inference—the direct and circumstantial evidence at trial showed only that Defendant was near the Coleman house on the night in question and had left his thumbprint on the exterior front door of the house at some point in time." The majority reasons this "gives rise to mere speculation . . . '[as to] the identity of the defendant as the perpetrator[,]' " *citing Malloy*, 309 N.C. at 179, 305 S.E.2d at 720, and on this ground holds defendant's motion to dismiss should have been allowed. I disagree.

"Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a *reasonable inference* of defendant's guilt may be drawn from the circumstances." *Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455 (internal citation omitted) (emphasis added). "If so, it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the de-

fendant is actually guilty. . . ." *State v. Thomas*, 296 N.C. 236, 244, 250 S.E.2d 204, 209 (1978) (citations omitted) (emphasis omitted).

Here, the evidence presented tended to show that the victim awoke at 4:00 a.m. to the sound of breaking glass coming from the front entrance of her home. She immediately called 911. Within two minutes, police officers responding to the announcement of a "burglary in progress," observed defendant, at the rear of the victim's house, running up an embankment. Upon seizure, police noticed defendant's hand was bleeding from a cut, and incident to his arrest, police searched defendant to find a screwdriver-like object, a seven-inch metal rod, and a lighter pen. Later, during the investigation, police recovered defendant's fingerprint from the exterior side of the front door below the broken glass pane.

I believe the evidence gives rise to more than "mere speculation." And, though circumstantial, I believe the evidence presented, given the benefit of every reasonable inference, is such that "a reasonable person might accept as adequate . . . to support . . . [the] particular conclusion[,]" *Garcia*, 358 N.C. at 412, 597 S.E.2d at 746, defendant was the perpetrator.

For these reasons I would hold no error in the denial of defendant's motion to dismiss the charge of first-degree burglary.

STATE OF NORTH CAROLINA v. DAVID LAMAR APPLEWHITE

No. COA07-1399

(Filed 6 May 2008)

1. Evidence— expert opinion testimony—failure to make special request for witness to be qualified as expert

The trial court did not err in a murder and discharging a firearm into occupied property case by admitting expert opinion testimony even though the witness was never qualified as an expert because: (1) a party's objection to a witness's qualifications as an expert is waived if it is not made in apt time upon this special ground, and a mere general objection to the content of the witness's testimony will not ordinarily suffice to preserve the matter for subsequent review; (2) although the trial court made no finding of the witness's qualifications as an expert, in the

absence of a special request by the defense, such a finding is deemed implicit in the trial court's admission of the challenged testimony, and (3) this issue was not preserved for review since defendant failed to make a special request to have the agent qualified as an expert.

2. Evidence— cross-examination—document—failure to make offer of proof

The trial court did not err in a murder and discharging a firearm into occupied property case by sustaining the State's objection to defendant's cross-examination of an agent regarding a document found in decedent's car because: (1) an exception to the exclusion of evidence cannot be sustained where the record failed to show what the witness's testimony would have been had he been permitted to testify, and in the instant case defense counsel told the trial court he did not want to make an offer of proof regarding the paperwork; and (2) the record was insufficient to establish what the essential content or substance of the agent's testimony would have been.

3. Evidence— hearsay—exception—excited utterance

The trial court did not err in a murder and discharging a firearm into occupied property case by permitting a witness to testify about statements decedent made to her shortly before his death under N.C.G.S. § 8C-1, Rule 803(2) as an excited utterance because: (1) the witness consistently described decedent as being scared, upset, and excited when he entered the house; (2) in light of decedent's statement that defendant pulled a gun on decedent, it was reasonable that decedent was still upset when he spoke to the witness; and (3) decedent's statements were made sufficiently close to the event and were made while he was upset and had not had time to reflect.

4. Evidence— direct examination—leading questions

The trial court did not abuse its discretion by allowing the State to use leading questions during the direct examination of a State's witness because: (1) N.C.G.S. § 8C-1, Rule 611(c) provides that leading questions may be used during the direct examination of a hostile witness; and (2) the witness testified that she had been defendant's girlfriend for eleven years, that she loved defendant, that they had two children together, and that she did not want defendant to go to jail, thus demonstrating her bias in favor of defendant and her adversity to the State.

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

Although defendant contends the trial court erred by allowing the State to impeach a witness's testimony with extrinsic evidence of a prior inconsistent statement she made to police, this argument was not preserved because: (1) defendant neither objected at trial nor assigned error to the admission of the evidence; (2) the argument did not correspond to the assignment of error; and (3) defendant did not argue plain error.

6. Evidence— testimony—gunshot residue on headrest—no requirement for item to be introduced

The trial court did not err in a murder and discharging a firearm into occupied property case by allowing a forensic chemist with the SBI to testify about the presence of gunshot residue on a headrest taken from defendant's vehicle even though the headrest was not admitted into evidence because there is no requirement under North Carolina law that an item be introduced into evidence in order for an expert to testify about it.

7. Criminal Law— instructions—self-defense—perceived inconsistency of jury verdict

The trial court's instructions on self-defense were not erroneous and did not render invalid a jury verdict acquitting defendant of felony murder based upon the underlying felony of discharging a weapon into occupied property and finding him guilty of the underlying felony.

8. Appeal and Error— preservation of issues—failure to raise issue at trial

Although defendant contends the trial court violated his right against double jeopardy by sentencing him for the offense of discharging a firearm into occupied property, this issue is waived based on defendant's failure to properly raise this issue at trial.

Appeal by defendant from judgments entered 12 July 2007 by Judge Charles H. Henry in Wayne County Superior Court. Heard in the Court of Appeals 16 April 2008.

Attorney General Roy A. Cooper III, by Assistant Attorney General LaToya B. Powell, for the State.

Sue Genrich Berry, for defendant-appellant.

STEELMAN, Judge.

Where defendant failed to request that a witness be qualified as an expert and made only a general objection to the contents of the witness's testimony, defendant's objection to the witness's qualifications has not been preserved for appellate review. Where defendant made no offer of proof concerning excluded testimony, defendant has not preserved the issue for appellate review. Where decedent's statements were admissible as an excited utterance, the trial court did not err in admitting the statements. Where the witness was adverse to the State, the trial court did not abuse its discretion in allowing the State to use leading questions in its direct examination of the witness. Defendant cites no authority for his argument about the admission of expert testimony regarding physical evidence where the physical evidence was not introduced into evidence, and his argument is without merit. A perceived inconsistency in the jury verdict does not invalidate the verdict. Where defendant failed to argue double jeopardy at trial, he has not preserved this argument for appellate review.

I. Factual and Procedural Background

On 24 December 2005, Reginald Reid (decedent) was living with his fiancé, Latosia Hudson (Hudson). At approximately noon on that day, decedent left his residence to pick up his son from his prior marriage to Tammy Hardy Reid (Reid). Decedent drove to Reid's house, and was told that his son was at his grandmother's house. Decedent drove to the grandmother's house, and arrived at the home simultaneously with David Applewhite (defendant) and defendant's girlfriend, Tiffany Hardy (Hardy), Reid's sister. Words were exchanged between decedent and defendant and both left the residence. Defendant took his two children home and then went to Auto Zone. Decedent returned to his residence. He had a brief conversation with Hudson about his confrontation with defendant and then left again in his vehicle.

Wayne County E.M.S. received a call at approximately 12:39 p.m. on 24 December 2005 and went to Peachtree Street, where paramedics found a vehicle resting partially on the curb. The car was in drive, its engine was running, and the doors were shut. Decedent was sitting in the driver's seat and was slumped over towards the passenger side. Paramedics confirmed that he was deceased. An autopsy revealed that a gunshot wound was the cause of death.

Reid arrived at the crime scene and confirmed the identity of decedent, her ex-husband. Reid informed officers about the alterca-

tion between decedent and defendant earlier that day. Based on this information, a "be on the look out" dispatch was issued for defendant.

At approximately 4:00 p.m., defendant went to the Goldsboro Police station to speak with police. Defendant told Sergeant Gary Lynch about a confrontation between defendant and decedent that occurred earlier in 2005, including a warrant taken out by defendant against decedent as a result of this encounter. When Sergeant Lynch questioned defendant about whether defendant saw decedent on Peachtree Street, defendant became agitated and left the police station.

Pat Matthews (Agent Matthews), a special agent with the State Bureau of Investigation (SBI), and Jeffrey Clifford (Officer Clifford), a crime scene specialist, were dispatched to investigate the crime scene. Agent Matthews and Officer Clifford executed a search warrant for defendant's vehicle and subsequently examined the vehicle to determine whether a firearm had been fired from inside the vehicle.

A warrant was issued for defendant's arrest on the evening of 24 December 2005. Defendant returned to the police station and was placed under arrest.

On 6 November 2006, defendant was indicted for first-degree murder and discharging a firearm into occupied property. The jury found defendant guilty of voluntary manslaughter and discharging a weapon into occupied property. The trial court found defendant to be a prior record level I for felony sentencing purposes. Defendant was sentenced to a term of 64 to 86 months imprisonment for the charge of voluntary manslaughter. A consecutive sentence of 20 to 33 months was imposed for the charge of discharging a weapon into occupied property. Defendant appeals.

II. Expert Testimony

[1] In his first argument, defendant contends that the trial court erred in admitting expert opinion testimony when the witness was never qualified as an expert. We disagree.

At trial, Agent Matthews testified that she had been employed as a field agent with the SBI since 1986, and that she had worked as a local law enforcement officer for five years before joining the SBI. Agent Matthews testified that she recovered a handgun from decedent's vehicle. The prosecutor asked Agent Matthews whether, in her

opinion, the handgun had been fired "in a close time, approximately, to the victim's death." Defense counsel made an objection, which was overruled. Agent Matthews responded that she saw no indication that the gun had been fired. Defendant made another general objection when the prosecutor asked Agent Matthews to explain the basis of her opinion, which was overruled.

A party's objection to a witness's qualifications as an expert "is waived if it is not made in apt time upon this special ground, and a mere general objection to the content of the witness's testimony will not ordinarily suffice to preserve the matter for subsequent review." *State v. Riddick*, 315 N.C. 749, 758, 340 S.E.2d 55, 60 (1986) (quoting *State v. Hunt*, 305 N.C. 238, 243, 287 S.E.2d 818, 821 (1982)).

Although the trial court made no finding of Agent Matthews's qualifications as an expert, "in the absence of a special request by the defense, such a finding is deemed implicit in the trial court's admission of the challenged testimony." *State v. Perry*, 69 N.C. App. 477, 481, 317 S.E.2d 428, 432 (1984) (citation omitted). In order to challenge Agent Matthews's testimony on appeal, counsel for defendant should have made a special request to have Agent Matthews qualified as an expert. *See id.* In the absence of such a request, and in light of defendant's general objection to the contents of Agent Matthews's testimony, we hold that this issue has not been preserved for our review. This argument is without merit.

III. Exclusion of Evidence

[2] In his second argument, defendant contends that the trial court erred in sustaining the State's objection to defendant's cross-examination of Agent Matthews regarding a document found in decedent's car. We disagree.

At trial, defense counsel questioned Agent Matthews about a legal paper she collected from the glove box of decedent's car. The prosecutor objected and the objection was sustained. Thereafter, defense counsel again inquired as to the nature of information removed from decedent's vehicle. The prosecutor objected and the objection was again sustained.

"It is well established that an exception to the exclusion of evidence cannot be sustained where the record fails to show what the witness' testimony would have been had he been permitted to testify." *State v. Simpson*, 314 N.C. 359, 370, 334 S.E.2d 53, 60 (1985) (citations omitted).

In the instant case, at the close of the State's evidence, the trial court asked counsel for defendant whether he wanted to make an offer of proof regarding the paperwork. Defense counsel responded in the negative. The trial court offered defendant an opportunity to recall Agent Matthews for further cross-examination, and defense counsel responded, "I understand that . . . But I'm not making any proffer to the Court to show what she would have said or what the documents would say."

Defendant urges us to "assume that the legal paperwork was the warrant the Defendant had taken out against the decedent for threatening him with a gun." However, the only indication in the record concerning the substance of Agent Matthews's testimony is the State's exhibit log, which lists the paperwork found in defendant's vehicle as "miscellaneous paperwork from Ford explorer."

We hold that the record is insufficient to establish what the "essential content or substance" of Agent Matthews's testimony would have been. *See Simpson* at 371, 334 S.E.2d at 61. "Without a showing of what the excluded testimony would have been, we are unable to say that the exclusion was prejudicial." *Id.* The evidence in the record is not adequate for judicial review, and this argument is dismissed.

Defendant argues that the State's objection was not raised in a timely manner and was waived. Although defendant correctly cites the rule that "the admission of evidence without objection waives prior or subsequent objection to the admission of evidence of a similar character," *State v. Augustine*, 359 N.C. 709, 720, 616 S.E.2d 515, 525 (2005) (citations omitted), the rule is inapplicable to the facts of the instant case.

IV. Witness Testimony

[3] In his third argument, defendant contends the trial court erred when it permitted Hudson to testify about statements decedent made to her shortly before his death. We disagree.

N.C. Gen. Stat. § 8C-1, Rule 803 lists hearsay exceptions for which the availability of the declarant is immaterial. N.C. Gen. Stat. § 8C-1, Rule 803 (2007). Subsection (2) is the "Excited Utterance" exception, which is defined as "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." N.C. Gen. Stat. § 8C-1, Rule 803(2).

> In order to fall within this hearsay exception, there must be (1) a sufficiently startling experience suspending reflective thought and (2) a spontaneous reaction, not one resulting from reflection or fabrication. . . . Although the requirement of spontaneity is often measured in terms of the time lapse between the startling event and the statement, . . . the modern trend is to consider whether the delay in making the statement provided an opportunity to manufacture or fabricate the statement.

State v. Smith, 315 N.C. 76, 86-87, 337 S.E.2d 833, 841 (1985) (internal citations and quotations omitted).

The State offered testimony from Hudson that decedent told her "he had just went to his son's grandmother's house to pick up his son, and [defendant] pulled up behind him and pulled a gun on him, and he left because he don't want no trouble, and he came home." The State also offered Hudson's testimony that decedent told her that defendant followed him home and "looked at him and shook his head as if 'Yeah, I know where you live now.' " The trial court conducted a *voir dire* of Hudson, heard arguments from both parties, and determined that her testimony regarding statements made to her by decedent was admissible under Rules 803(2) and 803(3).

In the instant case, the lapse in time between the confrontation of defendant and decedent and decedent's description of the confrontation to Hudson was the time it took for decedent to drive home from his son's grandmother's house. Hudson stated that decedent had been gone only fifteen to twenty minutes. Decedent told Hudson that defendant followed him home, and this statement was made almost simultaneously with the event. The likelihood that decedent had an opportunity to deliberately misrepresent his confrontations with defendant is remote.

Further, Hudson stated that when decedent came into the house, he seemed "a little scared, maybe concerned at the same time, and maybe even a little upset at the same time." Hudson consistently described decedent as being scared, upset, and excited when he entered the house. In light of decedent's statement that defendant pulled a gun on decedent, it is reasonable that decedent was still upset when he spoke to Hudson.

We hold that decedent's statements were made sufficiently close to the event and were made while he was upset and had not had time to reflect. *See Smith* at 86-87, 337 S.E.2d at 841. These statements were admissible as an excited utterance under Rule 803(2). Accord-

ingly, we need not address whether this statement was also admissible under 803(3). This argument is without merit.

V. Hostile Witness

[4] In his fourth argument, defendant contends that the trial court erred when it allowed the State to use leading questions in the direct examination of the State's witness Tiffany Hardy. We disagree.

Leading questions may be used during the direct examination of a hostile witness. N.C. Gen. Stat. § 8C-1, Rule 611(c) (2007). "Whether to allow a leading question on direct examination clearly falls within the discretion of the trial court." *State v. York*, 347 N.C. 79, 90, 489 S.E.2d 380, 386-87 (1997) (citation omitted). A trial court will be reversed for an abuse of discretion only upon a showing that its decision was manifestly unsupported by reason. *Id.* (citations omitted).

In the instant case, Hardy testified that she had been defendant's girlfriend for eleven years, that she loved defendant, and that they had two children together. She also testified that she did not want defendant to go to jail. This testimony demonstrates Hardy's bias in favor of defendant, and thus her adversity to the State. *See State v. Dickens*, 346 N.C. 26, 44-45, 484 S.E.2d 553, 562-63 (1997).

We hold that the trial court did not abuse its discretion in allowing the State to use leading questions in its direct examination of Hardy. This argument is without merit.

[5] Defendant attempts to make an additional argument that the trial court erred in allowing the State to impeach Hardy's testimony with extrinsic evidence of a prior inconsistent statement she made to police. However, defendant neither objected at trial nor assigned error to the admission of this evidence. Thus, this argument has not been preserved for our review. *See* N.C. R. App. P. 10(b)(1); *see also State v. Purdie*, 93 N.C. App. 269, 278, 377 S.E.2d 789, 794 (1989) ("When, as here, the argument in the brief does not correspond to the assignment of error, that assignment should be deemed abandoned under Rule 28 of the Rules of Appellate Procedure."). Defendant does not argue plain error, and we hold that there is none. N.C. R. App. P. 10(c)(4).

VI. Physical Evidence

[6] In his fifth argument, defendant contends the trial court committed plain error when it allowed Elizabeth Patel, a forensic chemist

with the SBI, to testify about the presence of gunshot residue on a headrest taken from defendant's vehicle when the headrest was not admitted into evidence. We disagree.

Defendant argues that "the trial court is without authority to permit an expert witness to testify about items of physical evidence which [have] not been introduced into evidence." There is no requirement under the law of North Carolina that an item be introduced into evidence in order for an expert to testify about it. Defendant cites no authority for this argument, and we hold that it is without merit.

VII. Jury Instructions

[7] In his sixth argument, defendant contends that the trial court erred in its jury instructions on self-defense on the grounds that the instructions were ambiguous and unclear and resulted in an incongruous verdict. We disagree.

Defendant contends that the jury verdict is inconsistent in that he was acquitted of felony murder based upon the underlying felony of discharging a weapon into occupied property but was found guilty of the underlying felony. Defendant argues that this verdict "can only be explained by the jury's inability to intelligently determine the issues presented with such confusing instructions."

"It is well established in North Carolina that a jury is not required to be consistent and that incongruity alone will not invalidate a verdict." *State v. Rosser*, 54 N.C. App. 660, 661, 284 S.E.2d 130, 131 (1981) (citations omitted).

A review of the trial court's jury instructions on self-defense reveals that those instructions were detailed, thorough, and closely paralleled the applicable North Carolina Pattern Jury Instructions. Defendant makes no argument regarding the form and substance of the court's instructions, and it is clear that his actual argument is about what he perceives to be an inconsistent jury verdict, as opposed to any alleged instructional error.

We hold the trial court's jury instructions on self-defense were clear and unambiguous. The perceived inconsistency of the jury verdict does not render it invalid.

Defendant concedes that he failed to object to the trial court's jury instructions. Therefore, our review of the jury instructions is limited to plain error. N.C. R. App. P. 10(b)(1); 10(c)(4); *State v. Cummings*, 352 N.C. 600, 613, 536 S.E.2d 36, 47 (2000). Defend-

ant has failed to show error, much less plain error. This argument is without merit.

VIII. Sentencing

[8] In his final argument, defendant contends that the trial court erred in sentencing him for the offense of discharging a firearm into occupied property on the grounds that the sentence violates his constitutional protection against double jeopardy. We disagree.

"[T]he failure of a defendant to properly raise the issue of double jeopardy before the trial court precludes reliance on the defense on appeal." *State v. Thompson*, 314 N.C. 618, 621, 336 S.E.2d 78, 79-80 (1985) (citations omitted).

Defendant contends that the jury verdict acquitting him of felony murder, in which the underlying felony was discharging a firearm into occupied property, precludes his conviction of the offense of discharging a firearm into occupied property. However, defendant concedes that he failed to make a double jeopardy argument at trial. In light of defendant's failure to raise this issue at trial, we hold that the trial court did not err in entering judgments against him for discharging a firearm into occupied property. *See State v. Roope*, 130 N.C. App. 356, 362, 503 S.E.2d 118, 123 (1998).

Defendant has voluntarily abandoned his remaining assignment of error, and we do not review this issue.

NO ERROR.

Judges HUNTER and STEPHENS concur.

IN THE MATTER OF: B.L.H. AND Z.L.H., MINOR CHILDREN

No. COA07-1313-2

(Filed 6 May 2008)

1. Termination of Parental Rights— failure to allege grounds in petition—no right to amend petition

The trial court erred in a termination of parental rights case by allowing an amendment to the petition to conform to evidence presented at the hearing that grounds existed to terminate re-

spondent mother's rights under N.C.G.S. § 7B-1111(a)(2), that the children had been left in a foster care or out of home placement for a period of twelve months preceding the filing of the petitions, when such grounds were not initially alleged in the petitions because: (1) the only ground found by the trial court for terminating respondent's parental rights was under § 1111(a)(2); (2) Article 11 of Chapter 7B expressly states that the general legislative purpose of the Article is to provide judicial procedures for terminating the legal relationship between a juvenile and the biological or legal parents, and Article 11 is entirely silent on the amendment of petitions or motions in termination proceedings; (3) the only right of amendment permitted in Chapter 7B proceedings is for the amendment of a petition in juvenile, abuse, neglect or dependency proceedings, and this right is limited to when the amendment does not change the nature of the conditions upon which the petition is based; and (4) the Court of Appeals will not superimpose a right to amend a petition or motion for termination of parental rights to conform with the evidence presented at the adjudication hearing.

2. Termination of Parental Rights— grounds—sufficiency of notice

The original petition to terminate respondent mother's parental rights was not sufficient on its face to support the findings of the trial court and put respondent on notice that N.C.G.S. § 7B-1111(a)(2), that the children had been left in a foster care or out of home placement for a period of twelve months preceding the filing of the petitions, was a possible ground for terminating her parental rights, and the order is reversed because: (1) the petitions clearly alleged that petitioner obtained nonsecure custody of both minor children on 10 March 2006, and at the time the petitions were filed on 30 January 2007 and 5 February 2007, the minor children had not been in foster care or placement outside the home for more than twelve months; (2) given the filing dates of the petitions, respondent was assured that N.C.G.S. § 7B-1111(a)(2) was not a possible ground for terminating her parental rights absent the filing of amended petitions; and (3) the trial court found no other grounds existed for the termination of respondent's parental rights.

Judge STEELMAN dissenting.

IN RE B.L.H. & Z.L.H.

[190 N.C. App. 142 (2008)]

Appeal by respondent from orders entered 25 July 2007 by Judge Marvin P. Pope, Jr. in Buncombe County District Court. Originally heard in the Court of Appeals 18 February 2008. An opinion vacating the order of the trial court was filed by this Court on 4 March 2008. Petition for Rehearing by Cumberland County Department of Social Services was filed on 24 March 2008, granted on 26 March 2008, and heard without additional briefs or oral argument. This opinion supersedes the previous opinion filed on 4 March 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"). Respondent is the biological mother of the minor children. The biological fathers of B.L.H. and Z.L.H. are unknown and respondent indicated she does not know the identity of the biological fathers. Although the legal father of Z.L.H. was identified, DNA testing confirmed that he was not the biological father.

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. Petitioner specifically alleged as grounds for terminating respondent's parental rights to B.L.H. and Z.L.H. that:

> Pursuant to N.C.G.S. § 7B-1111(a)(1), the respondent mother has neglected the minor [children] . . . [and that t]here is a high risk of repetition of neglect if the [minor children are] returned to the care and custody of the respondent mother . . . .
>
> Pursuant to N.C.G.S. § 7B-1111(a)(3), the minor [children have] been in the custody of the Department and in an out-of-home or foster-care placement for a continuous period of more than six months preceding the filing of this petition and, during this time, the respondent mother has willfully failed to pay a reasonable portion of the cost of care for the minor [children], although the respondent mother is able-bodied and capable of full time employment. . . .

Respondent and the minor children were timely served copies of the summonses and petitions to terminate her parental rights to the minor children. Petitioner accomplished service by publication for the unknown fathers.

The petitions were heard on 16 May 2007 and 4 June 2007. At the adjudication hearing, petitioner's first witness was Andrea Biffle, the social worker supervising the minor children's foster care. Ms. Biffle testified to the history of the custody and placement of the minor children from 25 August 2005, when petitioner first became involved with the children, to 10 March 2006, when petitioner first assumed custody over the minor children. Petitioner then moved to amend the petitions to conform to the evidence presented to include an allegation that grounds existed to terminate respondent's parental rights under N.C.G.S. § 1111(a)(2), arguing the children had been left in a foster care or out of home placement for a period of twelve months preceding the filing of the petitions. Defendant objected, arguing she received no notice of the allegation and that such an amendment was a substantial change to the petitions requiring additional time to prepare a defense. The trial court overruled defendant's objection and allowed the amendment.

On 25 July 2007, the trial court entered separate orders terminating respondent's parental rights to B.L.H. and Z.L.H. The only ground found by the trial court for terminating respondent's parental rights to the minor children was under N.C.G.S. § 1111(a)(2). Respondent appeals.

I. Amendment of Petition

[1] Respondent argues the trial court erred in finding and concluding that grounds existed to terminate respondent's parental rights under N.C.G.S. § 1111(a)(2) when such grounds were not alleged in the petitions. Respondent contends the trial court erred in permitting petitioner to amend its petitions to conform to the evidence presented at the adjudication hearing to add N.C.G.S. § 1111(a)(2) as an alleged ground of termination. Petitioner's response is that the trial court correctly allowed the petitions to be amended under Rule 15(b) of the North Carolina Rules of Civil Procedure. We disagree.

This Court has held that the North Carolina Rules of Civil Procedure do "not provide parties in termination actions with procedural rights not explicitly granted by the juvenile code." *In re S.D.W. & H.E.W.*, 187 N.C. App. 416, 421, 653 S.E.2d 429, 432 (2007) (citing *In re Jurga*, 123 N.C. App. 91, 472 S.E.2d 223 (1996)) (holding

that parents could not execute a "Declaration of Voluntary Termination of Parental Rights" because the juvenile code did not provide procedures for this type of unilateral declaration); *In re Curtis v. Curtis*, 104 N.C. App. 625, 410 S.E.2d 917 (1991) (reversing the trial court's grant of summary judgment for the petitioner on the issue of whether the respondent had abused his daughter, because the termination procedures set out in the juvenile code required an adjudication hearing on this issue and did not authorize a summary procedure based on N.C. Gen. Stat. § 1A-1, Rule 56); *see also In re D.S.C.*, 168 N.C. App. 168, 173, 607 S.E.2d 43, 47 (2005) (our case law has "declined to judicially impute procedural rights to parties which are not otherwise authorized by the termination statute"); *In re Peirce*, 53 N.C. App. 373, 281 S.E.2d 198 (1981) (holding that a respondent in a termination of parental rights proceeding may not file a counterclaim).

The Rules of Civil Procedure will, however, apply to fill procedural gaps where Chapter 7B requires, but does not identify, a specific procedure to be used in termination cases. *In re S.D.W. & H.E.W.*, 187 N.C. App. at 421, 653 S.E.2d at 432; *see also In re McKinney*, 158 N.C. App. 441, 443, 581 S.E.2d 793, 795 (2003) (applying the Rules of Civil Procedure to determine whether the contents of a motion filed to terminate the respondent's parental rights were sufficient to confer subject matter jurisdiction on the trial court); *In re Triscari Children*, 109 N.C. App. 285, 426 S.E.2d 435 (1993) (holding the requirements for verification established in Chapter 1A, Rule 11(b) should determine whether a petition for the termination of a respondent's parental rights has been properly verified).

Article 11 of Chapter 7B expressly states that the general legislative purpose of the Article "is to provide judicial procedures for terminating the legal relationship between a juvenile and the juvenile's biological or legal parents[.]" N.C. Gen. Stat. § 7B-1100(1) (2007). Article 11 is entirely silent on the amendment of petitions or motions in termination proceedings. The only right of amendment permitted in Chapter 7B proceedings is for the amendment of a petition in juvenile, abuse, neglect or dependency proceedings, and this right is limited to "when the amendment does not change the nature of the conditions upon which the petition is based." N.C. Gen. Stat. § 7B-800 (2007). Accordingly, we will not superimpose a right to amend a petition or motion for termination of parental rights to conform with the evidence presented at the adjudication hearing and the trial court erred by allowing the amendment. *See Peirce*, 53 N.C. App. at 380, 281

S.E.2d at 203 (holding "the legislative intent was that G.S., Chap. 7A, Art. 24B, [now Article 11 of Chapter 7B] exclusively control the procedure to be followed in the termination of parental rights.").

II. Notice of Grounds for Termination

[2] Since the trial court erred in permitting the amendment of the petitions to conform to the evidence presented at the adjudication hearing, we must further determine whether the petitions were sufficient on their face to support the findings of the trial court. A petition for termination of parental rights must allege "[f]acts that are sufficient to warrant a determination that one or more of the grounds for terminating parental rights [listed in N.C.G.S. § 7B-1111] exist." N.C. Gen. Stat. § 7B-1104(6) (2007). "While there is no requirement that the factual allegations [in a petition for termination of parental rights] be exhaustive or extensive, they must put a party on notice as to what acts, omissions, or conditions are at issue." *In re Hardesty*, 150 N.C. App. 380, 384, 563 S.E.2d 79, 82 (2002). Where the factual allegations in a petition to terminate parental rights do not refer to a specific statutory ground for termination, the trial court may find any ground for termination under N.C.G.S. § 7B-1111 as long as the factual allegations in the petition give the respondent sufficient notice of the ground. *In re A.H.*, 183 N.C. App. 609, 644 S.E.2d 635 (2007); *In re Humphrey*, 156 N.C. App. 533, 577 S.E.2d 421 (2003). However, where a respondent lacks notice of a possible ground for termination, it is error for the trial court to conclude such a ground exists. *In re C.W. & J.W.*, 182 N.C. App. 214, 228-29, 641 S.E.2d 725, 735 (2007); *Hardesty*, 150 N.C. App. at 384, 563 S.E.2d at 82.

Here, the petitions clearly alleged that petitioner obtained nonsecure custody of both minor children on 10 March 2006. However, at the time the petitions were filed on 30 January 2007 and 5 February 2007, the minor children had not been in foster care or placement outside the home for more than twelve months. While the requisite time period had elapsed before the adjudication hearing on 16 May 2007, this Court has held that

> [u]nder N.C.G.S. § 7B-1111(a)(2), the twelve-month period begins when a child is left in foster care or placement outside the home pursuant to a court order, and ends when the motion or petition for termination of parental rights is filed. Where the twelve-month threshold does not expire before the motion or petition is filed, a termination on the basis of N.C.G.S. § 7B-1111(a)(2) cannot be sustained.

In re J.G.B., 177 N.C. App. 375, 383, 628 S.E.2d 450, 456 (2006) (citing *In re A.C.F.*, 176 N.C. App. 520, 527-28, 626 S.E.2d 729, 735 (2006)). Thus, the petitions, as originally filed in this case, did not put respondent on notice that N.C.G.S. § 7B-1111(a)(2) was a possible ground for terminating her parental rights to the minor children. Moreover, given our previous holdings and the filing dates of the petitions at issue, respondent was assured that N.C.G.S. § 7B-1111(a)(2) could not be used as grounds to terminate her parental rights to the minor children absent the filing of amended petitions. The trial court erred in finding grounds existed to terminate respondent's parental rights to the minor children under N.C.G.S. § 7B-1111(a)(2). Since the trial court found no other grounds existed for the termination of respondent's parental rights to her minor children, B.L.H. and Z.L.H., we reverse the order of the trial court.

Reversed.

Judge STEPHENS concurs.

Judge STEELMAN dissents with a separate opinion.

STEELMAN, Judge, dissenting.

I must respectfully dissent from the majority. I would hold that, because Chapter 7B is silent on the matter, Rule 15 of the North Carolina Rules of Civil Procedure permits the amendment of the petition in conformity with the evidence.

I. Additional Facts

The hearing of this matter was conducted on two separate days, 16 May 2007 and 4 June 2007. The first witness for the Department of Social Services ("DSS") was Andrea Biffle, a social worker employed by DSS. During Ms. Biffle's testimony, DSS moved to amend its pleadings to conform to the evidence and add an additional grounds for termination: that the parents had willfully left the juveniles in foster care for more than 12 months without showing reasonable progress under N.C. Gen. Stat. § 7B-1111(a)(2). The guardian *ad litem* had no objection. Counsel for respondent mother objected, contending that it was a substantial change in the petition, with no prior notice, and that she needed time to prepare a defense. There was no objection to the testimony upon which the motion to amend was based as being outside the issues raised by the pleadings. The trial court allowed the amendment.

On 16 May 2007, DSS presented five witnesses, and respondent mother presented one witness. When the hearing resumed on 4 June 2007, respondent mother presented the testimony of two additional witnesses, and DSS presented four witnesses in rebuttal. At no time during the balance of the first day of hearings or during the entire second day of hearings did respondent mother argue or contend that she had insufficient time to prepare to meet the new allegations made under N.C. Gen. Stat. § 1111(a)(2).

II. Analysis

It is clear that, when there are procedures set forth in Chapter 7B governing termination of parental rights proceedings, those procedures must control over those set forth in the North Carolina Rules of Civil Procedure. *In re S.D.W. & H.E.W.*, 187 N.C. App. 416, 419, 653 S.E.2d 429, 431 (2007) (recognizing that "where the juvenile code sets forth specific procedures governing termination actions, those procedures apply to the exclusion of the Rules of Civil Procedure.") However, because "a termination of parental rights proceeding is civil in nature, it is governed by the Rules of Civil Procedure, unless otherwise provided." *In re McKinney*, 158 N.C. App. 441, 445, 581 S.E.2d 793, 796 (2003) (citations and internal quotations omitted); *see also S.D.W. & H.E.W.*, 187 N.C. App. at 422-23, 653 S.E.2d at 432 (stating that "where the juvenile code does not identify a specific procedure to be used in termination cases, the Rules of Civil Procedure will fill the procedural gaps that Article 11 [of Chapter 7B] leaves open.").

Chapter 7B is devoid of any provision dealing with the amendment of pleadings in termination of parental rights proceedings. Clearly, there must be a mechanism for the amendment of pleadings. Otherwise, petitioner would be required to dismiss and refile to correct pleading defects, a procedure that would only serve to needlessly delay these time-sensitive cases. *See* N.C. Gen. Stat. § 7B-1100(2) (2007) (recognizing the necessity of permanency for juveniles at the earliest possible age). I would hold, in the absence of provisions in Chapter 7B dealing with amendment of pleadings in termination proceedings, that Rule 15 of the North Carolina Rules of Civil Procedure controls.

Subsection (b) of Rule 15 governs amendments to conform with the evidence. The first sentence of this section provides that when issues not raised in the pleadings are tried by the express or implied consent of the parties, then they are to be treated as being raised in the pleadings. N.C. Gen. Stat. § 1A-1, Rule 15(b) (2007).

> [W]here no objection is made to evidence on the ground that it is outside the issues raised by the pleadings, the issue raised by the evidence is nevertheless before the trial court for determination. The pleadings are regarded as amended to conform to the proof even though the defaulting pleader made no formal motion to amend.

Mangum v. Surles, 281 N.C. 91, 98, 187 S.E.2d 697, 701-02 (1972). The Supreme Court went on to hold that "amendments should always be freely allowed unless some material prejudice is demonstrated[.]" *Id.* at 98-99, 187 S.E.2d at 702.

In the instant case, respondent mother failed to object that the testimony was outside the pleadings. She fails to assert material prejudice in her brief. Indeed the record shows there to be none. The conforming amendment took place during the first witness on the first day of the hearings. The trial was not concluded until nearly three weeks later. Respondent mother had that period of time in which to prepare a response to the amended allegation, and at no time during the 7 June hearing did respondent assert that more time was needed.

Because there was no material prejudice and Chapter 7B does not address the matter of amending pleadings in a termination proceeding, I respectfully dissent.

VERNETTA MARIE COCKERHAM-ELLERBEE, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF CANDICE COCKERHAM, PLAINTIFF v. THE TOWN OF JONESVILLE, D/B/A THE JONESVILLE POLICE DEPARTMENT, SCOTT VESTAL AND LEE GWYN, DEFENDANTS

No. COA07-1161

(Filed 6 May 2008)

Police Officers; Damages and Remedies— negligence—public duty doctrine—special duty exception—punitive damages

In an action against a town and two town police officers under the special duty exception to the public duty doctrine to recover for the wrongful death of plaintiff's daughter who was murdered by plaintiff's estranged husband, plaintiff's forecast of evidence was sufficient to establish a genuine issue of material fact as to whether defendants' conduct was willful or wanton so

as to preclude the entry of summary judgment for defendants on the issue of punitive damages where it showed that defendants failed to enforce a domestic violence protective order plaintiff had against her estranged husband; defendant officers knew that the husband had acted violently against plaintiff in the past, that he continued to make threats against her and her children, and that she was actively seeking enforcement of the order against him; plaintiff pointed out her estranged husband to the officers while he was violating the protective order; the officers responded by promising to arrest the husband and leaving; and the officers failed to arrest the husband as promised and therefore placed plaintiff and her children in extreme danger.

Appeal by plaintiff from order entered 23 May 2007 by Judge Michael E. Helms in Superior Court, Yadkin County. Heard in the Court of Appeals 1 April 2008.

Kennedy, Kennedy, Kennedy and Kennedy, LLP, by Harvey L. Kennedy and Harold L. Kennedy, III, for plaintiff-appellant.

Frazier, Hill & Fury RLLP, by William L. Hill and Torin L. Fury, for defendants-appellees.

WYNN, Judge.

To make out a claim for punitive damages, a plaintiff must prove by clear and convincing evidence that the defendant is liable for compensatory damages and that the conduct causing the plaintiff's injury was accompanied by fraud, malice, or willful or wanton conduct, defined as "the conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably likely to result in injury, damage, or other harm."[1] Here, because we find that the plaintiff has forecast evidence sufficient to show that a genuine issue of material fact remains as to whether the defendants' conduct was willful or wanton, we reverse the trial court's order of summary judgment for defendants.

On 18 November 2004, Plaintiff Vernetta Marie Cockerham-Ellerbee filed a complaint against the Town of Jonesville, specifically the Jonesville Police Department, and Jonesville police officers Scott Vestal and Lee Gwynn in their official capacities (collectively, "Defendants"), instituting a wrongful death action. The case stemmed

1. N.C. Gen. Stat. §§ 1D-5(7), 15(a) (2005).

from the murder of Ms. Cockerham-Ellerbee's daughter Candice, committed by Richard Ellerbee, Ms. Cockerham-Ellerbee's estranged husband. Ms. Cockerham-Ellerbee alleges that Defendants negligently failed to enforce a domestic violence protective order that she had against Mr. Ellerbee, as well as failed to arrest Mr. Ellerbee for violations of the order, failed to warn her or her children that they had not arrested Mr. Ellerbee, failed to provide protection to her and her children, and failed to act with due care or in a reasonably prudent manner in light of all the circumstances. She seeks compensatory and punitive damages in her complaint.

Defendants filed a motion to dismiss Ms. Cockerham-Ellerbee's entire cause of action, which was denied by the trial court on 2 March 2005. This Court affirmed the denial of the motion to dismiss in an opinion filed 7 March 2006; that opinion, located at *Cockerham-Ellerbee v. Town of Jonesville*, 176 N.C. App. 372, 626 S.E.2d 685 (2006), offers an excellent overview of the relevant facts of the case. Most significantly, this Court held that the allegations in Ms. Cockerham-Ellerbee's complaint "are sufficient to state a claim falling under the special duty exception to the public duty doctrine." *Id.* at 379, 626 S.E.2d at 690.

Defendants then filed a motion for summary judgment, arguing that (1) Ms. Cockerham-Ellerbee could not establish "reasonable reliance" upon any "special promise" made or "special duty" created by Defendants; (2) Ms. Cockerham-Ellerbee was contributorily negligent as a matter of law; and (3) Ms. Cockerham-Ellerbee was not entitled to punitive damages against any of Defendants as a matter of law. On 23 May 2007, the trial court denied Defendants' motion for summary judgment as to their first two arguments but granted them summary judgment as to Ms. Cockerham-Ellerbee's claim for punitive damages.

Ms. Cockerham-Ellerbee appeals, arguing that a genuine issue of material fact remains as to whether Defendants' conduct was willful or wanton, such that punitive damages could be awarded under statutory law. We agree.

Our standard of review of the grant of a motion for summary judgment is well established. Summary judgment is properly granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c)

(2005). In conducting this review, we consider the evidence in the light most favorable to the non-moving party. *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998).

Under section 1D-15 of the North Carolina General Statutes, "[p]unitive damages may be awarded only if the claimant proves that the defendant is liable for compensatory damages and that one of the following aggravating factors was present and was related to the injury[,]" namely, fraud, malice, or willful or wanton conduct. N.C. Gen. Stat. § 1D-15(a). "Willful or wanton conduct" is defined as "the conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably likely to result in injury, damage, or other harm." *Id.* § 1D-5(7). Further, such conduct "means more than gross negligence," *id.*, and must be proved by "clear and convincing evidence." *Id.* § 1D-15(b).

Prior to the creation of section 1D, governing punitive damages, the Supreme Court of North Carolina noted:

> The purpose of punitive damages . . . is two-fold: to punish the wrongdoing of the defendant and to deter others from engaging in similar conduct. The tort in question must be accompanied by additional aggravating or outrageous conduct in order to justify the award of punitive damages. To constitute outrageous behavior, there must exist evidence of "insult, indignity, malice, oppression or bad motive." Actual ill will or vindictiveness of purpose is not as a rule required[.]

Rogers v. T.J.X. Cos., 329 N.C. 226, 230, 404 S.E.2d 664, 666 (1991) (internal citations and quotation omitted). The Supreme Court has also explained that "[c]onduct is wanton when in conscious and intentional disregard of and indifference to the rights and safety of others." *Hinson v. Dawson*, 244 N.C. 23, 28, 92 S.E.2d 393, 397 (1956). More recently, this Court has stated that a wanton act is one "done with a wicked purpose or . . . done needlessly, manifesting a reckless indifference to the rights of others," and an act is willful "when there is a deliberate purpose not to discharge a duty, assumed by contract or imposed by law, necessary for the safety of the person or property of another." *Benton v. Hillcrest Foods, Inc.*, 136 N.C. App. 42, 51, 524 S.E.2d 53, 60 (1999) (quotation and citations omitted).

In Ms. Cockerham-Ellerbee's amended complaint, she states the following:

> That the facts alleged above constitute actions by the Defendants which were willful, wanton, reckless and in total disregard of the rights of Candice Cockerham. That the Defendants were substantially aware of the probable consequences of their conduct. That the Defendants, Scott Vestal and Lee Gwyn, as police officers for the Town of Jonesville, participated in the willful and wanton conduct described above. That at the time of said willful and wanton conduct, Scott Vestal and Lee Gwyn held jobs which were tantamount to managerial positions. In addition, the Town of Jonesville condoned the willful and wanton conduct of Scott Vestal and Lee Gwyn, by failing to terminate them and by subsequently promoting them to higher ranking positions after it knew of their willful and wanton conduct.

In her brief to this Court, Ms. Cockerham-Ellerbee outlines "eight (8) separate incidents or events . . . which tend to establish the conscious and intentional disregard of and indifference to the rights and safety of Vernetta Marie Cockerham-Ellerbee and her family by the Defendants." Each of the incidents that she describes was included in either her original complaint against Defendants or in her amended affidavit, filed in response to Defendants' motion for summary judgment.[2]

The trial court's order granting summary judgment to the defendants on Ms. Cockerham-Ellerbee's claim for punitive damages does not specify the basis for its ruling. However, at the hearing, after informing the parties that the trial court was denying the motion for summary judgment as to Ms. Cockerham-Ellerbee's negligence claims, the trial court declared that it planned to dismiss the punitive damages, as "[t]here is absolutely no evidence I have heard of willful or wanton[.]" Later, the trial court inquired:

> Intentional? Do you have any evidence that would support a contention—any evidence—not just the contention written on your complaint or in your prayer for relief, but any evidence supporting your contention that, for example, Officer So-and-So was a drinking buddy with him, and when he found him, whatever, he said, "Now, don't go back around there, and I won't take you in," or something like that? Some intentional conduct on

2. Also included as an exhibit to the record on appeal is Defendants' motion to strike this amended affidavit and for appropriate sanctions. However, the record does not contain a ruling on that motion to strike or any indication that the trial court did not consider the content of the affidavit when issuing its summary judgment order.

> their part that caused them not to follow through with their alleged promise?
>
> Is there any evidence? I mean, I know you contend it, but there ought to be some evidence to support it to get—to go farther with it.

Thus, it seems clear that the basis of the trial court's order was that there was no remaining genuine issue of material fact as to the willful and wanton conduct by Defendants necessary to sustain Ms. Cockerham-Ellerbee's claim for punitive damages.[3]

However, we find that the trial court's remarks, particularly those that Ms. Cockerham-Ellerbee had failed to forecast any evidence of "intentional conduct on [the officers'] part that caused them not to follow through with their alleged promise[,]" reflect a misapprehension of the law of punitive damages. To survive a motion for summary judgment, Ms. Cockerham-Ellerbee does not need to allege facts that show the type of intentional, malicious, or vindictive conduct on the part of Defendants described by the trial court. Rather, her claim for punitive damages need only allege facts that would support a finding of willful or wanton conduct, actions that reflect a "conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably likely to result in injury, damage, or other harm." N.C. Gen. Stat. § 1D-5(7).

The eight incidents described by Ms. Cockerham-Ellerbee in her original complaint and amended affidavit include the following: (1) on 13 November 2002, Ms. Cockerham-Ellerbee obtained a domestic violence protective order against Mr. Ellerbee, which she provided to the defendants on 18 November 2002 and a copy of which was also issued to the Jonesville Police Department by operation of law; (2) Ms. Cockerham-Ellerbee reported to the police on 14 November 2002 that Mr. Ellerbee had broken into her home and threatened her life; (3) on 16 November 2002, Mr. Ellerbee told Ms. Cockerham-Ellerbee

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3. In her motion requesting oral argument before this Court, Ms. Cockerham-Ellerbee asserts that "[t]his Court has not dealt with the issue of punitive damages as it relates to the conduct of police officers regarding domestic violence since the inception of the punitive damages statute in 1995." Nevertheless, that question was not argued by the parties at the trial level; although Ms. Cockerham-Ellerbee's attorney discussed one case, *Jackson v. Housing Authority of High Point*, 316 N.C. 259, 341 S.E.2d 523 (1986), to support his position that punitive damages could be awarded, the trial court did not dispute that assertion, and the defendants have made no argument to the contrary in their brief. We therefore decline to discuss the matter.

that he had dug graves for her and her children and planned to kill them; she reported the threats to police; (4) in response to the threats, the Chief of the Jonesville Police Department told Ms. Cockerham-Ellerbee that he would place the department on "high alert" and inform the officers to be on the lookout for Mr. Ellerbee so that he could be arrested; (5) on 18 November 2002, Mr. Ellerbee went to the daycare of Ms. Cockerham-Ellerbee's youngest son and, while there, threatened her daughter; Ms. Cockerham-Ellerbee reported these incidents to Officer Vestal and had a magistrate swear out an arrest warrant for Mr. Ellerbee, a copy of which she took to the police department, along with information as to Mr. Ellerbee's home and work locations; (6) also on 18 November 2002, Mr. Ellerbee began following Ms. Cockerham-Ellerbee in his car; she informed Officer Vestal of the stalking in person, while Mr. Ellerbee was immediately behind her; Officer Vestal told her that he would "get" Mr. Ellerbee; (7) while Ms. Cockerham-Ellerbee was meeting with Officer Vestal and Detective Gwyn at 5:00 p.m. on 18 November 2002 at her father's house, Mr. Ellerbee drove by, and the police officers told Ms. Cockerham-Ellerbee and her daughter that they "would no longer have to worry about [their] safety and that they were going to go and arrest Richard Ellerbee right then" before getting into their cars and pursuing Mr. Ellerbee with their blue lights flashing; (8) Ms. Cockerham-Ellerbee and her daughter relied upon the promise of protection by the defendants, who did not notify them that they had failed to arrest Mr. Ellerbee.

Taken together—and viewed in the light most favorable to Ms. Cockerham-Ellerbee, the non-moving party—this evidence is sufficient to allow a jury to decide that Defendants acted "recklessly, manifesting a reckless indifference to the rights of" Ms. Cockerham-Ellerbee and her daughter, *see Benton*, 136 N.C. App. at 51, 524 S.E.2d at 60, and that they acted with "indifference to the rights and safety of others, which the defendant[s] [knew or should have known was] reasonably likely to result in injury, damage, or other harm." N.C. Gen. Stat. § 1D-5(7). Defendants knew that Mr. Ellerbee had acted violently against Ms. Cockerham-Ellerbee in the past, that he continued to make threats against her, that she had an enforceable domestic violence protection order against him, and that she was actively seeking its enforcement against him.

According to Ms. Cockerham-Ellerbee, she gave the police Mr. Ellerbee's home and work addresses and also pointed him out to Officer Vestal and Detective Gwyn while he was in the middle of vio-

lating the terms of the protective order. She further forecast evidence that the officers responded by promising to arrest him and then leaving. That alleged promise gave Ms. Cockerham-Ellerbee and her children a sense of security that they would be safe; failing to act on that promise unquestionably placed them in extreme danger—danger of which the police had been made aware—and reflected a reckless disregard for their rights.

The bulk of Defendants' brief to this Court goes to the weight and credibility of Ms. Cockerham-Ellerbee's evidence of willful or wanton conduct; they assert that she has failed to present "clear and convincing" evidence of such conduct. However, such questions are for a jury, not for this Court. Moreover, the facts of the cases cited by Defendants in their brief make them inapposite to the case at hand; in both *Benton*, 136 N.C. App. 42, 524 S.E.2d 53, and *Wesley v. Greyhound Lines, Inc.*, 47 N.C. App. 680, 268 S.E.2d 855, *disc. review denied*, 301 N.C. 239, 283 S.E.2d 136 (1980), *overruled on other grounds*, *Johnson v. Ruark Obstetrics & Gynecology Assocs., P.A.*, 327 N.C. 283, 395 S.E.2d 85, *reh'g denied*, 327 N.C. 644, 399 S.E.2d 133 (1990), the defendants were found not to be liable for failing to take security measures to protect the plaintiff from the actions of a third party. Nevertheless, neither of those cases involved a legal finding that the plaintiff had "state[d] a claim falling under the special duty exception to the public duty doctrine." *Cockerham-Ellerbee*, 176 N.C. App. at 379, 626 S.E.2d at 690. Moreover, neither contained factual allegations that the defendants had explicitly promised, but failed, to provide such security, or that they had ongoing interactions with the plaintiff and explicit knowledge of the danger posed by the specific third party.

According to the law, Ms. Cockerham-Ellerbee has alleged facts that would constitute willful or wanton conduct if true. Defendants dispute her account of events, showing that a genuine issue of material fact remains as to Defendants' conduct. As such, the trial court erred in granting summary judgment to Defendants on Ms. Cockerham-Ellerbee's claim for punitive damages.

Reversed.

Judges BRYANT and JACKSON concur.

STATE OF NORTH CAROLINA v. ROCKY LEE DEWALT

No. COA07-196

(Filed 6 May 2008)

1. **Appeal and Error; Confessions and Incriminating Statements— preservation of issues—Miranda warnings—failure to argue at trial—waiver**

   The trial court did not err in a multiple drug offenses and communicating threats case by denying defendant's motion to suppress incriminating statements obtained by the State even though defendant contends he was not given each of the four warnings required by Miranda because: (1) the trial court was presented with sufficient evidence including testimony from the pertinent detective and a lieutenant that the detective gave defendant Miranda warnings before questioning him; (2) although defendant initially asserted at trial that he was not informed of his Miranda rights prior to being questioned by a detective, he now argues a different rationale on appeal than he did at trial regarding the adequacy of the warnings; (3) even alleged errors arising under the United States Constitution are waived if defendant does not raise them at trial; and (4) defendant did not allege the trial court committed plain error.

2. **Confessions and Incriminating Statements— custodial interrogation—knowing and voluntary waiver of rights**

   The trial court did not err in a multiple drug offenses and communicating threats case as a matter of law by admitting inculpatory statements defendant made to a detective, and any error present in the court's conclusion that defendant was not in custody was harmless beyond a reasonable doubt, because there was sufficient evidence that defendant was informed of his constitutional rights in accordance with Miranda prior to questioning and that defendant subsequently provided a knowing and voluntary waiver of those rights.

Appeal by defendant from judgments entered 23 August 2006 by Judge John O. Craig, III, in Yadkin County Superior Court. Heard in the Court of Appeals 29 October 2007.

Attorney General Roy Cooper, by Assistant Attorney General Meredith Jo Alcoke, for the State.

Glenn, Mills & Fisher, P.A., by Carlos E. Mahoney, for defendant appellant.

McCULLOUGH, Judge.

Defendant appeals from judgments entered after a jury verdict of guilty of trafficking in cocaine by possession; possession with intent to manufacture, sell, or deliver cocaine; possession of marijuana less than one-half ounce; and two counts of communicating threats. We determine there was no prejudicial error.

FACTS

While on patrol on 10 January 2006, North Carolina State Trooper Eddie Michael Stone observed a white Jeep Cherokee swerve over the center line while driving south on U.S. 421. Trooper Stone then pulled the vehicle over and issued a warning citation to the driver, Rita Ashburn. The other passengers in the Jeep were J.T. Harris, Kenny Thompson, Rocky Dewalt ("defendant"), and defendant's two-year-old child. Trooper Stone subsequently contacted Detective Eric Ronald Ball with the Yadkin County Sheriff's Office, who arrived approximately five minutes later. Lieutenant Richard Nixon arrived shortly thereafter.

Upon arrival, Detective Ball instructed defendant to exit the vehicle and searched him for weapons. As defendant exited the vehicle, Detective Ball observed a small popcorn bag on the floor of the vehicle between defendant's feet. Inside of the popcorn bag was a second bag containing marijuana and 46.8 grams of crack cocaine.

After discovering the controlled substances, Detective Ball handcuffed defendant and put him in the backseat of Lieutenant Nixon's patrol car. Detective Ball then finished his search of the vehicle. When he completed his search, Detective Ball returned to the patrol car, told defendant he was under arrest, and informed defendant of his *Miranda* rights. Detective Ball then asked defendant who owned the drugs found in the vehicle. In response, defendant stated that all of the "dope" belonged to him. Detective Ball then transported defendant to the sheriff's office. During the proceedings that followed, defendant threatened the lives of both Trooper Stone and Detective Ball.

On 23 August 2006, defendant was convicted of trafficking in cocaine by possession, possession with intent to manufacture, sell or deliver cocaine, possession of marijuana less than one-half ounce, and two counts of communicating threats by a jury in Yadkin County Superior Court before Judge John O. Craig, III. Defendant gave notice of appeal on 23 August 2006.

I.

Defendant argues the trial court erred by denying defendant's motion to suppress incriminating statements obtained by the State. We disagree.

In reviewing a trial court's ruling on a motion to suppress, the trial court's findings of fact are conclusive if supported by competent evidence. *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001). However, determinations by the trial court of whether a custodial interrogation was conducted, whether defendant made inculpatory statements voluntarily in response to such interrogation, and whether such statements are admissible at trial are conclusions of law, and thus fully reviewable on appeal. *State v. Smith*, 180 N.C. App. 86, 97, 636 S.E.2d 267, 274 (2006); *Buchanan*, 353 N.C. at 336, 543 S.E.2d at 826. " '[T]he trial court's conclusions of law must be legally correct, reflecting a correct application of applicable legal principles to the facts found.' " *State v. Golphin*, 352 N.C. 364, 409, 533 S.E.2d 168, 201 (2000) (quoting *State v. Fernandez*, 346 N.C. 1, 11, 484 S.E.2d 350, 357 (1997)), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001).

A custodial interrogation refers to "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda v. Arizona*, 384 U.S. 436, 444, 16 L. Ed. 2d 694, 706 (1966); *see State v. Young*, 186 N.C. App. 343, 347, 651 S.E.2d 576, 579-80 (2007). "For Fifth Amendment purposes, included within the meaning of 'questioning' are any actions that police 'should know are reasonably likely to elicit an incriminating response from a suspect.' " *State v. Morrell*, 108 N.C. App. 465, 470, 424 S.E.2d 147, 150, *appeal dismissed*, *cert. denied*, *disc. review denied*, 333 N.C. 465, 427 S.E.2d 626 (1993) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301, 64 L. Ed. 2d 297, 308 (1980)). In a criminal trial, "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege

against self-incrimination" provided by the Fifth Amendment to the United States Constitution. *Miranda*, 384 U.S. at 444, 16 L. Ed. 2d at 706. Before a defendant is questioned, and absent the implementation of other fully effective means,

> [h]e must be warned . . . that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation.

Id. at 479, 16 L. Ed. 2d at 726. Following these warnings, the suspect may waive effectuation of his rights, so long as the waiver is made "voluntarily, knowingly and intelligently." *Id.* at 444, 16 L. Ed. 2d at 707. If law enforcement officers fail to advise a suspect of his rights, any statements made by the suspect in response to custodial interrogation will be deemed inadmissible. *Morrell*, 108 N.C. App. at 470, 424 S.E.2d at 151.

In the case *sub judice*, defendant was arrested after Detective Ball found drugs in a bag near defendant's feet. After being frisked and handcuffed, defendant was placed in a patrol car while the police continued to search for drugs. Once the search was completed, Detective Ball arrested defendant and asked him to identify the owner of the drugs. In response, defendant informed Detective Ball that the drugs belonged to him. At trial, defense counsel objected to the introduction of defendant's inculpatory statements and moved that they be suppressed. In his motion, defendant asserted that he was not informed of his rights, in accordance with *Miranda v. Arizona*, prior to being questioned by Detective Ball. As this questioning amounted to custodial interrogation, defendant argued his inculpatory responses were inadmissible under *Miranda* and should be suppressed.

Before ruling on defendant's motion, the trial court conducted a hearing outside of the presence of the jury to determine whether defendant's inculpatory statements were admissible. During this hearing, Detective Ball testified that, after he finished searching the Jeep for drugs, he returned to the patrol car and read defendant his *Miranda* rights. Detective Ball's testimony was supported by Lieutenant Nixon, who testified he clearly heard Detective Ball inform defendant of his *Miranda* rights. According to Detective Ball's testimony, after receiving the *Miranda* warnings, defendant indicated

that he did not want a lawyer. Detective Ball then began to question him. When asked to whom the drugs belonged, defendant responded that all of the drugs belonged to him. Detective Ball further testified that he was unable to obtain a written waiver from defendant because he did not carry the waivers with him on patrol. After considering the evidence, the trial court denied defendant's motion to suppress, holding:

> So I will hereby find, based upon—well, let me first note that although the defendant did not testify in the voir dire hearing, he did submit a sworn affidavit which the Court has considered in this matter in which he states that on January the 10th, 2006, he was placed in custody by the sheriff's department without first being advised of his constitutional rights, was interrogated by Deputy Ball and gave certain statements which may tend to incriminate him in the charges. The Court finds that based upon the testimony of Detective Ball and of Lieutenant Nixon that the defendant was, in fact, handcuffed and therefore was in custody and that based upon the statements of these two individuals and their testimony he was read his Miranda rights.
>
> And the Court, based upon the experience of these sheriff's deputies, will find that when they say he was Mirandized, the Court finds that he was fully Mirandized and advised of his right to remain silent and his right to have an attorney present when he is questioned or when he makes any sort of statement.
>
> The Court also finds that it was not an interrogation as might come under the normal definition or construction of that word. It was more of a question asked. It was not like he was—the term interrogation usually implies a lengthy series of questions and that does not appear to be the case here.
>
> Also it appears he was just asked one question or maybe another question. The Court will note that it is reasonable to believe the testimony of these two deputies who say that they do not routinely carry the Miranda waiver forms with them in their patrol cars but that it is normally done back in a police interview room and that is when the waiver forms are normally done and that when they are out in the field it is their practice to Mirandize defendants orally.
>
> The Court finally notes that based upon the testimony of Detective Ball that they were unable to question the defendant

any further or have him sign a Miranda waiver form because of his acting out and being obstreperous and disruptive at the magistrate's office and in addition just his general demeanor was such that they had to go ahead and place him in detention, in the detention facility before they had a chance to conduct any sort of interview like they might normally do in such a situation.

So based upon those findings of fact, I believe that the Miranda rights were properly done and that under the circumstances the alleged inculpatory statement made by the defendant to Detective Ball will be allowed.

In further support of the denial of defendant's motion, the trial court later added: "[B]ased upon my consideration of the testimony and of the evidence that I am concluding that the defendant's statement was made after a knowing and voluntary waiver of his rights that were read to him."

A.

[1] On appeal, defendant first argues the trial court incorrectly determined that he was advised of his constitutional rights in compliance with *Miranda v. Arizona*. According to defendant, the prosecution failed to present sufficient evidence that Detective Ball provided defendant with each of the four warnings required by *Miranda*. Therefore, defendant asserts his inculpatory statements, in response to Detective Ball's questioning, were inadmissible at trial. Although defendant argued at trial that these statements were inadmissible, his current argument relies on a different rationale than the argument advanced at trial. Before the trial court, defendant objected to the introduction of the inculpatory statements on the grounds that he had not been advised of his *Miranda* rights prior to interrogation. The trial court subsequently held a hearing, outside the presence of the jury, to determine whether the arresting officers had informed defendant of these rights. As defendant asserted that no *Miranda* warnings were provided, the trial court focused its inquiry on determining whether the officers informed defendant of his *Miranda* rights before they questioned him. During this hearing, the trial court was presented with testimony from two officers confirming that the *Miranda* warnings had been given prior to the questioning. Detective Ball, the arresting officer, testified that he "read him his *Miranda* rights." Further testimony, provided by Lieutenant Nixon, confirmed that Detective Ball had advised defendant of his rights prior to questioning. When asked by the prosecutor if these warnings included "basically that he has a right to remain silent, that he can

have an attorney if he wanted to, so on and so forth[?]" Lieutenant Dixon responded in the affirmative. Thus, the trial court was presented with sufficient evidence to support a conclusion that defendant had received *Miranda* warnings before being questioned by Detective Ball.

In defendant's argument on appeal, he no longer contends that no *Miranda* warnings were provided. Rather, defendant objects to the introduction of the inculpatory statements on the grounds that the prosecution presented insufficient evidence that Detective Ball provided each of the four warnings required by *Miranda*. Thus, defendant's argument on appeal challenges the adequacy of these warnings, not their existence. While clear testimony as to the presence of each of the four *Miranda* warnings is preferred, a review of the record reveals defendant did not preserve this issue for appellate review. "In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(b)(1) (2008). "Even alleged errors arising under the Constitution of the United States are waived if defendant does not raise them in the trial court." *State v. Jaynes*, 342 N.C. 249, 263, 464 S.E.2d 448, 457 (1995), *cert. denied*, 518 U.S. 1024, 135 L. Ed. 2d 1080 (1996). In addition, as defendant has not alleged the trial court committed plain error, he has waived this argument. *See* N.C. R. App. P. 10(c)(4) (2008). Therefore, defendant's assignment of error is dismissed.

B.

[2] Defendant also argues that the trial court erred as a matter of law in concluding that defendant was not subject to interrogation while in police custody. Accordingly, defendant contends the trial court incorrectly admitted defendant's inculpatory statements.

Upon a review of the record, we find defendant was correct in his assertion that the questioning performed by Detective Ball amounted to custodial interrogation. In determining the admissibility of defendant's inculpatory statements, the trial court stated that the questioning performed by Detective Ball "was not an interrogation as might come under the normal definition or construction of that word." Although this statement does not expressly indicate that no interrogation was conducted for the purposes of a *Miranda* analysis, the statement is not helpful and mischaracterizes the appropriate legal

standard to be applied. Nevertheless, as previously discussed, the trial court was presented with sufficient evidence to support its conclusions that defendant was informed of his constitutional rights, in accordance with *Miranda*, prior to questioning and that defendant subsequently provided a knowing and voluntary waiver of those rights. Thus, the record contained sufficient evidence to support the trial court's determination that the inculpatory statements made by defendant were admissible at trial. On review, the question before this Court is "whether the ruling of the court below was correct, and not whether the reason given therefor is sound or tenable." *State v. Blackwell*, 246 N.C. 642, 644, 99 S.E.2d 867, 869 (1957). "[A] correct decision of a lower court will not be disturbed because a wrong or insufficient or superfluous reason is assigned." *Id.* In this instance, the trial court properly determined that defendant waived his rights, and that the inculpatory statements stemming from Detective Ball's questioning were admissible. Therefore, we hold that the trial court did not err in admitting the inculpatory statements, and that any error present in the court's conclusion that defendant was not in custody was harmless beyond a reasonable doubt. *See* N.C. Gen. Stat. § 15A-1443 (2007).

Defendant has failed to show his inculpatory statements, made in response to Detective Ball's questioning, were inadmissible at trial. We therefore hold the trial court did not err in denying defendant's motion to suppress these statements.

No prejudicial error.

Chief Judge MARTIN and Judge ELMORE concur.

KELLY B. CROCKER, PLAINTIFF v. GREGORY S. CROCKER, DEFENDANT

No. COA07-964

(Filed 6 May 2008)

1. Divorce— postseparation support—sufficiency of findings of fact—financial needs—standard of living—expenses reasonably necessary

The trial court erred by entering an order for postseparation support to defendant husband without the findings of fact required by N.C.G.S. § 50-16.2A(b), and the order is reversed and

the case is remanded for the necessary findings of fact, because: (1) although the court's finding of fact about the mortgage payment on the wife's residence was sufficient to show the court properly considered that factor in awarding postseparation support when the evidence revealed that it was the parties' only debt, the court's finding about defendant husband's need for support was insufficient to show other statutory factors were considered when it merely recited his testimony; and (2) the trial court failed to make necessary findings of the financial needs of the parties, considering the parties' accustomed standard of living, and the expenses reasonably necessary to support each of the parties.

2. Divorce— permanent alimony—sufficiency of findings of fact—substantially dependent or substantially in need of maintenance or support

The trial court erred by entering an order of permanent alimony to defendant husband when it failed to make the required findings of fact under N.C.G.S. § 50-16.3A(a), and the order is reversed and remanded for the necessary findings of fact, because: (1) in order to support its finding that the husband was actually substantially dependent, the trial court should have made findings of the parties' incomes and expenses and the standard of living of the family unit, but failed to do so; (2) the court failed to make findings regarding the husband's need for financial contribution or the parties' estates; and (3) the court did not properly find that defendant husband was either actually substantially dependent or substantially in need of maintenance or support.

3. Divorce— alimony—sufficiency of findings of fact—amount, duration, or manner of payment

The trial court erred by concluding the findings of fact were sufficient to support an award of alimony to defendant husband under N.C.G.S. § 50-16.3A(b) and (c), and on remand the trial court is required to make the necessary findings, because: (1) in regard to the amount and sources of earned and unearned income of both spouses, the court did not make findings of fact about income from retirement or other benefits even though it found that both parties had individual retirement accounts, stock options, and financial assets; (2) the court failed to make findings of the parties' standard of living, husband's real estate assets, and the relative needs of the spouses; and (3) the trial court failed to

state any reason for the amount of alimony, its duration, or the manner of payment.

Appeal by plaintiff from orders entered 17 August 2005 *nunc pro tunc* 28 June 2005, 23 March 2007 *nunc pro tunc* 13 February 2007, and 29 March 2007 *nunc pro tunc* 12 March 2007 by Judge Amy R. Sigmon in Catawba County District Court. Heard in the Court of Appeals 3 March 2008.

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

Crowe & Davis, P.A., by H. Kent Crowe, for defendant-appellee.

MARTIN, Chief Judge.

Plaintiff appeals from the trial court's orders awarding defendant $2,000 per month in postseparation support and alimony and its denial of a subsequent request for additional findings of fact.

Plaintiff Kelly B. Crocker ("wife") and defendant Gregory S. Crocker ("husband") were married on 1 July 1989 and separated on 6 September 2004. They were divorced in November 2005. Four minor children were born during the marriage. Wife is a pediatrician, and husband is self-employed, earning income through his ownership and management of rental properties in the Boone/Blowing Rock area. On 2 February 2005, wife filed a complaint seeking divorce from bed and board, interim distribution, equitable distribution, child custody, and child support. On 7 April 2005, husband filed an answer and counterclaim, seeking divorce from bed and board, postseparation support, alimony, equitable distribution, child custody, and child support. Wife filed a reply on 10 June 2005. The trial court heard the issues of temporary custody, child support, and postseparation support on 28 June 2005 and awarded husband $2,000 per month in postseparation support. The court made findings that husband's gross monthly income was $4,800, wife's gross monthly income was $13,444, and the parties owned two residences. One residence did not have a mortgage and the other residence was on Lake Hickory and had a monthly mortgage payment of $1,318.

On 20 October 2006, the trial court held a hearing on permanent alimony. The court took judicial notice of the postseparation support order, among other documents, and incorporated the findings of fact from these documents by reference. On 7 March 2007,

before the permanent alimony award was entered, wife filed a motion for additional findings of fact and amendment of the order pursuant to N.C.G.S. § 1A-1, Rule 52. On 23 March 2007, the court entered the order awarding husband alimony of $2,000 per month for sixteen years. The court also entered an order denying wife's motion for additional findings of fact. Wife appeals.

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[1] First, wife argues that the trial court erred in entering the order for postseparation support because it lacked findings of fact required by N.C.G.S. § 50-16.2A(b). The statute requires:

> In ordering postseparation support, the court shall base its award on the financial needs of the parties, considering the parties' accustomed standard of living, the present employment income and other recurring earnings of each party from any source, their income-earning abilities, the separate and marital debt service obligations, those expenses reasonably necessary to support each of the parties, and each party's respective legal obligations to support any other persons.

N.C. Gen. Stat. § 50-16.2A(b) (2007). N.C.G.S. § 1A-1, Rule 52(a) requires in all non-jury trials that the trial court find specially "those material and ultimate facts from which it can be determined whether the findings are supported by the evidence and whether they support the conclusions of law reached." *Quick v. Quick*, 305 N.C. 446, 451, 290 S.E.2d 653, 657 (1982); *see also* N.C. Gen. Stat. § 1A-1, Rule 52 (2007). We note that the general principles articulated in *Quick* as applied to alimony awards are equally applicable to awards of postseparation support. *See* 2 Suzanne Reynolds, *Lee's North Carolina Family Law* § 8.45 & n.312 (5th ed. 1999) (citing *Quick*, 305 N.C. at 450, 290 S.E.2d at 657, for the proposition "[b]ecause all of the issues in the claim for postseparation support are decided by the court, Rule 52 of the Rules of Civil Procedure governs the contents of the [postseparation support] order"). When a statute requires the court to consider certain factors in making an award, "[t]he trial court must at least make findings sufficiently specific to indicate that the trial judge properly considered each of the [statutory] factors." *Skamarak v. Skamarak*, 81 N.C. App. 125, 128, 343 S.E.2d 559, 561 (1986) (citing *Quick*, 305 N.C. 446, 290 S.E.2d 653). Wife contends that the court failed to make findings related to the parties' financial needs, their accustomed standard of living, their separate and marital debt obligations, and the expenses reasonably necessary to support each of them. With regard to these factors, the trial court found "[d]efendant

testified that he needs $3,500.00 per month as post-separation support," and "[d]efendant is living in a residence upon which there is no mortgage payment. The [p]laintiff is living in the Lake Hickory residence which is encumbered by a mortgage that costs about $1,318.00 per month that [p]laintiff is paying."

Furthermore:

> [W]hile Rule 52(a) does not require a recitation of the evidentiary and subsidiary facts required to prove the ultimate facts, it does require *specific findings* of the ultimate facts established by the evidence, admissions and stipulations which are determinative of the questions involved in the action and essential to support the conclusions of law reached.

Quick, 305 N.C. at 452, 290 S.E.2d at 658. "[M]ere recitations of the evidence . . . do not reflect the 'processes of logical reasoning' " and are not ultimate facts; therefore, they are insufficient. *Williamson v. Williamson*, 140 N.C. App. 362, 364, 536 S.E.2d 337, 339 (2000) (quoting *Appalachian Poster Adver. Co. v. Harrington*, 89 N.C. App. 476, 479, 366 S.E.2d 705, 707 (1988)). Because the evidence revealed that the only debt the parties had was the mortgage on the Lake Hickory residence, the court's finding of fact about the mortgage payment was sufficient to show that the court properly considered that factor in awarding postseparation support. However, because the court's finding about husband's need for support merely recites husband's testimony, it is insufficient to show the court considered the other statutory factors for postseparation support. Coupled with the court's failure to make findings of fact about the parties' standard of living, we conclude the trial court failed to make necessary findings of the financial needs of the parties, considering the parties' accustomed standard of living and the expenses reasonably necessary to support each of the parties. Therefore, we reverse the postseparation support order and remand the case to the trial court for findings of fact in accordance with N.C.G.S. § 50-16.2A.

[2] Next, wife argues that the trial court erred in entering its order of permanent alimony where it failed to make required findings of fact pursuant to N.C.G.S. § 50-16.3A. The court purported to make extensive findings of fact by taking judicial notice of the postseparation support order, the consent judgment regarding equitable distribution, the child custody and support order, and various wage affidavits and amended alimony affidavits and incorporating by reference the facts in these documents. As we previously noted, when determining an

alimony award, "[t]he trial court must at least make findings sufficiently specific to indicate that the trial judge properly considered each of the [statutory] factors." *Skamarak*, 81 N.C. App. at 128, 343 S.E.2d at 561. The general incorporation of all findings from other court documents is not sufficiently specific to demonstrate whether the trial judge properly considered the statutory factors for awarding alimony. Therefore, these findings of fact cannot be considered in determining whether the court's findings of fact are adequate under N.C.G.S. § 50-16.3A.

Wife argues that the trial court's findings of fact were insufficient under § 50-16.3A(a), which requires "a finding that one spouse is a dependent spouse, that the other spouse is a supporting spouse, and that an award of alimony is equitable after considering all relevant factors" before the court makes an award of alimony. N.C. Gen. Stat. § 50-16.3A(a) (2007). " 'Dependent spouse' means a spouse, whether husband or wife, who is actually substantially dependent upon the other spouse for his or her maintenance and support or is substantially in need of maintenance and support from the other spouse." N.C. Gen. Stat. § 50-16.1A(2) (2007). In the case before us, the trial court found "[d]efendant is . . . actually substantially dependent upon the plaintiff for his maintenance and support and is substantially in need of maintenance and support." Wife contends that these findings are error when they are not supported by necessary additional findings of fact as recognized by our Supreme Court in *Williams v. Williams*, 299 N.C. 174, 261 S.E.2d 849 (1980). We agree.

In *Williams*, our Supreme Court concluded:

> [T]he legislature intended trial courts to determine dependency . . . bearing in mind these propositions:
>
> . . . .
>
> (2) The incomes and expenses measured by the standard of living of the family as a unit must be evaluated from the evidence presented. If this comparison reveals that one spouse is without means to maintain his or her accustomed standard of living, then the former would qualify as the dependent spouse under the phrase "actually substantially dependent."

Id. at 182-83, 261 S.E.2d at 855-56 (quoting N.C. Gen. Stat. § 50-16.1(3) (now N.C. Gen. Stat. § 50-16.1A(2) (2007))). Thus, in order to support its finding that husband was actually substantially dependent,

the trial court should have made findings of the parties' incomes and expenses and the standard of living of the family unit. Although the court made findings of fact of the parties' incomes, it did not make any findings of fact to show it considered their expenses or their standard of living. Accordingly, the court's findings of fact were insufficient to support a finding that husband was actually substantially dependent.

The Court in *Williams* further noted: "If the comparison does not reveal an *actual* dependence by one party on the other, the trial court must then determine if one spouse is 'substantially in need of maintenance and support' from the other. In doing so, . . . additional guidelines should be followed." *Id.* at 183, 261 S.E.2d at 856. The additional guidelines include "the standard of living, socially and economically, to which the parties *as a family unit* had become accustomed during the several years prior to their separation"; "the present earnings and prospective earning capacity and any other 'condition' (such as health and child custody) of each spouse"; "whether the spouse seeking alimony has a demonstrated need for financial contribution from the other spouse in order to maintain the standard of living of the spouse seeking alimony in the manner to which that spouse became accustomed during the last several years prior to separation"; "[t]he financial worth or 'estate' of both spouses"; and "the length of a marriage and the contribution each party has made to the financial status of the family over the years." *Id.* at 183-85, 261 S.E.2d at 856-57. Of these factors, in the present case, the court made no findings of the standard of living of the parties, husband's need for financial contribution, or the parties' estates. Therefore, the findings of fact are insufficient for the court to find that husband was substantially in need of maintenance or support. Because the court did not properly find that husband was either actually substantially dependent or substantially in need of maintenance or support, we must reverse the order awarding permanent alimony and remand for findings of fact in accordance with N.C.G.S. § 50-16.3A(a).

[3] Wife further argues that the findings of fact were insufficient to support an award of alimony in accordance with N.C.G.S. § 50-16.3A(b). We agree. The statute mandates "[i]n determining the amount, duration, and manner of payment of alimony, the court shall consider all relevant factors" and lists sixteen factors. N.C. Gen. Stat. § 50-16.3A(b). "[T]he court shall make a specific finding of fact on each of the factors in subsection (b) of this section if evidence is offered on that factor." N.C. Gen. Stat. § 50-16.3A(c). Wife contends

that the trial court failed to make findings of fact on five of the required factors.

First, wife contends the court failed to make findings of "[t]he amount and sources of earned and unearned income of both spouses, including, but not limited to, earnings, dividends, and benefits such as medical, retirement, insurance, social security, or others." N.C. Gen. Stat. § 50-16.3A(b)(4). Although the court made findings of the earned income of the parties and wife's health insurance benefits, the court did not make findings of fact about income from retirement or other benefits but did find that both parties had "individual retirement accounts, stock options, and financial assets."

Additionally, wife claims that the trial court failed to make findings of "[t]he standard of living of the spouses established during the marriage; . . . [t]he relative assets and liabilities of the spouses; . . . [and t]he relative needs of the spouses." N.C. Gen. Stat. § 50-16.3A(b)(8), (10), and (13). The court failed to make findings of the parties' standard of living, husband's real estate assets, and the relative needs of the spouses. Without these necessary findings, we cannot determine whether the court properly considered the relevant factors; therefore, upon remand, we direct the trial court to make findings of fact on these factors.

We also agree with wife that the court failed to make the necessary findings under N.C.G.S. § 50-16.3A(c), which requires: "The court shall set forth the reasons for its award or denial of alimony and, if making an award, the reasons for its amount, duration, and manner of payment." The trial court failed to state any reason for the amount of alimony, its duration, or the manner of payment. On remand, we direct the court also to make findings of fact in accordance with § 50-16.3A(c).

Orders for postseparation support and alimony are reversed and remanded for additional findings.

Reversed and Remanded.

Judges CALABRIA and GEER concur.

STATE OF NORTH CAROLINA v. DERRICK LAMAR WILLIAMS

No. COA07-1057

(Filed 6 May 2008)

1. Criminal Law— prosecutor's arguments—evidence outside record—abuse of discretion standard

The trial court did not abuse its discretion in a second-degree rape case by allowing some improper statements made by the prosecutor during closing arguments to the jury that were outside the record because: (1) in light of the substantial evidence against defendant, as well as the charge to the jury that would have had a curative effect in mitigating the State's improper remarks, the remarks were not of such a magnitude that their inclusion prejudiced defendant; and (2) our appellate courts presume that jurors follow the trial court's instructions.

2. Rape; Sexual Offenses— second-degree rape—sex offender registration—satellite monitoring

The trial court did not err in a second-degree rape case by allegedly ordering defendant to register as a sex offender and to enroll for lifetime monitoring in the State's satellite registration program immediately upon entry of the judgment because: (1) to the extent defendant objects to being required to register as a sex offender immediately upon judgment entered against him, the trial court did not actually order defendant to register as a sex offender when the pertinent form was not signed by the trial court and was only applicable to defendants who did not receive active terms of imprisonment, and there was no oral order requiring defendant to register as a sex offender; (2) in regard to lifetime monitoring, the requirement for defendant to register will automatically go into effect upon his release from prison at the same time the order to enroll in the monitoring program goes into force according to its terms; and (3) to the extent defendant's argument concerns the way in which the monitoring will be conducted, that issue was not yet ripe for review since the program was new, and thus commenting on the substance of the policies and procedures of the program would involve mere speculation.

Appeal by defendant from judgment and order entered 27 March 2007 by Judge Thomas H. Lock in Superior Court, Cumberland County. Heard in the Court of Appeals 4 March 2008.

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

Greene & Wilson, P.A., by Thomas Reston Wilson, for defendant-appellant.

WYNN, Judge.

Defendant Derrick Lamar Williams appeals his conviction and sentence for second-degree rape. After a careful review of Defendant's arguments on appeal, as well as the record and transcripts before us, we conclude that he received a fair trial, free of prejudicial error, and affirm his conviction and sentence.

The State introduced evidence at trial which tended to show that Defendant raped K.B. at a small party in Fayetteville on the evening of 24 June 2005. However, Defendant testified that the sex was consensual and had taken place after he and K.B. had also engaged in oral sex. Others present at the party, as well as one of K.B.'s coworkers and several police officers, corroborated much of K.B.'s testimony, but only Defendant and K.B. were present in the apartment when the rape took place. According to trial testimony, Defendant's DNA was found in K.B.'s vagina, but oral swabs were not taken because K.B. complained only of vaginal penetration to the police and medical personnel.

At the conclusion of Defendant's trial, the jury returned a verdict finding him guilty of second-degree rape. After entering judgment against him, the trial court sentenced Defendant to eighty-four to one hundred months' imprisonment and ordered him, upon registration as a sex offender, to be monitored for life in the State's satellite registration program for sex offenders. Defendant now appeals, arguing that the trial court erred by (I) denying his motion for a mistrial following improper statements made by the prosecutor during his closing arguments to the jury; and (II) requiring Defendant to register as a sex offender and be monitored for life in the State's satellite registration program.

I.

[1] Defendant first argues that the trial court erred by denying his motion for a mistrial following improper statements made by the prosecutor during closing arguments to the jury. However, after a careful review of the trial transcripts, we observe that defense counsel only objected to the prosecutor's comments and excepted to the

trial court's ruling to overrule the objection, but failed to move for a mistrial. As such, we review Defendant's argument on appeal only as it relates to whether the prosecutor's remarks were improper. We conclude that, although they were, they did not ultimately prejudice Defendant.

As held by our Supreme Court,

> The standard of review for improper closing arguments that provoke timely objection from opposing counsel is whether the trial court abused its discretion by failing to sustain the objection. In order to assess whether a trial court has abused its discretion when deciding a particular matter, this Court must determine if the ruling could not have been the result of a reasoned decision.

State v. Jones, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002) (internal citations and quotation omitted). In applying this standard of review, we must first determine whether the remarks were improper, such as "statements of personal opinion, personal conclusions, name-calling, and references to events and circumstances outside the evidence, such as the infamous acts of others." *Id.* If we deem the remarks improper, we must then decide if they were "of such a magnitude that their inclusion prejudiced defendant[.]" *Id.*

Here, defense counsel objected at trial to the prosecutor asking the jury in his rebuttal closing arguments: "Do you recall they took an oral swab of [K.B.'s] mouth? You heard—did you hear that technician say anything about finding any of the defendant's DNA inside her mouth?" The prosecutor went on to say, "Well, that would have been there, ladies and gentlemen, if, as he put it, he could not achieve an erection and he had her to help him to do so. . . . [I]f for no other reason, that's enough to disbelieve everything that defendant told you over there, that alone." After the jury began deliberations, defense counsel renewed the objection, noting to the trial court that the State's evidence "was clear that there was [sic] never any oral swabs collected[.]" Indeed, although the nurse who conducted the rape kit examination of K.B. testified that she took a cheek swab of K.B. to get her DNA, she also stated that she did not take any oral swabs because K.B. had complained only of vaginal penetration. Given that the prosecutor referenced "events and circumstances outside the evidence," these remarks were improper. *Id.*

However, when overruling the defense objection, the trial court stated: "Even if the state's argument was inconsistent with the evi-

dence, I certainly did charge the jury that it was their duty to recall all the evidence and that if their recollection of the evidence differed from the state, they are to rely upon their own recollections[.]" The transcript does indeed show that the trial court made this charge to the jury, both prior to the State's closing arguments and again during the jury instructions, immediately prior to their deliberations.

In light of the substantial evidence against Defendant, as well as the charge to the jury that would have had a curative effect in mitigating the State's improper remarks, we hold that these remarks were not "of such a magnitude that their inclusion prejudiced defendant[.]" *Id.* The jury heard from K.B. and Defendant as to their conflicting versions of events on the night in question; although the prosecutor's improper remarks cast doubt on the veracity of Defendant's account, the jury also heard the nurse who conducted the rape kit state unequivocally that she did not take any oral swabs of K.B.'s mouth, but only a cheek swab for her DNA. The jury was twice instructed to resolve this type of discrepancy in favor of their own recollections of the evidence presented, rather than what the State summarized. Our appellate courts "presume 'that jurors . . . attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given to them.' " *State v. Jennings*, 333 N.C. 579, 618, 430 S.E.2d 188, 208 (quoting *Francis v. Franklin*, 471 U.S. 307, 324 n.9, 85 L. Ed. 2d 344, 360 n.9 (1985)), *cert. denied*, 510 U.S. 1028, 126 L. Ed. 2d 602 (1993). Accordingly, we hold that the prosecutor's comments, while improper, were not prejudicial to Defendant.

II.

[2] Next, Defendant contends that the trial court erred by ordering him to register as a sex offender and to enroll for lifetime monitoring in the State's satellite registration program immediately upon entry of the judgment against him. We disagree.

Defendant was visiting his daughter in Fayetteville when he committed the rape but lived in Las Vegas and was arrested there; at the time of the trial, he was living in Phoenix, Arizona. As such, he asserts that he does not fall within any of the categories of person—State residents, nonresident students, and nonresident workers—to which the sex offender registration and monitoring statutes apply. He therefore asserts that the trial court erred by ordering him to register as a sex offender in North Carolina, and by entering judicial findings

and an order subjecting him to lifetime satellite monitoring, prior to the completion of his prison sentence.

Nevertheless, as the record makes clear, the trial court did not actually order Defendant to register as a sex offender. Rather, the form "Notification of Requirement to Register as Sex Offender who Committed an Aggravated Offense," included in the record, was not signed by the trial court, as it is applicable only to defendants who did not receive active terms of imprisonment. Further, there is no oral order from the trial court in the transcript that requires Defendant to register as a sex offender. Accordingly, to the extent Defendant objects to being required to register as a sex offender immediately upon judgment entered against him, that portion of his argument is overruled.

However, the trial court did sign and enter "Judicial Findings and Order as to Satellite-Based Monitoring for Sex Offenders—Lifetime Monitoring." The findings state that the trial court has ordered Defendant to be imprisoned and that "[t]he defendant was convicted of a reportable conviction . . . and is required to register under Part 3 of Article 27A of Chapter 14 of the General Statutes because the defendant is classified as a sexually violent predator, is a recidivist, or was convicted of an aggravated offense[.]" Based upon those two findings, the order provides that "the defendant shall be enrolled in a satellite-based monitoring program for his/her natural life" and "placed on unsupervised probation for the period for which he/she is subject to satellite-based monitoring." However, the requirement to enroll goes into force only "upon completion of the defendant's sentence and any term of post-release supervision."

Defendant contends that this order should be reversed because it is based in part on the erroneous finding that he is required to register as a sex offender. However, North Carolina law states that a current State resident with a "reportable conviction" *shall* register "[w]ithin 10 days of release from a penal institution or arrival in a county to live outside a penal institution[.]" N.C. Gen. Stat. § 14-208.7(a)(1) (2007). Thus, according to the plain meaning of the statute, Defendant, as a current North Carolina resident, albeit one in prison, "shall register" as a sex offender within ten days of his release or arrival in a county to live outside a penal institution. As such, the requirement for Defendant to register will automatically go into effect upon his release from prison, at the same time the order to enroll in the monitoring program goes into force according to its terms.

To the extent that Defendant's argument on appeal concerns the way in which the monitoring will be conducted, we find that issue not yet ripe for our review. The sex offender monitoring program is new, established by statute in 2006, and the law states only that, "[t]he Department of Correction shall establish a sex offender monitoring program that uses a continuous satellite-based monitoring system and shall create guidelines to govern the program." N.C. Gen. Stat. § 208.40(a). As conceded by the State in oral arguments to this Court, the policies and procedures of the program are in Department of Correction manuals to which neither the State nor Defendant has access. Thus, we have no means of determining whether Defendant will continue to be monitored by the State of North Carolina even if he returns to Arizona or Nevada. Until Defendant can make some showing that the monitoring is itself a violation of his rights or somehow prevents his ability to leave the State of North Carolina, we decline to engage in speculation as to the substance of the policies and procedures of the program. We reject Defendant's arguments concerning the requirement to enroll in the satellite monitoring program.

No prejudicial error in part; affirmed in part.

Judges BRYANT and JACKSON concur.

ANDREA MOORE, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR D'ANDRE MOORE, PLAINTIFF v. QUENTIN JAMES MILLS, DEFENDANT

No. COA07-955

(Filed 6 May 2008)

Discovery— failure to appear—sanctions—striking affirmative defenses—attorney fees—court reporter costs

The trial court abused its discretion in a negligence case arising out of a motor vehicle accident by striking defendant's affirmative defenses of contributory negligence and gross contributory negligence as a sanction for failing to appear at a deposition because, given defendant's attempts to cure his failure to attend his deposition, his affidavit explaining the misunderstanding, which was presented to the trial court at hearing, and the severity of the sanctions imposed, the sanctions were manifestly

unsupported by reason. However, the remaining sanction related to payment of attorney fees and court reporter costs is affirmed.

Judge McCULLOUGH dissenting.

Appeal by defendant from order entered 3 May 2007 by Judge William C. Griffin, Jr., in Martin County Superior Court. Heard in the Court of Appeals 6 February 2008.

Burton & Sue, LLP, by Gary K. Sue, for defendant.

Gaskins & Gaskins, P.A., by Herman E. Gaskins, Jr., for plaintiff.

ELMORE, Judge.

On 26 March 2006, Andrea Moore and her minor son, D'Andre Moore (together, plaintiffs) filed an action against Quentin James Mills (defendant). The complaint alleged negligence and gross negligence arising from a 22 September 2005 motor vehicle accident. Defendant filed his answer on 4 May 2006, asserting contributory negligence and gross contributory negligence as affirmative defenses. Plaintiffs replied on 10 May 2006, relying on the last clear chance doctrine. The parties began discovery, and defendant received notice of a deposition scheduled for 5 April 2007.

Defendant failed to appear at the deposition, which was to be held at plaintiffs' attorneys' offices in Washington, North Carolina. Defendant was aware of the deposition and the time for which it was scheduled. Indeed, he spoke on the telephone to a legal assistant at his attorneys' offices that morning, who reminded him of the event and asked him to arrive early to speak with his lawyer. However, although defendant left his house in Williamston, North Carolina, more than sufficiently early to arrive in time for the deposition, defendant claims to have gotten lost in Washington, with which he was unfamiliar. Defendant could not remember the street address for the offices and had neglected to bring a letter that his attorneys sent him with the pertinent information. Defendant compounded his mistake by searching for a sign with the name of his own attorneys' firm, rather than that of plaintiffs'. Unsurprisingly, none of the people that defendant approached in Washington had heard of defendant's attorneys' firm, which was located in Williamston. Eventually, defendant gave up in his search and returned home. He did not realize his mistake until he received a call from his attorneys, inquiring as to the reason for his absence. Defendant promptly offered to reschedule the

deposition at plaintiffs' convenience, and his attorneys wrote to plaintiffs' lawyers, offering to pay for both the attorneys' and court reporters' time and expenses and to reschedule the deposition.

Plaintiffs moved for sanctions on 9 April 2007, seeking an order striking all of defendant's pleadings. On the day of the hearing, defendant arrived with counsel and a court reporter retained by his attorneys. Defendant presented the trial court with an affidavit explaining his absence from the deposition and offered to make himself available for deposition at that time, again offering to pay plaintiffs' attorneys' fees and court reporter expenses. Nevertheless, plaintiffs' counsel declined the offer and proceeded with the motion for sanctions.

The trial court held a hearing and gave an oral ruling granting plaintiffs' request for fees and striking the contributory negligence defense. Subsequently, in the trial court's written order, the trial court struck both defendant's contributory negligence and gross contributory negligence defenses. Defendant now appeals. For the reasons outlined below, we reverse and vacate the portion of the trial court's order striking defendant's pleadings, but affirm the remainder of the order.

On appeal, defendant contends that the trial court abused its discretion by striking his defenses of contributory negligence and gross contributory negligence. We agree.

Our Rules of Civil Procedure state: "If a party . . . fails (i) to appear before the person who is to take his deposition, after being served with a proper notice, . . . the court in which the action is pending on motion may make such orders in regard to the failure as are *just* . . . ." N.C. Gen. Stat. § 1A-1, Rule 37(d) (2007) (emphasis added). Plaintiffs correctly note that these orders may include "[a]n order refusing to allow the disobedient party to support or oppose designated claims or defenses" or "[a]n order striking out pleadings or parts thereof . . . ." N.C. Gen. Stat. § 1A-1, Rule 37(b)(2) (2007). "The imposition of sanctions under Rule 37 is in the sound discretion of the trial judge and cannot be overturned absent a showing of abuse of that discretion." *In re Pedestrian Walkway Failure*, 173 N.C. App. 237, 246, 618 S.E.2d 819, 826 (2005) (quotations and citation omitted).

Nevertheless, we are mindful that

> [i]mposition of sanctions that are directed to the outcome of the case, such as dismissals, default judgments, or preclusion orders, are reviewed on appeal from final judgment, and while

> the standard of review is often stated to be abuse of discretion, the most drastic penalties, dismissal or default, are examined in the light of the general purpose of the Rules to encourage trial on the merits.

Imports, Inc. v. Credit Union, 37 N.C. App. 121, 124, 245 S.E.2d 798, 800 (1978) (quotations and citation omitted). Moreover, we note this Court's recent holding that a trial court "will be reversed upon a showing that [the] ruling was so arbitrary that it could not have been the result of a reasoned decision." *Baker v. Charlotte Motor Speedway, Inc.*, 180 N.C. App. 296, 299, 636 S.E.2d 829, 832 (2006) (quotations and citations omitted) (alteration in original).

Given defendant's attempts to cure his failure to attend his deposition, his affidavit explaining the misunderstanding, which was presented to the trial court at hearing, and the severity of the sanctions imposed, we find that the trial court's sanctions were "manifestly unsupported by reason." *Id.* (quotations and citations omitted). Accordingly, we reverse and vacate that part of the trial court's order striking defendant's pleadings relating to the affirmative defenses of contributory negligence and gross contributory negligence. The remaining sanction, payment of attorneys' fees and court reporter costs, is affirmed.

Reversed and vacated in part and affirmed in part.

Judge ARROWOOD concurs in result only.

Judge McCULLOUGH dissents by separate opinion.

McCULLOUGH, Judge, dissenting:

In this case defendant failed to appear for his deposition. The trial court imposed sanctions which included the payment of attorneys' fees and court reporter costs as well as striking defendant's pleadings regarding the affirmative defenses of contributory negligence. The majority opinion upholds the sanctions of attorneys' fees and court reporter costs but vacates the order striking the defenses. From this ruling I dissent.

Defendant's deposition was scheduled for 5 April 2007 at the law office of plaintiff's counsel. The lawyers and court reporter arrived, but defendant failed to appear. Plaintiff's attorney moved for sanctions and requested that the court "[e]nter an order striking all plead-

ings filed by defendant and rendering a judgment by default against defendant." The trial court declined to impose the full measure of sanctions requested and instead ordered the striking of the affirmative defenses but left defendant's denial of negligence intact.

At the hearing on the motion for sanctions, defendant recounted a rather preposterous story of having forgotten the name and address of plaintiff's law firm; thus, he sought directions to his own lawyer's office. No one in Washington, N.C., knew how to direct him to his lawyer's office, which is not surprising since his attorney is from Greensboro. He never called his lawyer and eventually went home.

After defendant's explanation and argument, the trial court decided that the appropriate sanction should be the payment of attorneys' fees and court reporter costs as well as the striking of defenses, leaving defendant's denial of negligence for trial.

As the majority recognizes, Rule 37 permits the trial court to impose sanctions as was done here. N.C. Gen. Stat. § 1A-1, Rule 37(d) (2007).

In the case *sub judice* the trial judge declined to impose the more drastic sanction requested, that of default judgment, even though such a sanction is clearly permissible. *Imports, Inc. v. Credit Union*, 37 N.C. App. 121, 245 S.E.2d 798 (1978).

The majority also properly notes that the imposition of sanctions under Rule 37 is in the sound discretion of the trial judge and cannot be reversed absent a showing of abuse of discretion. *In re Pedestrian Walkway Failure*, 173 N.C. App. 237, 618 S.E.2d 819 (2005).

Rulings committed to a trial judge's discretion are accorded great deference and will not be overturned unless it is shown that the decision was so arbitrary that it could not have been the result of a reasoned decision. *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

Nonetheless, the majority has freely substituted its judgment for that of the trial court. The trial judge clearly exercised discretion and refused to grant the full measure of sanctions requested, limiting his order to the striking of affirmative defenses along with the monetary payments. The denial of negligence was left for trial.

In justifying its actions, the majority quotes from *Imports, Inc.* The quoted portion cited by the majority discusses dismissals and defaults, neither of which are present here. *See id.*

The trial judge made a discretionary decision within the range of permissible sanctions and in so doing clearly exercised his discretion as the court declined to impose the full measure of sanctions requested. Having acted in accordance with Rule 37, the trial court is entitled to be upheld. In this case I would give deference to the trial judge and uphold the sanctions imposed.

STATE OF NORTH CAROLINA v. EDWARD DEVILLE HOBBS

No. COA07-914

(Filed 6 May 2008)

Criminal Law— missing transcript of evidentiary phase of trial—unavailability—absence of available alternatives—new trial

A defendant convicted of armed robbery and other offenses is entitled to a new trial based on the fact that a verbatim transcript of the evidentiary phase of his trial was unavailable to him in the preparation of his appeal because: (1) N.C.G.S. § 7A-452(e) provides that an indigent defendant entering notice of appeal is entitled to receive a copy of the trial transcript at State expense; (2) defendant satisfied his burden of demonstrating the absence of available alternatives to the missing transcripts by showing his appellate counsel contacted defendant's trial counsel, the prosecutor, and the presiding judge without being able to obtain the pertinent information; (3) the lost proceedings comprised three days of testimony two years ago by an unknown number of witnesses concerning ten separate charges; and (4) although our courts have declined to find prejudice in cases in which a transcript is unavailable for only a portion of the trial proceedings, this appeal is hindered by the total unavailability of either a transcript or an acceptable alternative for a majority of defendant's trial, thus denying defendant the opportunity to procure meaningful appellate review.

Appeal by defendant from judgments entered 18 July 2005 by Judge Alma L. Hinton in Pitt County Superior Court. Heard in the Court of Appeals 18 March 2008.

Attorney General Roy A. Cooper, III, by Assistant Attorney General LaToya B. Powell, for the State.

Appellate Defender Staples Hughes, by Assistant Appellant Defender Anne M. Gomez, for defendant-appellant.

JACKSON, Judge.

Edward DeVille Hobbs ("defendant") appeals from judgments entered upon jury verdicts finding him guilty of robbery with a dangerous weapon, possession of a firearm by a felon, possession of burglary tools, breaking and entering a motor vehicle, two counts of misdemeanor larceny, and two counts of possession of stolen goods. For the following reasons, we reverse and remand for a new trial.

On 24 January 2005, defendant was indicted for robbery with a dangerous weapon, possession of a firearm by a felon, possession of burglary tools, misdemeanor possession of marijuana, carrying a concealed weapon, two counts of breaking or entering a motor vehicle, two counts of misdemeanor larceny, and two counts of misdemeanor possession of stolen goods. On 18 July 2005, a jury acquitted defendant of misdemeanor possession of marijuana and one count of breaking or entering a motor vehicle, and found him guilty of the remaining charges. The trial court arrested judgment on the two counts of possession of stolen goods. The record before this Court does not disclose the disposition of the charge of carrying a concealed weapon. The trial court sentenced defendant as a prior record level II offender to sixty-one to eighty-three months imprisonment, along with a suspended sentence of thirteen to sixteen months imprisonment and thirty-six months supervised probation. Defendant failed to file timely notice of appeal, but on 3 November 2006, this Court allowed defendant's petition for writ of certiorari for the purpose of reviewing his convictions.

Kay Westbrook ("Westbrook") was the court reporter who covered the proceedings on 18 July 2005—the portion of defendant's trial beginning with closing arguments. Westbrook completed the transcript of the proceedings on 18 July 2005 and mailed a copy of the transcript to the Office of the Appellate Defender on 2 January 2007. However, Kimberly Horstman ("Horstman"), the court reporter for the proceedings from 12 July through 14 July 2005, was unable to complete a transcript because her notes and the audiotapes from that portion of defendant's trial had been lost. Specifically, on 18

December 2006, Horstman contacted the Pitt County Superior Court Judicial Assistant Marilyn Ellis ("Ellis"), requesting sixteen audio tapes and handwritten notes from her portion of defendant's trial for the purposes of preparing transcripts for the instant appeal. The following day, Ellis retrieved the requested tapes and notes and sent the original tapes by uncertified United States mail to Horstman's correct home address. Horstman never received the package, and was unable to obtain any information about the package or its whereabouts from either the post office or her postal carrier. These tapes and notes, which covered the evidentiary phase of defendant's trial, are believed to be lost.

In his sole assignment of error, defendant contends that he is entitled to a new trial because a verbatim transcript of the evidentiary phase of his trial was unavailable to him in the preparation of his appeal. We agree.[1]

Pursuant to North Carolina General Statutes, section 7A-452(e), when an indigent defendant had entered notice of appeal, he is entitled to receive a copy of the trial transcript at State expense. N.C. Gen. Stat. § 7A-452(e) (2007). Although due process does not "require[] a verbatim transcript of the entire proceedings," *Karabin v. Petsock*, 758 F.2d 966, 969 (3d Cir. 1985), *cert. denied*, 474 U.S. 857, 106 S. Ct. 163 (1985), the United States Supreme Court has held that an appellate "counsel's duty cannot be discharged unless he has a transcript of the testimony and evidence presented by the defendant and also the court's charge to the jury, as well as the testimony and evidence presented by the prosecution." *Hardy v. United States*, 375 U.S. 277, 282, 11 L. Ed. 2d 331, 335 (1964). In *Hardy*, Justice Goldberg further explained in his concurring opinion, joined by Chief Justice Warren and Justices Brennan and Stewart, that

> [a]s any effective appellate advocate will attest, the most basic and fundamental tool of his profession is the complete trial transcript, through which his trained fingers may leaf and his trained eyes may roam in search of an error, a lead to an error, or even a basis upon which to urge a change in an established and hitherto accepted principle of law. Anything short of a complete transcript is incompatible with effective appellate advocacy.

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1. Defendant has preserved this issue for our review by "assert[ing] as an assignment of error that he is unable to obtain an effective appellate review of errors committed during the trial proceeding because of the inability of the [r]eporter to prepare a transcript." *State v. Neely*, 21 N.C. App. 439, 441, 204 S.E.2d 531, 532 (1974).

Id. at 288, 11 L. Ed. 2d at 339 (Goldberg, J., concurring). Nevertheless, notwithstanding the critical importance of a complete trial transcript for effective appellate advocacy, "[t]he unavailability of a verbatim transcript does not automatically constitute error. To prevail on such grounds, a party must demonstrate that the missing recorded evidence resulted in prejudice. General allegations of prejudice are insufficient to show reversible error." *State v. Quick*, 179 N.C. App. 647, 651, 634 S.E.2d 915, 918 (2006) (internal citation omitted).

In the case *sub judice*, transcripts of the evidentiary phase of defendant's trial are unavailable to defendant for his appeal. Although defendant emphasizes that he is represented by different counsel on appeal than at trial, new counsel on appeal is but one factor in determining prejudice in the event of a missing or incomplete transcript. *See United States v. Sierra*, 981 F.2d 123, 126 (3d Cir. 1992), *cert. denied*, 508 U.S. 967, 113 S. Ct. 2949 (1993).[2] The fact that defendant is represented by new counsel on appeal, however, is relevant in determining whether defendant has satisfied his burden of attempting to reconstruct the record. Specifically, our Supreme Court has held that the lack of a transcript does not prejudice the defendant when alternatives—such as a narrative of testimonial evidence compiled pursuant to Rule 9(c)(1) of the North Carolina Rules of Appellate Procedure—"are available that would fulfill the same functions as a transcript and provide the defendant with a meaningful appeal." *State v. Lawrence*, 352 N.C. 1, 16, 530 S.E.2d 807, 817 (2000), *cert. denied*, 532 U.S. 1083, 148 L. Ed. 2d 684 (2001).

Here, defendant's appellate counsel contacted defendant's trial counsel in an attempt to reconstruct the record. By affidavit dated 4 June 2007, defendant's trial counsel informed defendant's appellate counsel that he had little memory of the charges or the trial, that he possessed no notes from the trial, and that he would be unable to assist in reconstructing the proceedings. Defendant's appellate counsel also contacted both the prosecutor and the presiding judge, Judge Alma L. Hinton ("Judge Hinton"). By facsimile dated 9 May 2007,

2. "The majority of circuits have maintained that to obtain a new trial, *whether or not appellate counsel is new*, the defendant must show that the transcript errors *specifically prejudiced* his ability to perfect an appeal." *United States v. Huggins*, 191 F.3d 532, 537 (4th Cir. 1999) (emphases added), *cert. denied*, 529 U.S. 1112, 146 L. Ed. 2d 799 (2000). Although some courts have employed a less demanding test for prejudice when a defendant is represented by new counsel on appeal, such a rule would "create[] the perverse incentive of encouraging defendants to dismiss trial counsel and seek new appellate counsel whenever questions arise over the sufficiency of a trial transcript." *Id.* (criticizing the approach taken by the Fifth and Eleventh Circuits).

Judge Hinton's assistant informed defendant's appellate counsel that "Judge Hinton asked that I let you know she has no notes with respect to the trial of . . . defendant over which she presided on July 12, 2005, in Pitt County." By letters correctly addressed to the prosecutor and dated 20 March 2007 and 3 May 2007, defendant's appellate counsel requested from the prosecutor any notes he might have relating to the proceedings. The record fails to contain either a response from the prosecutor or any indication that the prosecutor did not receive the letters. Although the better practice would have been for defendant's appellate counsel to follow up with the prosecutor via telephone after failing to receive a response from her letters, the State has advanced no argument in its brief to this Court that the letters were not received. Accordingly, defendant satisfied his burden of demonstrating the absence of available alternatives to the missing transcripts.[3]

Without an adequate alternative, this Court must determine whether "the incomplete nature of the transcript prevents the appellate court from conducting a 'meaningful appellate review,' " in which case a new trial would be warranted. *In re D.W.*, 171 N.C. App. 496, 502, 615 S.E.2d 90, 94 (2005) (quoting *In re Hartsock*, 158 N.C. App. 287, 293, 580 S.E.2d 395, 399 (2003)). Here, a transcript is available for the final day of defendant's trial and includes the jury instructions, verdict, and sentencing. However, as defendant correctly argues, "[t]he lost proceedings comprised three days of testimony two years ago by an unknown number of witnesses concerning ten separate charges." Although our Courts have declined to find prejudice in cases in which a transcript is unavailable for only a portion of the trial proceedings,[4] the instant appeal is hindered by the total unavailabil-

3. We note that the precise burden imposed upon appellants for reconstructing the records has not been defined. *Compare United States v. Gallo*, 763 F.2d 1504, 1530 (6th Cir. 1985) ("a reasonable but unsuccessful effort"), *State v. Baldridge*, 857 S.W.2d 243, 253 (Mo. Ct. App. 1993) ("due diligence"), *and State v. Polk*, No. 57511, 1991 Ohio App. LEXIS 900, at *6 (Ohio Ct. App. Mar. 7, 1991) ("A good faith effort requires the use of all possible sources, not just trial counsel's recollection."). However, we decline to reach this issue in the instant appeal.

4. *See*, *e.g.*, *Lawrence*, 352 N.C. at 16, 530 S.E.2d at 817 (declining to find prejudice when (1) "a mechanical malfunction resulted in the elimination of a portion of Detective Bernice Smith's testimony and all of Special Agent Tom Trochum's testimony from the record," (2) "the State set out the unrecorded testimony in narrative form" in the record; and (3) "[t]he trial court held a settlement conference at which Detective Smith and Agent Trochum both testified that the State's summary was an accurate reflection of their testimony at trial."); *D.W.*, 171 N.C. App. at 502-03, 615 S.E.2d at 94 (declining to find prejudice when (1) "the trial court inadvertently failed to record [the juvenile's] testimony on direct examination"; (2) "[the juvenile']s only other argument

ity of either a transcript or an acceptable alternative for a *majority* of defendant's trial. *See People v. Bills*, 45 Cal. Rptr. 2d 364, 367-68 (Cal. Ct. App. 1995) ("The cases which have reversed convictions because records were lost involved very substantial omissions, such as *all* or a large portion or a crucial portion of the reporter's notes, or a crucial item of evidence." (internal citations omitted)), *disc. rev. denied*, No. S049756, 1996 Cal. LEXIS 152 (Cal. Jan. 4, 1996).[5]

As a result of the unavailability of transcripts or an acceptable alternative for the entire portion of defendant's trial preceding the jury instructions, defendant has been rendered unable to procure meaningful appellate review of his trial. Accordingly, we must grant defendant a new trial.

New Trial.

Judges WYNN and BRYANT concur.

GUILFORD COUNTY BY AND THROUGH ITS CHILD SUPPORT ENFORCEMENT UNIT, EX REL. ANGELA HILL, PLAINTIFF v. BRIAN D. HOLBROOK, DEFENDANT

No. COA07-1165

(Filed 6 May 2008)

Child Support, Custody, and Visitation— child support—affidavit of parentage—Rule 60(b) motion

The trial court did not abuse its discretion in a child support case by granting defendant's N.C.G.S. § 1A-1, Rule 60(b) motion to set aside the 21 April 2006 order that adjudicated him the father of a minor child even though plaintiff contends defendant

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on appeal is the trial court's denial of his motion to dismiss"; and (3) "the record . . . clearly show[ed] that the evidence presented by the State was sufficient to deny [the juvenile]'s motion to dismiss").

5. An example of a "crucial portion of the reporter's notes" is *State v. Hernandez*, 173 N.C. App. 448, LEXIS 2035 (N.C. Ct. App. Sept. 20, 2005), in which the defendant challenged the denial of his motion to suppress and the court reporter's notes from the suppression were lost. This Court held that "the record indicate[d] that defendant . . . attempted unsuccessfully to procure an acceptable alternative to a transcript," and the Court granted the defendant a new suppression hearing. *Hernandez*, 2005 N.C. App. LEXIS 2035, at 8. Although not bound by unpublished opinions, *see State v. Pritchard*, 186 N.C. App. 128, 129, 649 S.E.2d 917, 918-19 (2007), the facts of *Hernandez* are virtually indistinguishable from the instant case.

exceeded Rule 60(b)'s one-year time limit since he brought his motion on 11 May 2006 and he executed an affidavit of parentage on 26 July 2003 nearly three years earlier, because: (1) Rule 60(b) provides that a party must bring a motion under subparts (1)-(3) not more than one year after the judgment, order, or proceeding was entered or taken, and plaintiff acknowledged that the affidavit of parentage was not filed until 10 June 2005; (2) the one-year limit did not begin to run until 10 June 2005, and thus defendant filed the motion within the one-year time limit; and (3) the one-year clock begins to run only after an affidavit of paternity has been filed and some judgment, order, or proceeding was entered or taken by a court, and not from the day that a putative father executes an affidavit of parentage.

Appeal by plaintiff from order entered 31 May 2007 by Judge Patrice A. Hinnant in Guilford County District Court. Heard in the Court of Appeals 20 February 2008.

James A. Dickens for plaintiff.

Kathryn S. Lindley for defendant.

ELMORE, Judge.

Guilford County (plaintiff) by and through its child support enforcement unit, *ex relatione* Angela Hill, appeals a 31 May 2007 order setting aside a 12 October 2005 order adjudicating Brian D. Holbrook (defendant) the father of a minor child, B.H. For the reasons stated below, we affirm the order of the district court.

B.H. was born to Angela Hill on 25 July 2003. Defendant signed an affidavit of parentage for B.H. on 26 July 2003. The couple was never married. On 12 October 2005, the district court entered an order adjudicating defendant the father of B.H. upon a motion by plaintiff for the purpose of establishing defendant's child support obligation. The 12 October 2005 order found as fact that the court could not verify defendant's income and ordered defendant to pay $50.00 per month for current support, effective 1 July 2005. The order also continued the matter until 13 September 2005, when defendant should "return to court with verifiable employer [sic], with a pay rate" so that the court could verify his income. On 21 April 2006, the district court entered an order requiring defendant to pay child support at a rate of $558.00 per month.

On 11 May 2006, defendant filed a Rule 60 motion to set aside the 21 April 2006 order and a motion for paternity test. Defendant alleged that he "was informed, believes, and therefore alleges that [Hill] has informed others that another person is the father of the child in this matter; further that [Hill] alleged [he] was the father of another child wherein subsequent paternity testing found he was not the father." He asked the court to set aside the 21 April 2006 child support order and to order the parties to submit to a paternity test.

On 26 October 2006, Judge Hinnant filed an order allowing defendant's motion for paternity testing, placing the child support payments on hold pending the outcome of the testing, and holding open defendant's Rule 60 motion to set aside until further hearing. Judge Hinnant found as fact:

> 6. The Defendant further contends that [Hill] had previously alleged he was the father of [B.H.'s] brother, [T.H.], but this was disproved via paternity testing.
>
> 7. [T.H.'s] father, who was also present in the courtroom, testified that [Hill] alleged Defendant was the father of [T.H.] before naming him as the father.
>
> 8. The Defendant states he was recently told that the child on this action is not his biological child.
>
> 9. The IV-D Agency contends that the issue of paternity regarding [B.H.] is res judicata [sic], as evidenced by the signed Affidavit of Parentage.
>
> 10. Based on the above-findings that [Hill] mistakenly identified Defendant as the father of her first child, [T.H.], there is a reasonable possibility that Defendant is not the biological father of [B.H.].

Plaintiff then filed a writ of certiorari to this Court asking us to reverse Judge Hinnant's order allowing defendant's motion for paternity testing. We granted the writ and reversed the order for paternity testing because defendant was barred by the doctrine of *res judicata* from contesting paternity.

Judge Hinnant heard the matter again on 22 February 2007. She made the following relevant findings in her 31 May 2007 order:

> 9. The Court finds that the mother, Angela Hill, informed others that another person other than the Defendant was the father of the minor child in this matter.

10. The Court finds that the mother also alleged that the Defendant was the father of her other child, but subsequent paternity testing proved that he was not the father.

11. The Court reviewed pictures of both of [Hill's] children, and compared the photograph of the minor child in this action to the Defendant and to [Hill's] other child by another man.

12. Based on the Court's evaluation of the photographs revealing the appearance of the children and the lack of resemblance to the Defendant of either child, there is a reasonable belief that the Defendant may not be the father of this child, because [Hill] was involved with another man.

Judge Hinnant then granted defendant's Rule 60 motion and his motion for paternity test.

Plaintiff filed writs of certiorari and supersedeas with this Court. We granted certiorari and stayed Judge Hinnant's 31 May 2007 order pending the outcome of this appeal.

Plaintiff's sole argument on appeal is that the trial court abused its discretion by granting defendant's Rule 60(b) motion. Plaintiff contends that defendant exceeded Rule 60(b)'s one-year time limit because he brought his motion on 11 May 2006 and he executed the affidavit of parentage on 26 July 2003, nearly three years earlier. Rule 60(b) states, in relevant part:

b) *Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.*—On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) Mistake, inadvertence, surprise, or excusable neglect;

(2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

(3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

* * *

The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

N.C. Gen. Stat. § 1A-1, Rule 60(b) (2007).

Although we agree with plaintiff that defendant's Rule 60(b) motion is best characterized as falling within Rule 60(b)(1)-(3) and not the more time-permissive Rule 60(b)(6), we disagree with plaintiff's assertion that defendant had one year from the execution of the affidavit of parentage to bring his Rule 60(b) motion. Rule 60(b) states that a party must bring a motion under Rule 60(b)(1)-(3) "not more than one year after the *judgment*, *order*, *or proceeding* was entered or taken." N.C. Gen. Stat. § 1A-1, Rule 60(b) (2007) (emphasis added). In this case, plaintiff acknowledges that the affidavit of parentage was not filed until 10 June 2005. No "judgment, order, or proceeding" could be "entered or taken" until the affidavit of parentage was filed with a court. Accordingly, the one-year limit did not begin to run until 10 June 2005. Defendant filed his Rule 60 motion on 11 May 2006, within the one-year time limit.

Plaintiff relies on our opinions in *State ex rel. Davis v. Adams*, 153 N.C. App. 512, 571 S.E.2d 238 (2002), and *County of Durham DSS, ex rel. Stevons v. Charles*, 182 N.C. App. 505, 642 S.E.2d 482 (2007), to support his claim that the one-year time limit started running on the day that defendant executed the affidavit of parentage. This reliance is misplaced. In *Davis*, the defendant father executed an affidavit of parentage on 10 July 1995 and "[t]he trial court entered the Voluntary Support Agreement as an order of the court on 21 July 1995." *Davis*, 153 N.C. App. at 512-13, 571 S.E.2d at 239. The defendant executed an amended voluntary support agreement, which was entered as an order of the court on 5 November 1996. *Id.* at 513, 571 S.E.2d at 239. The defendant underwent a paternity test in 1999 after hearing rumors that he was not the biological father of the minor child. *Id*. The defendant filed a Rule 60(b) motion "on 10 August 2000 asking the trial court to void the Acknowledgment and Order of Paternity he executed on 10 July 1995 and the Amended Voluntary Support Agreement and Order entered 5 November 1996." *Id*. The trial court denied defendant's motion. *Id*. We affirmed the trial court, reasoning that "*[t]he most recent order* in the present case was entered 5 November 1996. Defendant filed his motion in the cause on 10 August 2000, more than three years *after the order was entered*, clearly making defendant's motion untimely under N.C.G.S. § 1A-1, Rule 60(b)." *Id.* at 515, 571 S.E.2d at 241 (emphases added).

Similarly, in *Stevons*, the defendant father executed an acknowledgment of paternity on 23 September 1997 and the trial court entered an order of paternity and a voluntary support agreement and order on 3 October 1997. *Stevons*, 182 N.C. App. at 505, 642 S.E.2d at

483. On 4 March 2005, shortly after the mother made statements that the defendant was not the minor child's biological father, the defendant filed a motion pursuant to Rule 60(b) and N.C. Gen. Stat. § 110-132 "seeking to set aside his acknowledgment of paternity and seeking a paternity test." *Id.* at 506, 642 S.E.2d at 483. The trial court denied the defendant's motion pursuant to Rule 60(b), but granted relief under N.C. Gen. Stat. § 110-132. *Id.* The issue on appeal was whether the trial court erred by granting relief under § 110-132; we did not examine the trial court's denial of the motion on Rule 60(b) grounds. *Id.* We held that "the one-year time period for seeking relief under Rule 60(b)(1), (2) and (3) applies to challenges under N.C. Gen. Stat. § 110-132(a)." *Id.* at 507, 642 S.E.2d at 484. We reversed the trial court's order because the defendant's "motion was filed over seven years *after the filing of his acknowledgment of paternity*," and were therefore time-barred. *Id.* (emphasis added).

It is clear from our analysis in *Davis* and *Stevons* that the one-year clock begins to run only after an affidavit of paternity has been filed and some "judgment, order, or proceeding was entered or taken" by a court, and not from the day that a putative father executes an affidavit of parentage. Here, defendant filed his Rule 60(b) motion within the one-year time limit, and the district court properly heard the motion.

Accordingly, we affirm the order of the district court.

Affirmed.

Judges McCULLOUGH and ARROWOOD concur.

STATE OF NORTH CAROLINA v. DAVID JONATHAN PATTERSON, DEFENDANT

No. COA07-951

(Filed 6 May 2008)

1. Appeal and Error— preservation of issues—failure to argue

Eight assignments of error for which defendant failed to present arguments in his brief are deemed abandoned under N.C. R. App. P. 28(a).

2. Probation and Parole— revocation of probation—hearing within tolled probationary period

The trial court did not lack subject matter jurisdiction to revoke defendant's probation on 4 April 2007 even though defendant contends the probationary periods expired prior to the court's entry of the probation revocation orders because: (1) N.C.G.S. § 15A-1344(d) provides, in part, that the probation period shall be tolled if the probationer shall have pending against him criminal charges in any court of competent jurisdiction, which, upon conviction, could result in revocation proceedings against him for violation of the terms of this probation, and there was evidence in the record that defendant had criminal charges pending against him during his probation as of the 4 April hearing including defendant's own testimony and other evidence in the record; and (2) defendant's probationary periods under file numbers 04 CRS 52952, 05 CRS 50050, and 05 CRS 50052 did not expire prior to the 4 April 2007 hearing, but instead tolled, and thus, the 4 April hearing was conducted during defendant's probation.

Appeal by defendant from judgments entered 4 April 2007 by Judge Zoro J. Guice, Jr. in Transylvania County Superior Court. Heard in the Court of Appeals 14 April 2008.

Roy Cooper, *Attorney General*, *by Brenda Eaddy*, *Assistant Attorney General*, *for the State.*

Don Willey, *for defendant-appellant.*

MARTIN, Chief Judge.

On 18 January 2005, defendant David Jonathan Patterson pled guilty to one count each of felony forgery and felony uttering (04 CR 52952), and four counts each of misdemeanor common law forgery and misdemeanor common law uttering (04 CR 52953-56). On that same day, defendant was sentenced in district court to two consecutive sentences of six to eight months imprisonment suspended, with twenty-four months of supervised probation to begin when defendant was released from imprisonment from a sentence imposed in case number 02 CRS 51877, in which a previous probation had been revoked on 3 January 2005. According to the record, the sentence in 02 CRS 51877 was completed on 1 April 2005.

On 29 March 2005, defendant pled guilty to three additional counts each of misdemeanor common law forgery and misdemeanor

common law uttering (05 CR 50050-53). Defendant was sentenced to two consecutive terms of 120 days imprisonment suspended to begin at the expiration of the sentence imposed under file number 04 CR 52952, with twenty-four months of supervised probation.

On 22 September 2005, probation violation reports were filed against defendant, and on 5 January 2006, the district court revoked defendant's probation and activated his suspended consecutive sentences under file numbers 04 CR 52952, 05 CR 50050, and 05 CR 50052. Defendant gave notice of appeal to superior court. On 8 March 2006, the superior court entered judgments continuing defendant's probation under the original terms and conditions under file numbers 04 CRS 52952, 05 CRS 50050, and 05 CRS 50052.

On 25 July 2006 and 7 February 2007, new probation violation reports were filed against defendant. On 4 April 2007, the superior court heard evidence and argument regarding the probation violations reported on 7 February. On that same date, the court revoked defendant's probation and activated his consecutive suspended sentences under file numbers 04 CRS 52952, 05 CRS 50050, and 05 CRS 50052. Defendant gave notice of appeal to this Court.

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[1] The record on appeal contains ten assignments of error. In his brief, however, defendant has brought forward arguments in support of only two of the assignments of error; therefore, those assignments of error for which defendant failed to present arguments 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.").

[2] Defendant contends the trial court lacked subject matter jurisdiction to revoke his probation on 4 April 2007 because the probationary periods expired prior to the court's entry of the probation revocation orders. We disagree.

"[A] period of probation commences on the day it is imposed and runs concurrently with any other period of probation, parole, or imprisonment to which the defendant is subject during that period." N.C. Gen. Stat. § 15A-1346(a) (2007); *see also State v. Canady*, 153 N.C. App. 455, 459-60, 570 S.E.2d 262, 265 (2002) ("[A]ny sentence of probation must run concurrently with any other probation sentences imposed on a defendant."). However, "[i]f a period of probation is being imposed . . . on a person already subject to an undischarged term of imprisonment, the period of probation may run either con-

currently or consecutively with the term of imprisonment, as determined by the court. If not specified, it runs concurrently." N.C. Gen. Stat. § 15A-1346(b).

In the present case, on 3 January 2005, Transylvania County Superior Court ordered that defendant begin serving two consecutive sentences of forty-five days imprisonment in file numbers 02 CRS 51877 and 03 CRS 50505. Thus, defendant's imprisonment term began on 3 January 2005 and, including defendant's one-day credit for time already spent in confinement, ended on 1 April 2005. *See* N.C. Gen. Stat. § 15A-1353(a) (2007) ("When a sentence includes a term or terms of imprisonment, . . . [u]nless otherwise specified in the order of commitment, the date of the order is the date service of the sentence is to begin.").

On 18 January 2005, defendant was placed on twenty-four months of supervised probation under file number 04 CR 52952, which was to begin *after* defendant was released from incarceration under 02 CRS 51877. Thus, defendant's two-year probation under file number 04 CR 52952 began on 2 April 2005 and was scheduled to end on 1 April 2007.

On 29 March 2005, three days before defendant's release from jail and four days before defendant's probationary period under 04 CR 52952 was set to begin, defendant was ordered to serve twenty-four months of supervised probation under file numbers 05 CR 50050 and 50052. Because the revocation order did not specify that defendant's probation was to run consecutively with defendant's remaining term of imprisonment, this two-year probationary period began on 29 March 2005 and ran concurrently with the other probationary period set to begin four days later. *See* N.C. Gen. Stat. § 15A-1346. Thus, the date on which defendant's probation was scheduled to end under file numbers 05 CR 50050 and 50052 was 28 March 2007.

The State filed probation revocation reports on 7 February 2007 regarding violations defendant was alleged to have committed during his probation. While the probation officer noticed a hearing date of 14 February 2007 in the reports, the hearing on these alleged violations did not actually take place until 4 April 2007—three days after defendant was scheduled to complete his probation for file number 04 CR 52952, and seven days after defendant was scheduled to complete his probation for file numbers 05 CR 50050 and 50052.

However, the probation violation reports filed 7 February alleged that, on 3 August and 26 August 2006, defendant committed

new criminal offenses in violation of the regular conditions of his probation. The reports alleged that charges for the offenses of common law forgery and common law uttering (06 CR 51880) and attempt to obtain controlled substance by fraud (06 CR 51772) "remain[ed] pending in Transylvania County District Court and disposition [wa]s not expected until after the offender[']s release date of 3-16-07." The reports further stated that, "[i]f convicted, this office intends to return the offender to court for a revocation hearing." In addition, at the 4 April 2007 hearing, the probation officer testified that he "believe[d defendant] pled guilty in District Court [to pending charges under 06 CR 51880 and 51772,] but [defendant] appealed those and they are still pending at this time." At that same hearing, when asked "what are the pending charges you now face," defendant testified: "Controlled substance, forgery of an instrument and trying to obtain medication."

N.C.G.S. § 15A-1344(d) provides, in part, that "[t]he probation period shall be tolled if the probationer shall have pending against him criminal charges in any court of competent jurisdiction, which, upon conviction, could result in revocation proceedings against him for violation of the terms of this probation." N.C. Gen. Stat. § 15A-1344(d) (2007). Here, there is evidence in the record that defendant had criminal charges pending against him during his probation. While the record does not reflect the date on which those charges were first brought against defendant, nonetheless, on 17 January 2007, the probation officer signed probation violation reports which stated that the charges against defendant under file numbers 06 CR 51880 and 51772 remained pending "and disposition [wa]s not expected until after the offender[']s release date of 3-16-07." Defendant also signed these probation violation reports on 7 February 2007 indicating that he understood the contents of the reports. Since "a defendant's probationary period is automatically suspended when new criminal charges are brought" under N.C.G.S. § 15A-1344(d), *see State v. Henderson*, 179 N.C. App. 191, 195, 632 S.E.2d 818, 820-21 (2006), the evidence in the record suggests that defendant's concurrent probationary periods under file numbers 04 CRS 52952, 05 CRS 50050, and 05 CRS 50052 began tolling some time before the probation officer signed the violation reports on 17 January 2007. Although the record does not include copies of any charging documents for the new criminal charges referenced in the reports, we conclude that defendant's testimony confirming that criminal charges were still pending against him as of the 4 April hearing, along with the other evidence in the record, are sufficient to sup-

port the inference that the charges alleged to have been committed by defendant on 3 August and 26 August 2006 were pending against defendant for a period of time exceeding seven days. Accordingly, defendant's probationary periods under file numbers 04 CRS 52952, 05 CRS 50050, and 05 CRS 50052 did not expire *prior* to the 4 April 2007 hearing, but instead tolled. Consequently, the 4 April hearing was conducted *during* defendant's probation. Therefore, we conclude that the trial court had jurisdiction to revoke defendant's probation on 4 April 2007 and activate his sentences under file numbers 04 CRS 52952, 05 CRS 50050, and 05 CRS 50052.

Our decision renders it unnecessary to address defendant's contention that the trial court erred when it did not find that the State made reasonable efforts to conduct the probation revocation hearing during the probationary period.

No error.

Judges BRYANT and ARROWOOD concur.

STATE OF NORTH CAROLINA v. WANDA DIETZE

No. COA07-1066

(Filed 6 May 2008)

Obstruction of Justice— filing false report to police—failure to show unlawful purpose

The trial court erred by denying defendant's motion to dismiss the charge of filing a false report to the police because: (1) under North Carolina law, filing a false report to the police is not a crime by itself, but instead the false report is unlawful only if made for the purpose of hindering or obstructing the officer in the performance of his duties; and (2) the State failed to present any evidence that defendant filed a false report with that unlawful purpose.

Appeal by defendant from judgment entered 27 March 2007 by Judge Donald W. Stephens in Superior Court, Durham County. Heard in the Court of Appeals 4 March 2008.

Attorney General Roy Cooper, by Assistant Attorney General Rufus C. Allen, for the State.

Richard E. Jester, for defendant-appellant.

WYNN, Judge.

Under North Carolina law, filing a false report to the police by itself is not a crime; rather, the false report is unlawful only if made "for the purpose of interfering with the law enforcement agency or hindering or obstructing the officer in the performance of his duties."[1] Here, the State failed to present any evidence that the defendant filed a false report with that unlawful purpose. Accordingly, we reverse her conviction.

According to the State, Defendant Wanda Dietze filed a false report in September 2006, accusing Nicholas Hernandez of misdemeanor stalking. Defendant and Mr. Hernandez had worked at the Duke Eye Center during the same time period, although Defendant subsequently left her position. She was then charged, in April 2005, with making harassing telephone calls to employees at the Eye Center, including Mr. Hernandez. Defendant had also previously accused Mr. Hernandez of sexual harassment, but the Eye Center determined the claim was unfounded.

After investigating Defendant's complaint against Mr. Hernandez for misdemeanor stalking, the State decided that Defendant's claims were baseless and dismissed the charges prior to Mr. Hernandez's trial. During that time period, Defendant also called a Duke University police officer up to thirty-two times a day, as well as regularly called and left messages for the Assistant District Attorney (ADA) who was prosecuting Mr. Hernandez. According to the ADA, Defendant likewise constantly telephoned the Durham Police Department sergeant in charge of her case. After dismissing the charges against Mr. Hernandez, the ADA charged Defendant with filing a false report to a police station because Defendant "was the one who's instigating all the activity. . . . And because of the persistence of [Defendant], . . . if we did not charge her that it would be a situation where she would continually try to take charges against people at Duke."

After a January 2007 conviction in District Court, Defendant appealed to Superior Court, where she was found guilty by a jury. The

1. *State v. Hughes*, 353 N.C. 200, 204-05, 539 S.E.2d 625, 629 (2000) (quoting N.C. Gen. Stat. § 14-225).

trial court entered judgment against her on 27 March 2007 and sentenced her to thirty days in the Durham County Jail, to be suspended for eighteen months while she was on supervised probation. As a condition of her probation, the trial court also required Defendant not to have any contact with Mr. Hernandez and certain other Duke Eye Center employees, as well as undergo a mental health evaluation.

Defendant now appeals to this Court, arguing that the trial court erred by (I) denying her motion to dismiss or to set aside the verdict for insufficient evidence, and (II) allowing a tape recording to be entered into evidence, in violation of her right to confrontation and of the prohibition against hearsay. Because Defendant's first argument is dispositive in deciding her appeal, we decline to consider the second issue.

To survive a motion to dismiss, the State must have presented "substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Garcia*, 358 N.C. 382, 412, 597 S.E.2d 724, 746 (2004) (citation and quotations omitted), *cert. denied*, 543 U.S. 1156, 161 L. Ed. 2d 122 (2005). "Substantial evidence" is "relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion." *Id.* (internal citations omitted). In considering a motion to dismiss by the defense, such evidence "must be taken in the light most favorable to the state . . . [which] is entitled to all reasonable inferences that may be drawn from the evidence." *State v. Sumpter*, 318 N.C. 102, 107, 347 S.E.2d 396, 399 (1986).

According to North Carolina law,

> Any person who shall willfully make or cause to be made to a law enforcement agency or officer any false, misleading or unfounded report, for the purpose of interfering with the operation of a law enforcement agency, or to hinder or obstruct any law enforcement officer in the performance of his duty, shall be guilty of a Class 2 misdemeanor.

N.C. Gen. Stat. § 14-225 (2005). Our state Supreme Court has further observed that "making a false statement to the police, standing alone, . . . is not a crime." *State v. Hughes*, 353 N.C. 200, 204-05, 539 S.E.2d 625, 629 (2000). Rather, as emphasized by our Supreme Court, such a false report is unlawful only if it is made "*for the purpose of interfering with the law enforcement agency or hindering or obstructing the officer in the performance of his duties*." *Id.* at 205, 539 S.E.2d at 629 (quoting N.C. Gen. Stat. § 14-225).

We note, too, that the statutory prohibition against filing a false report to law enforcement is found in the chapter of our state criminal law that describes activities that constitute the obstruction of justice. *See* N.C. Gen. Stat. §§ 14-221 *et seq.* These statutes, including prohibitions against jury tampering, witness intimidation, and failure to comply with a court order, are designed to ensure that our citizens do not interfere with the administration of justice in our society. Nevertheless, the plain language of N.C. Gen. Stat. § 14-225, in its requirement that a false report be made "for the purpose of interfering with the law enforcement agency or hindering or obstructing the officer in the performance of his duties," makes clear that the General Assembly did not seek punishment for those making false reports unless they acted with malicious intent. As written, the statute encourages citizens to make a report and seek assistance if they have been victimized—even if some details of that report are ultimately found to be untrue—without fear of criminal repercussions. Indeed, the statutory language reflects a legislative intent to deter only the type of false report that is designed to confound a police investigation or otherwise squander precious law enforcement resources.

Here, although the State presented sufficient evidence that Defendant willfully made a false report to the police that she had been stalked by Mr. Hernandez, there is no evidence in the record or transcripts that she did so "for the purpose of interfering with the law enforcement agency or hindering or obstructing the officer in the performance of his duties." N.C. Gen. Stat. § 14-225. Defendant's conduct undoubtedly had the *effect* of interfering with the work of the police, as investigating her complaint took time and manpower away from work on actual crimes. However, there was no testimony or other evidence that she acted with that malicious *purpose*. Indeed, the transcript of the tape-recorded conversation between Defendant and a Durham Police Department sergeant that was introduced at trial strongly suggests that Defendant believed that she had been stalked by Mr. Hernandez.

Moreover, even had Defendant's purpose in filing the false report been to harass Mr. Hernandez and, by extension, the Duke Eye Center, her actions still would not have been illegal unless they were designed to obstruct justice. As noted by the State, the tape recording of Defendant's phone calls to the Durham Police sergeant "is evidence of Defendant's complaint"—but again, evidence of the false report is not in and of itself a crime. *Hughes*, 353 N.C. at 204-05, 539 S.E.2d at 629. Defendant's repeated phone calls to the Duke

University police were irrelevant to her interactions or filing a false report with the Durham police. Likewise, her contact with the ADA indicates only that she was interested in having her claim zealously pursued, even if the police investigated and found the claim to be baseless.

We recognize that the State in this case was attempting to take action against Defendant to protect Mr. Hernandez and others at the Duke Eye Center from further contact with or harassment by her. However, by failing to show that Defendant acted with an impermissible purpose in having the arrest warrant sworn out against Mr. Hernandez, the State did not meet its burden at trial to provide substantial evidence as to each element of the crime of filing a false report to law enforcement. To hold otherwise would have a chilling effect on citizens' willingness to turn to the police for help, even if such contact were ultimately based on mistake or confusion.

Accordingly, we reverse the denial of Defendant's motion to dismiss and vacate her conviction.

Reversed.

Judges BRYANT and JACKSON concur.

STATE OF NORTH CAROLINA v. PIERRE TOREZ-OMAR FARRAR

No. COA05-1319-2

(Filed 6 May 2008)

Burglary and Unlawful Breaking or Entering— first-degree burglary—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of first-degree burglary based on alleged insufficient evidence because the evidence at trial, viewed in the light most favorable to the State, showed that defendant and two other men went to the victims' residence around 9:30 pm; the men went on the porch, put shirts over their faces, and latex gloves on their hands; one of the men had a gun, kicked in the door, and all three entered the house and confronted the victims; and a chain necklace, a PlayStation, some games, and a VCR were taken while the men asked, "where is the money?"

STATE v. FARRAR

[190 N.C. App. 202 (2008)]

Appeal by defendant from judgments entered 17 March 2005 by Judge L. Todd Burke in Guilford County Superior Court. Heard originally in the Court of Appeals on 21 August 2006, and opinion filed 19 September 2006, finding no error in part and vacated in part and remanded for entry of judgment of non-felonious breaking and entering. Remanded to this Court by opinion of the Supreme Court of North Carolina filed 9 November 2007.

Attorney General Roy Cooper, by Assistant Attorney General David L. Elliott, for the State.

Parish & Cooke, by James R. Parish, for defendant appellant.

McCULLOUGH, Judge.

Previously, this Court reversed defendant's conviction for first-degree burglary finding a fatal variance between the indictment and the jury instructions given by the trial judge. *State v. Farrar*, 179 N.C. App. 561, 634 S.E.2d 253 (2006). On 9 November 2007, our Supreme Court vacated that portion of this Court's decision which held that the variance was fatal, holding that where the variance is favorable to defendant no prejudice results. Thus, defendant's first-degree burglary conviction was reinstated. *State v. Farrar*, 361 N.C. 675, 651 S.E.2d 865 (2007).

This case was remanded to this Court for consideration of the remaining assignment of error. That assignment of error alleged that the trial court erred in failing to dismiss the charge of first-degree burglary due to the insufficiency of the evidence.

The facts of this home invasion are more fully discussed in the prior opinions set forth above. The elements of burglary in the first degree are:

> (1) the breaking (2) and entering (3) in the nighttime (4) into a dwelling house or a room used as a sleeping apartment (5) which is actually occupied at the time of the offense (6) with the intent to commit a felony therein.

State v. Wells, 290 N.C. 485, 496, 226 S.E.2d 325, 332 (1976).

The evidence at trial showed that defendant and two other men went to the victims' residence around 9:30 p.m. on Avalon Road in Guilford County. The men went on the porch, put shirts over their faces, and latex gloves on their hands. One of the men had a gun,

kicked in the door, and all three entered the house and confronted sisters Darlene and Mollie Slade with their children. A chain necklace, a PlayStation, some games, and a VCR were taken while the men asked, "where is the money?"

Taken in the light most favorable to the State, we believe substantial evidence on each element was presented and the motion properly denied. Accordingly, this assignment of error is overruled.

As this Court has now considered all of defendant's assignments of error and found them to be without merit, defendant's trial was conducted free of prejudicial error.

No prejudicial error.

Chief Judge MARTIN and Judge HUNTER concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 6 MAY 2008)

BECKER v. BECKER No. 07-543	Guilford (06CVD5678)	Affirmed
CRAWFORD v. WATLINGTON No. 07-1352	Wake (96CVS1992)	Dismissed
CYPRUS GRP., LLC v. TWISS No. 07-1127	Wake (07CVS1420)	Affirmed
HALL v. MAURICIO No. 07-656	Johnston (05CVS3418)	Affirmed in part; reversed in part
HAMES v. HAMES No. 07-831	Burke (05CVD805)	Affirmed
HERMAN v. HERMAN No. 07-1081	Catawba (05CVD2885)	Affirmed
IN RE A.H., L.L., B.L. No. 08-18	Transylvania (01J46-7) (07JA44)	Affirmed
IN RE B.K. No. 07-1577	Forsyth (06J235)	Affirmed in part, vacated in part and remanded
IN RE C.M.B. No. 08-71	Alamance (06JA102)	Affirmed
IN RE C.M.W. No. 07-1315	Iredell (07JB67)	Vacated
IN RE D.K.B. No. 07-1359	Mecklenburg (06J1113)	Affirmed in part, remanded in part
IN RE ESTATE OF DIGMAN No. 07-425	Guilford (04CVS5366)	Affirmed
IN RE K.B. & K.B. No. 07-1368	Orange (07JA39-41)	Affirmed in part, remanded in part
IN RE K.T. & C.T. No. 07-1547	Buncombe (98J104C) (05J245)	Affirmed
JOHNSON v. WALKER No. 07-523	Durham (06CVS4077)	Reversed and remanded
JOHNSON v. WALKER No. 07-642	Durham (06CVS4077)	Reversed and remanded
MACKENZIE v. LEWIS No. 07-1211	Durham (04CVD847)	Affirmed

MILES v. KOON No. 07-1181	Mecklenburg (05CVS9754)	Affirmed
MINCEY-SMITH v. SMITH No. 07-1325	Forsyth (06CVD6636)	Affirmed
MITCHELL CTY. v. BUCHANAN No. 07-1307	Mitchell (07CVD94)	Affirmed in part; vacated and remanded in part
NORMAN v. N.C. DEP'T OF TRANSP. No. 07-894	Indus. Comm. (TA-12343)	Affirmed
POTCHAK v. TATUM No. 07-1303	Durham (06CVS6512)	Affirmed
SEAGLE v. HERRING No. 07-655	Rowan (05CVS3289)	No error
STATE v. BALDWIN No. 07-1132	Forsyth (06CRS64553-55) (07CRS3829)	No error
STATE v. BARNES No. 07-1387	Lenoir (06CRS53705)	No error
STATE v. BERNARD No. 07-1289	Wake (06CRS39494-97)	No error
STATE v. BRANSON No. 07-1216	Rockingham (06CRS53908) (06CRS5902-03)	No error
STATE v. BRYSON No. 07-1230	Buncombe (06CRS11300-01)	Affirmed in part; dismissed in part
STATE v. CROSS No. 07-1461	Cumberland (07CRS15781)	Affirmed
STATE v. FORTE No. 07-739	Cabarrus (06CRS311-12) (06CRS2658)	No prejudicial error
STATE v. GREEN No. 07-1256	Henderson (07CR51393) (07CR51415)	Affirmed
STATE v. HALL No. 07-1370	Alexander (06CRS317-18)	Dismissed
STATE v. HALL No. 07-724	Burke (05CRS7268-69)	No error
STATE v. HALLYBURTON No. 07-111	Catawba (06CRS11483-84)	Affirmed

STATE v. HARRINGTON No. 07-1442	Alexander (05CRS50979)	No prejudicial error
STATE v. LACEWELL No. 07-657	Cumberland (05CRS50810)	Affirmed
STATE v. MCCAIN No. 07-1115	Guilford (05CRS97513-15) (05CRS97518)	No prejudicial error
STATE v. MCDUFFIE No. 07-1177	Moore (06CRS8543) (06CRS52423-24)	No prejudicial error
STATE v. MCSWEENEY No. 07-1139	Forsyth (05CRS61026) (05CRS26421)	No error
STATE v. MILES No. 07-922	Cumberland (00CRS53225)	Judgment vacated
STATE v. MILLS No. 07-1197	Forsyth (06CRS54973) (06CRS8762) (07CRS8999)	No error
STATE v. NOOE No. 07-1116	Montgomery (05CRS50832)	No error
STATE v. PALMER No. 07-811-2	Rutherford (06CRS50421)	No error
STATE v. RIDLEY No. 03-1543	Craven (03CRS2594) (03CRS51405-09)	Affirmed
STATE v. SERVANTES No. 07-1238	Buncombe (04CRS53785) (04CRS53787)	Affirmed
STATE v. TIMMONS No. 07-1196	Wake (06CRS113535-36)	No error
STATE v. WILLIAMS No. 07-1464	Forsyth (03CRS60921)	No error
STATE v. WILLIAMS No. 07-1462	Lincoln (05CRS52707) (06CRS3474)	No error
STATE v. WILSON No. 07-974	Forsyth (06CRS50046)	No error
STATE v. YANCEY No. 07-1406	Forsyth (06CRS55643) (06CRS20293)	No error

WARD v. JETT PROPS., LLC No. 07-1448	Forsyth (07CVD4315)	Affirmed
YADKIN VALLEY BANK & TR. CO. v. AF FIN. GRP. No. 07-240	Surry (05CVS1007)	Affirmed
YADKIN VALLEY BANK & TR. CO. v. AF FIN. GRP. No. 07-417	Surry (05CVS1007)	Affirmed

MASON v. DWINNELL

[190 N.C. App. 209 (2008)]

JOELLEN MASON, PLAINTIFF v. IRENE DWINNELL, DEFENDANT

No. COA07-176

(Filed 6 May 2008)

1. Appeal and Error— notice of appeal—prior order

There was no appellate jurisdiction to review a trial court order from 24 July 2006 when the sole notice of appeal was from a 1 June 2006 order in the same case. The notice of appeal was filed before the 24 July order, and so could not have referred to that order, and another notice of appeal was required.

2. Child Support, Custody, and Visitation— custody—same sex parents—best interest of child standard

In a child custody case involving same sex domestic partners, the question was whether the birth parent had acted inconsistently with her paramount parental right, making the applicable standard the best interest of the child. The nature of the relationship is of no legal significance to custody and visitation, and the question of whether a domestic partner may acquire the status of a parent is not presented here.

3. Child Support, Custody, and Visitation— custody—standing—same sex partner

The trial court properly concluded that a nonbiological same-sex domestic partner had standing to pursue custody of a minor child. The relationship between the third party and the child is the relevant consideration; here, there were unchallenged findings that established that the nonbiological partner had a relationship with the child in the nature of a parent-child relationship.

4. Child Support, Custody, and Visitation— custody—same sex parents—exclusive parental authority shared with partner—best interest of child standard

A same-sex partner who was the biological parent of a child gave up her right to unilaterally exclude her partner (or limit contact with the child) by choosing to cede to her a sufficiently significant amount of parental responsibility and decision-making authority, creating a permanent parent-like relationship. The domestic partner is not entitled to the rights of a legal parent, but the trial court may apply the best interest of the child test in considering a request for custody and visitation.

5. Child Support, Custody, and Visitation— conduct inconsistent with exclusive parental role—involving another person—nature of conduct

When examining a legal parent's conduct to determine whether it is inconsistent with his or her constitutionally-protected status, the focus is on volitional acts of the legal parent that relinquish otherwise exclusive parental authority to a third party, not whether the conduct consists of "good acts" or "bad acts." However, the conduct by the same-sex parent in this case (encouraging the child to develop a parent-child bond with her partner with the expectation that it would continue and then severing the relationship) cannot be viewed as benign. The proper standard for determining custody, then, was "the best interest of the child."

6. Child Support, Custody, and Visitation— joint custody—same sex parents

The trial court did not err by granting joint custody to same-sex parties on the "best interest of the child" standard. The court made sufficient findings about the bond between the child and the nonbiological partner and defendant, the biological parent, did not argue that these findings were unsupported by evidence. The mere fact that contrary evidence exists does not justify reversal.

Appeal by defendant from order entered 1 June 2006 by Judge Ann McKown in Durham County District Court. Heard in the Court of Appeals 11 October 2007.

Gabriela J. Matthews & Associates, P.A., by Gabriela J. Matthews; and Tharrington Smith, L.L.P., by Jill Schnabel Jackson, for plaintiff-appellee.

Darsie, Sharpe, Mackritis & Dukelow, P.L.L.C., by Lisa M. Dukelow and Jaye Meyer, for defendant-appellant.

Blan V. Minton; Latham & Watkins LLP, by Robyn L. Ginsberg and Kendall C. Burman; and Center on Children and Families, by Barbara Bennett Woodhouse, for amici curiae National Association of Social Workers and National Association of Social Workers, North Carolina Chapter.

Professor Suzanne Reynolds for amicus curiae North Carolina Association of Women Attorneys.

GEER, Judge.

Defendant Irene Dwinnell appeals from the trial court's order awarding permanent joint legal and physical custody of her minor child to Dwinnell and her former domestic partner, plaintiff Joellen Mason. It is important to first observe that the factual context of this case—involving same sex domestic partners—is immaterial to the proper analysis of the legal issues involved. The fundamental question presented by this appeal is whether the district court's findings of fact are sufficient to support its conclusion of law that it should apply the "best interest of the child" standard in determining whether Mason—who is not a legal parent[1] of the child—should be awarded custody of the child, including visitation. We hold that the trial court properly applied the controlling authority of *Price v. Howard*, 346 N.C. 68, 484 S.E.2d 528 (1997), and, accordingly, we affirm the trial court's order.

Facts and Procedural History

The district court made the following pertinent findings of fact. Mason and Dwinnell were domestic partners for eight years. At some point during that relationship, Dwinnell learned that, for medical reasons, she would need to pursue a pregnancy at that time if she wanted biological children. Although Mason had no plans to bear a biological child, she wanted to have a family with Dwinnell. Subsequently, on 25 November 1995, Mason and Dwinnell held a commitment ceremony attended by their families and friends.

Mason and Dwinnell together researched and discussed their options for conceiving a child, including use of an anonymous or known donor and the various sperm donation programs available. Ultimately, they mutually chose an anonymous sperm donor who had physical characteristics resembling those of Mason. Dwinnell and Mason together attended all of Dwinnell's inseminations and, after she became pregnant, all of her prenatal care appointments, sessions at the hospital, and childbirth classes. They also planned and prepared the child's nursery together.

A birth plan was developed that included Mason's participating in the birth of the child. Mason in fact attended the child's birth on 11 January 1997 and cut his umbilical cord. Combining their surnames, Dwinnell and Mason named the child Mason Dwinnell. Although

1. We use the phrase "legal parent" to reference both biological and adoptive parents.

Dwinnell's name was the only name listed as a parent on the child's birth certificate, evidence was presented that the parties mutually desired to include both Mason and Dwinnell on the birth certificate, but the hospital refused to do so.

Dwinnell and Mason discussed and agreed upon the godparents of the child. They held a baptismal ceremony for the child at which they publicly presented themselves to family and friends as the child's two parents. The women explained how they derived the child's name by combining their last names, and both Mason's parents and Dwinnell's parents were recognized as the child's grandparents.

Dwinnell has stipulated that following the child's birth, "he lived with both parties who were acting as a family unit." Dwinnell and Mason shared caretaking responsibilities for the child with Mason normally caring for him during weekday mornings. Although the women shared paying household expenses and the child's individual expenses, Dwinnell and Mason agreed that Mason would claim the child as a dependent for all income tax purposes.

On 22 March 2000, when the child was three years old, Dwinnell and Mason signed before a notary public a "Parenting Agreement" prepared by an attorney. Each woman had received a draft and had an opportunity to review it prior to signing it. According to the district court, Dwinnell and Mason both wished to enter into an agreement that gave Mason all of the rights and responsibilities of an equal parent.

The document recited that (1) each party acknowledged and agreed that "they jointly decided to conceive and bear a child, based upon their commitment to each other and their commitment to jointly parent a child;" (2) Mason "would legally adopt this child, with the consent and joinder of [Dwinnell], if the laws of the State of North Carolina allowed for second parent adoptions, which they currently do not;" (3) each party acknowledged and agreed that "although [Mason] is not the biological mother, she is a *de facto* parent who has and will provide the parties' child with a stable environment and she has formed a psychological parenting relationship with the parties' child;" (4) "each party further acknowledges and agrees that their child's relationship with [Mason] should be protected and promoted to preserve the strong emotional ties that exist between them;" and (5) "the parties desire to make provisions regarding the support, custody and care of their child in the event that they should cease living together as a family . . . ." The document then set forth provisions

relating to Mason's custody, visitation, and financial support should the women's relationship terminate, as well as other provisions addressing what would happen if Dwinnell was unable to care for the child. The document specifically stated: "Each party acknowledges and agrees that all major decisions regarding their child, including, but not limited to, residence, support, education, religious upbringing and medical care shall be made jointly by the parties and that their child shall be involved in the decision-making to the extent he is able, by maturity, to do so."

Also in 2000, Dwinnell executed a minor health care power of attorney authorizing Mason to obtain medical care for the child. Mason would take the child to the doctor if he needed medical attention while she was caring for him. Mason also went with Dwinnell to the majority of the child's annual pediatric appointments.

Consistent with the Parenting Agreement, Dwinnell and Mason discussed the child's education and mutually agreed for him to attend private school at Carolina Friends School. Both Dwinnell and Mason attended parent-teacher conferences for the child. In addition, until this litigation, Dwinnell and Mason discussed and mutually agreed upon all of the child's extracurricular activities.

Dwinnell has stipulated that Mason paid the majority of daycare and preschool expenses; all of the child's school tuition for four years and one semester, with a fifth year's tuition paid by a trust funded by Mason's parents; and all of the child's before- and after-care from 2000 through June 2004. Dwinnell has further stipulated that Mason's parents established an irrevocable trust for the minor child, as they had for all of their grandchildren, with Dwinnell and Mason executing documents in which they agreed to serve as co-trustees. Mason established a college savings account for the child funded by Mason and her parents.

When completing forms relating to the child, Dwinnell marked through "Husband," "Father," or "Guardian" and inserted "co-parent," followed by Mason's name. Such forms admitted at trial included the application for enrollment at Carolina Friends School and a contract with the school completed by Dwinnell and Mason jointly, as well as a consent form signed by both Dwinnell and Mason for the child to have therapeutic intervention at Developmental Therapy Associates. In addition, in 2001, Dwinnell executed a will designating Mason as the child's guardian if she died.

In May 2001, Dwinnell and Mason decided to cease living together, and, in September 2001, Mason moved one block away. From that date until 2004, Dwinnell and Mason exercised parental responsibilities for the child in their respective homes, including overnight stays. Dwinnell has stipulated that on most mornings from October 2001 through much of 2003, after the child had spent the night with her, she would drop the child off at Mason's house, and Mason would take the child to daycare.

Although the parties did not at first have a set custody schedule, beginning in early 2003, Dwinnell would have the child for two days, followed by two days with Mason, with the parties alternating weekends. In early 2004, however, Dwinnell changed the schedule, and Mason consulted an attorney. Following a mediation, the parties agreed to have the child see a child therapist. When the therapist discussed custodial schedules with the child, despite Dwinnell's notifying him that he should not do so, the child was no longer sent to see that therapist. Beginning in October 2004, Dwinnell would only allow her child to visit Mason every other weekend and one evening each week for dinner. Dwinnell also removed Mason's name from the school pick-up list.

On 18 October 2004, Mason filed a complaint for custody. Dwinnell moved to dismiss the complaint, but the district court denied the motion on 20 December 2004. On 21 January 2005, the trial court granted the parties temporary joint legal and physical custody of the child, specifying that the child would spend equal time with each party. Following a 10-day hearing, the district court entered an order of permanent custody on 1 June 2006.

In the permanent custody order, the district court found, in addition to the findings recited above, that Dwinnell "encouraged, fostered, and facilitated the emotional and psychological bond between the minor child and [Mason]." Further, "[t]hroughout the child's life, [Mason] has provided care for him, financially supported him, and been an integral part of his life such that the child has benefited from her love and affection, caretaking, emotional and financial support, guidance, and decision-making."

Based on its findings of fact, the district court concluded first that Mason had standing to file a custody action. The court then concluded that "[b]y allowing [Mason] to be involved in the minor[] child['s] life as set forth above in the findings of fact and voluntarily executing a Parenting Agreement to share parental rights and respon-

sibilities, [Dwinnell] has acted inconsistent with her paramount parental right . . . ." As a result, the court concluded that it should determine the custody issues based on the child's best interests. Alternatively, the court concluded that Mason "is a parent by estoppel, given [Dwinnell's] conduct in establishing [Mason] as a parent to the child from preconception through 2004. Therefore, [Dwinnell] is now estopped from alleging that [Mason] is not a parent." Finally, the court concluded, based on findings of fact additional to those summarized above, that it was in the best interest of the child that the parties be granted permanent joint legal and physical custody of the child. The decretal portion of the order set forth detailed provisions regarding the operation of the joint legal and physical custody.

On 21 June 2006, Dwinnell filed a notice of appeal from the 1 June 2006 order. On 24 July 2006, the court entered an order amending its 1 June 2006 permanent custody order to correct "a clerical error in the facts and conclusions." The court amended one finding of fact and one conclusion of law to add that it was making its findings "by clear, cogent and convincing evidence." The order noted that the court had articulated the proper standard "on the record on several occasions, but inadvertently omitted it from its Order."

24 July 2006 Order

[1] As an initial matter, we address Dwinnell's assignment of error arguing that the trial court improperly entered its 24 July 2006 order amending its 1 June 2006 permanent custody order after Dwinnell had already filed a notice of appeal. We first note that the record on appeal contains no notice of appeal from the 24 July order. The sole notice of appeal included in the record on appeal references only the 1 June 2006 order.

Rule 3(d) of the North Carolina Rules of Appellate Procedure requires that the notice of appeal filed by the appellant "designate the judgment or order from which appeal is taken . . . ." In this case, since the notice of appeal was filed prior to the entry of the 24 July 2006 order, it could not reference that subsequent order. Dwinnell was, therefore, required to file another notice of appeal regarding that order. *See*, *e.g.*, *In re Hudson*, 165 N.C. App. 894, 898, 600 S.E.2d 25, 28 (notice of appeal from decision on the merits of case did not provide appellate jurisdiction of subsequent order imposing Rule 11 sanctions when order not mentioned in notice of appeal), *appeal dismissed*, *disc. review denied*, *and cert. denied*, 359 N.C. 189, 607 S.E.2d 271 (2004); *Finley Forest Condo. Ass'n v. Perry*, 163

N.C. App. 735, 741, 594 S.E.2d 227, 231 (2004) (although plaintiff filed notice of appeal referencing underlying judgment, plaintiff "failed to file notice of appeal from the trial court's order permitting costs to be taxed against plaintiff; therefore, this Court is without jurisdiction to consider this issue"); *Chee v. Estes*, 117 N.C. App. 450, 452, 451 S.E.2d 349, 351 (1994) ("Plaintiffs' notice of appeal indicates that an appeal was being taken from the judgment entered in accordance with the verdict and it cannot be fairly inferred from the notice that plaintiffs intended as well to appeal the denial of their motion for new trial.").

"Without proper notice of appeal, the appellate court acquires no jurisdiction and neither the court nor the parties may waive the jurisdictional requirements even for good cause shown under Rule 2." *Bromhal v. Stott*, 116 N.C. App. 250, 253, 447 S.E.2d 481, 483 (1994), *disc. review denied in part*, 339 N.C. 609, 454 S.E.2d 246, *aff'd in part*, 341 N.C. 702, 462 S.E.2d 219 (1995). We, therefore, have no jurisdiction to review the 24 July 2006 order.

Statutory and Constitutional Framework

[2] With respect to the merits, Dwinnell argues strenuously that we should defer to the legislature and allow it to decide whether the circumstances of this case warrant application of the "best interest of the child" standard. The legislature has, however, already spoken. In N.C. Gen. Stat. § 50-13.2(a) (2007), the General Assembly provided: "An order for custody of a minor child entered pursuant to this section shall award the custody of such child to such person, agency, organization or institution as will best promote the interest and welfare of the child." In other words, the General Assembly has determined that it is the public policy of this State that the "best interest of the child" standard shall apply whenever custody is sought regardless of the relationship of the recipient of custody to the child. *See Price*, 346 N.C. at 81, 484 S.E.2d at 535 (observing that, in North Carolina, statutes require courts "to base custody decisions solely upon the best interest of the child").

Rather than a question of legislative intent or State public policy, this appeal primarily presents a question of constitutional law. As our Supreme Court stated in *Price*: "The question now before us is whether, under the facts of this case, the trial court was required to hold that defendant's constitutionally protected interest in the companionship, custody, care, and control of her child must prevail or whether the statutorily prescribed 'best interest of the child'

test should have been applied to determine custody." *Id.* at 74, 484 S.E.2d at 531.

"It has long been understood that it is the duty of the courts to determine the meaning of the requirements of our Constitution." *Leandro v. State*, 346 N.C. 336, 345, 488 S.E.2d 249, 253 (1997). Thus, it is our responsibility to determine under what circumstances the federal and state constitutions override the General Assembly's determination that "the best interest of the child" standard should apply in all custody determinations.

In *Petersen v. Rogers*, 337 N.C. 397, 445 S.E.2d 901 (1994), our Supreme Court first addressed the impact of *Stanley v. Illinois*, 405 U.S. 645, 31 L. Ed. 2d 551, 92 S. Ct. 1208 (1972), on custody determinations in North Carolina. The Court noted *Stanley's* holding, based on the Due Process Clause, that " '[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' " 337 N.C. at 400-01, 445 S.E.2d at 903 (emphasis omitted) (quoting *Stanley*, 405 U.S. at 651, 31 L. Ed. 2d at 559, 92 S. Ct. at 1213). Based on this principle, the Court held "that absent a finding that parents (i) are unfit or (ii) have neglected the welfare of their children, the constitutionally-protected paramount right of parents to custody, care, and control of their children must prevail." *Id.* at 403-04, 445 S.E.2d at 905. Because the trial court in that case had made no finding that the natural parents were unfit or had neglected their child's welfare, the trial court "could not award custody to anyone other than [the parents]." *Id.* at 404, 445 S.E.2d at 905.

Our Supreme Court revisited legal parents' constitutional rights in *Price*. The Court noted that "[i]t was unnecessary in *Petersen* to articulate anything more than general constitutional principles." *Price*, 346 N.C. at 73, 484 S.E.2d at 531. The Court explained that "[i]n *Petersen*, this Court held that natural parents have a constitutionally protected interest in the companionship, custody, care, and control of their children" and that "this interest must prevail in a custody dispute with a nonparent, absent a showing of unfitness or neglect." *Id.* at 72, 484 S.E.2d at 530. *Price*, however, addressed "whether other circumstances can require that interest to yield to the 'best interest of the child' test prescribed by N.C.G.S. § 50-13.2(a)." *Id.*

The Court began its discussion of those "other circumstances" by noting that "[a] natural parent's constitutionally protected paramount

interest in the companionship, custody, care, and control of his or her child is a counterpart of the parental responsibilities the parent has assumed and is based on a presumption that he or she will act in the best interest of the child." *Id.* at 79, 484 S.E.2d at 534 (citing *Lehr v. Robertson*, 463 U.S. 248, 77 L. Ed. 2d 614, 103 S. Ct. 2985 (1983)). Based on this principle, the Court articulated the following test:

> [T]he parent may no longer enjoy a paramount status if his or her conduct is inconsistent with this presumption or if he or she fails to shoulder the responsibilities that are attendant to rearing a child. If a natural parent's conduct has not been inconsistent with his or her constitutionally protected status, application of the "best interest of the child" standard in a custody dispute with a nonparent would offend the Due Process Clause.

Id.

The Court declined to specify the universe of conduct that would "constitute conduct inconsistent with the protected status parents may enjoy," but rather directed that a parent's conduct "be viewed on a case-by-case basis." *Id.* Where a trial court finds conduct inconsistent with the parent's constitutionally-protected status, "custody should be determined by the 'best interest of the child' test mandated by statute." *Id.*, 484 S.E.2d at 535. Subsequently, the Supreme Court clarified that "a trial court's determination that a parent's conduct is inconsistent with his or her constitutionally protected status must be supported by clear and convincing evidence." *Adams v. Tessener*, 354 N.C. 57, 63, 550 S.E.2d 499, 503 (2001).

As in *Price*, we are, therefore, required to consider whether the trial court's findings, to the extent based on clear and convincing evidence, support its conclusion of law that Dwinnell "has acted inconsistent with her paramount parental right," making the "best interest of the child" standard applicable. In doing so, we must follow the Supreme Court's mandate that "[s]uch conduct would, of course, need to be viewed on a case-by-case basis . . . ." *Price*, 346 N.C. at 83, 484 S.E.2d at 537.

We note that because this case involves questions of custody only, it does not present the issue whether a former domestic partner may acquire the status of a legal parent. Therefore, we decline to address the doctrine of parent by estoppel adopted in other jurisdictions.

Likewise, we find immaterial Dwinnell's arguments that she and Mason could not marry, and Mason could not adopt the child under

North Carolina law. We cannot improve on the Pennsylvania Supreme Court's explanation as to why "the nature of the relationship" has no legal significance to the issues of custody and visitation: "The ability to marry the biological parent and the ability to adopt the subject child have never been and are not now factors in determining whether the third party assumed a parental status and discharged parental duties. *What is relevant, however, is the method by which the third party gained authority to do so*." *T.B. v. L.R.M.*, 567 Pa. 222, 232, 786 A.2d 913, 918-19 (2001) (emphasis added).

Standing

[3] Before turning to the constitutional question, we first address Dwinnell's related argument that Mason lacked standing to bring a custody action and that the trial court, therefore, erred in denying her motion to dismiss.[2] Standing in custody disputes is governed by N.C. Gen. Stat. § 50-13.1(a) (2007), which states that "[a]ny parent, relative, or *other person*, agency, organization or institution claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child . . . ." N.C. Gen. Stat. § 50-13.1(a) (emphasis added). Nevertheless, as with N.C. Gen. Stat. § 50-13.2, our courts have concluded that the federal and state constitutions place limitations on the application of § 50-13.1.

As this Court explained in *Ellison v. Ramos*, 130 N.C. App. 389, 392, 502 S.E.2d 891, 893, *appeal dismissed and disc. review denied*, 349 N.C. 356, 517 S.E.2d 891 (1998), despite the statute's "broad language, in the context of a third party seeking custody of a child from a natural (biological) parent, our Supreme Court has indicated that there are limits on the 'other persons' who can bring such an action." A conclusion otherwise " 'would conflict with the constitutionally-protected paramount right of parents to custody, care, and control of their children.' " *Id.* at 393, 502 S.E.2d at 893 (quoting *Petersen*, 337 N.C. at 406, 445 S.E.2d at 906).

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2. Dwinnell also argues that the trial court erred in denying her motion to dismiss under Rule 12(b)(6). It is, however, "well established that the denial of a Rule 12(b)(6) motion to dismiss is not reviewable upon an appeal from a final judgment on the merits." *Shadow Group, L.L.C. v. Heather Hills Home Owners Ass'n*, 156 N.C. App. 197, 199, 579 S.E.2d 285, 286 (2003). *See also Concrete Serv. Corp. v. Investors Group, Inc.*, 79 N.C. App. 678, 682-83, 340 S.E.2d 755, 758-59 ("[W]here an unsuccessful motion to dismiss is grounded on an alleged insufficiency of the facts to state a claim for relief, and the case thereupon proceeds to judgment on the merits, the unsuccessful movant may not on an appeal from the final judgment seek review of the denial of the motion to dismiss."), *cert. denied*, 317 N.C. 333, 346 S.E.2d 137 (1986).

Applying *Petersen*, this Court concluded that "the relationship between the third party and the child is the relevant consideration for the standing determination." *Id.* at 394, 502 S.E.2d at 894. As a result, "a third party who has no relationship with a child does not have standing under N.C. Gen. Stat. § 50-13.1 to seek custody of a child from a natural parent." *Id.* On the other hand, the Court held "that a relationship in the nature of a parent and child relationship, even in the absence of a biological relationship, will suffice to support a finding of standing." *Id. See also id.* at 395, 502 S.E.2d at 895 (declining to draw a bright line, but rather "confin[ing] our holding to an adjudication of the facts of the case before us: where a third party and a child have an established relationship in the nature of a parent-child relationship, the third party does have standing as an 'other person' under N.C. Gen. Stat. § 50-13.1(a) to seek custody").

This test has since been applied in *Seyboth v. Seyboth*, 147 N.C. App. 63, 554 S.E.2d 378 (2001). Even though the Court held that the trial court erred in awarding visitation to a stepfather based on the "best interest of the child" test without first making the findings mandated by *Petersen* and *Price*, 147 N.C. App. at 68-69, 554 S.E.2d at 382, the Court nonetheless held that the stepfather had standing to seek visitation rights under N.C. Gen. Stat. § 50-13.1 because he had a parent-child relationship with his stepchild. *Id.* at 65-66, 554 S.E.2d at 380-81.

There can be no serious dispute that Mason established that she had standing under N.C. Gen. Stat. § 50-13.1, as limited by *Ellison*. In her complaint, Mason alleged that she and Dwinnell jointly raised the child; they entered into an agreement in which they each acknowledged that Mason was a *de facto* parent and had "formed a psychological parenting relationship with the parties' child;" and "[t]he minor child has lived all his life enjoying the equal participation of both [Mason] and [Dwinnell] in his emotional and financial care and support, guidance and decision-making." These allegations are sufficient under *Ellison* to support the trial court's denial of Dwinnell's motion to dismiss for lack of standing.

The trial court's 1 June 2006 order included numerous findings of fact not challenged on appeal that establish that Mason had a relationship in the nature of a parent-child relationship, including: "Throughout the child's life, [Mason] has provided care for him, financially supported him, and been an integral part of his life such that the child has benefited from her love and affection, caretaking, emotional and financial support, guidance, and decision-making." Other unchal-

lenged findings reveal that this relationship was presented to friends, family, and schools as one of parent and child.

No reasonable basis exists to contend that Mason fails to meet the standard set forth in *Ellison*. Thus, the trial court properly concluded in its 1 June 2006 order that Mason "has standing to pursue custody of the minor child." *See also* 3 Suzanne Reynolds, *Lee's North Carolina Family* Law § 13.4.c.ii, at 13-21 (5th ed. 2002) ("The plain language of the North Carolina statute on standing appears to align the state with broad discretion and a lenient standing requirement even against a parent.").

Dwinnell's Constitutionally-Protected Interest

[4] We next turn to the question whether the district court's findings of fact are sufficient to support its conclusion of law that Dwinnell acted in a manner inconsistent with her constitutionally-protected paramount interest in the companionship, custody, care, and control of her child. Under our standard of review in custody proceedings, "the trial court's findings of fact are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary." *Owenby v. Young*, 357 N.C. 142, 147, 579 S.E.2d 264, 268 (2003). Whether those findings of fact support the trial court's conclusions of law is reviewable de novo. *Hall v. Hall*, 188 N.C. App. 527, 530, 655 S.E.2d 901, 904 (2008).

Dwinnell first argues that only conduct that would support a termination of parental rights can meet the requirements of *Price*. This contention was rejected by our Supreme Court in *David N. v. Jason N.*, 359 N.C. 303, 608 S.E.2d 751 (2005).

In *David N.*, the trial court had found that the father was a fit and proper person to care for his child, but nonetheless also found that the father had acted inconsistent with his constitutionally-protected status. This Court reversed the trial court's ruling on the grounds that the "finding of [defendant's] fitness is inconsistent with the conclusion of law that he not be afforded his constitutional right to parent his child." *David N. v. Jason N.*, 164 N.C. App. 687, 690, 596 S.E.2d 266, 268 (2004). The Supreme Court reversed, holding:

> It is clear from the holdings of *Petersen*, *Price*, and *Adams* that a natural parent may lose his constitutionally protected right to the control of his children in one of two ways: (1) by a finding of unfitness of the natural parent, or (2) where the natural par-

ent's conduct is inconsistent with his or her constitutionally protected status.

359 N.C. at 307, 608 S.E.2d at 753. Because of the disjunctive nature of the test, the Court held "that the trial court's finding of [the natural father]'s fitness in the instant case did not preclude it from granting joint or paramount custody to [the child's grandparents], based upon its finding that [the father]'s conduct was inconsistent with his constitutionally protected status." *Id.*

In this case, the trial court specifically found that Dwinnell "is a fit and proper person to exercise legal and physical custody of the minor child." Therefore, under *David N.*, the question is whether Dwinnell's conduct was "inconsistent with . . . her constitutionally protected status." *Id.*

Our Supreme Court in *Petersen* defined that status as the "paramount right of parents to custody, care, and control of their children." 337 N.C. at 403-04, 445 S.E.2d at 905. Most recently, the United States Supreme Court has held: "[I]t cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 66, 147 L. Ed. 2d 49, 57, 120 S. Ct. 2054, 2060 (2000).[3] Thus, the question becomes more specifically articulated: Did the legal parent act inconsistently with her fundamental right to custody, care, and control of her child and her right to make decisions concerning the care, custody, and control of that child?

The district court made findings of fact unchallenged on appeal that Dwinnell and Mason jointly decided to create a family and *intentionally* took steps to identify Mason as a parent of the child, including attempting to obtain sperm with physical characteristics similar to Mason, using both parties' surnames to derive the child's name, allowing Mason to participate in the pregnancy and birth, holding a

3. It should be noted that this statement of the Due Process right was joined in by four Justices (Justice O'Connor, Chief Justice Rehnquist, Justice Ginsburg, and Justice Breyer). Justices Souter and Thomas wrote separate opinions each concurring in the judgment, but suggesting agreement with the plurality's view of the scope of the constitutional right. Justices Stevens and Kennedy authored separate dissenting opinions acknowledging the liberty interest, but urging that it should not necessarily preclude application of a best interests standard when third parties seek visitation. Justice Scalia filed a third dissenting opinion objecting that "parental rights" are not mentioned in the Constitution and that "[j]udicial vindication" of such "parental rights" risks creating "a new regime of judicially prescribed, and federally prescribed, family law." 530 U.S. at 92-93, 147 L. Ed. 2d at 73, 120 S. Ct. at 2074.

baptismal ceremony at which Mason was announced as a parent and her parents as grandparents, and designating Mason as a parent of the child on forms and to teachers.

Indeed, Dwinnell has stipulated that "[a]fter the child's birth, he lived with both parties who were acting as a family unit." They remained together as a family for four years. Even after Dwinnell and Mason's relationship ended, Dwinnell allowed Mason to have the functional equivalent of joint custody for a three-year period.

The findings of fact also reveal that Dwinnell and Mason functioned as if both were parents, with Dwinnell agreeing to allow Mason to declare the child as a dependent on her tax returns and the parties sharing caretaking and financial responsibilities for the child. The court found, without challenge by Dwinnell, that Dwinnell "encouraged, fostered, and facilitated the emotional and psychological bond between the minor child and [Mason]" and that "[t]hroughout the child's life, [Mason] has provided care for him, financially supported him, and been an integral part of his life such that the child has benefited from her love and affection, caretaking, emotional and financial support, guidance, and decision-making." As a result, Mason became "the only other adult whom the child considers a parent . . ." Although Dwinnell assigned error to this latter finding of fact, it is supported by clear and convincing evidence and, therefore, is binding.

Moreover, the trial court found—again, in findings not challenged on appeal—that Dwinnell chose to share her decision-making authority with Mason, including decisions on godparents, the child's name, whether the child should attend private school, and the child's extracurricular activities. Further, Dwinnell granted Mason a medical power of attorney, allowing Mason to participate in medical decisions regarding the child and, indeed, both Dwinnell and Mason signed a "consent form for the child to have therapeutic intervention at Developmental Therapy Associates." In the "Parenting Agreement," Dwinnell even agreed that Mason should participate in making "all major decisions regarding their child."

The findings of fact also establish that Dwinnell intended that this parent-like relationship be a permanent relationship for her child. The district court, in reaching its decision, pointed to the Parenting Agreement signed by Dwinnell and Mason when the child was three years old. The district court found that Dwinnell had an opportunity to review the agreement and executed it before a notary public.

Although Dwinnell points to her testimony that she did not voluntarily enter into the agreement, it was for the district court to decide what credibility and weight to give that testimony. *Phelps v. Phelps*, 337 N.C. 344, 357, 446 S.E.2d 17, 25 (1994). In that document, Dwinnell asserted that she and Mason had committed to "jointly parent" the child; that Dwinnell would consent to Mason's adoption of the child if allowed by North Carolina law; that "although [Mason] is not the biological mother, she is a *de facto* parent who has and will provide the parties' child with a stable environment and she has formed a psychological parenting relationship with the parties' child;" that the child's relationship with Mason "should be protected and promoted to preserve the strong emotional ties that exist between them;" and that the purpose of the document was to make provisions for the continuation of the relationship should Dwinnell and Mason cease to live together.

While Dwinnell argues vigorously that the Parenting Agreement is unenforceable, the district court was not required to address that issue and did not do so. Thus, the issue is also not before this Court. Dwinnell mistakes the significance of the document. The district court was not enforcing any agreement, but rather relied upon the agreement as a manifestation of Dwinnell's intent to create a permanent family unit involving two parents and a child that would continue even if the relationship between Dwinnell and Mason did not. Phrased differently, the assertions in the document constitute admissions by Dwinnell regarding her intentions and conduct in creating a permanent parent-like relationship between Mason and her biological child.[4]

We believe these circumstances are analogous to those in *Price*, in which the plaintiff, a man who had previously lived with the child's

4. Dwinnell also asserts that this Court held in *Grindstaff v. Byers*, 152 N.C. App. 288, 567 S.E.2d 429 (2002), decided before *David N.*, "that as a matter of law the signing of an agreement where the parent remains involved in the child's life is not an act inconsistent with a natural parent's constitutionally protected status . . . ." Significantly, in *Grindstaff*, the father entered into a temporary custody agreement that granted full custody to the children's grandmother until he could resume custody. In contrast, the document in this case indicated an intent on the part of Dwinnell to establish a permanent parent-like relationship between Mason and her child. Nothing in *Grindstaff* precluded the district court from considering that aspect of the agreement in this case. *See Cantrell v. Wishon*, 141 N.C. App. 340, 344, 540 S.E.2d 804, 807 (2000) (reversing denial of custody and remanding for findings on whether the mother acted inconsistently with her constitutionally-protected status with a direction to consider, among other factors, "the effect, if any, of the document that the mother signed relinquishing custody of her children to the [third parties]" and "the mother's role in building the relationship between her children and the [third parties]").

mother, sought custody. In *Price*, the biological mother represented to her child and others, including the plaintiff, that he was the child's father even though he was not. 346 N.C. at 83, 484 S.E.2d at 537. According to the Supreme Court, "[s]he chose to rear the child in a family unit with [the] plaintiff being the child's *de facto* father." *Id.* She thus "created" a "family unit" that included a third person and the child. *Id.*

In contrast to this case, however, the mother in *Price* relinquished all custody to the plaintiff for a period of time. The parties disputed "whether defendant's voluntary relinquishment of custody to plaintiff was intended to be temporary or indefinite and whether she informed plaintiff and the child that the relinquishment of custody was temporary." *Id.* The Court explained:

> This is an important factor to consider, for, if [the mother] had represented that [the plaintiff] was the child's natural father and voluntarily had given him custody of the child for an indefinite period of time with no notice that such relinquishment of custody would be temporary, [*the mother*] *would have not only created the family unit that plaintiff and the child have established, but also induced them to allow that family unit to flourish in a relationship of love and duty with no expectations that it would be terminated.*

Id. (emphasis added). If, however, the parties agreed that the plaintiff would have custody for only a temporary period of time, the mother "would still enjoy a constitutionally protected status absent other conduct inconsistent with that status." *Id.* The Court, therefore, remanded for further findings of fact.

While this case does not involve the biological mother's leaving the child in the care of a third person, we still have the circumstances of Dwinnell's intentionally creating a family unit composed of herself, her child and, to use the Supreme Court's words, a "*de facto* parent." *Id.* Indeed, as occurred in *Price* for a period of time, they all lived together as a family and Dwinnell led her child to believe that Mason was one of his parents. Even though Dwinnell did not completely relinquish custody, she fully shared it with Mason, including sharing decision-making, caretaking, and financial responsibilities for the child. And, in contrast to *Price*, the findings establish that Dwinnell intended—during the creation of this family unit—that this parent-like relationship would be permanent, such that she "induced [Mason and the child] to allow that family unit to flourish in a relationship of

love and duty with no expectations that it would be terminated." *Id.* Ultimately, Dwinnell succeeded: the district court found that Mason and the child forged a strong parent-child bond.

As the South Carolina Court of Appeals has recognized: "[W]hen a legal parent invites a third party into a child's life, and that invitation alters a child's life by essentially providing him with another parent, *the legal parent's rights to unilaterally sever that relationship are necessarily reduced.*" *Middleton v. Johnson*, 369 S.C. 585, 597, 633 S.E.2d 162, 169 (S.C. Ct. App. 2006) (emphasis added). "A parent has the absolute control and ability to maintain a zone of privacy around his or her child. However, a parent cannot maintain an absolute zone of privacy if he or she voluntarily invites a third party to function as a parent to the child." *Id.*

Similarly, the New Jersey Supreme Court has held: "[A] parent has the absolute ability to maintain a zone of autonomous privacy for herself and her child. However, if she wishes to maintain that zone of privacy she cannot invite a third party to function as a parent to her child and cannot cede over to that third party parental authority the exercise of which may create a profound bond with the child." *V.C. v. M.J.B.*, 163 N.J. 200, 224, 748 A.2d 539, 552, *cert. denied*, 531 U.S. 926, 148 L. Ed. 2d 243, 121 S. Ct. 302 (2000).

Thus, like all parents, Dwinnell had the constitutionally-protected right to "maintain a zone of privacy" around her and her child. *Id.* Indeed, since no biological father was present, Dwinnell exercised exclusive and autonomous parental authority in relation to her child. She nonetheless voluntarily chose to invite Mason into that relationship and function as a parent from birth on, thereby materially altering her child's life. She gave up her right to unilaterally exclude Mason (or unilaterally limit contact with Mason) by choosing to cede to Mason a sufficiently significant amount of parental responsibility and decision-making authority to create a permanent parent-like relationship with her child.

The New Jersey Supreme Court's opinion in *V.C.* describes the situation exactly:

> What we have addressed here is a specific set of circumstances involving the volitional choice of a legal parent to cede a measure of parental authority to a third party; to allow that party to function as a parent in the day-to-day life of the child; and to foster the forging of a parental bond between the third party and the child.

> In such circumstances, the legal parent has created a family with the third party and the child, and has invited the third party into the otherwise inviolable realm of family privacy. By virtue of her own actions, the legal parent's expectation of autonomous privacy in her relationship with her child is necessarily reduced from that which would have been the case had she never invited the third party into their lives.

163 N.J. at 227, 748 A.2d at 553-54. The court concluded: "Most important, where that invitation and its consequences have altered her child's life by essentially giving him or her another parent, the legal parent's options are constrained. It is the child's best interest that is preeminent as it would be if two legal parents were in a conflict over custody and visitation." *Id.*, 748 A.2d at 554. *See also T.B.*, 567 Pa. at 232, 786 A.2d at 919 ("[A] biological parent's rights do not extend to erasing a relationship between her partner and her child which she voluntarily created and actively fostered simply because after the parties' separation she regretted having done so." (internal quotation marks omitted)).

We stress that the cases that we have cited from other jurisdictions have each applied, as we do, a test applicable generally to third parties seeking custody of a child contrary to the wishes of the legal parent. *See V.C.*, 163 N.J. at 205-06, 748 A.2d at 542 ("Although the case arises in the context of a lesbian couple, the standard we enunciate is applicable to all persons who have willingly, and with the approval of the legal parent, undertaken the duties of a parent to a child not related by blood or adoption."); *T.B.*, 567 Pa. at 232, 233, 786 A.2d at 918, 919 (holding that in determining whether a former domestic partner had standing to seek visitation, "a well-established common law doctrine" applied and "the nature of the relationship between Appellant and Appellee has no legal significance"); *Middleton*, 369 S.C. at 593, 633 S.E.2d at 167 ("In this case, we are asked to determine what legal standard applies to a third party's claim for visitation of a non-biological child for whom he claims to have functioned as a psychological parent.").

In sum, we conclude that the district court's findings of fact establish that Dwinnell, after choosing to forego as to Mason her constitutionally-protected parental rights, cannot now assert those rights in order to unilaterally alter the relationship between her child and the person whom she transformed into a parent. Her choice does not mean that Mason is entitled to the rights of a legal parent, but only that a trial court may apply the "best interest of the child" standard in

considering Mason's request for custody, including visitation. *See, e.g.*, *id.* at 599-600, 633 S.E.2d at 170 (holding third party entitled to visitation when mother invited him "to act as a father," child lived with third party at least half of the week for most of his life, and mother ceded over large part of parental responsibilities, thereby fostering parent-child bond between third party and child).[5]

[5] Dwinnell, however, argues that because of the absence of abandonment, her conduct can only be described as "good acts," enriching her child's life by involving Mason as a parental figure. She contends that the Supreme Court in *Price* did not contemplate that "good acts" could be inconsistent with a parent's constitutionally-protected status.

Neither our Supreme Court nor the United States Supreme Court has yet required a showing of "bad acts" as opposed to conduct inconsistent with the parent's paramount constitutional interest. In *Troxel*, the United States Supreme Court plurality expressly declined to decide "whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation." *Troxel*, 530 U.S. at 73, 147 L. Ed. 2d at 61, 120 S. Ct. at 2064. Instead, the plurality reasoned that the more neutral concept of "*special factors* . . . might justify the State's interference with [the biological mother's] fundamental right to make decisions concerning the rearing" of her children. *Id.* at 68, 147 L. Ed. 2d at 58, 120 S. Ct. at 2061 (emphasis added).

When examining a legal parent's conduct to determine whether it is inconsistent with his or her constitutionally-protected status, the focus is not on whether the conduct consists of "good acts" or "bad acts." Rather, the gravamen of "inconsistent acts" is the volitional acts of the legal parent that relinquish otherwise exclusive parental authority to a third party.

In any event, Dwinnell has misunderstood the nature of her conduct, as found by the district court, and its consequences. As *Price*

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5. Although Dwinnell points to *Seyboth*, as supporting her position, this Court held, in that case, only that "the trial court erred in applying the best interest of the child analysis without first determining whether defendant engaged in conduct inconsistent with her parental rights and responsibilities." 147 N.C. App. at 68, 554 S.E.2d at 382. The Court, therefore, remanded so that the trial court could hear additional evidence and make the required findings. *Id.* at 68-69, 554 S.E.2d at 382. In this case, the district court complied with *Seyboth* by making the necessary findings of fact regarding defendant's conduct prior to applying the "best interest of the child" standard.

itself implicitly recognized in the language quoted above, encouraging a child to view a third person, with whom the child lives, as a parent and to develop a parent-child bond with that person with the expectation that it would continue and then severing that relationship cannot be viewed as benign conduct. *See, e.g.*, *Middleton*, 369 S.C. at 599, 633 S.E.2d at 169 (acknowledging risk of emotional harm to child in severance of parent-like relationship and stressing that "South Carolina has long recognized the importance of the degree of attachment, echoed by other jurisdictions, between a child and a third-party in making a custody determination between a biological parent and the third party"). Indeed, the United States Supreme Court in *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 844, 53 L. Ed. 2d 14, 35, 97 S. Ct. 2094, 2109-10 (1977) (internal quotation marks and citations omitted), has stressed that "the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in promot[ing] a way of life through the instruction of children, as well as from the fact of blood relationship."

Our Supreme Court recognized these effects 50 years ago in *In re Gibbons*, 247 N.C. 273, 280, 101 S.E.2d 16, 21-22 (1957), when it held that the legal right of a parent to custody may yield to the interests of the child when the parent

> has voluntarily permitted the child to remain continuously in the custody of others in their home, and has taken little interest in [the child], thereby substituting such others in his own place, so that they stand in *loco parentis* to the child, and continuing this condition of affairs for so long a time that the love and affection of the child and the foster parents have become mutually engaged, *to the extent that a severance of this relationship would tear the heart of the child, and mar his happiness.*

(Emphasis added.) The Court explained that the biological father, "having permitted" the family unit of his child and his grandmother to develop, " 'claims the right, because he is the father, to sever the ties which bind this child to the respondent.' " *Id.* at 281, 101 S.E.2d at 22 (quoting *Merchants v. Bussell*, 139 Me. 118, 124, 27 A.2d 816, 819 (1942)). The Court held: " 'In this instance the welfare of the child is paramount. *The dictates of humanity must prevail over the whims and caprice of a parent.*' " *Id.* (emphasis added) (quoting *Merchants*, 139 Me. at 124, 27 A.2d at 819).

Although Dwinnell, in contrast to the father in *Gibbons*, did not relinquish custody completely to another, her conduct had precisely the same potential to "tear the heart of the child, and mar his happiness." *Id.* at 280, 101 S.E.2d at 22. Under these circumstances, the district court could properly conclude, as it did, that Dwinnell acted in a manner inconsistent with her constitutionally-protected paramount interest in the companionship, custody, care, and control of her child. The proper standard for determining custody was, therefore, the "best interest of the child" standard.

Although some courts in other states have attempted to create a bright-line test for when the "best interest of the child" standard should apply as between a legal parent and a third party, our Supreme Court, in *Price*, stressed that a parent's conduct "need[s] to be viewed on a case-by-case basis." 346 N.C. at 83, 484 S.E.2d at 537. *See also id.* at 79, 484 S.E.2d at 534-35 ("Other types of conduct, which must be viewed on a case-by-case basis, can also rise to this level so as to be inconsistent with the protected status of natural parents."). This Court, in turn, in discussing standing to seek custody, similarly observed: "After due consideration, it would seem to us that at this time drawing a bright line for all such cases would be unwise." *Ellison*, 130 N.C. App. at 395, 502 S.E.2d at 895. We explained that "any rule crafted now would face a serious risk of stumbling upon unforeseen pitfalls" and, therefore, we "confine[d] our holding to an adjudication of the facts of the case before us . . . ." *Id.*

Best Interest of the Child

[6] Dwinnell argues alternatively that if the "best interest of the child" standard does apply, the district court erred in granting permanent joint custody to both parties because the best interests of her child were not served by such an award. It is well established that the district court's determination regarding the best interest of the child will not be disturbed unless there is an abuse of discretion. *Dixon v. Dixon*, 67 N.C. App. 73, 76, 312 S.E.2d 669, 672 (1984). As this Court has explained:

> [T]rial courts have the duty to decide domestic disputes, guided always by the best interests of the child and judicial objectivity. To that end, trial courts possess broad discretion to fashion custodial and visitation arrangements appropriate to the particular, often difficult, domestic situations before them. The decision of the trial judge, who sees and hears the witnesses and observes their demeanor, ought not to be upset on appeal absent a clear showing of abuse of that discretion.

Glesner v. Dembrosky, 73 N.C. App. 594, 598, 327 S.E.2d 60, 63 (1985) (internal citations omitted).

We first note that in challenging the trial court's application of the "best interest of the child" standard, Dwinnell has failed to cite any authority in support of her position. "Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated *or authority cited*, will be taken as abandoned." N.C.R. App. P. 28(b)(6) (emphasis added). Even if we consider Dwinnell's unsupported argument, it is without merit.

Dwinnell first asserts: "Given the fact that this case deals with a natural parent and a third party, the court finding that the natural parent had always been a fit parent, and finding that the natural parent always put the best interest of the child first, the court should not have ordered the natural parent to have joint legal custody of the minor child with [Mason]." This contention simply represents a rephrasing of Dwinnell's initial contention that as between a fit parent and a third party, the district court may not award custody to the third party over the objection of the natural parent. Because we have held that the district court could properly apply the "best interest of the child" standard, the court was entitled to decide whether joint custody between Dwinnell and Mason was in the child's best interests. While the district court could conclude that Dwinnell's fitness warranted that she have sole custody, it was not required to do so if the evidence indicated that the child's best interests required a different result.

Dwinnell next asserts that "[t]he court entered no findings to support it's [sic] conclusion that a joint physical custodial schedule that provided week to week visitation was in the best interest of the minor child." Immediately following this statement, Dwinnell points to evidence supporting her position and argues that the trial court "did not address [this evidence] in the findings of fact and still concluded that a joint physical custodial schedule that provided week to week visitation with the parties was in the best interest of the child."

Significantly, Dwinnell does not acknowledge that the district court's "best interests" determination is reviewed for an abuse of discretion. Contrary to Dwinnell's contention, our review of the district court's order indicates that it is supported by sufficient findings of fact. The court found that the child considers Mason to be a parent; that an emotional and psychological bond exists between the child and Mason; that the child "has benefited from [Mason's] love and

affection, caretaking, emotional and financial support, guidance, and decision-making"; that one therapist concluded from his discussions with the child that he "wished to maintain equal time with both parties, but preferred to remain at one house for an entire week and have a midweek dinner visit with the other party"; that the court adopted a temporary custody schedule consistent with this expressed desire; and that from the rendering of the temporary joint custody decision in December 2004 through the permanent custody decision in November 2005, the parties had been following the alternating weekly custodial schedule.

The court also found that during that period, "[a]ll of the child's end of year progress reports from his teachers at Carolina Friends School show that the child is performing well in all areas, including academically, socially and emotionally." In addition, the court found: "The minor child has been participating in therapy with Dr. Sortisio since the spring of 2005. The Court finds Dr. Sortisio's testimony that the child is doing well with an alternating custodial schedule credible as well as her conclusion that the child's previous signs of distress have greatly diminished."

These findings of fact are sufficient to support the district court's conclusions that (1) "[i]t is in the best interest of the minor child that the parties be granted permanent joint legal and physical custody of the minor child;" and (2) that the parties should alternate custody on a weekly basis. Dwinnell has not argued that these findings of fact are unsupported by evidence; the mere fact that contrary evidence may exist does not justify reversal.[6] Dwinnell makes no other specific argument regarding the district court's award of joint custody and, therefore, has presented no persuasive basis for overturning the district court's order.

Conclusion

Although this appeal arises in the context of a same-sex domestic partnership, it involves only the constitutional standards applicable to all custody disputes between legal parents and third parties. We simply apply the law as set forth by our Supreme Court in *Price*, consistent with the holdings of the United States Supreme Court. Courts do not violate a parent's constitutionally-protected interest by respecting the parent-child relationships that the legal parent—in accordance with her constitutional rights—voluntarily chose to create.

6. Further, the district court was not required to make findings of fact on every piece of evidence. *Quick v. Quick*, 305 N.C. 446, 451, 290 S.E.2d 653, 657 (1982).

We hold, under the circumstances of this case, as found by the district court, that Dwinnell made the choice, with respect to Mason's relationship to her child, to act in a manner inconsistent with her constitutionally-protected right to custody, care, and control of her child and her right to exclusively make decisions concerning the care, custody, and control of that child. The district court, therefore, properly concluded it should apply the "best interest of the child" standard. At that point, it was up to the parties to establish the best interests of the child. Since Dwinnell has failed to demonstrate that the district court's "best interests" determination was an abuse of discretion, we affirm.

Affirmed.

Judges BRYANT and STEELMAN concur.

WILLIE OUTLAW, PLAINTIFF, AND APAC-ATLANTIC, INC. APPELLANT v. EDWARD LEONARD JOHNSON, JR. AND MAIL CONTRACTORS OF AMERICA, INC., DEFENDANTS

No. COA07-466

(Filed 6 May 2008)

1. Negligence— last clear chance—sufficiency of evidence

The trial court did not err by submitting last clear chance to the jury in a negligence action arising from the collision of a truck with the rear of a slow-moving steamroller in the lane of travel. The evidence supported reasonable inferences of all of the elements of the doctrine.

2. Negligence— sudden emergency—instruction refused

There was no prejudicial error in the trial court's refusal to give defendants' requested instruction on sudden emergency in a negligence action arising from the collision of a truck with a steamroller on a highway. Given the jury verdict that defendant Johnson was negligent in one or more ways, it could not be said that he was suddenly and unexpectedly confronted with imminent danger through no negligence of his own.

3. Evidence— spoliation—instruction refused—evidence not lost or destroyed by opposing party

The trial court did not err by denying defendants' request for a jury instruction on spoliation in a negligence action arising from the collision of a truck with the back of a steamroller on a highway where a strobe light from the steamroller was stored in a shop. Defendants did not meet the threshold requirement for an instruction that the evidence was lost or destroyed by the opposing party.

4. Evidence— auto accident—driving record excluded—no prejudicial error

There was no prejudicial error in a negligence action arising from a collision between a truck and a steamroller where the trial court excluded from evidence the steamroller driver's driving record. Although a part of the record was admissible, defendants did not demonstrate specific prejudice and did not allege that the jury verdict would have differed otherwise.

5. Trials— questions following granting of motion in limine—no attorney misconduct

The trial court did not err in a negligence action arising from the collision between a truck and a steamroller by denying defendants' motion for a mistrial for attorney misconduct. A motion in limine had been granted to exclude testimony about whether the truck driver could see the steamroller from behind the van he was following, but a witness offered a speculative answer about seeing over the van, the court sustained an objection and instructed the jury, the court then allowed a series of pointed questions about the witness's observations, and the speculative statement was not repeated.

6. Workers' Compensation— lien—recovery from judgment—last clear chance

The trial court did not err by finding that APAC was not entitled to recover on its workers' compensation lien from the negligence judgment awarded to its employee, plaintiff Outlaw, after the steam roller he was driving was struck from behind by a truck. Even where last clear chance was submitted and found by the jury (as here), the General Assembly intended for N.C.G.S. § 97-10.2(e) to apply.

7. Pleadings— cross-claim—property damage—status as party required

In a negligence action arising from the collision of a steamroller and a truck on a highway, the construction company was not entitled to recover on its property damage claim contained in a cross-claim. APAC was not a party to the action, which is required to assert a cross-claim.

8. Negligence— instructions—traffic manual—not applicable

The trial court did not err by not giving APAC's requested jury instructions on the United States Department of Transportation's Manual on Uniform Traffic Control Devices in an action arising from the collision of a truck and a steamroller. The provisions of the manual cited by APAC did not provide standard safety procedures applicable to the facts of this case.

Appeal by Defendants and Appellant from order and judgment entered 27 June 2006 and order entered 22 September 2006 by Judge Kenneth F. Crow in Superior Court, Lenoir County. Heard in the Court of Appeals 26 November 2007.

Robert D. Rouse, III for Plaintiff Willie Outlaw.

Womble Carlyle Sandridge & Rice, PLLC, by Clayton M. Custer, for Appellant APAC-Atlantic, Inc.

Cranfill Sumner & Hartzog LLP, by Robert W. Sumner, Jaye E. Bingham, and Gloria T. Becker, for Defendants.

McGEE, Judge.

The evidence introduced at trial tended to show that on 29 March 2004, construction company APAC-Atlantic, Inc. (APAC) was involved in a road maintenance project on a bridge on Highway 70 in Lenoir County. Highway 70 in Lenoir County is a four-lane highway with two lanes of travel in both eastbound and westbound directions. Willie Outlaw (Plaintiff Outlaw) was employed by APAC as a steamroller operator. Plaintiff Outlaw testified that after completing work at the bridge construction site, he was instructed by his supervisor to move his steamroller from the construction site to a "staging area" located at a nearby overpass. Plaintiff Outlaw then drove his steamroller in the right-hand eastbound lane of Highway 70 towards the staging area. Plaintiff Outlaw testified that during this time he was looking forward, or eastbound, down Highway 70, and was traveling

approximately five or six miles per hour. Plaintiff Outlaw's next memory following this series of events was waking up in a hospital.

Ronald Brewington (Mr. Brewington) testified that on 29 March 2004, he was driving a van eastbound on Highway 70 in Lenoir County. As Mr. Brewington approached the bridge where APAC was undertaking its construction project, he passed a tractor-trailer truck. Mr. Brewington then merged into the left lane because the right lane of the bridge was closed off by orange cones. The orange cones tapered off approximately 200 feet after the bridge, and Mr. Brewington moved back into the right lane. Five seconds later, Mr. Brewington observed the tractor-trailer move back into the right lane. At that time, the tractor-trailer was approximately 100 to 200 feet behind Mr. Brewington's van. Mr. Brewington testified that after moving into the right lane, he looked down the highway and saw a steamroller in the road. The steamroller was "a good ways" down the highway, and Mr. Brewington "thought it was just another ordinary vehicle going down the road." Mr. Brewington took his eyes off the steamroller to check his mirrors, but when he looked ahead ten or fifteen seconds later, he was immediately behind the steamroller. Mr. Brewington swerved to the left to avoid hitting the steamroller but realized that the tractor-trailer behind him was going to hit the steamroller. Mr. Brewington observed the collision in his rearview mirror.

Edward Leonard Johnson, Jr. (Defendant Johnson) was employed as a truck driver for Mail Contractors of America (Defendant MCA) (together, Defendants). Defendant Johnson testified that on 29 March 2004, he was driving an MCA truck eastbound on Highway 70 in Lenoir County. As Defendant Johnson approached the bridge where APAC was undertaking its construction project, a van passed him and then pulled in front of his truck. When Defendant Johnson reached the bridge, he found that the right lane was closed off by orange cones, so he drove across the bridge in the left lane. The orange cones tapered off roughly 200 feet past the bridge, and both the van and Defendant Johnson moved into the right lane. Defendant Johnson testified that after moving back into the right lane, he resumed a speed of fifty or fifty-five miles per hour. Defendant Johnson never saw any more orange cones, construction workers, construction equipment, or road work. After driving a quarter of a mile, the van in front of Defendant Johnson swerved suddenly into the left lane, and Defendant Johnson observed the steamroller driven by Plaintiff Outlaw in the right lane, directly in front of him. Defendant Johnson attempted to avoid the steamroller by swerving to

the right, but he clipped the end of the steamroller and his truck went into a ditch. Both Plaintiff Outlaw and Defendant Johnson were seriously injured in the collision. As a result of his injuries, Plaintiff Outlaw received workers' compensation from APAC in the amount of $117,217.94.

Plaintiff Outlaw filed a complaint against Defendants on 22 April 2005 alleging that he was injured due to the negligence of both Defendant Johnson and Defendant MCA. Defendants filed an answer on 22 June 2005 alleging, *inter alia*, that Plaintiff Outlaw was contributorily negligent in causing the accident. In addition, Defendants claimed that APAC was negligent in allowing Plaintiff Outlaw to drive the steamroller on the highway. Defendants contended that because APAC's negligence joined and concurred with any negligence on Defendants' part, Defendants would be entitled to subtract from any judgment obtained against them the amount of any subrogation lien held by APAC pursuant to the Workers' Compensation Act. *See* N.C. Gen. Stat. § 97-10.2(e) (2007). Plaintiff Outlaw filed a reply on 8 August 2005 asserting that even had he been contributorily negligent in causing the accident, Defendant Johnson had the last clear chance to avoid the collision. Plaintiff Outlaw's reply also contained a cross-claim by APAC against Defendants for property damage to the steamroller in the amount of $53,500.00. The parties later stipulated that APAC sustained damage to its steamroller in the amount of $55,000.00.

The case was tried from 15 May to 24 May 2006 and the jury returned a verdict finding that: (1) Plaintiff Outlaw was injured by the negligence of Defendant Johnson; (2) Plaintiff Outlaw contributed to his injuries by his own negligence; (3) Defendant Johnson had the last clear chance to avoid the accident; (4) Plaintiff Outlaw was entitled to recover damages in the amount of $450,000.00; and (5) APAC was guilty of negligence that joined and concurred with Defendant Johnson's negligence.

The trial court issued an order and judgment on 27 June 2006 concluding that, based upon the jury's answer to question five finding APAC negligent, Defendants were entitled to deduct the amount of APAC's workers' compensation lien of $117,217.94 from the jury's damage award of $450,000.00. Therefore, the trial court entered judgment in favor of Plaintiff Outlaw against Defendants in the amount of $332,782.06. The trial court also concluded that based upon the jury's answer to question five, APAC was not entitled to recover on its property damage claim from Defendants. Defendants filed a motion on 7

July 2006 for judgment notwithstanding the verdict, or in the alternative, for a new trial. APAC filed a motion on 13 July 2006 asking the trial court to reconsider its rulings concerning APAC's lien and property damage claim. The trial court denied all parties' motions on 22 September 2006. Defendants and APAC appeal.

I.

Defendants raise five questions on appeal, which we consider in turn.

A.

[1] Defendants first argue that the trial court erred in submitting the issue of last clear chance to the jury. The last clear chance doctrine is a rule of proximate cause that allows a contributorily negligent plaintiff to recover where "[the] defendant's negligence in failing to avoid the accident introduces a new element into the case, which intervenes between [the] plaintiff's negligence and the injury and becomes the direct and proximate cause" of the accident. *Scott v. Darden*, 259 N.C. 167, 171, 130 S.E.2d 42, 45 (1963). To succeed on a claim of last clear chance, the contributorily negligent plaintiff must prove:

> (1) that the plaintiff negligently placed himself in a position of helpless peril; (2) that the defendant knew or, by the exercise of reasonable care, should have discovered the plaintiff's perilous position and his incapacity to escape from it; (3) that the defendant had the time and ability to avoid the injury by the exercise of reasonable care; (4) that the defendant negligently failed to use available time and means to avoid injury to the plaintiff and (5) as a result, the plaintiff was injured.

Parker v. Willis, 167 N.C. App. 625, 627, 606 S.E.2d 184, 186 (2004), *disc. review denied*, 359 N.C. 411, 612 S.E.2d 322 (2005). The question of last clear chance "must be submitted to the jury if the evidence, when viewed in the light most favorable to the plaintiff, will support a reasonable inference of each essential element of the doctrine." *Bowden v. Bell*, 116 N.C. App. 64, 68, 446 S.E.2d 816, 819 (1994).

The first element of last clear chance is satisfied upon a showing that a plaintiff has placed himself in a position of either helpless or inadvertent peril. A plaintiff is in a position of helpless peril when that plaintiff's "prior contributory negligence has placed her in a position from which she is powerless to extricate herself." *Williams v. Odell*, 90 N.C. App. 699, 704, 370 S.E.2d 62, 66, *disc. review denied*, 323 N.C.

370, 373 S.E.2d 557 (1988). A plaintiff is in a position of inadvertent peril where his "negligence consists of failure to pay attention to [his] surroundings and discover his own peril." *Id.* Prior automobile accident cases draw a distinction between situations in which a plaintiff negligently fails to observe an approaching vehicle, and situations in which a plaintiff observes an approaching vehicle but negligently fails to move out of the way. Where a plaintiff either turns his back to, or does not see, an approaching vehicle, he has placed himself in a position of helpless or inadvertent peril. *See*, *e.g.*, *Nealy v. Green*, 139 N.C. App. 500, 534 S.E.2d 240 (2000) (holding that where the plaintiff had been walking on or near the road with his back to traffic, and he was then hit from behind by a truck, the evidence was sufficient to support a reasonable inference that the plaintiff had placed himself in a position of inadvertent peril); *Williams v. Spell*, 51 N.C. App. 134, 275 S.E.2d 282 (1981) (holding that where the plaintiff had been walking on the road with his back to traffic and was then hit from behind by a truck, there was sufficient evidence that the plaintiff had placed himself in a position of helpless peril). However, if a plaintiff observes an approaching vehicle but fails to extricate himself from the dangerous position despite having the time and ability to do so, he has not placed himself in a position of helpless or inadvertent peril. *See*, *e.g.*, *Clodfelter v. Carroll*, 261 N.C. 630, 135 S.E.2d 636 (1964) (holding that where the plaintiff was walking on the side of the road facing traffic, observed the defendant's vehicle approaching in front of her, but did not sufficiently move off the road although she had time to do so, the plaintiff had not placed herself in a position of helpless or inadvertent peril); *Odell*, 90 N.C. App. 699, 370 S.E.2d 62 (holding that where the plaintiff stood on a highway entrance ramp, was nearly struck by approaching vehicles, but failed to move out of the way before being struck by the defendant's vehicle, despite having the time and ability to do so, the plaintiff had not placed herself in a position of helpless peril).

In the present case, Defendants argue that Plaintiff Outlaw was not in a position of helpless or inadvertent peril because he observed Defendant Johnson's truck approaching him on the highway. Defendants correctly note that Mr. Brewington gave a statement to police in which he claimed that while Plaintiff Outlaw was driving the steamroller, he was "looking back" in the direction of Mr. Brewington's van and Defendant Johnson's truck. Mr. Brewington also testified at trial that Plaintiff Outlaw was "looking back" over his shoulder immediately before Mr. Brewington swerved to avoid hitting the steamroller. In addition, Marvin Lee White (Mr. White), Plaintiff

Outlaw's supervisor, testified that he observed Plaintiff Outlaw drive the steamroller down the highway, and that Plaintiff Outlaw "looked back" towards the bridge "a few times." According to Defendants, this evidence demonstrates that Plaintiff Outlaw saw Defendant Johnson's truck approaching behind him but did not move out of the way before the collision, despite having the time and ability to do so. As such, Defendants argue that Plaintiff Outlaw did not place himself in a position of helpless or inadvertent peril.

We disagree with Defendants' contention. While the evidence cited above does suggest that Plaintiff Outlaw observed Defendant Johnson's truck approaching behind him, the trial transcript contains contrary evidence. Plaintiff Outlaw testified at trial that he had not looked back at the time of the collision and had never seen Mr. Brewington's van or Defendant Johnson's truck. Plaintiff Outlaw also testified that he never took any steps to avoid the vehicles because he did not see them approaching. Taken in the light most favorable to Plaintiff Outlaw, this evidence supports a reasonable inference that Plaintiff Outlaw failed to pay attention to his own surroundings, thereby placing himself in a position of inadvertent peril. Plaintiff Outlaw therefore introduced sufficient evidence on the first element of last clear chance.

The second element of last clear chance is satisfied upon a showing that "the defendant owed a duty to the plaintiff to maintain a lookout and would have discovered [the plaintiff's perilous] situation had such a lookout been maintained." *Grogan v. Miller Brewing Co.*, 72 N.C. App. 620, 623, 325 S.E.2d 9, 11, *disc. review denied*, 313 N.C. 600, 330 S.E.2d 609 (1985). Defendants admit that Defendant Johnson had a duty to maintain a proper lookout on the highway, but they argue that Defendant Johnson could not have discovered Plaintiff Outlaw's perilous situation through the exercise of reasonable care. Defendants note that Defendant Johnson testified at trial that at an earlier deposition, he had stated that he was not able to see over Mr. Brewington's van, and that the van was blocking his view of the steamroller. In addition, Mr. Brewington testified that Defendant Johnson had maintained a safe distance between his truck and Mr. Brewington's van. Defendants claim that this evidence demonstrates that even while maintaining a proper lookout, Defendant Johnson was unable to see Plaintiff Outlaw's steamroller until it was too late to avoid the collision.

We disagree with Defendants' contention. While Defendant Johnson claimed that he was unable to see the steamroller, there is

sufficient evidence in the record to support an inference that Defendant Johnson could have seen the steamroller with the exercise of reasonable care. David Mack Wood (Mr. Wood), an eyewitness to the accident, testified at trial that the windshield of Defendant Johnson's truck was higher than Mr. Brewington's van. Defendant Johnson himself testified that prior to the collision, he "probably could see over the white van," although he did not see the steamroller. Defendant Johnson and Mr. Brewington both testified that after crossing the bridge, Mr. Brewington merged back into the right lane, and for a brief period, Defendant Johnson remained in the left lane, such that his view of the road was not obstructed by the van. Defendant Johnson admitted that on a clear day, he could see "[a] pretty good ways" down the highway from his seat in the truck. Trooper David Emory (Trooper Emory) of the North Carolina Highway Patrol testified that 29 May 2004 was a "[c]lear, sunshiny, beautiful day." Taken in the light most favorable to Plaintiff Outlaw, this evidence supports a reasonable inference that Defendant Johnson failed to maintain a proper lookout and could have discovered Plaintiff Outlaw's perilous situation through the exercise of reasonable care. Plaintiff Outlaw therefore introduced sufficient evidence on the second element of last clear chance.

The third element of last clear chance is satisfied upon a showing "that [the] defendant had the time and the means to avoid the injury to the plaintiff by the exercise of reasonable care after [the defendant] discovered or should have discovered [the] plaintiff's perilous position." *Watson v. White*, 309 N.C. 498, 505-06, 308 S.E.2d 268, 273 (1983). There must have existed " 'an appreciable interval of time between the plaintiff's negligence and his injury during which the defendant, by the exercise of ordinary care, could or should have avoided the effect of [the] plaintiff's prior negligence.' " *Id.* at 506, 308 S.E.2d at 273 (quoting *Mathis v. Marlow*, 261 N.C. 636, 639, 135 S.E.2d 633, 635 (1964)).

Defendants argue that Defendant Johnson did not have the time and means to avoid the accident. Defendants note that Defendant Johnson saw the steamroller for the first time only after Mr. Brewington's van swerved into the left lane. By that time, the steamroller was directly in front of Defendant Johnson's truck, and Defendant Johnson could only swerve to the right to try to avoid the collision. Defendants argue that this happened instantaneously and therefore Defendant Johnson had neither the time nor the means to avoid the accident. *See*, *e.g.*, *Casey v. Fredrickson Motor Express*

Corp., 97 N.C. App. 49, 56, 387 S.E.2d 177, 181, *disc. review denied*, 326 N.C. 594, 393 S.E.2d 874 (1990) (holding that where the defendant applied his brakes and skidded before colliding with the plaintiff, but had no time or means to respond otherwise, the plaintiff's evidence was insufficient to establish element three of last clear chance); *Grogan*, 72 N.C. App. at 623-24, 325 S.E.2d at 11-12 (holding that where the defendant forklift operator immediately slammed on her brakes when the plaintiff walked in front of the forklift, the defendant had neither the time nor the means to avoid injuring the plaintiff).

We disagree with Defendants' contention. As noted in our discussion of element two above, the jury was entitled to find that Defendant Johnson should have discovered Plaintiff Outlaw's perilous situation at some point before Mr. Brewington's van swerved. Therefore, the question is not whether Defendant Johnson had the time and means to avoid the collision upon seeing the steamroller, but rather whether he had the time and means to do so after he *should* have seen the steamroller. Mr. Brewington testified that after crossing the bridge and merging into the right lane, he drove another ten or fifteen seconds before swerving to avoid the steamroller. Similarly, Defendant Johnson testified that after crossing the bridge, he traveled a quarter of a mile before colliding with the steamroller. This evidence is sufficient to raise an inference that Defendant Johnson had the time and means to avoid the accident after he should have discovered Plaintiff Outlaw's perilous situation. Plaintiff Outlaw therefore introduced sufficient evidence on the third element of last clear chance.

The fourth element of last clear chance is satisfied upon a showing that the defendant negligently failed to use the available time and means to avoid the accident. *See Parker*, 167 N.C. App. at 627, 606 S.E.2d at 186. Defendants argue that Defendant Johnson was not negligent because he only had a split second to respond after seeing the steamroller, and he did all he could to avoid the accident. We disagree. As noted in our discussion of elements two and three above, the jury was entitled to find that Defendant Johnson had approximately fifteen seconds in which to discover Plaintiff Outlaw's perilous position and avoid the collision. There is no evidence in the record to suggest that Defendant Johnson was unable to slow down or otherwise avoid the accident during that period of time. We find that Plaintiff Outlaw's evidence was sufficient to raise an inference that Defendant Johnson was negligent in failing to use the available time and means to avoid injuring Plaintiff Outlaw. Plaintiff Outlaw

therefore introduced sufficient evidence on the fourth element of last clear chance.

The fifth element of last clear chance requires a showing that the plaintiff was injured. *Parker*, 167 N.C. App. at 627, 606 S.E.2d at 186. Defendants do not dispute that this element was met. Therefore, we find that Plaintiff Outlaw introduced sufficient evidence to support all five elements of last clear chance, and we hold that the trial court did not err in submitting this issue to the jury. Defendants' assignments of error are overruled.

B.

[2] Defendants next argue that the trial court erred in refusing their request for a jury instruction on the sudden emergency doctrine. Defendants requested the following pattern jury instruction, N.C.P.I. Civil 102.15:

> A person who, through no negligence of his own, is suddenly and unexpectedly confronted with imminent danger to himself or to others, whether actual or apparent, is not required to use the same judgment that would be required if there were more time to make a decision. The person's duty is to use that degree of care which a reasonable and prudent person would use under the same or similar circumstances. If, in a moment of sudden emergency, a person makes a decision that a reasonable and prudent person would make under the same or similar circumstances, he does all that the law requires, even if in hindsight some different decision would have been better or safer.

A specific jury instruction should be given when "(1) the requested instruction was a correct statement of law and (2) was supported by the evidence, and that (3) the instruction given, considered in its entirety, failed to encompass the substance of the law requested and (4) such failure likely misled the jury." *Liborio v. King*, 150 N.C. App. 531, 534, 564 S.E.2d 272, 274, *disc. review denied*, 356 N.C. 304, 570 S.E.2d 726 (2002). Failure to give a requested and appropriate jury instruction is reversible error if the requesting party is prejudiced as a result of the omission. *See Carrington v. Emory*, 179 N.C. App. 827, 832, 635 S.E.2d 532, 535 (2006).

Even assuming *arguendo* that the trial court erred by failing to give Defendants' requested jury instruction, we find that any such error was harmless error in light of the jury verdict. The first question posed to the jury asked, "[w]as [Plaintiff Outlaw] injured by the neg-

ligence of [Defendant Johnson]?" The trial court instructed the jury that to answer this question in the affirmative, the jury would need to find that Defendant Johnson was negligent in one or more of the following ways: (a) he failed to keep a reasonable lookout; (b) he failed to keep his truck under proper control; (c) he drove at a dangerous speed; (d) he failed to reduce his speed to avoid an accident; or (e) he followed the van in front of him too closely. The jury answered the question in the affirmative, meaning it found that Defendant committed one or more of these negligent acts or omissions. Further, each of these acts or omissions would have occurred before Defendant Johnson experienced the "sudden emergency" that began when Mr. Brewington's van swerved and Defendant Johnson first saw the steamroller. Therefore, it cannot be said that Defendant Johnson, "*through no negligence of his own*, [was] suddenly and unexpectedly confronted with imminent danger." N.C.P.I. Civil 102.15 (emphasis added).

We find that even if the trial court had instructed the jury on the sudden emergency doctrine, Defendants could not have benefitted from that instruction given the jury's answer to question one. Therefore, Defendants were not prejudiced by the trial court's refusal to issue the requested jury instruction. Defendants' assignments of error are overruled.

C.

[3] Defendants next argue that the trial court erred in refusing their request for a jury instruction on spoliation. The spoliation doctrine recognizes that where a party fails to produce certain evidence relevant to the litigation, the finder of fact may infer that the party destroyed the evidence because the evidence was harmful to its case. *See Arndt v. First Union Nat'l Bank*, 170 N.C. App. 518, 527, 613 S.E.2d 274, 281 (2005). The party requesting a spoliation instruction must demonstrate that the opposing party had notice of the potential for future litigation, and that the lost evidence was relevant and potentially supportive of the requesting party's claim. *Id.* at 527-28, 613 S.E.2d at 281.

The record reflects that at the time of the collision, a strobe light was attached by a magnet to the top of the steamroller. Following the collision, APAC employees removed the strobe light and stored it in a workshop. After Plaintiff Outlaw filed the current lawsuit, defense counsel made arrangements for Defendants' expert witnesses to inspect the steamroller involved in the collision. At the inspection,

defense counsel and Defendants' expert witnesses did not inspect the strobe light because it was no longer attached to the steamroller. Shortly before trial, Defendants learned that the strobe light was available for inspection, and APAC's counsel informed Defendants that Plaintiff Outlaw and APAC planned to introduce the strobe light into evidence at trial. Defendants allege that as a result of these events, they were entitled to a jury instruction on spoliation. Specifically, Defendants contend that APAC was aware of the pending lawsuit at the time it removed the strobe light; that the strobe light was relevant to an important issue in the lawsuit, namely, whether the strobe light was functioning properly at the time of the collision; and that Defendants were prejudiced because they were unable to inspect the strobe light prior to trial.

We find that the trial court did not err in refusing to give Defendants' requested spoliation instruction because such an instruction was not supported by the evidence. *See Liborio*, 150 N.C. App. at 534, 564 S.E.2d at 274. The record demonstrates that approximately one month before trial, one of Defendants' expert witnesses, Mr. Bayer, requested that he be allowed to inspect the strobe light. APAC's counsel then faxed a letter to Defendants' counsel attempting to arrange an inspection, but Defendants' counsel never received the fax. At a pretrial hearing, the trial court attempted to resolve the situation by ordering APAC's counsel to ship the strobe light overnight to Defendants' expert witness for inspection. Defendants did not call Mr. Bayer to testify at trial, and the strobe light was available in the courtroom at trial.

Based on this record, it appears that APAC did not lose or destroy the strobe light and, after its availability became an issue, made the strobe light available to Defendants. Therefore, Defendants have not met the threshold requirement for an instruction on spoliation, namely, that the relevant evidence was lost or destroyed by the opposing party. An instruction on spoliation was not warranted simply because Defendants would have preferred to inspect the strobe light at the same time they inspected the steamroller. Defendants' assignments of error are overruled.

D.

[4] Defendants next argue that the trial court erred in excluding Plaintiff Outlaw's driving record from evidence. Before trial, Plaintiff Outlaw made a motion *in limine* to exclude evidence of his driving record, which contained three convictions between 1998 and 2001 for

driving either without a license or with a revoked license, and five DWI convictions between 1969 and 1986. Defendants argued that Plaintiff Outlaw's driving record was admissible to impeach Plaintiff Outlaw's credibility as a witness. The trial court excluded this evidence under N.C. Gen. Stat. § 8C-1, Rule 403, finding that "any such record would clearly be more prejudicial than probative[.]" Defendants argue that the trial court erred in excluding this evidence.

N.C. Gen. Stat. § 8C-1, Rule 609 (2007) provides as follows:

> (a) *General rule.*—For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a felony, or of a Class A1, Class 1, or Class 2 misdemeanor, shall be admitted[.]
>
> (b) *Time limit.*—Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction . . . unless the court determines, in the interests of justice, that the probative value of the conviction . . . substantially outweighs its prejudicial effect.

Plaintiff Outlaw's five DWI convictions were all at least twenty years old and were therefore properly excluded under Rule 609(b). Plaintiff Outlaw's convictions for driving without a license and driving with a revoked license were less than ten years old and are Class 2 misdemeanors, *see* N.C. Gen. Stat. § 20-35(a) (2007), and were therefore admissible under Rule 609(a). The trial court, however, found that despite the admissibility of these convictions under Rule 609(a), they should nonetheless be excluded under Rule 403 because their probative value on the issue of Plaintiff Outlaw's credibility was outweighed by their likely prejudicial effect. Defendants argue the trial court erred in making this determination.

In *State v. Brown*, 357 N.C. 382, 584 S.E.2d 278 (2003), *cert. denied*, 540 U.S. 1194, 158 L. Ed. 2d 106 (2004), the defendant asked our Supreme Court to apply the Rule 403 balancing test to a conviction otherwise admissible under Rule 609(a). The Supreme Court declined, stating:

> Defendant's argument fails to take into account the clearly expressed intent of the legislature. The language of Rule 609(a) ("shall be admitted") is mandatory, leaving no room for the trial court's discretion. Moreover, while [Rule] 609(b) requires a balancing test of the probative value and prejudicial effect of a conviction more than ten years old, this provision is explicitly absent

> from [Rule] 609(a). Indeed, the official comments to Rule 609(a) reveal an unequivocal intention to diverge from the federal requirement of a balancing test.

Id. at 390, 584 S.E.2d at 283. Our Court apparently overlooked *Brown* in reaching a contrary result in *Headley v. Williams*, 162 N.C. App. 300, 307, 590 S.E.2d 443, 447, *disc. review denied*, 358 N.C. 375, 598 S.E.2d 136 (2004) (finding no abuse of discretion where the trial court excluded on Rule 403 grounds evidence that was otherwise admissible under Rule 609(a)). While we are ordinarily bound by prior decisions of our Court, our Supreme Court's holding in *Brown* clearly controls our decision in the present case. Therefore, because Plaintiff Outlaw's convictions were admissible under Rule 609(a), and because the trial court had no discretion to exclude such evidence under Rule 403, we hold that the trial court erred in granting Plaintiff Outlaw's motion *in limine*.

When considering evidentiary errors on appeal, however, "[t]he burden is on the appellant to not only show error, but also to show that he was prejudiced and a different result would have likely ensued had the error not occurred." *Suarez v. Wotring*, 155 N.C. App. 20, 30, 573 S.E.2d 746, 752 (2002), *disc. review denied and cert. denied*, 357 N.C. 66, 579 S.E.2d 107 (2003). Defendants merely assert in their brief that the evidence at issue "was offered to impeach [P]laintiff Outlaw's credibility as a witness on cross-examination," and that Defendants "were prejudiced . . . to the extent the evidence related to impeaching [P]laintiff Outlaw's credibility on cross-examination and a new trial was warranted." Defendants have not demonstrated how they were specifically prejudiced by the trial court's error, nor do they allege that the jury verdict would have been different had Plaintiff Outlaw's prior convictions been admitted. Therefore, we find that the trial court's error was harmless error. Defendants' assignments of error are overruled.[1]

E.

[5] Finally, Defendants argue that the trial court erred by denying Defendants' motion for a mistrial due to attorney misconduct. Before

1. Defendants also argue that Plaintiff Outlaw's driving record was admissible because it was relevant on the issue of whether APAC was negligent in hiring Plaintiff Outlaw to drive a steamroller, and because APAC "opened the door" to such testimony at trial. Defendants correctly note, however, that because they prevailed on the issue of APAC's negligence at trial, this issue is moot unless we grant APAC a new trial. Because we do not grant APAC a new trial, *see infra*, we do not reach Defendants' additional arguments.

trial, Defendants made a motion *in limine* to exclude Plaintiff Outlaw's and APAC's witnesses from testifying about whether Defendant Johnson was able to see the steamroller while traveling behind Mr. Brewington's van. Counsel for Plaintiff Outlaw and for APAC admitted that it would be improper to ask a witness to speculate about what Defendant Johnson was able to see, but "believe[d] the witnesses [could] talk about what they saw and what their observations were and then the jury [could] draw inferences from that." The trial court agreed and granted Defendants' motion.

During Plaintiff Outlaw's direct examination of Mr. Wood at trial, the following exchange occurred:

> PLAINTIFF OUTLAW'S COUNSEL: Now, when you observed the three vehicles in a line, did you ascertain the height of the windshield of the tractor-trailer truck in relationship to the height of the van?
>
> DEFENSE COUNSEL: Objection.
>
> THE COURT: Overruled. Could you do that?
>
> MR. WOOD: Yes, you could. [Defendant Johnson] could see over the van.
>
> DEFENSE COUNSEL: Objection.
>
> THE COURT: Sustained. Ladies and gentlemen, you disregard that.

Defendants moved for a mistrial, and the trial court denied the motion. Defendants argue that counsel for Plaintiff Outlaw intentionally elicited this prohibited testimony, that Defendants were prejudiced thereby, and that Defendants were entitled to a new trial.

Under N.C. Gen. Stat. § 15A-1061 (2007), a trial court must declare a mistrial upon an appropriate motion "if there occurs during the trial an error or legal defect in the proceedings . . . resulting in substantial and irreparable prejudice to the defendant's case." We review a trial court's denial of a motion for a mistrial for abuse of discretion. *State v. Strickland*, 153 N.C. App. 581, 591, 570 S.E.2d 898, 905 (2002).

We note that Plaintiff Outlaw's counsel's question to Mr. Wood merely called for a "yes" or "no" answer, and did not call for Mr. Wood to speculate as to whether Defendant Johnson could see over the van. After Defendants' objection to Mr. Wood's improper response was

sustained, the trial court instructed Mr. Wood to "confine your answer just to the question that's being asked of you[.]" Mr. Wood agreed to do so. Plaintiff Outlaw's counsel, with the guidance of the trial court, then asked a series of pointed questions to Mr. Wood designed to elicit his observation that the windshield of Defendant Johnson's truck was higher than Mr. Brewington's van. Mr. Wood did not repeat his prior speculative statement. At the conclusion of Mr. Wood's testimony, the trial court issued a lengthy instruction asking the jurors to disregard Mr. Wood's speculative statement.

Based on this record, we find that the trial court did not abuse its discretion in denying Defendants' motion for a mistrial. The trial court specifically found that Mr. Wood "was just trying to offer what he thought was logical testimony," and that Plaintiff Outlaw's counsel had not intended to elicit Mr. Wood's improper response. Further, the trial court gave a curative instruction to the jury immediately after Mr. Wood's statement and it gave an additional curative instruction at the close of Mr. Wood's testimony. Under these circumstances, we cannot say Defendants suffered "substantial and irreparable prejudice" as a result of Mr. Wood's statement. Defendants' assignments of error are overruled.

In sum, we find that the trial court did not err in: submitting the issue of last clear chance to the jury; refusing Defendants' request for a jury instruction on spoliation; or denying Defendants' motion for a mistrial. We also find that the trial court did not commit prejudicial error in refusing Defendants' request for a jury instruction on sudden emergency, or in excluding Plaintiff Outlaw's driving record from evidence.

II.

APAC raises three questions on appeal. We consider each of APAC's arguments in turn.

A.

[6] APAC first argues that the trial court erred by concluding that pursuant to N.C.G.S. § 97-10.2(e), APAC was not entitled to recover on its workers' compensation lien from the judgment awarded to Plaintiff Outlaw. N.C.G.S. § 97-10.2(e) represents a codification of our Supreme Court's holding in *Brown v. R.R.*, 204 N.C. 668, 169 S.E. 419 (1933). In *Brown*, the Court held that "where an employer seeks to recover from a third-party tortfeasor the amount of workers' compensation benefits paid by the employer to its employee, the third

party may raise the employer's contributory negligence in causing the employee's injury as a defense to the employer's action." *Estate of Harvey v. Kore-Kut, Inc.*, 180 N.C. App. 195, 200, 636 S.E.2d 210, 213 (2006) (summarizing our Supreme Court's holding in *Brown*). *See Brown*, 204 N.C. at 671, 169 S.E. at 420.

In accord with the holding in *Brown*, N.C.G.S. § 97-10.2(e) provides that in a suit by an injured employee or his employer against a negligent third party:

> If the third party defending such proceeding . . . sufficiently alleges that actionable negligence of the employer joined and concurred with the negligence of the third party in producing the injury or death, then an issue shall be submitted to the jury in such case as to whether actionable negligence of [the] employer joined and concurred with the negligence of the third party in producing the injury or death. The employer shall have the right to appear, to be represented, to introduce evidence, to cross-examine adverse witnesses, and to argue to the jury as to this issue as fully as though he were a party although not named or joined as a party to the proceeding. Such issue shall be the last of the issues submitted to the jury. If the verdict shall be that actionable negligence of the employer did join and concur with that of the third party in producing the injury or death, then the court shall reduce the damages awarded by the jury against the third party by the amount which the employer would otherwise be entitled to receive therefrom by way of subrogation[.]

By its plain language, N.C.G.S. § 97-10.2(e) raises a complete bar to an employer's ability to recover on its workers' compensation lien if the employer's own negligence was a joint cause of the employee's injury. However, the statute does not explicitly address situations where, despite the employer's negligence, a jury finds that the defendant had the last clear chance to avoid injuring the plaintiff, meaning that the defendant's negligence was the proximate cause of the plaintiff's injury. APAC argues that traditional tort doctrines apply unless specifically abrogated by statute, and thus the doctrine of last clear chance should be superimposed on N.C.G.S. § 97-10.2(e). Therefore, according to APAC, just as a contributorily negligent plaintiff may recover when the defendant had the last clear chance to avoid the injury, so too may a negligent employer recover on its workers' compensation lien upon a jury finding of last clear chance, despite the language of N.C.G.S. § 97-10.2(e).

APAC's question appears to be one of first impression in North Carolina. Upon considering prior case law interpreting N.C.G.S. § 97-10.2(e) and the plain language of the statute, we hold that APAC's arguments are without merit.

Our Court has previously noted that N.C.G.S. § 97-10.2(e) "evidences a strong public policy in North Carolina of prohibiting a negligent employer from recouping any workers' compensation benefits paid to an injured employee. It is not the purpose of the Workers' Compensation Act to exculpate or absolve employers from the consequences of their negligent conduct." *Jackson v. Howell's Motor Freight, Inc.*, 126 N.C. App. 476, 480, 485 S.E.2d 895, 899, *disc. review denied*, 347 N.C. 267, 493 S.E.2d 456 (1997) (quoting *Geiger v. Guilford Coll. Comm. Volunteer Firemen's*, 668 F. Supp. 492, 497 (M.D.N.C. 1987)). *See also Johnson v. Southern Industrial Constructors*, 347 N.C. 530, 538, 495 S.E.2d 356, 360-61 (1998) (stating that "[i]t is clear from the provisions of N.C.G.S. § 97-10.2 . . . and the cases which have construed it, that it was and is the intent of the legislature that *non-negligent* employers are to be reimbursed for those amounts they pay to employees who are injured by the negligence of third parties" (emphasis added)).

Further, the plain language of N.C.G.S. § 97-10.2(e) precludes a negligent employer from recovering on its lien without regard to the last clear chance doctrine. "[W]hen confronted with a clear and unambiguous statute, courts 'are without power to interpolate, or superimpose, provisions and limitations not contained therein.' " *In re R.L.C.*, 361 N.C. 287, 292, 643 S.E.2d 920, 923, *cert. denied*, —— U.S. ——, 169 L. Ed. 2d 396 (2007) (quoting *In re Banks*, 295 N.C. 236, 239, 244 S.E.2d 386, 388-89 (1978)). We also note that under N.C.G.S. § 97-10.2(e), when a defendant alleges negligence on the part of the employer, the trial court *shall* submit the issue of the employer's negligence to the jury, and this *shall* be the *last* question considered by the jury. In accordance with this mandatory language, we find that the General Assembly intended for N.C.G.S. § 97-10.2(e) to apply even in cases where the issue of last clear chance has been submitted to the jury, and the jury has answered this question in the affirmative.

If last clear chance principles are to be superimposed on N.C.G.S. § 97-10.2(e), it is our General Assembly, and not our courts, that must make this policy determination. The trial court therefore did not err in finding that APAC was not entitled to recover on its workers' compensation lien. APAC's assignments of error are overruled.

B.

[7] APAC next argues that the trial court erred by concluding that APAC was not entitled to recover on its $55,000.00 property damage claim. APAC correctly notes that our prior cases demonstrate that property damages, like personal injury damages, are recoverable under the last clear chance doctrine. *See, e.g.*, *Page v. Boyles*, 139 N.C. App. 809, 535 S.E.2d 561 (2000), *aff'd per curiam*, 353 N.C. 361, 543 S.E.2d 480 (2001) (reinstating a jury award of personal and property damages in favor of the plaintiff, in a case where the defendant had the last clear chance to avoid the accident); *Wray v. Hughes*, 44 N.C. App. 678, 262 S.E.2d 307, *disc. review denied*, 300 N.C. 203, 269 S.E.2d 628 (1980) (holding that the question of last clear chance should have been submitted to the jury in a case where the plaintiff sought both property and personal injury damages). APAC contends that although the jury found that APAC was negligent in contributing to Plaintiff Outlaw's injury, APAC's negligence, like Plaintiff Outlaw's negligence, was "trumped" by the jury's finding on the issue of last clear chance, thus allowing APAC to recover on its property damage claim. We do not address APAC's arguments because we find that APAC was not procedurally able to seek an award of property damages in the current action.

The present action commenced when Plaintiff Outlaw filed a complaint against Defendant Johnson and Defendant MCA. APAC was not a party to this action. Defendants then filed an answer and counterclaim in which they alleged, pursuant to N.C.G.S. § 97-10.2(e), that APAC's negligence joined and concurred with that of Defendants, and therefore APAC was not entitled to recover on its workers' compensation lien. As a result of Defendants' allegation, APAC had "the right to appear, to be represented, to introduce evidence, to cross-examine adverse witnesses, and to argue to the jury as to this issue as fully *as though [it] were a party although not named or joined as a party to the proceeding*." N.C.G.S. § 97-10.2(e) (emphasis added). Plaintiff Outlaw filed a reply to Defendants' answer and counterclaim. This reply included a "CROSS-CLAIM OF ADDITIONAL PARTY APAC-ATLANTIC, INC.," in which "APAC, as an additional party to this action, pursuant to N.C. Gen. Stat. § 97-10.2," sought $53,500.00 in property damage to its steamroller.

N.C. Gen. Stat. § 1A-1, Rule 13(g) (2007) provides:

> *Crossclaim against coparty.*—A pleading may state as a crossclaim any claim by one *party* against a *coparty* arising out of the

> transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action (emphasis added).

Under Rule 13(g), in order for a person or entity to assert a crossclaim in a pleading, that person or entity must be a party to the action. Despite the statement to the contrary in Plaintiff Outlaw's reply, it is clear that under N.C.G.S. § 97-10.2(e), APAC was not a party to the lawsuit at issue. *See*, *e.g.*, *Leonard v. Johns-Manville Sales Corp.*, 309 N.C. 91, 102, 305 S.E.2d 528, 535 (1983) (noting that while an employer may defend an allegation of negligence under N.C.G.S. § 97-10.2(e), the employer "shall not be made a party"). While N.C.G.S. § 97-10.2(e) did grant APAC certain rights with respect to the litigation, the right to file a crossclaim was not included within these rights. Since APAC was not a party to the proceeding and was not made a party to the proceeding under any other statute or rule of civil procedure, it was unable to assert a crossclaim under Rule 13(g).[2] Therefore, the trial court did not err by finding that APAC was not entitled to recover on its property damage claim. APAC's assignments of error are overruled.

C.

[8] Finally, APAC argues that the trial court erred by refusing to instruct the jury on certain topics contained in the United States Department of Transportation's Manual on Uniform Traffic Control Devices (MUTCD). The MUTCD, which "contains standards for the design and deployment of traffic control devices," has been incorporated into the North Carolina Administrative Code. *See* 19A N.C.A.C. 2B.0208 (2007). APAC requested that the trial court instruct the jury as to three aspects of the MUTCD, including: (1) the MUTCD requires the use of "flaggers" when a lane is closed on a two-lane highway, but it does not require the use of flaggers when a lane is closed on a four-lane highway, *see* M.U.T.C.D. Figure 6H-10; (2) the MUTCD allows, but it does not require, the use of "shadow vehicles" to protect highway workers on mobile construction devices, *see* M.U.T.C.D. § 6D.03; and (3) the MUTCD contains typical applications of temporary traffic control devices, but recognizes that control devices may differ from those described to compensate for the conditions and requirements

2. Our holding on this issue does not suggest that APAC was wholly unable to assert a claim against Defendants for property damage to the steamroller; we hold only that the procedural mechanism APAC used to assert its claim in this case was improper.

of a particular work site, and gives supervising officials the responsibility and discretion to select an appropriate traffic control plan, *see* M.U.T.C.D. § 6A.01. The trial court denied APAC's request because the MUTCD had not been received into evidence.

APAC argues that these MUTCD provisions were essential to the jury's determination of whether APAC's safety controls were reasonable. Without these instructions, APAC contends, the jury was allowed to create its own standard to determine whether APAC's precautions were reasonable. We disagree with APAC's contentions. Had APAC closed a lane on a *two-lane* road, or had the MUTCD *required* the use of shadow vehicles in these circumstances, the requested jury instructions might have been relevant in terms of defining the reasonable safety precaution to use in such situations. However, the MUTCD provisions cited by APAC do not provide similar guidance applicable to the facts of this case. Pursuant to M.U.T.C.D. Figure 6H-10, APAC was not required to use flaggers to close a lane on a four-lane highway. Therefore, APAC's decision whether or not to use flaggers was discretionary. Similarly, pursuant to M.U.T.C.D. § 6D.03, APAC was not required to use a shadow vehicle but had the discretion to do so. Finally, M.U.T.C.D. § 6A.01 provided that these decisions, as well as APAC's other safety decisions not expressly controlled by MUTCD provisions,[3] were discretionary given the specific circumstances at the work site.

Because the MUTCD provisions cited by APAC did not provide traffic control guidance in these specific areas, the proper question for the jury was whether APAC was negligent in making certain discretionary safety decisions. In its charge to the jury, the trial court correctly instructed the jury as follows:

> With respect to [Defendants'] contentions of . . . APAC's negligence, a construction company such as . . . APAC has a duty to conduct its operations while exercising ordinary care to protect

3. Mr. White, Plaintiff Outlaw's supervisor, testified and was subject to cross-examination at trial regarding a number of his safety decisions relevant to the question of APAC's negligence, including: the proper method of setting up a work zone and blocking off a lane with traffic cones; whether the warning lights on the steamroller were sufficient; Mr. White's decision to end the right-lane closure shortly after the bridge, rather than extending the traffic cones all the way to the staging area; his decision not to use a flat-bed truck to transport the steamroller to the staging area, although such a truck was available and use of the truck for that purpose was common; his decision to tell Plaintiff Outlaw to drive the steamroller in the highway, rather than off the side of the highway; and his decision to forego the use of flaggers or a shadow vehicle.

> its employees and others from injury. Ordinary care means that degree of care that a reasonable and prudent company would use under the same or similar circumstances to protect its employees and others from injury. A company's failure to exercise ordinary care in its operations is negligence.

The jury was properly able to assess the reasonableness of APAC's safety decisions pursuant to the charge given by the trial court. It was not necessary for the jury to be instructed as to reasonableness standards set forth in the MUTCD because the MUTCD provisions cited by APAC did not provide standard safety procedures applicable to the facts of this case. We therefore find that the trial court did not err in failing to give APAC's requested jury instructions because such instructions were not supported by the evidence. *See Liborio*, 150 N.C. App. at 534, 564 S.E.2d at 274. APAC's assignments of error are overruled.

In sum, we find that the trial court did not err in: concluding that APAC was not entitled to recover on its workers' compensation lien; concluding that APAC was not entitled to recover on its property damage claim; or refusing to instruct the jury on certain topics contained in the MUTCD.

In Defendants' appeal we find no prejudicial error.

In APAC's appeal we find no error.

Chief Judge MARTIN and Judge STEPHENS concur.

PATSY MICHAEL, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF DAVID GWEAN MICHAEL, DECEASED; AND MEREDITH T. MICHAEL, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF CHRISTOPHER ROBERT MICHAEL, DECEASED; PLAINTIFFS v. HUFFMAN OIL COMPANY, INC.; CITY OF BURLINGTON, NORTH CAROLINA; ARCADIS FPS, INC., FORMERLY DOING BUSINESS AS FINKBEINER, PETTIS & STROUT, INC.; AND PAUL HOWARD CONSTRUCTION COMPANY, INC.; DEFENDANTS

No. COA07-1293

(Filed 6 May 2008)

1. Appeal and Error— appealability—partial summary judgment—substantial right affected

An appeal from a summary judgment for fewer than all of the defendants affected a substantial right and was heard where there were complex facts and the possibility of inconsistent verdicts.

2. Negligence— engineers—standard of care

The trial court did not abuse its discretion by excluding expert testimony about the standard of care applicable to professional engineers in a case that began with the deaths of two workers in an underground vault during construction of a waterline. The expert opinion was based solely on a methodology that has been found insufficient to establish the standard of care applicable to professional engineers.

3. Negligence— construction of waterline—not inherently dangerous

Workers who were killed in an underground vault during the installation of a waterline were not engaged in an inherently dangerous activity. They were not engaged in "trenching," and a supervisor stated that he had never in his twenty-two years in the field heard of anyone dying during construction of waterlines (as opposed to sewer mains). The trial court properly granted summary judgment for the City of Burlington on this issue.

4. Negligence— deaths during construction of waterline—no hazardous substance involvement

The trial court properly granted summary judgment for the City of Burlington on plaintiffs' claim that the City violated N.C.G.S. § 143-215.93 (control over oil or other hazardous substances) during construction of a waterline. The City was at no time "using, transferring, storing, or transporting oil or other hazardous substances" through its easement.

5. Contracts— indemnity provision for costs—not applicable to damages for personal injury

The trial court did not err by ruling that plaintiffs were not entitled to recover direct damages from the City of Burlington for the deaths of workers based upon indemnity language in a contract. The contract required the City to reimburse the decedents for certain claims, but plaintiffs were attempting to collect payment of direct damages for personal injury rather than to be indemnified.

6. Negligence— engineers—evidence of standard of care—properly excluded

Plaintiffs could not make a prima facie showing of professional negligence by an engineer where their expert testimony about the standard of care was properly excluded.

7. Negligence— misrepresentation—traditional negligence rules—standard of care

Even though one of the claims arising from deaths during a waterline installation was labeled negligent misrepresentation, it was based upon traditional negligence rules, and plaintiffs did not present evidence of the applicable standard of care. Summary judgment was properly granted for defendant city and its engineering firm.

8. Premises Liability— waterline construction—premises liability—standard of care—expert testimony required

Summary judgment was properly granted for defendants on a premises liability claim in an action arising from deaths during a waterline construction project. Based upon the complexity of facts, expert testimony was required to establish the standard of care, but plaintiffs failed to present that testimony.

Appeal by plaintiffs from orders entered 18 January, 4 April, 1 May and 2 May 2007 by Judge John O. Craig, III in Guilford County Superior Court. Heard in the Court of Appeals 2 April 2008.

Conner, Gwyn, Schenck, P.L.L.C., by C. Hamilton Jarrett, for plaintiff-appellants.

Cranfill, Sumner & Hartzog, L.L.P., by Patrick H. Flanagan, Ryan D. Bolick and Melody J. Canady, for defendant-appellee City of Burlington, North Carolina.

Parker, Poe, Adams & Bernstein, L.L.P., by Thomas N. Griffin, III and John E. Grupp, for defendant-appellee Arcadis FPS, Inc.

No brief was submitted by defendants Huffman Oil Company, Inc. or Paul Howard Construction Company.

TYSON, Judge.

Patsy Michael and Meredith T. Michael (collectively, "plaintiffs"), both individually and as Administrators of the Estates of David Gwean Michael and Christopher Robert Michael, respectively, appeal from orders: (1) excluding expert testimony by plaintiffs' witness, Dr. Wu-Seng Lung, Ph.D., P.E. ("Dr. Lung") regarding the standard of care applicable to Arcadis FPS, Inc. ("Arcadis") and the City of Burlington, North Carolina ("City of Burlington"); (2) granting partial summary judgment in favor of the City of Burlington on plaintiffs' Chapter 143 and negligent misrepresentation claims; (3) granting summary judgment in favor of Arcadis on all of plaintiffs' claims; and (4) subsequently granting summary judgment in favor of the City of Burlington on all of plaintiffs' remaining claims. We affirm.

I. Background

On 10 July 2002, the City of Burlington purchased an easement from Huffman Oil Company, Inc. ("Huffman") to construct and maintain a waterline under and across Huffman's property near the corner of U.S. Highway 70 and N.C. Highway 100 in Guilford County. In 2003, the City of Burlington began construction of approximately 12,300 linear feet of 24-inch potable waterline to connect the City of Burlington's water system to the City of Greensboro's water system ("the water main project").

Arcadis was retained to provide engineering and surveying services for the project. Paul Howard Construction Company, Inc. ("Howard") was hired to perform the required construction work. Howard entered into a sub-contract with PDM Investments, Inc. ("PDM") to install a series of underground vaults to house and provide access to valves at specified locations along the waterline.

David and Christopher Michael ("the Michaels") of Michael's Backhoe & Landscaping, Inc. were sub-contracted to construct part of the waterline on behalf of PDM. The Michaels were contractually responsible for all excavation, pipe installation, fittings and valve installation, compacting, erosion control measures, and testing from Station 0+00 to Station 48+00.

On 3 July 2003, after completing the majority of the required work, the Michaels performed a pressure test on a portion of the waterline recently installed. This test required access through the underground vault installed by PDM and Howard, near the intersection of Highways 70 and 100. The waterline failed to maintain sufficient pressure for the required period of time. The Michaels dismissed the remainder of their crew and proceeded to search for the leak. The next morning, the Michaels were found dead at the bottom of the vault.

The cause of death was determined to be "asphyxia and environmental hypoxia" due to a hazardous and toxic environment and petroleum discharge. The medical examiner found that the cause of death was "consistent with the extremely low oxygen levels in the vault measured shortly after the bodies of [the Micheals] were removed."

On 6 June 2005, plaintiffs filed a complaint alleging fourteen separate wrongful death claims against Huffman, the City of Burlington, Arcadis, and Howard. Plaintiffs contended that the deaths were caused by hazardous environmental conditions existing near the corner of Highways 100 and 70. Plaintiffs alleged the hazardous environmental condition resulted from toxic vapors leaking into the soil from two underground storage tanks used in connection with a gasoline service station that formerly operated on Huffman's property.

Plaintiffs alleged the following claims for relief against the City of Burlington: (1) strict liability under a violation of Chapter 143; (2) third-party beneficiary; (3) failure to investigate; (4) failure to warn; (5) negligent misrepresentation; (6) inherently dangerous work; and (7) premises liability. Plaintiffs alleged negligence and negligent misrepresentation against Arcadis. Subsequently, both the City of Burlington and Arcadis filed answers, which denied plaintiffs' material allegations and asserted the affirmative defense of contributory negligence. On 13 December 2006, Arcadis filed a motion to exclude plaintiffs' expert witness, Dr. Lung, and moved for summary judgment on all claims.

On 21 December 2006, the City of Burlington moved for partial summary judgment regarding the following claims: (1) third-party beneficiary; (2) failure to investigate; (3) failure to warn; (4) negligent misrepresentation; (5) inherently dangerous work; and (6) premises liability. On 20 February 2007, the City of Burlington filed: (1) a second motion for partial summary judgment regarding plaintiffs' claim

for strict liability under Chapter 143 and (2) a motion to exclude Dr. Lung's expert testimony.

By separate orders dated 18 January and 4 April 2007, the trial court ruled that Dr. Lung would not be permitted to testify at trial as to the appropriate standard of care or the breach of such standard regarding defendants, Arcadis and the City of Burlington. On 4 April 2007, the trial court also granted partial summary judgment in favor of the City of Burlington regarding plaintiffs' claims of: (1) strict liability under violation of Chapter 143 and (2) negligent misrepresentation.

On 2 May 2007, the trial court granted summary judgment in favor of Arcadis on all of plaintiffs' claims. The trial court also granted summary judgment in favor of the City of Burlington on all of plaintiffs' remaining claims. On 29 May and 15 June 2007, the trial court issued orders staying the remaining proceedings pending resolution of this appeal. Plaintiffs appeal.

II. Issues

Plaintiffs argue the trial court erred by: (1) granting Arcadis's and the City of Burlington's motions to exclude Dr. Lung's expert testimony; (2) granting partial summary judgment in favor of the City of Burlington regarding plaintiffs' Chapter 143 and negligent misrepresentation claims; (3) granting summary judgment in favor of Arcadis regarding all of plaintiffs' claims; and (4) subsequently granting summary judgment in favor of the City of Burlington regarding all of plaintiffs' remaining claims.

III. Interlocutory Appeal

[1] As a preliminary matter, this appeal is interlocutory. "Generally, a party cannot immediately appeal from an interlocutory order unless failure to grant immediate review would affect[] a substantial right pursuant to N.C.G.S. sections 1-277 and 7A-27(d)." *Davis v. Davis*, 360 N.C. 518, 524, 631 S.E.2d 114, 119 (2006) (internal citations and quotations omitted). In cases where there are complex facts and a possibility of inconsistent verdicts in separate trials, an order allowing summary judgment as to fewer than all defendants affects a substantial right. *Federal Land Bank v. Lieben*, 86 N.C. App. 342, 344, 357 S.E.2d 700, 702 (1987). As this is true of the case *sub judice*, we review the merits of plaintiffs' appeal.

IV. Exclusion of Expert Testimony

Plaintiffs argue Dr. Lung should be allowed to testify as an expert witness in this case and opine the standard of care to be employed by professional engineers in the design and administration of underground utility construction projects. We disagree.

A. Standard of Review

> It is well-established that trial courts must decide preliminary questions concerning the qualifications of experts to testify or the admissibility of expert testimony. When making such determinations, trial courts are not bound by the rules of evidence. In this capacity, trial courts are afforded wide latitude of discretion when making a determination about the admissibility of expert testimony. Given such latitude, it follows that *a trial court's ruling on the qualifications of an expert or the admissibility of an expert's opinion will not be reversed on appeal absent a showing of abuse of discretion.*

Howerton v. Arai Helmet, Ltd., 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004) (internal quotations and citations omitted) (emphasis supplied).

B. Analysis

[2] North Carolina has adopted a three-part test in determining the admissibility of expert testimony: "(1) Is the expert's proffered method of proof sufficiently reliable as an area for expert testimony? (2) Is the witness testifying at trial qualified as an expert in that area of testimony? [and] (3) Is the expert's testimony relevant?" *Id.* (citing *State v. Goode*, 341 N.C. 513, 527-29, 461 S.E.2d 631, 639-41 (1995)).

Here, the trial court separately considered Arcadis's and the City of Burlington's motions to exclude Dr. Lung's expert testimony. In its order excluding Dr. Lung's testimony concerning the standard of care applicable to Arcadis, it applied the three-part test enunciated in *Howerton* and concluded, *inter alia*:

> Dr. Lung's testimony regarding the standard of care applicable to [Arcadis] and any breach of the standard of care by [Arcadis] is not admissible and should be excluded . . . . Specifically (1) Dr. Lung is not qualified to express opinions regarding the standard of care applicable to the design of a water main construction project by North Carolina professional engineers, (2) Dr. Lung's testimony is not relevant to the claims asserted against [Arcadis],

and (3) Dr. Lung's method of proof is not sufficiently reliable as an area for expert testimony.

The trial court further stated, "This Order is not intended to and shall not affect the ability of Dr. Lung from testifying at the trial of this lawsuit regarding matters other than the standard of care applicable to [Arcadis] or any breach of the applicable standard of care by [Arcadis]." In a less extensive order, the trial court concluded that the same rationale applied to Dr. Lung's testimony regarding the standard of care applicable to the City of Burlington.

As a threshold issue, the trial court is required to "determine whether the expert's method of proof is sufficiently reliable as an area for expert testimony." *Id.* at 459, 597 S.E.2d at 686 (citation omitted). In *Howerton*, our Supreme Court stated:

> [T]o determine whether an expert's area of testimony is considered sufficiently reliable, a court may look to testimony by an expert specifically relating to the reliability, may take judicial notice, or may use a combination of the two. Initially, the trial court should look to precedent for guidance in determining whether the theoretical or technical methodology underlying an expert's opinion is reliable. Although North Carolina does not exclusively adhere to the *Frye* general acceptance test, when specific precedent justifies recognition of an established scientific theory or technique advanced by an expert, the trial court should favor its admissibility, provided the other requirements of admissibility are likewise satisfied. . . . Conversely, there are those scientific theories and techniques that have been recognized by this Court as inherently unreliable and thus generally inadmissible as evidence.

Id. at 459-60, 597 S.E.2d at 687 (internal citations and quotations omitted).

In cases where the trial court is without precedential guidance to determine whether the expert's proffered scientific or technical method of proof is sufficiently reliable, it should focus on the nonexclusive "indices of reliability" including: "the expert's use of established techniques, the expert's professional background in the field, the use of visual aids before the jury so that the jury is not asked to sacrifice its independence by accepting [the] scientific hypotheses on faith, and independent research conducted by the expert." *Id.* at 460, 597 S.E.2d at 687 (alteration original) (citation and quotation omitted).

The dispositive issue before us is whether plaintiffs have shown an abuse of discretion in the trial court's ruling that Dr. Lung's use of a code of ethics for engineers is an unreliable methodology for determining the standard of care applicable to the defendants at bar.

This Court addressed a similar issue in *Associated Indus. Contr'rs, Inc. v. Fleming Eng'g, Inc.*, 162 N.C. App. 405, 413, 590 S.E.2d 866, 872 (2004), *aff'd*, 359 N.C. 296, 608 S.E.2d 757 (2005). In *Fleming*, the defendant challenged the trial court's findings of fact, which took judicial notice of various statutes relating to the practice of engineering and land surveying. *Id.* Specifically, the defendant challenged the following finding of fact:

> 4. Under N.C.G.S. § 89C-3 and 89C-2, the Defendant, as a regulated professional engineer and surveyor, had a legal duty to safeguard the property of the public. In this case, the Defendant was to render its services in a professional adequate and workmanlike manner, in light of Plaintiff's evidence that its employees did not feel competent in performing the work themselves. *The Court finds that the Defendant failed to meet its legal duty and failed to meet the standard of care created by N.C.G.S. § 89C-2 and N.C.G.S. § 89C-3.*

Id. (emphasis supplied). This Court subsequently concluded, "[t]o the extent that Finding of Fact 4 suggests that N.C. Gen. Stat. §§ 89C-2, -3 (2003) creates a specific standard of care, we agree with Fleming that *the trial court erred in relying on those statutes*." *Id.* (emphasis supplied).

N.C. Gen. Stat. § 89C-2 (2003) provides:

> *In order to safeguard life, health, and property, and to promote the public welfare, the practice of engineering and the practice of land surveying in this State are hereby declared to be subject to regulation in the public interest.* It shall be unlawful for any person to practice or to offer to practice engineering or land surveying in this State, as defined in the provisions of this Chapter, or to use in connection with the person's name or otherwise assume or advertise any title or description tending to convey the impression that the person is either a professional engineer or a professional land surveyor, unless the person has been duly licensed. The right to engage in the practice of engineering or land surveying is a personal right, based on the qualifications of the person as evidenced by the person's certificate of licensure, which shall not be transferable.

(Emphasis supplied). Further, N.C. Gen. Stat. § 89C-3 (2003) defines the "[p]ractice of engineering" as:

> Any service or creative work, the adequate performance of which requires engineering education, training, and experience, in the application of special knowledge of the mathematical, physical, and engineering sciences to such services or creative work as consultation, investigation, evaluation, planning, and design of engineering works and systems, planning the use of land and water, engineering surveys, and the observation of construction for the purposes of assuring compliance with drawings and specifications, including the consultation, investigation, evaluation, planning, and design for either private or public use, in connection with any utilities, structures, buildings, machines, equipment, processes, work systems, projects, and industrial or consumer products or equipment of a mechanical, electrical, hydraulic, pneumatic or thermal nature, *insofar as they involve safeguarding life, health or property, and including such other professional services as may be necessary to the planning, progress and completion of any engineering services.*

(Emphasis supplied). N.C. Gen. Stat. §§ 89C-2, -3 both emphasize "safeguarding life, health, or property[.]" In *Fleming*, this Court expressly rejected the contention that this language created a specific standard of care for professional engineers in this State. 162 N.C. App. at 413, 590 S.E.2d at 872. We hold that N.C. Gen. Stat. §§ 89C-2, -3 are analogous to the "code of ethics for engineers," upon which Dr. Lung solely relied to base his expert opinion.

During Dr. Lung's deposition, the following colloquy took place:

[Mr. Griffin]: And what imposes that duty, Dr. Lung?

[Dr. Lung]: That's [sic] standard of care.

[Mr. Griffin]: Standard of care in North Carolina?

[Dr. Lung]: For average engineers.

[Mr. Griffin]: In what locality? Everywhere?

[Dr. Lung]: I'm using very general—

[Mr. Griffin]: Yes, sir.

[Dr. Lung]: —very general terms.

[Mr. Griffin]: Where does that standard of care come from? If I were an engineer and I said, I want to understand my standard of care along these lines. Where would I go to look it up?

[Dr. Lung]: My earlier statement referred to the code of ethics for professional engineers. That is where it comes from.

[Mr. Griffin]: Does the code of ethics talk about environmental investigations for water lines?

[Dr. Lung]: Not specifically.

[Mr. Griffin]: What does it say?

[Dr. Lung]: *Protecting the public.*

(Emphasis supplied).

It is clear from the record that Dr. Lung based his expert opinion solely on a methodology that has been previously found to be insufficient to establish the standard of care applicable to professional engineers. *See Fleming*, 162 N.C. App. at 413, 590 S.E.2d at 872. We hold plaintiffs have failed to show any abuse of discretion in the trial court's ruling that Dr. Lung's method of proof is not "sufficiently reliable as an area for expert testimony" as is required by *Howerton*. 358 N.C. at 459, 597 S.E.2d at 686.

The trial court was also not convinced that Dr. Lung was qualified to testify as an expert witness regarding the standard of care applicable to the design and administration of underground utility construction projects and entered extensive findings of fact to support this conclusion in its order. Because we affirm the trial court's ruling that Dr. Lung's proffered method of proof is not "sufficiently reliable as an area for expert testimony[,]" review of the second and third factors under *Howerton* is unnecessary. Plaintiffs have failed to show the trial court abused its discretion by granting Arcadis's and the City of Burlington's motion to exclude Dr. Lung's expert testimony regarding the standard of care applicable to professional engineers. This assignment of error is overruled.

V. Summary Judgment

Plaintiffs argue the trial court erred by granting summary judgment in favor of Arcadis and the City of Burlington because genuine issues of material fact exist regarding all of plaintiffs' claims.

A. Standard of Review

> Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. The party moving for summary judgment ultimately has the burden of establishing the lack of any triable issue of fact.
>
> A defendant may show entitlement to summary judgment by (1) proving that an essential element of the plaintiff's case is nonexistent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot 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

1. Inherently Dangerous Activities

[3] Plaintiffs argue the Michaels were engaged in an inherently dangerous activity and the City of Burlington breached its non-delegable duty to provide a safe work place, proximately causing the Michaels' deaths. We disagree.

This Court recently reiterated the elements that must be satisfied in order to establish an inherently dangerous activity claim:

> First, the activity must be inherently dangerous. Second, at the time of the injury, the employer either knew, or should have known, that the activity was inherently dangerous. Third, the employer failed to take the necessary precautions to control the

> attendant risks. And fourth, this failure by the employer proximately caused injury to plaintiff.

Kinsey v. Spann, 139 N.C. App. 370, 375, 533 S.E.2d 487, 492 (2000) (internal citations omitted). Under *Kinsey*, we first address whether the Michaels were engaged in an activity that was inherently dangerous. *Id.*

> The rule in regard to 'intrinsically dangerous' work is based upon the unusual danger which inheres in the performance of the contract, and not from the collateral negligence of the contractor. Mere liability to injury is not the test, as injuries may result in any kind of work where it is carelessly done, although with proper care it is not specially hazardous.

Vogh v. F.C. Geer Co., 171 N.C. 672, 676, 88 S.E. 874, 876 (1916). "There is an obvious difference between committing work to a contractor to be executed, from which if properly done, no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise unless preventive measures are adopted." *Woodson v. Rowland*, 329 N.C. 330, 352, 407 S.E.2d 222, 235 (1991) (quoting *Greer v. Construction Co.*, 190 N.C. 632, 637, 130 S.E. 739, 743 (1925)).

Our Supreme Court has previously considered whether "trenching" is an inherently dangerous activity and does so on a case-by-case basis. *See Woodson*, 329 N.C. at 354, 407 S.E.2d at 236. In *Woodson*, the Court conducted an extensive review of the cases involving "trenching" and concluded:

> Courts considering the inherent danger of putting a man in a deep trench have reached conflicting results. Some have held it not to be inherently dangerous, *see*, *e.g.*, *Cummings v. Hoosier Marine Properties, Inc.*, 173 Ind. App. 372, 363 N.E.2d 1266 (1977), while others have held the question is for the jury. *See*, *e.g.*, *Smith v. Inter-City Telephone Co.*, 559 S.W.2d 518 (Mo. 1977) (en banc). We think the latter approach is the better reasoned.

Id.

Plaintiffs argue that entering into a potable waterline valve vault is analogous to the activity of "trenching" and should be considered an inherently dangerous activity. We disagree.

Here, the Michaels were not engaged in the activity known as "trenching," but entered a secure concrete water vault structure located below ground level to evaluate the cause for a decrease in

waterline pressure. Plaintiffs' own expert witness, David Jackson Hooks ("Hooks"), a supervisor of the construction of underground utilites, stated in his deposition that in the twenty-two years he has worked in construction of underground utilities, "it [was] the first time [he] ever heard of anybody dying in a—anything associated with new construction with water mains[.]" Hooks further stated, "I've heard of it before with sewer mains where the gasses overcame people, but never from water construction." Under the facts of this case, plaintiffs have failed to establish that the Michaels were engaged in an inherently dangerous activity. The trial court properly granted the City of Burlington's motion for summary judgment regarding this particular issue.

2. Violation of Chapter 143

[4] Plaintiffs argue the trial court erred by granting the City of Burlington's motion for summary judgment regarding plaintiffs' claim under Chapter 143. We disagree.

N.C. Gen. Stat. § 143-215.93 (2003) provides:

> Any person having control over oil or other hazardous substances which enters the waters of the State in violation of this Part shall be strictly liable, without regard to fault, for damages to persons or property, public or private, caused by such entry, subject to the exceptions enumerated in G.S. 143-215.83(b).

"Having control" is statutorily defined as "any person, using, transferring, storing, or transporting oil or other hazardous substances immediately prior to a discharge of such oil or other hazardous substances onto the land or into the waters of the State . . . ." N.C. Gen. Stat. § 143-215.77(5) (2003).

Here, the City of Burlington obtained an easement across Huffman's property to construct and maintain a waterline that connected its water system to the City of Greensboro's water system. At no time was the City of Burlington "using, transferring, storing, or transporting oil or other hazardous substances" through its easement. The trial court properly granted the City of Burlington's motion for summary judgment regarding plaintiffs' claim that it violated Chapter 143.

3. Third-Party Beneficiary

[5] Plaintiffs argue the trial court erred by granting summary judgment in favor of the City of Burlington regarding its third-party bene-

ficiary claim. Plaintiffs assert they are direct beneficiaries of the construction contract, in which the City of Burlington assumed liability for all losses and damages relating to hazardous environmental conditions entitling plaintiffs to direct damages. We disagree.

Plaintiffs rely on the following contractual provision between the City of Burlington and Howard as the basis of their claim:

> G. To the fullest extent permitted by Laws and Regulations, Owner shall indemnify and hold harmless, CONTRACTOR, Subcontractors, ENGINEER, ENGINEER's Consultants and the officers, directors, shareholders, partners, employees, agents, other consultants, and subcontractors of each and any of them from and against all claims, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) arising out of or relating to a Hazardous Environmental Condition: (i) was not shown or indicated in the Drawings or Specifications or identified in the Contract Documents to be included within the scope of the Work, and (ii) was not created by CONTRACTOR or by anyone for whom CONTRACTOR is responsible. Nothing in this paragraph 4.06.G shall obligate OWNER to indemnify any individual or entity from and against the consequences of that individual's or entity's own negligence.

(Emphasis original).

In order to assert rights under a contract as third-party beneficiaries, plaintiffs must show: "(1) that a contract exists between two persons or entities; (2) that the contract is valid and enforceable; and (3) that the contract was executed for the direct, and not incidental, benefit of the [third party]." *Spaulding v. Honeywell, Int'l, Inc.*, 184 N.C. App. 317, 325, 646 S.E.2d 645, 651 (2007) (quoting *Babb v. Bynum & Murphrey, PLLC*, 182 N.C. App. 750, 753-54, 643 S.E.2d 55, 57-58 (2007)) (alteration original) (emphasis omitted), *cert. denied*, 362 N.C. 177, 657 S.E.2d 667 (2008). When a party seeks enforcement of a contract as a third-party beneficiary, the contract must be construed strictly against the party seeking enforcement. *Id.*

> As in the construction of any contract, the court's primary purpose in construing a contract of indemnity is to ascertain and give effect to the intention of the parties, and the ordinary rules of

> construction apply. 42 C.J.S. *Indemnity* § 8 (1944). *It will be construed to cover all losses, damages and liabilities which reasonably appear to have been within the contemplation of the parties*, but it cannot be extended to cover any losses '*which are neither expressly within its terms nor of such character that it can reasonably be inferred that they were intended to be within the contract.*'

Dixie Container Corp. v. Dale, 273 N.C. 624, 627, 160 S.E.2d 708, 711 (1968) (emphasis supplied).

In *Dixie Container Corp.*, our Supreme Court interpreted a nearly identical indemnity clause and stated:

> We think it is reasonably clear that in the "indemnify and save harmless" clause, *defendant only bound itself to reimburse plaintiff for any damages it became obligated to pay third persons as a result of defendant's activity on the leased premises*. Ordinarily, indemnity connotes liability for derivative fault. *Edwards v. Hamill*, 262 N.C. 528, 138 S.E.2d 151. "In indemnity contracts the engagement is to make good and save another harmless from loss on some obligation which he has incurred or is about to incur to a third party. . . ." *Casualty Co. v. Waller*, 233 N.C. 536, 537, 64 S.E. 2d 826, 827.

Id. at 628, 160 S.E.2d at 711 (emphasis supplied). Further, Black's Law Dictionary defines the term "indemnify" as "[t]o reimburse (another) for a loss suffered because of a third party's or one's own act or default." *Black's Law Dictionary* 783-84 (8th ed. 2004).

The City of Burlington contractually bound itself to *reimburse* the Michaels for "all claims, costs, losses, and damages . . . arising out of or relating to a Hazardous Environmental Condition[.]" Plaintiffs have not become obligated to pay damages to a third party as a result of the Michaels' activity at the construction site. It is clear that plaintiffs are not seeking to be indemnified, but are attempting to collect payment of direct damages for personal injury. Plaintiffs seek to recover damages "which are neither expressly within its terms nor of such character that it can reasonably be inferred that they were intended to be within the contract." *Dixie Container Corp.*, 273 N.C. at 627, 160 S.E.2d at 711. The trial court properly ruled that plaintiffs are not entitled to recover direct damages based upon the indemnity language in the contract.

4. Negligence Claims

Plaintiffs argue the trial court erred by granting summary judgment in favor of Arcadis and the City of Burlington regarding their negligence claims. Plaintiffs assert the following claims against both Arcadis and the City of Burlington: (1) negligence based upon the failure to warn and the failure to investigate and (2) negligent misrepresentation. Plaintiffs also assert the City of Burlington is liable under a negligence theory of premises liability.

i. Professional Negligence

[6] In order to establish a claim of professional negligence, a plaintiff must show: "(1) the nature of the defendant's profession; (2) *the defendant's duty to conform to a certain standard of conduct*; and (3) a breach of the duty proximately caused injury to the plaintiffs." *Fleming*, 162 N.C. App. at 413, 590 S.E.2d at 872 (quoting *Greene v. Pell & Pell, L.L.P.*, 144 N.C. App. 602, 604, 550 S.E.2d 522, 523 (2001)) (emphasis supplied).

> The standard of care provides a template against which the finder of fact may measure the actual conduct of the professional. The purpose of introducing evidence as to the standard of care in a professional negligence lawsuit "is to see if this defendant's actions 'lived up' to that standard . . . ." *Little v. Matthewson*, 114 N.C. App. 562, 567, 442 S.E.2d 567, 570 (1994), *aff'd per curiam*, 340 N.C. 102, 455 S.E.2d 160 (1995). Ordinarily, expert testimony is required to establish the standard of care. *Bailey v. Jones*, 112 N.C. App. 380, 387, 435 S.E.2d 787, 792 (1993).

Id. at 410, 590 S.E.2d 870. *But see Handex of the Carolinas, Inc. v. County of Haywood*, 168 N.C. App. 1, 11, 607 S.E.2d 25, 31 (2005) (citation and quotation omitted) ("The only exception to the requirement of establishing the professional standard of care by way of expert testimony is where the common knowledge and experience of the jury is sufficient to evaluate compliance with a standard of care[.]").

Because we have previously held that the trial court properly excluded Dr. Lung's expert testimony regarding the standard of care applicable to Arcadis and the City of Burlington, plaintiffs are unable to establish a *prima facie* showing of professional negligence. *Fleming*, 162 N.C. App. at 413, 590 S.E.2d at 872. The trial court properly granted summary judgment in favor of Arcadis and the City of Burlington regarding plaintiffs' professional negligence claims.

ii. Negligent Misrepresentation

[7] North Carolina has "adopted the Restatement 2d definition of negligent misrepresentation and [our courts have] held that the action lies where *pecuniary loss* results from the supplying of false information to others for the purpose of guiding them in their business transactions." *Driver v. Burlington Aviation, Inc.*, 110 N.C. App. 519, 525, 430 S.E.2d 476, 480 (1993) (citations omitted) (emphasis original). In *Driver*, this Court further stated, "we have not found, and plaintiffs have not directed us to, any case in which the theory of negligent misrepresentation was approved as a basis for recovery for personal injury." *Id.* at 525, 430 S.E.2d at 481.

Plaintiffs attempt to side-step this precedent by stating in their brief, "[a]ppellants' use of the term 'Negligent Misrepresentation' does not subject their claim to dismissal. Regardless of how the claim is labeled, [a]ppellants state a claim based upon traditional negligence rules." As stated above, without evidence of the applicable standard of care, plaintiffs have failed to establish a *prima facie* claim for professional negligence. Plaintiffs' contentions have no merit and are overruled.

iii. Premises Liability

[8] In *Nelson v. Freeland*, our Supreme Court articulated a consolidated approach to premises liability in North Carolina and abolished the distinction between invitees and licensees by "requiring a standard of reasonable care toward all lawful visitors." 349 N.C. 615, 631, 507 S.E.2d 882, 892 (1998). In *Royal v. Armstrong*, this Court applied this reasoning in *Nelson* and stated:

> [T]he substitution of a 'reasonable care' standard for earlier distinctions between the duties a host owed to invitees and to licensees in determining premises liability *does not mean that summary judgment is inappropriate where, as a matter of law,* "*there are no genuine issues of material fact and the plaintiff fails to show one of the elements of negligence.*"

136 N.C. App. 465, 469, 524 S.E.2d 600, 602 (quoting *Lavelle v. Schultz*, 120 N.C. App. 857, 859, 463 S.E.2d 567, 569 (1995)), *disc. rev. denied*, 351 N.C. 474, 543 S.E.2d 495 (2000).

Here, based upon the complexity of the facts before us, expert testimony is required to establish the standard of care applicable to the City of Burlington. *Fleming*, 162 N.C. App. at 410, 590 S.E.2d at

870; *see also Handex*, 168 N.C. App. at 11, 607 S.E.2d at 31 ("Implicit in the expert's establishment of the professional standard of care as the baseline for the jury, is that by way of establishing that standard the expert can assist the jury in discerning whether defendant's professional performance or conduct did not conform therewith, and thus was in breach of that duty and the proximate cause of plaintiff's injury."). This is not a case "where the common knowledge and experience of the jury is sufficient to evaluate compliance with a standard of care[.]" *Handex*, 168 N.C. App. at 11, 607 S.E.2d at 31. As held above, plaintiffs failed to present any expert testimony regarding the standard of care applicable to the City of Burlington.

Plaintiffs failed to show any genuine issues of material fact exist regarding any of the claims asserted against these defendants. The trial court properly granted summary judgment in favor of Arcadis and the City of Burlington. This assignment of error is overruled.

VI. Conclusion

Dr. Lung solely relied upon a code of ethics for engineers as the basis of his proffered expert testimony. Dr. Lung's methodology was insufficient to establish the standard of care applicable to professional engineers and was not "sufficiently reliable as an area for expert testimony[.]" *Howerton*, 358 N.C. at 459, 597 S.E.2d at 686. Plaintiffs have failed to show the trial court abused its discretion by granting Arcadis's and the City of Burlington's motions to exclude Dr. Lung's expert testimony.

Viewed in the light most favorable to plaintiffs, no genuine issues of material fact exist regarding any of plaintiffs' claims against Arcadis and the City of Burlington. The trial court's orders are affirmed.

Affirmed.

Judges McGEE and STEPHENS concur.

LETESHIA CROSS, EMPLOYEE-PLAINTIFF v. FALK INTEGRATED TECHNOLOGIES, INC., EMPLOYER-DEFENDANT, AND AMERICAN HOME ASSURANCE C/O AIGCS, CARRIER-DEFENDANT

No. COA07-565

(Filed 6 May 2008)

1. Workers' Compensation— return to school after release to work—not supportive of disability

The choice of a workers' compensation plaintiff to return to school after her release for work did not support her contention of disability, despite her argument that pursuit of an engineering degree was a reasonable effort to find employment. Educational pursuits have been approved as proper vocational rehabilitation after disability has been established, but not for purposes of establishing disability. Moreover, defendants offered vocational assistance and identified several available positions that were suitable for plaintiff without further education.

2. Workers' Compensation— maximum medical improvement—evidence

The Industrial Commission did not err by finding that plaintiff had reached maximum medical improvement on a certain date and that she was not entitled to total disability benefits after that date.

3. Workers' Compensation— benefits denied—uncontradicted evidence of impairment

The Industrial Commission's denial of workers' compensation benefits for a permanent brain injury under N.C.G.S. § 97-31(24) was not supported by the findings of fact where there was uncontradicted medical evidence of post-concussion syndrome with a two percent permanent partial impairment rating, and the Commission made no findings to support its conclusion denying compensation for a permanent brain injury.

4. Workers' Compensation— payments made but not due—deduction from permanent award—remanded for specific findings

The Industrial Commission was within its authority in a workers' compensation case in specifying that amounts were not "due and payable" when made and that those payments be deducted from plaintiff's award of permanent partial impairment

benefits. However, the Commission did not specify the exact amount of the credit and the matter was remanded for appropriate findings.

5. Workers' Compensation— third-party settlement—finding not supported by evidence—not prejudicial

While the evidence did not support an Industrial Commission finding regarding plaintiff's third-party settlement in a workers' compensation case, the finding was not crucial to the determination of plaintiff's entitlement to benefits and the same result would have been obtained without the questioned finding. There was no prejudice.

Appeal by Plaintiff from an Opinion and Award entered 2 February 2007 by the North Carolina Industrial Commission. Heard in the Court of Appeals 10 December 2007.

Anne R. Harris for Plaintiff-Appellant.

Robinson & Lawing, L.L.P., by Jolinda J. Babcock, for Defendants-Appellants.

STEPHENS, Judge.

Plaintiff Leteshia Cross was employed as an office assistant at Fox Run apartment complex when she suffered multiple injuries in a work-related motor vehicle accident on 6 June 2001. Defendants Falk Integrated Technologies, Inc., the owners of the apartment complex, and their insurance carrier, American Home Assurance c/o AIGCS, accepted the claim as compensable via an I.C. Form 60 and paid Plaintiff temporary total disability benefits from the date of the accident through 12 May 2004. Although Defendants filed I.C. Form 24 applications on 12 September 2002 and 12 December 2003 to terminate Plaintiff's compensation, both applications were denied. Defendants appealed the second denial, and the case came on for hearing before Deputy Commissioner Chrystal Redding Stanback on 24 January 2005. The Deputy Commissioner filed an Opinion and Award on 14 March 2006, finding that Plaintiff was entitled to receive certain benefits. Both parties appealed to the Full Commission. In an Opinion and Award filed 2 February 2007, the Full Commission reversed the Deputy Commissioner's decision in part, determining that Plaintiff was not owed disability benefits after 19 March 2002. From the Opinion and Award of the Full Commission, Plaintiff appeals.

I. Background

Plaintiff began undergraduate studies at the University of North Carolina at Greensboro in the Fall of 1999, where she completed one year before taking a semester off to give birth to her child. She returned to school at North Carolina A & T in January 2001 and, after completing her spring semester, started working for Defendants during her summer break. Plaintiff testified that it had been her intention to continue working full-time for Defendants after the summer ended while also attending college.

While running an office errand on 6 June 2001, Plaintiff, who was 19 at the time, pulled out of a parking lot and was hit by another vehicle. Plaintiff was taken to Moses Cone Memorial Hospital and treated for a fractured left femur, a fractured pelvis, and head trauma. Dr. Daniel F. Murphy, an orthopedist, performed surgery to stabilize the left femur fracture. A CT scan of Plaintiff's head revealed a small area of hemorrhage in the left frontal lobe of her brain. Plaintiff was released from the hospital with crutches on 12 June 2001, and was instructed not to place any weight on her left leg for the following weeks.

During Plaintiff's post-surgical care, Defendants provided medical case management through Sheila Ward, R.N., BSN, CCM. Ms. Ward testified that Plaintiff indicated she did not intend to return to work after her recovery and, instead, would attend school full-time. The Full Commission found Ms. Ward's testimony to be credible.

Plaintiff also experienced blurred vision and was treated by ophthalmologist Dr. Kathryn Hecker in July of 2001. Dr. Hecker advised Plaintiff to perform eye exercises and watch for improvement. No additional care was recommended or sought, and Plaintiff did not experience any long-term vision difficulties. Plaintiff continued treatment for her leg with Dr. Murphy. On 19 December 2001, Dr. Murphy performed additional surgery to remove the pin that had been inserted in Plaintiff's femur immediately after the accident.

Plaintiff attempted to return to school at North Carolina A & T as a full-time student in the Fall of 2001, but withdrew halfway through the semester because it was too difficult to maintain her class schedule while on crutches and attending physical therapy three times a week. In January 2002, Plaintiff enrolled as a student at Guilford Technical Community College. During this time, Plaintiff continued to receive temporary total disability benefits.

Plaintiff also experienced memory problems and was seen by Dr. Jeffrey Schmidt at Guilford Neurologic Associates on 12 March 2002. Dr. Schmidt recommended testing, but noted that Plaintiff could work with no restrictions. Neuropsychological testing was performed by Dr. Michael F. Zelson, a clinical neuropsychologist, on 1 April and 4 April 2002. Dr. Zelson "did not identify any neuropsychological impairment relative to the normative population." Although Dr. Zelson opined that, compared to Plaintiff's pre-injury level of functioning, Plaintiff may have a mild deficit in her ability to learn and consolidate new information, he did not anticipate that she would have any limitations in employment of a non-professional type.

Thereafter, Dr. Schmidt released Plaintiff from care on 31 May 2002, noting that her neurological examination had been unremarkable. He assigned a permanent partial impairment of two percent relative to her post concussion syndrome and again imposed no work restrictions.

Plaintiff was released from Dr. Murphy's care on 19 March 2002. At that time, he noted, "[a]lthough she has not gotten back to running she is pretty much back to all other activities. Residual weakness in the left leg is definitely improving including the instability feeling around the knee." Plaintiff was found to be at maximum medical improvement with a 15 percent permanent partial impairment rating to her left lower leg. No work restrictions were imposed and Dr. Murphy testified that, from an orthopedic standpoint, he felt Plaintiff could have worked as an administrative assistant starting 19 March 2002.

Although Plaintiff was released with no work restrictions in the Spring of 2002, and testified that she was physically and mentally capable of performing an office assistant job during this time, she made no attempt to locate work or to contact her former employer to return to work. Thus, in September 2002, Defendants filed an I.C. Form 24 application to terminate compensation. In her response, Plaintiff claimed that she had not been released to unrestricted work, contrary to the medical reports. The Form 24 application was subsequently denied. In its 2 February 2007 decision, the Full Commission determined that the 10 September 2002 Form 24 application should have been allowed and that Defendants should have been able to terminate disability compensation as it was not owed after 19 March 2002.

On 13 August 2003, Plaintiff returned to Dr. Murphy, reporting a several-month history of knee pain following try-outs for the North Carolina A & T bowling team. Dr. Murphy ordered an MRI of Plaintiff's left knee which revealed a focal chondral abnormality. Surgery was performed on 15 December 2003 to remove chondral loose bodies. Defendants continued paying total disability benefits throughout this time period.

In August of 2003, Defendants hired a vocational case manager, Mr. Scott Perry, BS, CDMS, ORP. Mr. Perry met with Plaintiff and her attorney on 19 August 2003 to prepare a vocational assessment. During the meeting, Plaintiff advised that she had no time to work because she was caring for her infant son and attending school full-time. Although Mr. Perry identified several job leads for Plaintiff, she did not follow up on any of them. She did, however, apply for an internship during the Fall 2003 semester and testified that she felt capable of going to school full-time while participating in an internship.

Defendants filed a second I.C. Form 24 application to terminate benefits in December of 2003, but the application was again denied. Mr. Perry then met with Plaintiff and her attorney in February 2004. At that meeting, Plaintiff reiterated that she did "not see how a full or part-time job could fit into her schedule." It was Mr. Perry's understanding that Plaintiff was not willing to rearrange her school schedule to accommodate a job.

In May 2004, Plaintiff obtained an internship in Michigan earning $3,500 per month, and Defendants thus terminated Plaintiff's ongoing compensation. Upon her return to North Carolina, Plaintiff began an internship at American Express in September 2004 earning $15 per hour and working 20 hours per week. She also maintained a full-time class schedule.

After graduating with a degree in Industrial Engineering in December 2004, Plaintiff increased her work schedule at American Express to 35 hours per week, earing $17 an hour. As of the date of the hearing, Plaintiff was working full-time and attending the masters program at North Carolina A & T, with plans to transfer to an MBA program at UNC Greensboro.

II. Disability

[1] By her first argument, Plaintiff asserts that the Full Commission erred in concluding that she was no longer disabled from her compensable injury after 19 March 2002.

"The term 'disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C. Gen. Stat. § 97-2(9) (2005). The burden is on the employee to establish both the existence and the degree of disability. *Hall v. Thomason Chevrolet, Inc.*, 263 N.C. 569, 139 S.E.2d 857 (1965). The employee may prove disability 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) (citations omitted).

After an employee has established disability, the burden shifts to the employer "to show not only that suitable jobs are available, but also that the [employee] is capable of getting one, taking into account both physical and vocational limitations." *Kennedy v. Duke Univ. Med. Ctr.*, 101 N.C. App. 24, 33, 398 S.E.2d 677, 682 (1990). An employer can overcome the presumption of disability by providing evidence that:

> (1) suitable jobs are available for the employee; (2) that the employee is capable of getting said job taking into account the employee's physical and vocational limitations; (3) and that the job would enable employee to earn some wages.

Franklin v. Broyhill Furniture Indus., 123 N.C. App. 200, 209, 472 S.E.2d 382, 388, *cert. denied*, 344 N.C. 629, 477 S.E.2d 39 (1996). When suitable employment is not available, the employer may provide vocational rehabilitation services to assist the employee in finding work that is suitable.

In this case, Plaintiff contends that she met her burden of establishing disability under the second prong of *Russell* by producing evi-

dence that she was capable of some work, but that, after a reasonable effort on her part, she was unsuccessful in her effort to obtain suitable employment. Citing *Russos v. Wheaton Indus.*, 145 N.C. App. 164, 551 S.E.2d 456 (2001), *disc. review denied*, 355 N.C. 214, 560 S.E.2d 135 (2002), and *Foster v. U.S. Airways, Inc.*, 149 N.C. App. 913, 563 S.E.2d 235, *disc. review denied*, 356 N.C. 299, 570 S.E.2d 505 (2002), Plaintiff asserts that her "reasonable effort to obtain employment" was satisfied by her pursuit of her engineering degree. Plaintiff's argument is misplaced.

In *Russos*, the Court concluded that the plaintiff was entitled to paralegal training as a type of vocational rehabilitation service. Since the parties there had entered into a Form 21 agreement, a presumption of disability had attached in favor of the plaintiff and the burden of proof accordingly shifted to the defendant to overcome that presumption. The Court held that the defendant had not met its burden of overcoming the presumption of disability and, thus, the defendant was required to pay the plaintiff's temporary total disability benefits while the plaintiff completed paralegal training, as the paralegal training "was a reasonable attempt at rehabilitation given the totality of the circumstances." *Russos*, 145 N.C. App. at 166, 551 S.E.2d at 458. Those circumstances included the uncontested fact that, unlike the case *sub judice*, the plaintiff in *Russos* was released to work with restrictions on lifting, pushing, pulling, and reaching activities which her employer could not accommodate.

In *Foster*, as in *Russos*, the parties had entered into a Form 21 agreement and the defendant did not carry its burden of overcoming the presumption of disability that had attached in favor of the plaintiff. The Court stated:

> The evidence in this case shows that plaintiff was not qualified to earn the same wages in another field that she received as a flight attendant. The evidence shows that "CRA representatives had stated that it would be impossible for them to place plaintiff in a job that paid the same as her old job and thereafter conducted a job search for inappropriate lower paying jobs." The evidence also shows that the DVR representative stated "that plaintiff did not have the educational background or job skills to transfer into a job that was going to pay her anywhere near the $35,000 per year she had earned at USAir." In addition, the evidence shows that receiving a Social Work degree would serve as the foundation for plaintiff to qualify for a higher wage in another field.

Foster, 149 N.C. App. at 924, 563 S.E.2d at 242. Further, as in *Russos*, the plaintiff in *Foster* was released to work with restrictions that precluded her return to her pre-injury job as a flight attendant. Thus, the Court held that the plaintiff was entitled to total disability benefits and that her pursuit of a community college degree was a proper method of vocational rehabilitation pursuant to N.C. Gen. Stat. § 97-25.

Unlike in *Russos* and *Foster* where a Form 21 agreement established a presumption of disability in favor of the plaintiffs, in this case the parties did not enter into a Form 21 agreement[1] and Plaintiff thus was required to offer sufficient evidence to establish disability. The evidence established, however, that at the time of her accident, Plaintiff was working full-time as an office assistant earning $8 per hour, having completed three semesters of college. After her release from the hospital, Plaintiff repeatedly told Ms. Ward that she did not intend to work following her recovery and, instead, planned to attend school full-time. Importantly, Plaintiff was released to work with no work restrictions by 19 March 2002 and, although she felt "she was physically and mentally capable of working and returning to a job as an office assistant," she chose to return to school instead. Such evidence does not support Plaintiff's contention that she was disabled after 19 March 2002 and is sufficient evidence to support the Commission's findings that "[P]laintiff was fully capable of earning the same wages she earned at the time of the accident by March 19, 2002," and that "[w]hile [P]laintiff could have earned the same wages that she earned at the time of the accident, she instead chose to attend school full-time."

Furthermore, neither the defendant in *Russos* nor the defendant in *Foster* was able to overcome the presumption of disability created by the Form 21 agreement by showing that suitable jobs were available for the plaintiffs. In this case, however, even had Plaintiff proven disability, Defendants offered vocational assistance to Plaintiff and

> identified several available positions that were suitable for [P]laintiff, including jobs as a leasing agent at an apartment complex, receptionist, office assistant, customer service representative, collections agent, medical records coordinator, and data entry clerk. These jobs paid between $8.00 and $10.00 per hour,

1. No presumption of disability is created by a Form 60 agreement. *Sims v. Charmes/Arby's Roast Beef*, 142 N.C. App. 154, 542 S.E.2d 277, *disc. review denied*, 353 N.C. 729, 550 S.E.2d 782 (2001).

and did not require [P]laintiff to have obtained a college education. [P]laintiff failed to apply for any of the jobs.

Finally, while Plaintiff attempts to offer her educational pursuits as evidence of disability under the second prong of *Russell*, the Court in both *Russos* and *Foster* only approved the plaintiffs' educational pursuits as proper methods of vocational rehabilitation after disability had been established, and did not consider such evidence for purposes of establishing disability. Accordingly, as Plaintiff failed to offer sufficient evidence to establish disability, Plaintiff's first argument is overruled.

III. Maximum Medical Improvement

[2] Plaintiff also argues that because she was not at maximum medical improvement with regard to her leg injury on 19 March 2002, the Commission erred in finding that Plaintiff's disability ended on 19 March 2002 and that she was, therefore, not entitled to receive temporary total disability benefits after that date.

"Disability" is defined by a diminished capacity to earn wages, not by physical impairment. N.C. Gen. Stat. § 97-2(9). "Maximum medical improvement" is the point at which an injury has stabilized. *Carpenter v. Indus. Piping Co.*, 73 N.C. App. 309, 311, 326 S.E.2d 328, 330 (1985). While an employee may seek a determination of her entitlement to permanent disability benefits under N.C. Gen. Stat. §§ 97-29 or 97-30, or scheduled benefits under N.C. Gen. Stat. § 97-31 only after reaching maximum medical improvement, *Effingham v. Kroger Co.*, 149 N.C. App. 105, 561 S.E.2d 287 (2002), temporary disability benefits may be terminated before an employee reaches maximum medical improvement if that employee is capable of earning the same wages as prior to injury, and thus, unable to prove disability.

Here, as discussed above, Plaintiff failed to prove she was disabled after 19 March 2002. On that date, Plaintiff was released from care for her left leg with a 15 percent permanent partial impairment rating and no work restrictions. According to her treating physician, Plaintiff was fully capable of returning to her job as an office assistant. Furthermore, Plaintiff herself testified that she was "physically and mentally capable of working and returning to a job as an office assistant" after 19 March 2002. Although Plaintiff returned to Dr. Murphy a year and a half later, complaining of knee pain following bowling activities at school, and underwent further surgery on 15 December 2003, Plaintiff offered no evidence that she was not capa-

ble of earning the same wages after 19 March 2002 that she was earning prior to her accident.[2] As a finding of maximum medical improvement is not necessary to terminate temporary disability benefits, and since Plaintiff failed to establish disability after 19 March 2002, the assignments of error on which this argument is based are overruled.

IV. Permanent Disability

[3] Plaintiff next assigns error to the Commission's conclusion that she was not entitled to benefits for a two percent permanent disability rating to her head. "In case of the loss of or permanent injury to any important external or internal organ or part of the body for which no compensation is payable under any other subdivision of this section, the Industrial Commission may award proper and equitable compensation not to exceed twenty thousand dollars ($20,000)." N.C. Gen. Stat. § 97-31(24) (2005); *see, e.g.*, *Russell v. Lab. Corp. of Am.*, 151 N.C. App. 63, 564 S.E.2d 634, *disc. review denied*, 356 N.C. 304, 570 S.E.2d 111 (2002) (considering the brain an important internal organ for purposes of compensation under N.C. Gen. Stat. § 97-31(24)). "[T]he Commission has discretion as to whether an award under N.C. Gen. Stat. § 97-31(24) is warranted, and its decision will not be overturned on appeal unless it is manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision." *Russell*, 151 N.C. App. at 67, 564 S.E.2d at 637 (quotation marks and citations omitted).

In *Russell*,

> the Commission made relevant findings of fact that on the date of the accident, 29 May 1996, x-rays, a CT head scan, and brain MRI and EEG tests were performed and all results indicated plaintiff had normal brain function; that an additional MRI was performed in October 1996 which indicated plaintiff had normal brain function; and that in June 1999 plaintiff underwent an independent medical examination wherein the results of her latest MRI were confirmed to be normal, her mental testing status and speech function were both normal, and the doctor observed that plaintiff was very physically active and had reached maximum medical improvement. The Commission found, in sum, that "[a]ll physical examinations and testing, such as the MRI's of the brain, show no physical damage to the brain." The Commission also made findings of fact pertaining to plaintiff's physically active lifestyle, her

2. Plaintiff was awarded temporary total disability benefits for the four weeks following her 15 December 2003 surgery, and neither party appealed this award.

> enrollment in college, and her articulate and alert demeanor at the hearing.

Id. "In light of these [uncontested] findings, [the Court could not] conclude that the decision to deny compensation for a permanent brain injury under N.C. Gen. Stat. § 97-31(24) was wholly arbitrary or manifestly unsupported by reason, though there may have been evidence to the contrary." *Id.*

Unlike in *Russell*, the Commission in this case made no findings of fact to support its conclusion to deny Plaintiff compensation for a permanent brain injury under N.C. Gen. Stat. § 97-31(24). The Commission found that "[P]laintiff returned to Dr. Schmidt on May 31, 2002, at which time he released her from his care, imposing a two percent (2%) permanent partial disability rating relative to her post-concussion syndrome." This finding of fact does not support, and in fact tends to contradict, the Commission's conclusion that "[P]laintiff has also requested compensation for a two percent (2%) rating to the head, which the Full Commission finds to be unsupported by the evidence of record and is, thus, denied. N.C. Gen. Stat. § 97-31."

Plaintiff's medical records from her treatment by Dr. Jeffrey J. Schmidt were entered into evidence. The notation from her 12 March 2002 visit stated:

> [A] report of a CT scan of [Plaintiff's] head immediately after [her car accident] indicates a small left frontal lobe hemorrhage . . . .
>
> . . . .
>
> [Plaintiff] did not attend summer classes following her accident . . . . Since returning to classes this winter, she has had significant problems with her memory and other cognitive difficulties and had to drop her calculus class. She seems to have some element of both retrograde and antegrade memory problems and has difficulty integrating the material. . . . She finds she has to "write everything down[.]" She finds herself telling people things over and over. She notes her spelling has suffered. She also reports blurred vision when she has to read quite a bit . . . . She is also experiencing headaches . . . .
>
> . . . .
>
> My impression is that Ms. Cross has a history of concussion sustained in a motor vehicle accident which occurred on 06/06/2001. She had a documented small left frontal lobe hemorrhage un-

> doubtedly relating to her concussion. She is experiencing subjective cognitive difficulties currently interfering quite a bit with her school work although she is able to function quite well on a day to day basis.

Additionally, the notation from her 31 May 2002 visit stated:

> The patient had been seen by Dr. Michael Zelson at the Moses Cone Outpatient Rehab. Center. She underwent thorough neuropsychological evaluation in early April, and overall she was found to be able to function well in most situations. "Compared to her estimated pre injury level of functioning, however, she did exhibit a mild though clinically significant decrement in her ability to learn and consolidate new information into memory." . . .
>
> . . . .
>
> [H]er headaches have eased off quite a bit. . . . [S]he does continue to have some trouble retaining certain material. . . .
>
> . . . .
>
> Ms. Cross has a history of post concussion syndrome with mild traumatic brain injury, . . . The prognosis for improvement from her cognitive problems is quite good but there is some possibility that she may never completely recover. At this point, I would like to release her from routine neurologic follow up and would apply a rating of permanent partial impairment of 2% relative to her post concussion syndrome. . . .

Thus, unlike in *Russell* where a CT scan performed on the day of the accident indicated that the injured employee had normal brain function, in this case the CT scan performed the day of the accident indicated that Plaintiff had "a small left frontal lobe hemorrhage[.]" Furthermore, unlike in *Russell* where the injured employee's mental testing status was found to be normal, here, "[c]ompared to [Plaintiff's] estimated pre injury level of functioning . . . she did exhibit a mild though clinically significant decrement in her ability to learn and consolidate new information into memory." Consequently, Dr. Schmidt assigned a two percent permanent partial impairment rating for the post-concussion syndrome Plaintiff sustained. In light of this uncontradicted evidence, we conclude that the Commission's conclusion of law denying Plaintiff's claim for benefits under N.C. Gen. Stat. § 97-31(24) is unsupported by its findings of fact.

Accordingly, we remand this matter to the Industrial Commission for appropriate findings of fact and conclusions of law as to whether Plaintiff is entitled to benefits under N.C. Gen. Stat. § 97-31(24).

V. Credit

[4] Plaintiff next contends the Commission erred in awarding Defendants a credit for benefits paid after 19 March 2002, and in applying said credit against Plaintiff's permanent partial impairment rating.

"The decision of whether to grant a credit is within the sound discretion of the Commission." *Shockley v. Cairn Studios, Ltd.*, 149 N.C. App. 961, 966, 563 S.E.2d 207, 211 (2002), *disc. review denied*, 356 N.C. 678, 577 S.E.2d 888 (2003). As such, the decision by the Commission to grant or deny a credit to the employer for payments previously made will be reversed only for an abuse of discretion. *Shockley*, 149 N.C. App. 961, 563 S.E.2d 207.

> Payments made by the employer to the injured employee during the period of his disability, or to his dependents, which by the terms of this Article were not due and payable when made, may, subject to the approval of the Commission be deducted from the amount to be paid as compensation.

N.C. Gen. Stat. § 97-42 (2005). The analysis of whether an employer is entitled to a credit under N.C. Gen. Stat. § 97-42 is limited to a determination of whether the payments for which the employer seeks credit were "due and payable" when made. *Foster v. Western-Electric Co.*, 320 N.C. 113, 357 S.E.2d 670 (1987); *Moretz v. Richards & Assocs., Inc.*, 316 N.C. 539, 342 S.E.2d 844 (1986). "Payments are due and payable under section 97-42 when the employer has accepted the plaintiff's injury as compensable and initiated payment of benefits." *Thomas v. B.F. Goodrich*, 144 N.C. App. 312, 318, 550 S.E.2d 193, 197, *disc. review denied*, 354 N.C. 228, 555 S.E.2d 276 (2001).

The record reflects that Defendant considered Plaintiff's claim to be compensable and filed a Form 60 Employer's Admission of Employee's Right to Compensation on 28 June 2001. Defendant commenced disability payments retroactive to the date of Plaintiff's accident. On 12 September 2002, Defendants filed a Form 24 Application to Terminate or Suspend Payment of Compensation in which Defendants maintained that Plaintiff was "not owed temporary total disability benefits after her releases to work, which occurred no

later than March 19, 2002." Although Defendant's application was denied by Special Deputy Commissioner Elizabeth M. "Lacy" Maddox on 31 January 2003, the Full Commission found that

> [D]efendants filed a Form 24 application on September [12], 2002. Contrary to her testimony at the hearing before the Deputy Commissioner, [P]laintiff claimed in the response to the Form 24 application that she had not been released to full duty work. It is clear from the record that by September 2002, [P]laintiff was aware that she had been released to work with no restrictions. Thus, the Full Commission finds that Form 24 application to terminate benefits, filed on September [12], 2002, was improvidently denied by Special Deputy Order of January 31, 2003.

Accordingly, Defendants accepted Plaintiff's injury as disabling only until 19 March 2002 and denied Plaintiff's claim after that point. Inasmuch as the Full Commission found that Defendant's Form 24 application to terminate benefits was improvidently denied, and Plaintiff has failed to establish disability beyond 19 March 2002, payments made after 19 March 2002 were not "due and payable." Thus, the Commission was within its statutory authority to order that such payments be deducted from Plaintiff's award of permanent partial impairment benefits.

However, as Plaintiff correctly asserts, "[t]he Commission's Opinion and Award does not specify the exact amount of the credit, or the exact dates of the payments which were allegedly subject to the credit." Although the Full Commission concluded that "[D]efendants are entitled to a credit for all temporary total disability benefits paid to the [P]laintiff after March 19, 2002[,]" the Full Commission also concluded, and neither party assigned as error, that Plaintiff was "entitled to temporary total disability benefits . . . for the four weeks following her December 15, 2003 surgery[.]" Moreover, the amount of the credit must be calculated in light of the Commission's further determination of whether Plaintiff is entitled to benefits for the permanent partial impairment rating to Plaintiff's brain, as discussed above. Accordingly, we remand to the Full Commission for findings of fact and conclusions of law consistent with this opinion on the amount of credit due to Defendants.

VI. Third-party Claim

[5] By her final assignment of error, Plaintiff contends the Commission erred in finding as fact that Plaintiff was paid $25,000 to

resolve her claim against the driver of the other vehicle involved in the accident.

Plaintiff filed a third-party negligence action against the driver of the vehicle which hit her. Defendants asserted a lien upon Plaintiff's third-party recovery pursuant to N.C. Gen. Stat. § 97-10.2. Plaintiff made an Application to Extinguish Workers' Compensation Lien and, upon review of the application, Judge Michael E. Helms distributed the total amount of the $37,501.00 settlement as follows: (1) $15,000 to Defendants in full satisfaction of the workers' compensation lien, (2) $9,375.25 to Plaintiff's counsel as an attorney's fee for the third-party claim, and (3) $13,125.75 to Plaintiff.

The Commission found as fact that Plaintiff "was paid $25,000[] to resolve the [third-party] claim." However, even if the Commission considered the attorney's fees paid out of Plaintiff's recovery, Plaintiff would have been deemed to have received $22,501, $2,499 less than the Commission's calculation of Plaintiff's recovery. Thus, the evidence does not support the Commission's challenged finding of fact. However, this finding was not crucial to the determination of Plaintiff's entitlement to benefits. Thus, without the questioned finding of fact, the same result would have been obtained. We therefore consider any error in the finding to be nonprejudicial. *Atwater v. Radio Station WJRI, Inc.*, 28 N.C. App. 397, 221 S.E.2d 88 (1976). Accordingly, Plaintiff's assignment of error is overruled.

For the above-stated reasons, we

AFFIRM IN PART, AND REVERSE AND REMAND WITH INSTRUCTIONS IN PART.

Chief Judge MARTIN and Judge McGEE concur.

STATE OF NORTH CAROLINA v. ANTONIO N. McALLISTER

No. COA07-1375

(Filed 6 May 2008)

1. Appeal and Error— Rule 2—chain of custody—no objection at trial—lengthy sentence

Rule 2 is an appropriate vehicle to review criminal cases when a defendant faces severe punishment. Here, an evidentiary issue was reviewed on its merits even though defendant conceded at the suppression hearing that his objections to the chain of custody were only to credibility and that he did not object at trial to its admission.

2. Evidence— hair samples found at scene—tampering—evidence not sufficient

There was no error in a prosecution for burglary, rape, kidnapping, and assault in the admission of evidence concerning hair samples found in a sock at the scene. Although defendant contended that the evidence had been tampered with, he offered no factual or legal support for the argument that the circumstances surrounding the discovery of the hair was suspicious.

3. Evidence— officer's history of violating storage protocol—remote and accidental—not admitted

The trial court did not abuse its discretion by excluding from a prosecution for rape and other crimes evidence that the lead investigator had been disciplined twice 15 years earlier for violating evidence storage protocol. The earlier events were remote in time and did not tend to prove deliberate criminal dishonesty.

4. Criminal Law— DNA evidence—supporting evidence present—sufficiency of DNA alone

The trial court did not err by denying defendant's motion to dismiss charges of burglary, rape, kidnapping, and assault for insufficient evidence. Although defendant contended that the State's evidence boiled down to three hair samples and DNA evidence, there was other evidence; moreover, defendant cited no authority for the contention that DNA evidence alone is not sufficient.

Appeal by Defendant from judgments entered 27 June 2007 by Judge Kenneth F. Crow in New Hanover County Superior Court. Heard in the Court of Appeals 3 April 2008.

Attorney General Roy Cooper, by Special Deputy Attorney General Joyce S. Rutledge, for the State.

Reita Pendry, for Defendant.

ARROWOOD, Judge.

Antonio McAllister (Defendant) appeals from judgments entered upon his convictions of first degree rape, first degree burglary, first degree kidnapping, and assault inflicting serious bodily injury. We find no error.

Defendant was tried before a New Hanover County jury in June 2007. The State's evidence tended to show, in relevant part, the following: Ms. Dora Corbett testified that in July 2005 she was seventy-eight years old and lived in rural Pender County, near Atkinson, North Carolina. Ms. Corbett's daughter, Emily Corbett Simpson, lived a few miles away. On the night of 5 July 2005, Ms. Corbett spoke with her daughter on the phone, then finished her evening activities, got in bed to read, and fell asleep with the light on.

Several hours after falling asleep, Ms. Corbett awoke to find that someone had tied her to the bed and was beating her face and head, especially her eyes and ears. This caused Ms. Corbett to experience "excruciating pain" and her eyes quickly swelled so much that she could not see the person hitting her. During the beating, Ms. Corbett was "in and out of consciousness." She told her attacker to take whatever he wanted, and he replied "Now, Ms. Corbett, here's what we're going to do. I'm going to rape you." She asked him to "just take [her] money" but he said "No" and gave "kind of a laugh." The attacker then engaged Ms. Corbett in forced sexual intercourse, while he choked her with his hands. The pain became so great that Ms. Corbett passed out. Ms. Corbett never heard a car.

The next time Ms. Corbett woke up, it was about 3:00 a.m. and she was alone. Her glasses were broken, her room was in disarray, and her wallet and keys had been taken from her purse. She was bleeding profusely and tried to call for help, but could not get a dial tone on her phone. Law enforcement officers later determined that the phone line had been cut. Ms. Corbett testified that she "knew

[she] would die if [she] didn't stop bleeding" so she decided to drive to her daughter's house. The drive, which normally would take ten minutes, took her an hour.

Emily Simpson testified that Ms. Corbett was her mother and that her mother called her on the night of 5 July 2005 to ask for a "wake up call" the next day. In the early morning hours of 6 July 2005, she and her husband were awakened by the sounds of a car horn and heard someone "stumbling around" and "sobbing and crying." They found a woman outside and, thinking there had been a car accident, brought her into their house. Emily called 911 to report a "little old lady" who was hurt. Ms. Corbett's face and neck were so swollen that Emily did not know the woman was her mother until her husband recognized Ms. Corbett's shoes and told her. Ms. Corbett was bleeding profusely, from her eyes, nose, mouth, and genital area. She said repeatedly that "He raped me" and told Emily and her husband that she had begged her attacker to stop beating her. There were bindings still tied to her arm.

Ms. Corbett testified that she knew Defendant's great-grandmother, who had worked on Ms. Corbett's family farm many years earlier. However, she did not know the Defendant and had never invited him to her house. In the hours following the rape, Ms. Corbett told several people that she couldn't see who raped her, but had been able to feel his hair, which felt "wooly" like "black person type hair." Later she had no memory of her statements to hospital or law enforcement personnel. Ms. Corbett suffered very serious injuries from the attack, including extensive genital lacerations and internal injuries requiring surgical treatment, and "significant facial fracture injuries." Virtually all the bones on the left side of her face were broken, including the bones of her cheek, sinuses, and eye socket, and she suffered long-term visual impairment.

Caroline Womble, the Pender County EMS ambulance driver, testified that she responded to the 911 call reporting Ms. Corbett's injuries. Ms. Corbett was wearing only a nightgown and slippers, was "bruised and bleeding" and her left eye was swollen shut. Ms. Corbett told Womble her assailant had "black person type hair." Cheryl Dorsett testified that she was a paramedic who treated Ms. Corbett on 6 July 2005. Ms. Corbett told Dorsett that she was sleeping and was awakened by someone who beat and raped her. Ms. Corbett thought her assailant was an African-American, based on the texture of his hair.

Lieutenant Cordelia Lewis of the Pender County Sheriff's Department testified that when she met with Ms. Corbett at the hospital on 6 July 2005, Ms. Corbett described her attacker as a man with "wooly" hair and a hard muscular body. Based on her discussion with Ms. Corbett, Lt. Lewis developed a possible list of suspects, focusing on African-American men living near Ms. Corbett. From "the very beginning" the Defendant was "at the top of [her] list." Lewis was able to eliminate several suspects, but could not find the Defendant.

Antonio Coley testified that he was a lifelong resident of the Atkinson area. He knew who Ms. Corbett was and lived within easy walking distance of her house. His uncle had an uninhabited trailer next to Coley's house, and around the time the assault on Ms. Corbett he began noticing things disturbed in the trailer. On 7 July 2005 Coley called the police to report that items in his uncle's trailer had been moved; window blinds were moved and doors cracked open. On 8 July 2005 Coley arrived home to find the trailer door open. As he walked inside, someone ran out the back door. Coley again reported a disturbance at the trailer to the local police. That evening, while Coley was visiting a cousin who lived nearby, he saw the Defendant. Coley testified that the Defendant, whom Coley had known all his life, was "really upset" that Coley had called law enforcement officers about the disturbance to the trailer. After "arguing back and forth" with Coley about Coley's call to the police, the Defendant left abruptly, saying "I'm gone. I'm out of here." After that, Coley no longer saw Defendant in the area and had no further trouble at his uncle's trailer.

Law enforcement officers testified about their investigation of the rape and assault suffered by Ms. Corbett. For purposes of this appeal, the most significant aspect of their testimony concerned the collection and processing of certain items of evidence. Detective Sergeant Lee Wells of the Pender County Sheriff's Department testified that on 6 July 2005 he responded to the report that Ms. Corbett had been assaulted in her home. He went to her house, secured it as a crime scene, noted the absence of tire tracks, and waited for the arrival of his supervising officer, Pender County Sheriff's Department Captain James Ezzell. Wells and Ezzell collected numerous items of evidence, including pieces of Ms. Corbett's clothing and bed linens, various objects found in her bedroom, personal items, and individual hairs. The law enforcement officers looked for items that might contain "any type of biological fluids . . . [h]airs, fibers, anything of that nature." They wore gloves when handling potential evidence, and

took photographs of Ms. Corbett's house and of items seized as evidence. The pieces of evidence were placed in bags and given sequential Pender County evidence numbers. Pender County Evidence, Number Fifteen (Pender 15) was a sock found near Ms. Corbett's bed, and Pender County Evidence, Numbers 45 and 72 (Pender 45 and 72) were individual hairs found in Ms. Corbett's bedroom.

The items of evidence collected by law enforcement officers were taken to the Pender County Law Enforcement Center and placed in a locked evidence storage area to which only Detective Wells and the Pender County Sheriff possessed keys. Detective Wells testified that Pender 15 was placed in a sealed bag and kept under his exclusive care, control, and custody, except when it was removed for forensic testing. The Sheriff's Department kept an inventory of the locked evidence, and documented the occasions when a piece of evidence was removed.

In September 2005 Pender County Sheriff's Department Detective Scott Lawson replaced Lieutenant Lewis as lead investigator in this case. Pender 45 and 72 had previously been submitted to the North Carolina State Bureau of Investigation (SBI) for analysis. SBI Special Agent Lucy Milks, who was qualified as an expert in trace evidence analysis, testified that she determined that Pender 45 and 72 were two "Negroid body hairs." The SBI kept the root of one of these hairs, to test its nuclear DNA. In September 2005, when Detective Lawson took over as lead detective, Agent Milks transferred the shafts of hair from Pender 45 and 72 to him. Detective Lawson took these hair shafts to LabCorp, a private agency, for further forensic testing.

LabCorp Associate Technical Director Dewayne Winston testified as an expert in forensic biology. He explained to the jury that the nucleus of a human cell contains DNA which is inherited from both parents, and is unique to each individual. Human cells also contain small organelles called mitochondria, and the mitochondria have their own DNA. Mitochondrial DNA is different from a cell's nuclear DNA and is inherited only from an individual's mother. Thus, an individual's mitochondrial DNA will be the same as other relatives in his maternal line, including his mother, grandmother, and siblings. If the mitochondrial DNA of two cells matches, the cells are almost certainly from the same person or from two people in the same maternal line, although there is a small chance (about 15/10,000) of two people randomly having the same mitochondrial DNA.

In December 2005 Dewayne Winston tested the mitochondrial DNA from Pender 45 and 72, the hair shafts collected from Ms. Corbett's bedroom. The mitochondrial DNA profiles of the two hairs were almost identical and therefore were consistent with the hairs being from either (1) the same individual, or (2) two people in the same maternal line. After Detective Lawson learned about the commonality in the mitochondrial DNA of the two hair shafts he had taken to LabCorp, he wanted to test these against known DNA samples from people identified as possible suspects. Several people were eliminated as possible suspects because their mitochondrial DNA was inconsistent with that found in Pender 45 and 72.

When local law enforcement officers were unable to find the Defendant, Lawson obtained the consent of Ms. Jessie Henry, the Defendant's mother, to test a DNA sample obtained from her. In April 2006 Lawson learned that this testing indicated a mitochondrial DNA match between the DNA sample from Defendant's mother and Pender 45 and 72, the hairs found in Ms. Corbett's bedroom. This indicated an overwhelming probability that the hairs constituting Pender 45 and 72 had come from the Defendant or someone in his maternal line. It was further determined that the Defendant's brothers, who would be expected to have the same mitochondrial DNA profile as Defendant, were both in custody at the time of the attack on Ms. Corbett.

On 24 April 2006 the Defendant was indicted on charges of first degree rape, in violation of N.C. Gen. Stat. § 14-27.2(a); first degree kidnapping, in violation of N.C. Gen. Stat. § 14-39; first degree burglary, in violation of N.C. Gen. Stat. § 14-51; and assault inflicting serious bodily injury, in violation of N.C. Gen. Stat. § 14-32.4. On 3 May 2006 Defendant was arrested in Florida and returned to North Carolina.

A search warrant was issued for collection of biological specimens from the Defendant and on 9 August 2006 Judy Mullis, the Pender County jail nurse, collected head hairs, pubic hairs, and a blood sample from Defendant. Mullis harvested these samples in the presence of witnesses, including Detectives Lawson and Wells, and the Defendant's attorney. Mullis placed each type of evidence in a separate sealed container, and placed all these containers inside a box, which was also sealed. The envelopes and the box were sealed with tamper-evident tape and initialed by Mullis in the presence of the others in attendance. Mullis gave Lawson the sealed box, identified as Pender 115. Lawson transported Pender 115 to the Law Enforcement Center a few blocks away. There he trans-

ferred Pender 115 to Detective Wells, who locked it in the evidence storage area. Lawson testified that he did not unseal, open, or otherwise tamper with Pender 115 when he took it from the jail to the Law Enforcement Center.

On 5 September 2006 Lawson took Pender 115 to LabCorp for forensic analysis and DNA testing. Before Lawson left, Captain Ezzell directed him to bring certain other pieces of evidence to LabCorp, in addition to Pender 115. These included Pender 15, the sock found near Ms. Corbett's bed. Lawson testified that he never opened, unsealed, or otherwise tampered with the evidence during the drive from Pender County to LabCorp. When Lawson arrived at LabCorp, he showed these items to LabCorp forensic analyst Shawn Weiss. To prevent cross-contamination, Lawson and Weiss wore a fresh pair of gloves for each item, and placed each item on a new piece of material. Weiss testified that neither Pender 15 nor Pender 115 showed signs of tampering.

When Lawson opened the sealed envelope containing Pender 15, the sock, both Lawson and Weiss observed three hairs inside the sock. These were placed in a separate sealed envelope. Later testing showed a nuclear DNA match between the blood sample taken from Defendant and nuclear DNA from the root of one of these hairs. The probability of the hair being from anyone other than the Defendant is infinitesimal, perhaps one in a thousand trillion.

The Defendant's evidence tended to show, in pertinent part, the following: Several witnesses testified that in July 2005 the Defendant was bald. He was staying with his grandmother, who testified that on 5 July 2005, the Defendant was at home with her.

Other evidence will be discussed as necessary to resolve the issues presented on appeal. Following the presentation of evidence, the jury found Defendant guilty of all charges. He was sentenced to consecutive prison terms totaling 572 to 715 months. From these convictions and judgments, Defendant appeals.

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[1] Defendant argues first that the trial court erred by denying his motion to suppress certain pieces of evidence, including (1) Pender 15, the sock found in Ms. Corbett's bedroom; (2) hairs found inside the sock; and (3) the results of DNA testing of these hairs. He asserts that this evidence should have been excluded, on the grounds that the State "had not preserved the chain of custody of the evidence[.]" We disagree.

Preliminarily, we note that during the suppression hearing on this matter, defense counsel conceded that this evidence was legally admissible and that his objections to the chain of custody were "basically a credibility issue only." At trial, he did not object to its admission. He did not assign plain error to the admission of the sock or the hairs found within it, nor does he argue plain error on appeal. Accordingly, Defendant has waived appellate review of the admissibility of the sock, the hairs found in the sock, and the DNA testing results. However, in light of the extensive prison sentence imposed on Defendant (in essence a life sentence), we have elected to apply N.C.R. App. P. 2 and review the issue on its merits. Rule 2 is an appropriate vehicle to review criminal cases when a defendant faces severe punishment. *State v. Hart*, 361 N.C. 309, 644 S.E.2d 201 (2007). We conclude that admission of this evidence was neither error nor plain error.

[2] The "chain of custody" refers to the foundation that must be laid before real evidence is admitted:

> Before real evidence may be received into evidence, the party offering the evidence must first satisfy a two-pronged test. "The item offered must be identified as being the same object involved in the incident and it must be shown that the object has undergone no material change."

State v. Fleming, 350 N.C. 109, 131, 512 S.E.2d 720, 736 (1999) (quoting *State v. Campbell*, 311 N.C. 386, 388, 317 S.E.2d 391, 392 (1984)). In determining the sufficiency of the chain of custody:

> The trial court possesses and must exercise sound discretion in determining the standard of certainty that is required to show that an object offered is the same as the object involved in the incident and is in an unchanged condition. A detailed chain of custody need be established only when the evidence offered is not readily identifiable or is susceptible to alteration and there is reason to believe that it may have been altered. Further, any weak links in a chain of custody relate only to the weight to be given evidence and not to its admissibility.

Campbell, 311 N.C. at 388-89, 317 S.E.2d at 392 (citations omitted).

In the instant case, evidence about the chain of custody for Pender 15 included the following uncontradicted testimony:

1. Pender County Sheriff's Department Detective Wells testified that evidence was collected from Ms. Corbett's bedroom on 6 July 2005, by law enforcement officers who wore gloves. Items were placed into sealed containers and assigned sequential numbers. Pender 15 was a sock collected by law enforcement officers on 6 July 2005.

2. Detective Wells testified that after Pender 15 was collected from Ms. Corbett's bedroom, it was taken to the Pender County Law Enforcement Center and placed in a locked evidence storage area, to which only Wells and the Pender County Sheriff had a key.

3. Detective Wells testified that Pender 15 was under his exclusive care, custody, and control, unless removed for forensic testing. The Pender County Sheriff's Department kept a written record of the occasions when the exhibit was removed for testing.

4. Judy Mullis testified that she collected blood and head and pubic hairs from Defendant on 9 August 2006, placing each type of evidence in a separate sealed envelope or container. She also testified that one could not remove the sealing tape without ripping the envelope or otherwise making such tampering obvious.

5. Detective Lawson testified that he received Pender 115 from Mullis in the presence of witnesses, and that he transported it the few blocks to the Law Enforcement Center without opening or tampering with the evidence.

6. Detective Lawson testified that on 5 September 2006 he obtained Pender 15 and 115 from Detective Wells and took them to LabCorp for forensic testing. Pender 15 and 115 were under Lawson's exclusive custody during the drive from the Pender County Law Enforcement Center to LabCorp. Lawson testified that he did not open, unseal, or otherwise tamper with the evidence while it was in his custody.

7. LabCorp forensic analyst Shawn Weiss testified that he was present when Pender 15 was opened, and that it showed no signs of tampering or having been opened. Weiss and Lawson examined Pender 15 and both observed hairs inside the sock. Weiss testified that the hairs were placed in a separate enve-

> lope for testing. Weiss also testified that the seals on Pender 115, the biological samples taken from Defendant, were intact.

Defendant does not dispute the existence of this and other evidence showing an unbroken chain of custody from the collection of the sock in Ms. Corbett's bedroom to the DNA testing of hairs later discovered inside the sock. Nor does Defendant challenge the existence of sworn testimony that Pender 15 and 115 were continually under the custody and control of either Detective Wells, Detective Lawson, or employees of LabCorp; that neither exhibit ever showed no signs of tampering; and that Detective Lawson testified that he did not open, unseal, or tamper with the evidence while it was in his control. We conclude that this undisputed evidence clearly establishes the chain of custody for Pender 15 and 115.

Defendant, however, asserts that Pender 15 was inadmissible, not because of any facial inadequacy in the chain of custody, but because other evidence raised "grave doubts about whether the evidence had been contaminated or tampered with." Defense counsel asserted at the suppression hearing that "it's our supposition that those hairs [in Pender 15] were placed in that sock by Detective Lawson." We conclude that the trial court did not err by rejecting Defendant's contention in this regard, or by allowing Pender 15 and associated exhibits to be admitted at trial.

Defendant directs our attention to the following facts and circumstances: (1) in September 2005, Detective Lawson was promoted from the canine squad to lead investigator on this case; (2) in September 2006, Pender 15 was in Detective Lawson's exclusive custody during the drive from Pender County to LabCorp; (3) Lawson was holding the sock when he and Weiss discovered hairs inside it; and (4) previous examination of the sock had not revealed the presence of hairs. On this basis, Defendant asserts that "Lawson had a powerful incentive to implicate" the Defendant; that "Lawson had the opportunity to tamper with" the evidence; and that the "circumstances are simply too suspect" for this Court to "find that the trial court's findings are supported by competent evidence and that the findings support the trial court's conclusion that the evidence is admissible." We disagree.

Defendant fails to offer any factual or legal support for the position that the circumstances surrounding the discovery of hairs in Pender 15 were "suspicious." "Based on the detailed and documented

chain of custody presented by the State, the possibility that the real evidence involved was confused or tampered with 'is simply too remote to require exclusion of this evidence.' Furthermore, any weaknesses in the chain of custody relate only to the weight of the evidence, and not to its admissibility." *State v. Sloan*, 316 N.C. 714, 723, 343 S.E.2d 527, 533 (1986) (quoting *State v. Grier*, 307 N.C. 628, 633, 300 S.E.2d 351, 354 (1983)). We conclude that Defendant "is unable to point to any precise lapse in the chain of custody, nor has he argued that the evidence was immaterial or irrelevant. The assignment of error is without merit." *State v. Corbett*, 307 N.C. 169, 181, 297 S.E.2d 553, 561 (1982). This assignment of error is overruled.

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[3] The Defendant next argues that the trial court abused its discretion when it sustained the State's objection to Defendant's cross-examination of Detective Lawson about certain incidents in Lawson's professional history. We disagree.

Evidence elicited on voir dire tended to show the following; In 1990 or 1991, more than fifteen years before the trial, Detective Lawson was employed as a law enforcement officer by the King, North Carolina, police department. During his tenure with the King police force, Detective Lawson was disciplined twice for violating the protocol for storage of evidence. In one incident, Lawson returned a firearm to the evidence storage area at a time when the evidence custodian was absent. Instead of waiting for the custodian's return, Lawson locked the gun in a file cabinet where it stayed for a few hours. In the other incident, Detective Lawson needed to return a paddle that was evidence in a child abuse case to the evidence storage area. As with the firearm, Lawson erred by returning the paddle to the wrong place. Neither of these incidents involved dishonesty, lying, or other ethical lapse on Lawson's part.

In the present case, Defendant asserted that Detective Lawson intentionally, dishonestly, and illegally tampered with evidence by planting hairs inside a sock. The trial court ruled that evidence of the 1990 and 1991 incidents was inadmissible because (1) the earlier events were too remote in time; and (2) evidence of Lawson's having mistakenly returned evidence to the wrong place did not tend to prove that, years later, Lawson would engage in deliberate criminal dishonesty. We agree with the trial court and conclude that the court did not abuse its discretion in excluding this evidence. This assignment of error is overruled.

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[4] Finally, Defendant argues that the trial court erred by denying his motion to dismiss the charges for insufficient evidence. "On a motion to dismiss on the ground of insufficiency of the evidence, the question for the court is whether there is substantial evidence of each element of the crime charged and of the defendant's perpetration of such crime." *State v. Bates*, 309 N.C. 528, 533, 308 S.E.2d 258, 262 (1983). Defendant does not dispute the sufficiency of evidence that Ms. Corbett was the victim of a first degree burglary, first degree kidnapping, first degree rape, and assault inflicting serious bodily injury. However, Defendant challenges the sufficiency of the evidence that he was the perpetrator of these offenses. Defendant contends that the State's evidence "boils down to two hairs from which mitochondrial DNA results were obtained" and a "single hair" from Pender 15, from which nuclear DNA matching that of the Defendant was obtained. We disagree.

We first note that "appellant has cited no authority which supports his contention that DNA evidence alone cannot sufficiently prove identity." *Engram v. State*, 341 Ark. 196, ——, 15 S.W.3d 678, —— (2000). Defendant does not challenge the admission of the evidence of a mitochondrial DNA match between Defendant's mother and two hairs found in Ms. Corbett's bedroom. This evidence strongly suggests that the assailant was someone in the same maternal line as Defendant's mother, and his two brothers were in custody when the attack took place. In addition, nuclear DNA testing identifies Defendant as the source of those hairs to a mathematical certainty.

Moreover, in addition to the mitochondrial and nuclear DNA evidence, other evidence tended to show that: (1) Ms. Corbett lived in a relatively unpopulated rural area; (2) the attacker called Ms. Corbett by name; (3) there were no tire tracks at Ms. Corbett's house and she did not hear a car; (4) Defendant grew up in the same neighborhood as the victim; (5) on 5 July 2005 the Defendant was staying or living within walking distance of the victim's house; (6) Defendant was angry that Coley called the police to report a disturbance at his uncle's trailer around the time of the assault and told Coley he was leaving; and (7) after that conversation, Coley didn't see Defendant in the area again. We conclude that the trial court did not err by denying Defendant's motion to dismiss for insufficiency of the evidence. This assignment of error is overruled.

For the reasons discussed above, we conclude Defendant had a fair trial, free of reversible error.

No error.

Judges McCULLOUGH and STEELMAN concur.

STATE OF NORTH CAROLINA v. THEODORE JERRY WILLIAMS

No. COA07-1080

(Filed 6 May 2008)

1. Discovery— missing booking photographs and a poster— findings supported by evidence

In a prosecution for assault on a government officer, the court's findings about missing booking photographs showing defendant's injuries and a poster mocking defendant were supported by the evidence or were unnecessary to the court's ultimate conclusions.

2. Discovery— missing booking photographs and a poster— relevance—conclusions supported by findings

In a prosecution for assault on a government officer, the court's findings supported its conclusions about the relevance of missing booking photographs showing injuries to defendant, as well as a poster mocking defendant. The crime with which defendant was charged arose from the incident which gave rise to the injuries depicted in the second photograph.

3. Discovery— State's willful destruction of evidence—timeliness of defendant's request for the evidence

There was no error in the trial court's finding that a poster mocking a defendant charged with assaulting a government official was willfully destroyed and that defendant had made a valid and timely request for the evidence. Although the State argued that there was no evidence that the poster still existed when defendant subpoenaed it, the State did not offer evidence that the poster did not exist at that time.

4. Discovery— booking photographs—not available to defendant—conclusion supported by evidence

The trial court's conclusion that booking photographs showing injuries to a defendant charged with assaulting a gov-

ernment official were not available to defendant was supported by the findings.

5. Constitutional Law— destruction of evidence—not available at trial—due process

The trial court correctly concluded that evidence that had been destroyed before trial would not have been available at trial, and that this deprived a defendant of his constitutional rights.

6. Constitutional Law— due process—destruction of material and exculpatory evidence

The State suppressed material and exculpatory evidence and flagrantly violated the due process rights of a defendant charged with assault on a government official where a poster mocking defendant and showing booking photographs of the injured defendant was destroyed. The missing poster would have been admissible as impeachment evidence and was relevant to any defense, including self-defense.

7. Criminal Law— destruction of evidence—irreparable harm—use of substitutes

A defendant charged with assaulting a government official was irreparably harmed by the destruction of booking photographs showing his injuries and a poster mocking him, despite the State's contention that defendant could have reproduced the poster or called witnesses to testify about its contents.

Judge TYSON dissenting.

Appeal by the State from order entered 18 January 2007 by Judge James E. Hardin in Superior Court, Union County. Heard in the Court of Appeals 5 March 2008.

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

Richard E. Jester for Defendant-Appellee.

McGEE, Judge.

The State of North Carolina (the State) appeals from an order dismissing the charge of felony assault on a government officer or employee against Theodore Jerry Williams (Defendant). For the reasons set forth herein, we affirm.

Defendant was charged with misdemeanor assault on a government official or employee on 20 April 2004. Defendant was then indicted on 1 November 2004 for felony assault on a government officer or employee and for having attained the status of habitual felon. The habitual felon indictment alleged that Defendant previously had been convicted of the following felonies: (1) breaking or entering a motor vehicle; (2) assault with a deadly weapon with intent to kill inflicting serious injury; and (3) possession of cocaine. The grand jury returned a superseding indictment on 30 October 2006, charging Defendant with felony assault on a government officer or employee. Specifically, the superseding indictment stated that Defendant

> unlawfully, willfully and feloniously did assault and strike Brad Mosely, a government officer of the Union County Sheriff's Office by punching him. At the time of the offense, the officer was attempting to discharge the following duty of that office: removing . . . [D]efendant from a holding cell in the Union County Jail.

Defendant filed a *pro se* motion to "dismiss for prosecutorial misconduct and *Brady* violation N.C.G.S. § 15A-954" on 28 November 2006. In his motion, Defendant alleged that since 19 April 2004, he had been "the victim of a vicious conspiracy between Stanly and Union County Law Enforcement and Prosecutors . . . to retaliate against . . . [D]efendant for the filing of a civil rights complaint . . . against [an] Assistant District Attorney, . . . [the] Stanly County Sheriff, . . . and the Stanly County Commissioners." Defendant further alleged that Stanly County Sheriff's Deputy Jeffrey Brafford and Stanly County Assistant District Attorney Nicholas Vlahos had created and displayed a two-picture "poster" of Defendant, in which

> the first picture showed . . . [D]efendant to be unmarked and in good health, with the words, "Before He Sued The DA's Office" written above it. The second picture was located directly below the first picture and showed . . . [D]efendant to be badly beaten and bruised, with the words "After He Sued The DA's Office" written above it.

Defendant asserted that "by and through counsel, . . . [Defendant] [had] made known [his] intent to use this 'poster' in his defense by motion in Union County Superior Court on March 23, 2005[.]" Defendant also alleged that he had subpoenaed Assistant District Attorneys Patrick Nadolski and Steve Higdon to produce the poster. Defendant further argued that those assistant district attorneys "willfully and intentionally destroyed the poster[.]" Defendant argued that

"the intentional destruction of . . . potentially exculpatory evidence by prosecutors . . . created such irreparable prejudice to . . . [D]efendant's preparation of his case that there is no remedy but to dismiss the prosecution."

The trial court heard evidence and arguments on 18 January 2007, and announced its ruling in open court. The State did not present evidence and did not cross-examine Defendant's witnesses. The trial court made the following findings of fact:

> 1) That on November 17th of 2003 . . . Defendant was arrested in Stanly County for alleged violations not related to this prosecution and at that time . . . Defendant was processed into the Stanly County Jail.
>
> 2) That upon processing, the staff of the Stanly County Jail made an identification photograph of . . . Defendant. The photograph of . . . Defendant did not reveal that he had sustained any injuries during his apprehension or processing.
>
> 3) That during the February-March 2004 time period, . . . Defendant sued the Assistant District Attorney Nicholas Vlahos, Union County Sheriff Tony Frick, and the Union County Commissioners in various courts, alleging, in essence, unlawful detention.
>
> 4) That on April the 19th of 2004 . . . Defendant was transported [from Stanly County] to Union County for processing regarding criminal violations alleged to have been committed by . . . Defendant in Union County.
>
> 5) That later on that same day, April the 19th, 2004, . . . Defendant was transported back to Stanly County, to the Stanly County Jail, in a manner and for reasons that . . . Defendant alleges violated his United States Constitutional rights. . . . Defendant alleges that he correspondingly complained of this to the detention officers of Stanly County.
>
> 6) . . . Defendant alleges that [while he was in Union County] he was assaulted by various officers and members of the Union County Jail. One of them was Deputy Brad Moseley. This incident is the subject of this prosecution and in an indictment it alleges that . . . Defendant assaulted a government official by punching in the face [of] Deputy Moseley. That on April the 20th, 2004, . . . Defendant was photographed by the staff of the Stanly County Jail in order to complete the in-processing of . . . Defendant.

7) That the photograph of . . . Defendant made on April 20th, 2004, showed . . . Defendant's condition during a time relevant to the subject prosecution.

8) That in May of 2004, Detention Officer Becky Green of the Stanly County Sheriff's Office went on an unrelated matter to the Stanly County office of the District Attorney for the 20th Prosecutorial District, that while in the office Ms. Green saw a poster which contained two photographs of . . . Defendant. One photograph of . . . Defendant was made when . . . Defendant was processed into the jail on November 17th of 2003, with a caption saying, in quotation, "Before suing the District Attorney's office," closed quotation, and a second photograph of . . . Defendant that was made when . . . Defendant was processed back into the Stanly County Jail between April 19th and 20th of 2004, which showed . . . Defendant's injuries and was captioned . . . "After he sued the District Attorney's office," . . . and that this poster was in the portion of the District Attorney's office occupied by Assistant District Attorneys Nicholas Vlahos and Steve Higdon.

9) That during proceedings regarding this case and upon the request of . . . Defendant for discovery and disclosure that Assistant District Attorney Higdon stated in open court that the poster had been destroyed and was not available, and that the subject photographs originally taken at the Stanly County Jail were not available as well.

Based upon these findings of fact, the trial court concluded:

1) That the photographs of . . . Defendant made during his processing into the Stanly County Jail on November 17th of 2003 and again between April the 19th and 20th of 2004 are relevant and material to the defense of the subject prosecution.

2) That the poster of the photographs described herein was willfully destroyed and not made available to . . . Defendant although . . . Defendant made a valid and timely request for same.

3) That the original photographs described herein have not been made available and as represented by the State of North Carolina are unavailable to . . . Defendant, even though implicitly requested by . . . Defendant.

4) That due to the destruction or failure of the State to provide this evidence, which is material and may be exculpatory in nature, . . . Defendant's rights pursuant to the Constitution of the

> United States and the North Carolina Constitution have been flagrantly violated and there is such irreparable prejudice to . . . Defendant's preparation of his case that there is no remedy but to dismiss the prosecution.

The trial court dismissed the charge of felony assault on a government officer or employee, and stated as follows: "I suggest that you dismiss [the habitual felon charge], unless [the State has] got another charge to attach to." The State appeals.

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[1] The State argues "the trial court abused its discretion in dismissing the prosecution against Defendant, as the trial court's findings of fact and conclusions of law were unsupported and erroneous." N.C. Gen. Stat. § 15A-954(a)(4) (2007) provides:

> The court on motion of the defendant must dismiss the charges stated in a criminal pleading if it determines that:
>
> . . .
>
> (4) The defendant's constitutional rights have been flagrantly violated and there is such irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution.

On appeal, our review

> 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. Indeed, an appellate court accords great deference to the trial court in this respect because it is entrusted with the duty to hear testimony, weigh and resolve any conflicts in the evidence, find the facts, and, then based upon those findings, render a legal decision, in the first instance, as to whether or not a constitutional violation of some kind has occurred.

State v. Cooke, 306 N.C. 132, 134, 291 S.E.2d 618, 619-20 (1982) (citations omitted). We apply *de novo* review to a trial court's conclusions of law. *State v. Hernandez*, 170 N.C. App. 299, 304, 612 S.E.2d 420, 423 (2005).

The State argues that the trial court's findings of fact four, five, six, seven, eight, and nine were not supported by the evidence and that the conclusions of law based on those findings were erroneous.

Defendant concedes that finding of fact number four is unsupported by any competent evidence because the 18 January 2007 evidentiary hearing on Defendant's motion to dismiss did not reflect the reason Defendant was transported to Union County. However, this finding of fact is unnecessary to the trial court's ultimate conclusions of law and ruling.

After a thorough review of the record and transcripts on appeal, we determine that findings of fact five through eight are supported by competent evidence and are binding on appeal. *See Cooke*, 306 N.C. at 134, 291 S.E.2d at 619.

We next determine whether finding of fact number nine was supported by competent evidence. We hold that it was. The State argues that finding of fact number nine was unsupported because there was evidence that Defendant had the original photographs that were used in making the poster. However, Defendant testified that he did not have the original photographs, and the trial court accepted Defendant's testimony. *See State v. Smith*, 278 N.C. 36, 41, 178 S.E.2d 597, 601, *cert. denied*, 403 U.S. 934, 29 L. Ed. 2d 715 (1971) (recognizing that "[w]here the evidence is conflicting (as here), the judge must resolve the conflict. He sees the witnesses, observes their demeanor as they testify and by reason of his more favorable position, he is given the responsibility of discovering the truth."). Nevertheless, even if Defendant had the original photographs, that evidence was irrelevant to the challenged finding of fact. At an 11 July 2005 pre-trial hearing in unrelated cases against Defendant in Stanly County, the transcript of which was introduced at the hearing in the present case, Assistant District Attorney Stephen Higdon stated: "I don't have any problem making this admission. [The poster] did exist. It was removed." Assistant District Attorney Higdon then stated: "[The poster] has been destroyed." This testimony fully supports that portion of the trial court's finding of fact number nine that states "Assistant District Attorney Higdon stated in open court that the poster had been destroyed and was not available . . . ."

We also hold that the evidence supports the remaining portion of finding of fact number nine. At the 11 July 2005 hearing, Assistant District Attorney Higdon stated that the photographs had been "given to [Assistant District Attorney Nicholas] Vlahos" and had been "destroyed." This testimony fully supports the portion of the finding concerning the photographs. Thus, with the exception of finding of fact number four, all of the trial court's findings are supported by

competent evidence and are conclusive on appeal. *See Cooke*, 306 N.C. at 134, 291 S.E.2d at 619.

[2] Moreover, the trial court's findings fully support its conclusions of law, and the trial court's conclusions of law are correct. In support of its order, the trial court stated as follows:

> I've got to tell you the truth, that I've been in the system now in one form or another since 1979. I spent more than twenty years in the D.A.'s office; I filled five different positions, eleven and a half years as the D.A. Frankly, if I had two assistants that put together a photographic array like this and made a poster and posted it on the wall making fun of a defendant, even if they can't stand him, they would have had a real problem with me. I got a real problem with this poster and it's uncontroverted that it existed in at least one person's office. There's no excuse for that. We're going to treat people with dignity and respect even if they're charged with crimes. That's the right thing to do and I think frankly, as prosecutors, we're held to that responsibility ethically, morally and legally. So it bothers me a great deal that two assistants would poke fun at a defendant, even if they can't stand him.
>
> As to the irreparable harm, it's uncontroverted that that poster was destroyed. There's no evidence to the contrary. There's no evidence that these photographs have been made available to . . . Defendant, even though a significant amount of time has passed and he has made various requests for those photographs. Frankly, he's not required to disclose to you or me the theory on which he intends to defend his case. But that evidence has been willfully destroyed is a significant problem. And as it relates in particular to the 20 April photograph, that is in—that photograph was made at a relevant time to the subject prosecution and in my opinion is material to the prosecution. He's entitled to it.

We agree with the trial court.

The State argues the poster "had already been destroyed sometime prior to July 2005 and had no relevance to any case arising out of Union County" and that the "poster did not hang in Union County and had nothing to do with the Union County case before Judge Hardin." However, the crime with which Defendant was charged arose out of the incident which gave rise to the injuries depicted in

the second photograph. Accordingly, the poster, and the second photograph, were clearly relevant to the present case. Moreover, at the time the indictments were filed in the present case, Stanly and Union Counties were in the same prosecutorial district. Accordingly, the poster was relevant because it hung in the Office of the District Attorney prosecuting the present case against Defendant.

[3] The State also challenges the trial court's conclusion that "the poster of the photographs described herein was willfully destroyed and not made available to . . . Defendant although . . . Defendant made a valid and timely request for same." The State argues this conclusion was unsupported by the findings and the evidence. The State argues that "[i]n order for any request for the poster to have been timely, it would have had to [have] been made before the poster was presumably thrown away" and "[t]here was no evidence that the poster still existed in June or July of 2004, when [D]efendant alleged that he subpoenaed it." However, at the 11 July 2005 pre-trial hearing in Stanly County, Assistant District Attorney Stephen Higdon stated that the poster had been destroyed. Therefore, the only evidence was that the poster was destroyed by 11 July 2005. The State did not offer any evidence that the poster did not exist at the time Defendant subpoenaed it.

[4] The State also challenges the trial court's conclusion that "the original photographs described herein have not been made available and as represented by the State of North Carolina are unavailable to . . . Defendant, even though implicitly requested by . . . [D]efendant." However, this conclusion is supported by the trial court's finding that the original photographs were not available and by Defendant's testimony that he did not have copies of the original photographs.

[5] The State further argues that the trial court erred by making the following conclusion of law:

> That due to the destruction or failure of the State to provide this evidence, which is material and may be exculpatory in nature, . . . Defendant's rights pursuant to the Constitution of the United States and the North Carolina Constitution have been flagrantly violated and there is such irreparable prejudice to . . . Defendant's preparation of his case that there is no remedy but to dismiss the prosecution.

As reflected in this conclusion of law, the trial court determined that the State's destruction of, or failure to provide, the poster and the

original photographs violated Defendant's due process rights under *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215 (1963). "To establish a *Brady* violation, a defendant must show (1) that the prosecution suppressed evidence; (2) that the evidence was favorable to the defense; and (3) that the evidence was material to an issue at trial." *State v. McNeil*, 155 N.C. App. 540, 542, 574 S.E.2d 145, 147 (2002) (citing *Brady*, 373 U.S. at 87, 10 L. Ed. 2d at 218), *disc. review denied*, 356 N.C. 688, 578 S.E.2d 323 (2003). Under *Brady*, evidence is material "if there is a 'reasonable probability' of a different result had the evidence been disclosed to the defense." *Id.* (quoting *United States v. Bagley*, 473 U.S. 667, 682, 87 L. Ed. 2d 481, 494 (1985)).

The State first cites *State v. Hardy*, 293 N.C. 105, 127, 235 S.E.2d 828, 841 (1977), for the proposition that "[d]ue process is concerned that the suppressed evidence might have affected the outcome at trial and not that the suppressed evidence might have aided the defense in preparing for trial." Based upon this authority, the State argues that *Brady* "requires the State only to turn over such information at trial, not prior to trial[.]" However, it is uncontroverted that the photographs and the poster had been destroyed. Therefore, they could not have been produced at trial.

[6] The State also argues that the poster and the photographs were neither exculpatory nor material. We disagree.

> " '[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt, or to punishment, irrespective of the good faith or bad faith of the prosecution.' " *State v. Holadia*, 149 N.C. App. 248, 256, 561 S.E.2d 514, 520 (2002) (quoting *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215, 218 (1963)), *cert. denied*, 355 N.C. 497, 562 S.E.2d 433 (2002). The duty to disclose such evidence applies irrespective of whether there has been a request by the accused and encompasses impeachment evidence as well as exculpatory evidence. *Id.* at 256, 561 S.E.2d at 520.

State v. Mack, 188 N.C. App. 365, 374-75, 656 S.E.2d 1, 9 (2008).

In the present case, the poster would have been admissible as impeachment evidence. Moreover, even if the poster was not relevant to show that Defendant did not commit the charged assault, it was relevant to any defense Defendant could have offered, including self-defense. Accordingly, we hold that the State suppressed ma-

terial and exculpatory evidence and thereby flagrantly violated Defendant's rights to due process of law under *Brady*. *See* N.C.G.S. § 15A-954(a)(4).

[7] The State also argues that Defendant was not irreparably prejudiced by the failure of the State to provide the poster because Defendant had the original photographs and could have recreated the poster or could have called witnesses to testify about the contents of the poster. First, as we have already held, Defendant did not have possession of the original photographs and could not have recreated the poster. Second, during the hearing, Defendant tendered the transcript of a trial of unrelated charges against Defendant in Stanly County. In that trial, Defendant attempted to call as a witness a person who had seen the poster to testify to the contents of the poster. As reflected in that transcript, which was included in the record on appeal in the present case, the trial judge in that case sustained the State's objections to testimony regarding the poster content. Therefore, it was probable that the trial court in the present case would have sustained the State's objections to similar testimony and that Defendant would have been unable to present to the jury testimony as to the poster content. Accordingly, we hold Defendant was irreparably prejudiced by the State's failure to provide the poster and the photographs in the present case. *See* N.C.G.S. § 15A-954(a)(4).

Affirmed.

Judge STEPHENS concurs.

Judge TYSON dissents with a separate opinion.

TYSON, Judge dissenting.

The majority's opinion affirms the trial court's order, which dismissed the charge of felony assault on a government officer or employee against defendant. I vote to reverse and respectfully dissent.

I. Standard of Review

> [T]he scope of appellate review . . . 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. Indeed, an

> appellate court accords great deference to the trial court in this respect because it is entrusted with the duty to hear testimony, weigh and resolve any conflicts in the evidence, find the facts, and, then based upon those findings, render a legal decision, in the first instance, as to whether or not a constitutional violation of some kind has occurred.

State v. Cooke, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982) (internal citations omitted).

II. Finding of Fact Numbered 9

The parties concede and the majority's opinion agrees that finding of fact numbered 4 is not supported by any competent evidence, but holds the trial court's finding of fact numbered 9 is supported by competent evidence. I disagree.

Finding of fact numbered 9 states:

> That during proceedings regarding this case and upon the request of the Defendant for discovery and disclosure that Assistant District Attorney Higdon stated in open court that the poster had been destroyed and was not available, and that the subject photographs originally taken at the Stanly County Jail were not available as well.

The records and transcripts before us do not support "that the subject photographs originally taken at the Stanly County Jail were not available as well." At defendant's 11 July 2005 hearing, defendant's counsel stated:

> Your Honor, I have in my hand a copy of [sic] Stanly County Sheriff's Office booking report. It is—it has on it [sic] copy of the photograph, the actual photograph that I saw with my eyes in the clerk's office. This is the photograph that was on the bottom of the paper that said, "After he sued the D.A.'s office."

At defendant's 18 January 2007 hearing, defendant stated:

> [Defendant]: . . . I'm handing you what is marked as Exhibit 3. Do you recognize that photograph right there . . .?
>
> [Witness]: Yes. It's one that looks like it was taken at the Stanly County Jail.
>
> [Defendant]: Was that by chance be [sic] the picture where up there it said, before he sued the Stanly County

District Attorney's office? Is that the one that was up there . . . in that poster?

[Witness]: That was—this is a side shot. It was a face, a complete face.

The transcripts from defendant's 11 July 2005 and 18 January 2007 hearings clearly reveal defendant and his counsel possessed both photographs. Competent evidence does not support the trial court's finding of fact numbered 9, these judicial admissions are binding upon defendant, and no evidence supports the trial court's contrary conclusions of law. *See City of Brevard v. Ritter*, 285 N.C. 576, 580, 206 S.E.2d 151, 154 (1974) (citation omitted) ("Stipulations duly made during the course of a trial constitute judicial admissions binding on the parties and dispensing with the necessity of proof for the duration of the controversy."); *see also State v. Simon*, 185 N.C. App. 247, 255-56, 648 S.E.2d 853, 858 (2007).

III. Conclusions of Law Numbered 1, 2, 3, and 4

The majority's opinion also holds that conclusions of law numbered 1, 2, 3, and 4 are supported by the trial court's findings of fact. I disagree.

Conclusions of law numbered 1, 2, 3, and 4 state:

1) That the photographs of the Defendant made during his processing into the Stanly County Jail on November 17th of 2003 and again between April the 19th and 20th of 2004 are relevant and material to the defense of the subject prosecution.

2) That the poster of the photographs described herein was willfully destroyed and not made available to the Defendant although the Defendant made a valid and timely request for same.

3) That the original photographs described herein have not been made available and as represented by the State of North Carolina are unavailable to the Defendant, even though implicitly requested by the Defendant.

4) That due to the destruction or failure of the State to provide this evidence, which is material and may be exculpatory in nature, the Defendant's rights pursuant to the Constitution of the United States and the North Carolina Constitution have been flagrantly violated and there is such irreparable prejudice to the

Defendant's preparation of his case that there is no remedy but to dismiss the prosecution.

No evidence in the record shows and no findings of fact support the trial court's conclusions that: (1) the photographs "are relevant and material to the defense of the [Union County] prosecution[;]" (2) the poster was "willfully destroyed[;]" (3) "the original photographs described herein have not been made available[;]" or (4) "there is such irreparable prejudice to the Defendant's preparation of his [Union County] case that there is no remedy but to dismiss the prosecution." Uncontested evidence shows defendant was in possession of both Stanly County photographs at two separate hearings. No relevance of these photographs is shown to defendant's Union County charges that are presently before us. The trial court's order, which dismissed the Union County indictment against defendant, is unsupported by evidence or findings of fact and should be reversed.

IV. Conclusion

The trial court's finding of fact numbered 9 is not supported by competent evidence and cannot be used to support the trial court's conclusions of law. *Cooke*, 306 N.C. at 134, 291 S.E.2d at 619. The trial court's remaining findings of fact do not support its conclusions of law numbered 1, 2, 3, and 4. *Id*. Defendant has failed to show any prejudice from the destruction of the poster and particularly any relevance of the Stanly County allegations and actions to the present charges in Union County. The trial court's order, which dismissed the charge of felony assault on a government officer or employee against defendant, should be reversed. I respectfully dissent.

WASHBURN v. YADKIN VALLEY BANK & TR. CO.

[190 N.C. App. 315 (2008)]

ROBERT E. WASHBURN, PLAINTIFF v. YADKIN VALLEY BANK AND TRUST COMPANY, DEFENDANT

JOSEPH E. ELLER, PLAINTIFF v. YADKIN VALLEY BANK AND TRUST COMPANY, DEFENDANT

No. COA07-612
No. COA07-613

(Filed 6 May 2008)

1. Pleadings— judgment on—prior orders not attached—collateral estoppel and law of the case not applicable

Where prior orders were not attached to the pleadings and it cannot be concluded that the trial court considered those orders, collateral estoppel and law of the case were not considered in an appeal from judgment on the pleadings.

2. Judgments— on the pleadings—issues of fact not material or admitted—only questions of law remaining

In a judgment on the pleadings in an employment matter, only questions of law concerning contractual obligations and statutory issues remained where all material allegations were admitted in the pleadings, the "disputed issue of fact" which defendant pointed toward was not material, and defendant filed its own motions for judgment on the pleadings.

3. Employer and Employee— noncompetition agreements—not binding

Plaintiffs were not bound by noncompetition provisions where the plain, unequivocal and clear terms of the employment agreements (drafted by defendant) gave plaintiffs the discretion to declare their employment terminated following a corporate merger, plaintiffs exercised their discretion and complied with all of the requirements of the agreements, and the noncompetition provisions specifically and unequivocally stated that they did not apply prospectively if plaintiffs exercised their discretion in declaring their employment terminated without cause.

4. Employer and Employee— Wage and Hour Act—severance pay after merger

Plaintiffs were entitled to judgment on the pleadings on their wage and hour claims in a dispute that arose over payment after they left their corporate employment following a merger. The

Wage and Hour Act provides that employees whose employment is terminated shall be paid all wages due, the Act specifically includes severance pay, and the disputed payments in this case constitute severance pay.

5. Judgments— on the pleadings—affirmative defenses

The trial judge did not err by granting judgment on the pleadings for plaintiffs on defendant's affirmative defenses where none of those defenses barred plaintiffs' recovery.

6. Employer and Employee— employment departure after merger—counterclaims—judgment on the pleadings

The trial court properly granted judgment on the pleadings on counterclaims for breach of contract, tortious interference with contractual relations, and unfair competition arising from plaintiffs' departure from their employment after a corporate merger. The noncompetition provisions did not apply prospectively, so that there was no breach of the agreement and interference with the agreement could not have happened, and even if plaintiffs were bound by the provisions, a mere breach of contract is not sufficient for an unfair or deceptive trade practice action.

7. Trade Secrets— misappropriation—allegations not sufficiently specific

The trial court did not err by granting plaintiffs' Rule 12(b)(6) motions to dismiss counterclaims for misappropriation of trade secrets arising from plaintiffs' departure from their employment following a corporate merger. Defendant's allegations did not sufficiently specify the trade secrets or the acts by which the alleged misappropriations were accomplished.

Appeal by Defendant from orders entered 6 February 2007 by Judge J. Marlene Hyatt in Watauga County Superior Court. Heard in the Court of Appeals 26 November 2007.

Hagan Davis Mangum Barrett Langley & Hale PLLC, by Stuart C. Gauffreau and D. Beth Langley, for Plaintiffs-Appellees.

Williams Mullen Maupin Taylor, by Michael C. Lord and Heather E. Bridgers, for Defendant-Appellant.

STEPHENS, Judge.

Plaintiffs Robert E. Washburn ("Washburn") and Joseph E. Eller ("Eller") (collectively, "Plaintiffs") initiated separate actions seeking

damages and declaratory relief upon allegations that Defendant Yadkin Valley Bank and Trust Company ("Yadkin") breached provisions of Plaintiffs' employment agreements. Yadkin denied the allegations and counterclaimed. The trial court: (1) granted Plaintiffs' motions for judgment on the pleadings as to their claims, (2) granted Plaintiffs' 12(b)(6) motions to dismiss Yadkin's misappropriation of trade secrets counterclaims, (3) granted Plaintiffs' motions for judgment on the pleadings as to Yadkin's remaining counterclaims, and (4) denied Yadkin's motions for judgment on the pleadings as to all claims. In both actions, Yadkin timely appealed. Because the facts and issues presented in these two cases are virtually identical, we consolidate Yadkin's appeals and render this single opinion on all issues.

I. FACTUAL AND PROCEDURAL HISTORY

On 3 August 2004, Plaintiffs filed verified complaints in Watauga County Superior Court. According to the complaints, High Country Bank hired Washburn and Eller in 1998 and 2001, respectively, as senior vice presidents, and Plaintiffs entered into employment agreements with High Country Bank upon accepting their positions. The employment agreements were identical in all pertinent respects and contained the following relevant provisions:

> 5. Non-Competition and Confidentiality.
>
> . . . .
>
> (b) Non-competition. In consideration of employment of the Officer, during the Term and any subsequent Payment Period (as defined below), the Officer agrees that he will not, within the North Carolina counties in which the Bank has banking offices during the Term (the "Market"), directly or indirectly, own, manage, operate, join, control or participate in the management, operation or control of, or be employed by or connected in any manner with, any Person who Competes with the Bank, without the prior written consent of the Board; provided, however, that the provisions of this Paragraph 5(b) shall not apply prospectively in the event this Agreement is terminated by the Bank without Cause (as defined below) . . . .
>
> . . . .
>
> 7. Termination and Termination Pay.
>
> . . . .

(f) Unapproved Change in Control Termination. In the event of (i) the termination of this Agreement without Cause or (ii) the voluntary termination of this Agreement by the Officer, in each case in connection with, or within one (1) year after, any Change in Control (as defined below) which has not been approved in advance by a formal resolution of two-thirds (2/3) of the members of the Board who are not Affiliates of the Person effecting or proposing to effect the Change in Control ("Independent Directors"), the Officer shall be entitled at his election:

(A) to continue to receive his Base Salary and bonuses as provided in this Agreement for a period of three and ninety-nine one hundreths [sic] (3.99) years subsequent to the effective date of such termination; and

(B) to continue to participate in all Benefit Plans and Fringe Benefits, except qualified retirement plans or for the period of three and ninety-nine one hundreths [sic] (3.99) years.

Upon written notice by the Officer to the Bank, in lieu of paying the amount in item (A) above for a period of three and ninety-nine one hundredths (3.99) years in installments, the Officer shall be paid the Present Value of such Base Salary and bonuses in a lump sum within sixty (60) days of the termination of his employment. . . . The Officer shall also be entitled to a cash payment of an amount equal to the amount of any and all excise tax liability incurred by Officer pursuant to Section 4999 of the Internal Revenue Code of 1986, as amended, in connection with the payments and benefits compensation in [] Paragraph 7 . . . .

(g) Approved Change in Control Termination. Upon ten (10) days prior written notice, the Officer may declare this Agreement to have been terminated without Cause by the Bank, upon the occurrence of any of the following events, which have not been consented to in advance by the Officer in writing, following a Change in Control, approved in advance by a formal resolution of at least two-thirds (2/3) of the Independent Directors: (i) if the Officer is required to move his personal residence or perform his principal executive functions more than twenty (20) miles from the city limits of Boone, North Carolina; (ii) if the Bank should fail to maintain Benefit Plans and Fringe Benefits providing to him at least substantially the same level of benefits afforded the Officer as of the date of the change in Control; or (iii) if in the Officer's sole discretion, his responsi-

> bilities or authority in the capacity described in Paragraph 1 have been diminished materially.
>
> Upon such termination, or upon any other termination of this Agreement without Cause by the Bank within one (1) year following an approved Change in Control, the Officer shall be entitled to receive the compensation and benefit continuation when and as provided in Paragraph 7(f) above.

The complaints alleged that on 1 January 2004, Yadkin acquired and merged with High Country Financial Corporation, the parent company of High Country Bank. As a result of the merger, Plaintiffs became employees of Yadkin, and Yadkin assumed Plaintiffs' employment agreements. The complaints further alleged that on 3 May 2004, Washburn and Eller provided written notices to Yadkin declaring that, in their discretion, their job responsibilities and authority had been diminished as a result of the merger, and that, therefore, their employment agreements were terminated without cause pursuant to Paragraph 7(g). Furthermore, Plaintiffs informed Yadkin that, pursuant to Paragraph 5(b), they did not consider themselves bound by the agreements' non-competition provisions because their agreements had been terminated without cause. Finally, the complaints alleged that Plaintiffs were entitled to severance payments and benefits as provided for in Paragraph 7(f), but that Yadkin did not provide the payments and benefits to which Plaintiffs claimed entitlement. Plaintiffs advanced breach of contract claims and claims based on violations of North Carolina's Wage and Hour Act, and sought declaratory relief that they were not bound by the agreements' non-competition provisions.

On 2 September 2004, Yadkin filed notices that it had removed the actions to the United States District Court for the Western District of North Carolina. In its notices of removal filed with the federal court, Yadkin asserted that the provision of severance payments and benefits under the employment agreements constituted employee benefit plans and that, therefore, Plaintiffs' claims were completely preempted by the Employee Retirement Income Security Act of 1974 ("ERISA").

On 1 November 2004, AF Financial Group ("AF Financial"), a holding company whose subsidiary conducted banking activities in and around the same geographic area as Yadkin, hired Washburn as its President and Chief Executive Officer. Subsequently, AF Financial hired Eller to work with its subsidiary, AF Bank. On 17 August 2005,

Yadkin filed a complaint in Surry County Superior Court advancing five claims against AF Financial, including tortious interference with contract and misappropriation of trade secrets. On 23 March 2006, Judge Richard L. Doughton entered a partial summary judgment order dismissing Yadkin's tortious interference claim and its other claims to the extent those claims were based on the tortious interference claim. Judge Doughton did not address Yadkin's misappropriation of trade secrets claim or its other claims to the extent those claims were based on the misappropriation claim. Yadkin and AF Financial proceeded to conduct discovery on the surviving claims.

On 3 August 2006, federal district court Judge Richard L. Voorhees remanded Plaintiffs' actions to Watauga County Superior Court, concluding that Plaintiffs' claims were not preempted by ERISA. Accordingly, on 12 October 2006, Yadkin filed answers to Plaintiffs' complaints. Yadkin generally denied Plaintiffs' allegations and advanced nine affirmative defenses. Yadkin's fifth affirmative defense in each action was that Plaintiffs' breach of contract and Wage and Hour Act claims were preempted by ERISA. In its answers, Yadkin also advanced counterclaims against both Washburn and Eller. As to both Plaintiffs, Yadkin advanced claims of breach of contract, misappropriation of trade secrets, and unfair competition. As to Washburn, Yadkin advanced the additional claim of interference with contractual relations. In support of this claim, Yadkin alleged that Washburn caused AF Financial to hire Eller. Plaintiffs filed replies to Yadkin's counterclaims on or about 8 December 2006.

In the Surry County action, on 16 November 2006 Yadkin voluntarily dismissed without prejudice all of its remaining claims against AF Financial. Thereafter, Yadkin timely filed notice of appeal from Judge Doughton's partial summary judgment order. After Yadkin filed its notice of appeal, AF Financial filed a motion for Rule 11 sanctions, asserting that Yadkin's claims were not well grounded in fact, were not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and were brought for an improper purpose. Judge L. Todd Burke agreed and, on 8 January 2007, awarded $5,000.00 in costs and $25,000.00 in attorney's fees to AF Financial. Yadkin timely noticed appeal from the order imposing sanctions.[1]

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1. In *Yadkin Valley Bank & Trust Co. v. AF Fin. Grp.*, —— N.C. App. ——, —— S.E.2d —— (May 6, 2008) (Nos. COA07-240, COA07-417) (unpublished), this Court affirmed both Judge Doughton's grant of partial summary judgment and Judge Burke's imposition of Rule 11 sanctions.

In the Watauga County actions, on 29 December 2006 Plaintiffs filed motions for judgment on the pleadings as to their claims, Rule 12(b)(6) motions to dismiss Yadkin's misappropriation of trade secrets counterclaims, and motions for judgment on the pleadings as to Yadkin's other counterclaims. In both cases, Yadkin filed its own motion for judgment on the pleadings on 16 January 2007. Judge J. Marlene Hyatt conducted a hearing on the motions on 22 January 2007. By orders entered 6 February 2007, Judge Hyatt granted Plaintiffs' motions and denied Yadkin's motions. Judge Hyatt did not determine the amount of damages Plaintiffs were entitled to receive pursuant to their breach of contract and Wage and Hour Act claims. Yadkin timely filed notices of appeal. Judge Hyatt's orders are the subject of this opinion.

II. PLAINTIFFS' CLAIMS

[1] Yadkin first argues that Judge Hyatt erred in granting Plaintiffs' motions for judgment on the pleadings on Plaintiffs' claims. Yadkin's primary assertion in support of this argument is that Judge Hyatt improperly relied on the doctrines of collateral estoppel and the law of the case to enter her orders. Generally, these two doctrines prevent parties from re-litigating issues that have been decided by other courts. *See Mays v. Clanton*, 169 N.C. App. 239, 609 S.E.2d 453 (2005) (discussing collateral estoppel doctrine); *Creech ex rel. Creech v. Melnik*, 147 N.C. App. 471, 556 S.E.2d 587 (2001) (discussing the law of the case doctrine), *disc. review denied*, 355 N.C. 490, 561 S.E.2d 498, *reconsideration denied*, 355 N.C. 747, 565 S.E.2d 194 (2002). Yadkin asserts that Judge Hyatt determined that Judge Doughton's partial summary judgment order, Judge Voorhees' remand order, and Judge Burke's order imposing sanctions precluded Yadkin from prevailing in the instant actions. Yadkin's assertion is flawed.

Of the three orders purportedly relied upon by Judge Hyatt, her orders granting judgment on the pleadings indicate that Judge Voorhees' remand order was the only order she could have considered in reaching her decisions. According to Judge Hyatt's orders, she reviewed only the parties' pleadings: Plaintiffs' complaints, Yadkin's answers and counterclaims, and Plaintiffs' replies to Yadkin's counterclaims. Judge Voorhees' remand order was attached as an exhibit to Plaintiffs' replies to Yadkin's counterclaims. However, the other orders, although they are included in the record on appeal, were not attached to any of the pleadings, and, thus, we cannot conclude that Judge Hyatt ever considered Judge Doughton's or Judge Burke's

orders. Judge Hyatt's limited review was proper in light of the procedural posture of the case before her, and had she reviewed other materials, we would treat her orders granting judgment on the pleadings as orders granting summary judgment. *See Helms v. Holland*, 124 N.C. App. 629, 478 S.E.2d 513 (1996) (reviewing trial court's order granting judgment on the pleadings as an order granting summary judgment because the trial court considered matters outside the pleadings in reaching its decision). Furthermore, although the transcript reveals that Plaintiffs argued collateral estoppel and the law of the case to Judge Hyatt based on Judge Doughton's and Judge Burke's orders, the orders granting judgment on the pleadings properly do not enunciate the reasons underlying the rulings. *United Virginia Bank v. Air-Lift Assocs.*, 79 N.C. App. 315, 339 S.E.2d 90 (1986). Accordingly, we are not constrained to determine whether these doctrines apply to the facts of the cases at bar.

[2] A motion for judgment on the pleadings is authorized by Rule 12(c) of the Rules of Civil Procedure. N.C. Gen. Stat. § 1A-1, Rule 12(c) (2005). "The rule's function is to dispose of baseless claims or defenses when the formal pleadings reveal their lack of merit." *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974). "A motion for judgment on the pleadings is the proper procedure when all the material allegations of fact are admitted in the pleadings and only questions of law remain. When the pleadings do not resolve all the factual issues, judgment on the pleadings is generally inappropriate." *Id.* (citation omitted). We review an order granting judgment on the pleadings in light of the following principles:

> The trial court is required to view the facts and permissible inferences in the light most favorable to the nonmoving party. All well pleaded factual allegations in the nonmoving party's pleadings are taken as true and all contravening assertions in the movant's pleadings are taken as false. All allegations in the nonmovant's pleadings, except conclusions of law, legally impossible facts, and matters not admissible in evidence at the trial, are deemed admitted by the movant for purposes of the motion.

Id. (citations omitted).

In the cases at bar, all material allegations of fact were admitted in the pleadings. Yadkin acknowledged that the agreements were valid, that the agreements speak for themselves, and that it had not paid Plaintiffs as detailed in the agreements' Paragraph 7(f). Additionally, the pleadings established that Yadkin's acquisition of

High Country Financial Corporation constituted an "Approved Change of Control" as set forth in the agreements, and that Plaintiffs declared the agreements terminated without cause because Plaintiffs determined, in their sole discretion, that their responsibilities or authority had been materially diminished. In its briefs to this Court, however, Yadkin contends that the trial court resolved the "disputed issue of fact" of whether Plaintiffs' responsibilities and authority were diminished as a result of the merger. This "issue" is not material, as the agreements clearly state that Plaintiffs were entitled to make this determination in their "sole discretion." Furthermore, we note that Yadkin filed its own motions for judgment on the pleadings, apparently concluding, as we have, that all material allegations of fact were admitted in the pleadings. As contract and statutory interpretation are matters of law, *Shelton v. Duke Univ. Health Sys.*, 179 N.C. App. 120, 633 S.E.2d 113 (2006), *disc. review denied*, 361 N.C. 357, 643 S.E.2d 591 (2007); *Am. Ripener Co. v. Offerman*, 147 N.C. App. 142, 554 S.E.2d 407 (2001), *disc. review denied*, 355 N.C. 210, 559 S.E.2d 796 (2002), only questions of law remained for Judge Hyatt to determine, to wit: (1) were Plaintiffs entitled to Paragraph 7(f) payments and benefits, (2) were Plaintiffs bound by the non-competition provisions, (3) were Plaintiffs entitled to relief under the Wage and Hour Act, and (4) did any of Yadkin's affirmative defenses bar Plaintiffs' recovery.

A. Employment Agreements

[3] Covenants not to compete restrain trade and are scrutinized strictly. *Kennedy v. Kennedy*, 160 N.C. App. 1, 584 S.E.2d 328, *appeal dismissed*, 357 N.C. 658, 590 S.E.2d 267 (2003). To the extent the language of a written instrument is ambiguous, its provisions are to be strictly construed against the drafting party. *Reichhold Chems., Inc. v. Goel*, 146 N.C. App. 137, 555 S.E.2d 281 (2001), *appeal dismissed and disc. review denied*, 356 N.C. 677, 577 S.E.2d 634 (2003).

By the plain, unequivocal, and clear terms of the employment agreements, which were drafted by Yadkin, Plaintiffs were entitled to the Paragraph 7(f) payments and benefits. Paragraph 7(g) gave Plaintiffs, and only Plaintiffs, the discretion to declare their employment terminated without cause following Yadkin's merger with High Country Financial Corporation. Plaintiffs exercised their discretion and complied with all the requirements of the agreements in communicating their declarations to Yadkin. Thus, Plaintiffs were "entitled to receive the compensation and benefit continuation" provided for in Paragraph 7(f). Moreover, the non-competition provisions spe-

cifically and unequivocally stated that they "shall not apply prospectively" if Plaintiffs exercised their discretion in declaring their employment terminated without cause. Thus, Plaintiffs were not bound by the non-competition provisions.

B. Wage and Hour Act

[4] We also conclude that Plaintiffs were entitled to judgment on the pleadings on their Wage and Hour Act claims. Pursuant to that Act, an "employer shall pay every employee all wages and tips accruing to the employee on the regular payday." N.C. Gen. Stat. § 95-25.6 (2005). The Act also provides that "[e]mployees whose employment is discontinued for any reason shall be paid all wages due on or before the next regular payday . . . ." N.C. Gen. Stat. § 95-25.7 (2005). The Act specifically includes "severance pay" in its definition of "wage." N.C. Gen. Stat. § 95-25.2 (2005). A statute such as this one, "that is *free from ambiguity, explicit in terms and plain of meaning* must be enforced as written, without resort to judicial construction." *Clark v. Sanger Clinic, P.A.*, 142 N.C. App. 350, 354, 542 S.E.2d 668, 671 (quotation marks and citation omitted), *disc. review denied*, 353 N.C. 450, 548 S.E.2d 524 (2001). As the Paragraph 7(f) payments constitute severance pay, Yadkin violated the Wage and Hour Act, and Plaintiffs were entitled to relief thereunder.

C. Yadkin's Affirmative Defenses

[5] Finally, we agree with Yadkin that, in entering her orders granting judgment on the pleadings, Judge Hyatt "must have concluded that none of Yadkin's [] affirmative defenses had any potential merit as a matter of law based solely on the consideration of the substance contained in the four corners of the pleadings." We disagree, however, with Yadkin's assertion that Judge Hyatt erred in reaching this conclusion. None of Yadkin's affirmative defenses bar Plaintiffs' recovery under their claims. It is evident from the pleadings that Plaintiffs did not breach the employment agreements, that Plaintiffs did not engage in any misconduct, and that Plaintiffs' claims are not preempted by ERISA. In sum, Judge Hyatt did not err in entering her orders granting judgment on the pleadings in favor of Plaintiffs.

III. YADKIN'S COUNTERCLAIMS

A. Judgment on the Pleadings

[6] Yadkin next argues that Judge Hyatt erred in granting judgment on the pleadings on its counterclaims of breach of contract,

tortious interference with contractual relations, and unfair competition. We disagree.

As discussed above, the non-competition provisions did not apply to Plaintiffs prospectively following their termination. Thus, Plaintiffs did not breach their agreements. Similarly, since Eller was not bound by the non-competition provision in his agreement, there was no contractual relationship with which Washburn could have interfered. *See United Labs., Inc. v. Kuykendall*, 322 N.C. 643, 661, 370 S.E.2d 375, 387 (1988) ("The tort of interference with 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 . . . .") (citation omitted). Finally, since Plaintiffs are not bound by the non-competition provisions, it simply cannot be said that they engaged in unfair methods of competition with Yadkin. *See* N.C. Gen. Stat. § 75-1.1(a) (2005) ("Unfair methods of competition in or affecting commerce . . . are declared unlawful."). Even if Plaintiffs were bound by the provisions, " '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.' " *Southeastern Shelter Corp. v. BTU, Inc.*, 154 N.C. App. 321, 330, 572 S.E.2d 200, 206 (2002) (quoting *Branch Banking & Trust Co. v. Thompson*, 107 N.C. App. 53, 62, 418 S.E.2d 694, 700, *disc. review denied*, 332 N.C. 482, 421 S.E.2d 350 (1992)). In sum, the trial court properly granted judgment on the pleadings as to these counterclaims.

B. 12(b)(6) Failure to State a Claim

[7] Finally, Yadkin argues that Judge Hyatt erred in granting Plaintiffs' Rule 12(b)(6) motions to dismiss Yadkin's misappropriation of trade secrets counterclaims.

In ruling on a motion to dismiss pursuant to Rule 12(b)(6), the issue is not whether a claimant will prevail, but whether the claimant is entitled to offer evidence in support of the claim. *Ryan v. Univ. of N.C. Hosps.*, 128 N.C. App. 300, 494 S.E.2d 789, *disc. review improvidently allowed*, 349 N.C. 349, 507 S.E.2d 39 (1998). "The only purpose of a Rule 12(b)(6) motion is to test the legal sufficiency of the pleading against which it is directed." *Azzolino v. Dingfelder*, 71 N.C. App. 289, 295, 322 S.E.2d 567, 573 (1984) (citation omitted), *aff'd in part and rev'd in part on other grounds*, 315 N.C. 103, 337 S.E.2d 528 (1985), *cert. denied*, 479 U.S. 835, 93 L. Ed. 2d 75 (1986). The same rules regarding the sufficiency of a complaint to withstand a motion to dismiss apply to a claim for relief stated by a defendant in a coun-

terclaim. *Brewer v. Hatcher*, 52 N.C. App. 601, 279 S.E.2d 69 (1981). This Court reviews *de novo* a trial court's ruling on a motion to dismiss pursuant to Rule 12(b)(6). *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 580 S.E.2d 1, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003).

North Carolina's Trade Secrets Protection Act ("TSPA") provides that the owner of a trade secret "shall have remedy by civil action for misappropriation" of the secret. N.C. Gen. Stat. § 66-153 (2005).

> "Trade secret" means business or technical information, including but not limited to a formula, pattern, program, device, compilation of information, method, technique, or process that:
>
> a. Derives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development or reverse engineering by persons who can obtain economic value from its disclosure or use; and
>
> b. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

N.C. Gen. Stat. § 66-152(3) (2005). " 'Misappropriation' means acquisition, disclosure, or use of a trade secret of another without express or implied authority or consent, unless such trade secret was arrived at by independent development, reverse engineering, or was obtained from another person with a right to disclose the trade secret." N.C. Gen. Stat. § 66-152(1) (2005). The TSPA also provides that "actual or threatened misappropriation of a trade secret may be preliminarily enjoined during the pendency of the action and shall be permanently enjoined upon judgment finding misappropriation . . . ." N.C. Gen. Stat. § 66-154(a) (2005).

In *VisionAIR, Inc. v. James*, 167 N.C. App. 504, 606 S.E.2d 359 (2004), this Court affirmed the trial court's denial of the plaintiff's request for a preliminary injunction in plaintiff's trade secrets action. We stated:

> To plead misappropriation of trade secrets, "a plaintiff must identify a trade secret with sufficient particularity so as to enable a defendant to delineate that which he is accused of misappropriating and a court to determine whether misappropriation has or is threatened to occur." *Analog Devices, Inc.* [*v. Michalski*, 157 N.C. App. 462, 468, 579 S.E.2d 449, 453 (2003)] (citations omit-

> ted); *see also FMC Corp.* [*v. Cyprus Foote Mineral Co.*, 899 F.Supp. 1477, 1484 (W.D.N.C. 1995)] (preliminary injunction inappropriate where trade secret described only in general terms and where evidence of blatant misappropriation not shown).

Id. at 510-11, 606 S.E.2d at 364. We then stated that a complaint that makes general allegations in sweeping and conclusory statements, without specifically identifying the trade secrets allegedly misappropriated, is "insufficient to state a claim for misappropriation of trade secrets." *Id.* at 511, 606 S.E.2d at 364 (citing *Analog Devices, Inc.*, 157 N.C. App. at 469-70, 579 S.E.2d at 454).

In the present case, Yadkin alleged Plaintiffs "acquired knowledge of Yadkin's business methods; clients, their specific requirements and needs; and other confidential information pertaining to Yadkin's business." Yadkin further alleged that this "confidential client information and confidential business information" constituted trade secrets as defined by the TSPA and that "Yadkin believes [Plaintiffs] used its trade secrets on behalf of AF Financial without Yadkin's permission." These allegations do not identify with sufficient specificity either the trade secrets Plaintiffs allegedly misappropriated or the acts by which the alleged misappropriations were accomplished. The identification of the trade secrets allegedly misappropriated is broad and vague. Yadkin's allegation that it "believes [Plaintiffs] used its trade secrets" is general and conclusory. *VisionAIR, Inc.*, 167 N.C. App. 504, 606 S.E.2d 359. The trial court did not err in dismissing Yadkin's misappropriation of trade secrets counterclaims. Yadkin's argument is overruled.

For the reasons stated above, the orders of the trial court in both COA07-612 and COA07-613 are affirmed.

AFFIRMED.

Chief Judge MARTIN and Judge McGEE concur.

IN RE B.W.

[190 N.C. App. 328 (2008)]

IN THE MATTER OF: B.W., A MINOR CHILD

No. COA07-1579

(Filed 6 May 2008)

1. Child Abuse and Neglect— statements by attorney—not evidentiary—not prejudicial

In a hearing adjudicating child abuse and neglect and the cessation of reunification efforts with the parents, any error in allowing statements by an attorney regarding pending criminal charges was not prejudicial because the trial court's finding on the issue was not necessary to its disposition.

2. Child Abuse and Neglect— findings concerning grandparents—supported by evidence

In a hearing adjudicating child abuse and neglect and the cessation of reunification efforts with the parents, the evidence supported the trial court's findings concerning the grandparents' unwillingness to acknowledge the nature and source of the child's injuries or to deny respondent (the mother) access to the child if the child was placed in their home.

3. Child Abuse and Neglect— infant's injuries—aggravated circumstances

The serial infliction of multiple fractures of the skull, leg, and ribs upon a prematurely born and malnourished infant during the first eight weeks of life qualifies as "aggravated circumstances" under N.C.G.S. § 7B-101(2).

4. Child Abuse and Neglected— child not placed with grandparents—no abuse of discretion

The trial court did not abuse its discretion by not ordering that a neglected and abused child be placed with his maternal grandparents. Its findings reflected that the court complied with N.C.G.S. § 7B-903(a) by properly considering and rejecting a placement with the grandparents.

5. Child Abuse and Neglect— reunification efforts ceased—aggravating circumstances—no abuse of discretion

The trial court's decision to cease reunification efforts was supported by the necessary finding under N.C.G.S. § 7B-507(b)(2) where the court determined that the child's injuries constituted an aggravated circumstance under N.C.G.S. § 7B-101(2). Nothing

in the statute requires another court to find aggravated circumstances before reunification efforts are stopped. There was no abuse of discretion in ceasing reunification efforts given respondent's lack of concern for the child and the lack of an inclination to come to terms with the gravity of the abuse he suffered while in her care.

Appeal by respondent from order entered 25 September 2007 by Judge C. Thomas Edwards in Catawba County District Court. Heard in the Court of Appeals 14 April 2008.

Lauren Vaughan for petitioner-appellee.

Melanie Steward Cranford for Guardian ad Litem.

Rebekah W. Davis for respondent-appellant.

BRYANT, Judge.

Respondent K.P.,[1] mother of the minor child B.W., appeals from an order adjudicating the child an abused and neglected juvenile and ceasing efforts to reunify him with his parents. Respondent-father S.W. is not a party to this appeal.

Facts and Procedural History

The Catawba County Department of Social Services (DSS) obtained non-secure custody of B.W. on 11 May 2007, after an examination at Frye Medical Center revealed injuries consistent with child abuse, including cuts, bruises, bite marks, a fractured skull, and multiple rib and leg fractures of varying ages. The minor child was less than eight weeks old and had been in his parents' care since leaving the hospital after his premature birth at thirty-six weeks' gestation. DSS filed a juvenile petition alleging abuse and neglect on 11 May 2007.

At an adjudicatory hearing held 27 August 2007, respondents stipulated that B.W. had suffered "a skull fracture and multiple fractures of varying ages to his ribs and legs[,]" as alleged by DSS. They further stipulated the following:

It is the opinion of Dr. David Berry of Frye Regional Medical Center, to a reasonable degree of medical certainty that these injuries occurred on multiple occasions and were caused by

1. Initials have been used throughout to protect the identity of the juvenile.

> chest squeezing and rough handling of [the] minor child. Dr. Berry has noted that these findings are suggestive of abuse. The parents have related no events which could have caused the child's injuries.
>
> The minor child is the only child of his parents and has been in their care and custody since [he] was born. Ms. Pearl Morton, a relative of the father, is the only other person residing in the dwelling. The parents report that [she] occasionally has acted as caretaker for the child.
>
> At present, the parents of the minor child do not have their own independent stable housing. The parents and child had been residing in [Morton's] home . . . .

Based on these undisputed findings, the court concluded that the minor child was abused and neglected within the meaning of N.C. Gen. Stat. § 7B-101(1), (15) (2007).

At disposition, the court heard testimony from forensic psychologist Dr. H.D. Kilpatrick, an expert in child custody and maltreatment who performed forensic evaluations of the parents; pediatric nurse practitioner Elizabeth Osbahr, FNP, (Ms. Osbahr) who examined B.W. at the Children's Advocacy Center; DSS investigator Shannon Roberts; and L.P. (the grandmother), B.W.'s maternal grandmother. The court received written reports from Dr. Kilpatrick, Ms. Osbahr, DSS and the Guardian ad Litem, as well as the minor child's medical records from Frye Regional Medical Center. Neither parent testified. Counsel for respondent-father informed the court that she had advised her client not to testify, in light of the criminal charges pending against him.

In its dispositional findings, the court described the multiple injuries observable on B.W. at the time DSS received a child protective services report on 10 May 2007. The court found that the parents "declined having knowledge of these abrasions and bruising, . . . except for the cut on the nose which reportedly occurred when the father dropped a telephone on the less-than-two-month-old child's head." It then listed the child's internal injuries, including a "closed fracture of the skull, subarachnoid subdural and extradural hemorrhage," posterior fractures of the 5th, 6th, 7th, and 8th ribs and anterior fractures of the 4th, 5th, and 6th ribs of varying ages, a closed fracture of the upper tibia, and a fractured fibula. The court noted that the minor child was also diagnosed "to be malnourished, under-

weight, and to suffer from Failure to Thrive," and that he "demonstrated a pain response to palpations of the chest and skull." The medical evidence was found by the court to be "consistent with B[.W.] having suffered physical abuse on multiple occasions."

Based on the results of their psychological evaluations, the court found that "[n]either parent acknowledged or suggested that B.[W.] had experienced pain or suffering" as a result of his injuries. Nor had either parent expressed empathy or concern for the child at any time during their respective interviews with Dr. Kilpatrick. The psychological tests administered to the parents failed to "disclose any valid results as a result of the parents' attempt to present themselves in the most favorable light." In addition to describing respondent as "complacent and nonreactive" to questions about the nature and source of B.W.'s injuries, Dr. Kilpatrick averred "that the flat affect, and lack of empathy, [and] the defensive and inconsistent responses were problematic for both parents." Deeming "not viable" any "suggestion that B[.W.] did not suffer pain and that his injuries were caused by someone other than either parent[,]" the court found that "efforts to reunify B.[W.] with the . . . parents would clearly be futile and inconsistent with [his] health, safety and need for a permanent home[.]"

The court ordered that B.W. remain in DSS custody and approved his continued placement with his foster family. Concluding that "[t]he injuries sustained by this child constitute aggravated circumstances as defined by N.C. Gen. Stat. § 7B-101(2) [(2007),]" and that "[f]urther efforts to reunify the child with either parent would clearly be futile and inconsistent with [his] need for a safe permanent home with in [sic] a reasonable period of time[,]" the court ordered that further efforts to reunify B.W. with the parents cease. It separately found that placing the minor child with his maternal grandparents would be "contrary to [his] best interest[,]" in light of "the parents' and grandparents' unwillingness to consider or explain the source of the [child's] injuries." The court noted that such a placement would also "place[] the maternal grandparents in the untenable position of having to exclude their daughter from their home for the next seventeen and a half years in order to provide any hope of safety to this child." Respondent appeals.

Respondent raises three issues on appeal: (I) Whether the trial court's findings numbered 29, 30, 34 and 35 are supported by competent evidence; (II) Whether the trial court abused its discretion by declining to place the child with the maternal grandparents; and (III)

Whether the trial court's conclusion to cease reunification efforts is supported by competent evidence. For the reasons given below, we affirm the order of the trial court.

I

On appeal, respondent challenges four of the district court's dispositional findings of fact. Under the Juvenile Code, the court must support its disposition in an abuse and neglect proceeding with "appropriate findings[,]" N.C. Gen. Stat. § 7B-905 (2007), based on "credible evidence presented at the hearing." *In re K.S.*, 183 N.C. App. 315, 323, 646 S.E.2d 541, 545 (2007) (quotation omitted). "The standard of review that applies to an assignment [of error] challenging a dispositional finding is whether the finding is supported by competent evidence." *In re C.M.*, 183 N.C. App. 207, 212, 644 S.E.2d 588, 593 (2007) (citations omitted). A finding based upon competent evidence is " 'binding on appeal, even if there is evidence which would support a finding to the contrary.' " *K.S.*, 183 N.C. App. at 323, 646 S.E.2d at 545 (quoting *In re J.S.*, 165 N.C. App. 509, 511, 598 S.E.2d 658, 660 (2004)).

[1] Respondent first excepts to finding number 29 that "[t]he parents have been indicted for felony child abuse charges" as a result of B.W.'s injuries. She notes that the court heard no evidence regarding such charges, which were "mentioned for the first time" by respondent-father's counsel. The transcript reflects that the father's counsel asked the court not to cease reunification efforts prior to the resolution of the "criminal trial that's getting ready to occur." The court then engaged counsel in the following exchange:

> THE COURT: In—in—in where, ma'am? In what?
>
> [COUNSEL]: They have been indicted.
>
> THE COURT: They who?
>
> [COUNSEL]: The parents.
>
> THE COURT: Your parents, the parents that you and [respondent's counsel] represent?
>
> [COUNSEL]: Yes.
>
> THE COURT: Have criminal charges pending? Is that what you're saying?
>
> [COUNSEL]: Yes, Your Honor.

Respondent's own counsel later reiterated the fact of the parents' indictment in his argument to the court, as follows:

> [W]e think it's way too early in the process to cease [re]unification of the parents. . . . They—they have been indicted. You know who knows how long it'll be before that case is actually tried or dealt with in Superior Court[.]

We agree with respondent "that statements by an attorney are not considered evidence[,]" *K.S.*, 183 N.C. App. at 323, 646 S.E.2d at 545 (quotation and alteration omitted), and that no evidence regarding the indictments was introduced at the hearing. Assuming, *arguendo*, that her counsel did not stipulate to the existence of the indictments, however, we do not believe that the court's unsupported finding on this issue was necessary to its disposition. *In re T.M.*, 180 N.C. App. 539, 547, 638 S.E.2d 236, 240 (2006) ("[E]rroneous findings unnecessary to the determination do not constitute reversible error."). The court made the additional, uncontested finding that "[t]he suggestion that . . . [B.W.']s injuries were caused by someone other than either parent here today is not viable." Accordingly, because any error by the court was harmless, we overrule this assignment of error. *Id.*; *In re Beck*, 109 N.C. App. 539, 548, 428 S.E.2d 232, 238 (1993).

[2] Respondent challenges the following portion of dispositional finding number 35: "Placement with the relatives is not indicated due to the parents' and the grandparents' unwillingness to consider or explain the source of the [child's] injuries." She contends that "[t]he evidence does not show what the grandparents really thought about the source of B.W.'s injuries[,]" and that the grandmother's testimony evinced a "willing[ness] to consider a potential source of the injuries[.]" In a related claim, respondent asserts that the evidence did not support a portion of finding number 30—that placing B.W. in the home of his maternal grandparents would leave the grandparents "in the untenable position of having to exclude their daughter from their home for the next seventeen and a half years in order to provide any hope of safety to the child." Respondent argues that a placement with the grandparents was not shown to be "untenable[,]" inasmuch as the grandmother testified she was willing to keep B.W.'s parents away from the child and that she and her husband were otherwise prepared to care for their grandson.

We find sufficient competent evidence to support the court's finding that the grandparents were unwilling to acknowledge the nature

and source of B.W.'s injuries. The grandmother testified that she visited B.W. three to five times per week before he was taken into DSS custody and saw him two days before he was examined at Frye Medical Center on 10 May 2007. Other than a "little scratch on his leg" caused by a car seat, the grandmother claimed to have "never seen any injuries on B[.W.] None." She further claimed that the child "never acted like he had anything wrong with him" and displayed "no physical evidence" of abuse at any time. The grandmother had "no idea" how the child had sustained multiple bone fractures and "c[ould]not imagine" that respondent or the father had injured the child. When asked if she believed B.W. had experienced the injuries recorded in his medical records[,] the grandmother responded, "I'm not really sure. I—I was told so many different stories every time we would go to see him, . . . I don't know." Asked specifically if she believed the child had a fractured skull, broken leg, or broken ribs, the grandmother replied that she did not "know what to believe." Although the court did not hear separately from the grandfather, there is no indication that he held a view contrary to the grandmother's as to the child's injuries or respondent's responsibility therefor.

We further find competent evidence to support finding number 30 that the grandparents would be unlikely to deny respondent access to B.W., over time, if the child was placed in their home. The grandmother acknowledged that respondent and S.W. moved into her home after DSS took custody of B.W. and remained there until DSS required their departure as a condition of the grandparents' home study. As discussed above, the grandmother refused to credit the overwhelming medical evidence of B.W.'s injuries and insisted that the child had "never" shown any sign of injury or distress at the time DSS assumed custody. Although finding number 30 was predictive insofar as it assessed the "untenable" nature of a hypothetical placement with the grandparents, we cannot say it lacked evidentiary support. *Cf. In re McLean*, 135 N.C. App. 387, 396, 521 S.E.2d 121, 127 (1999) (noting that, when a newborn child is removed from the home for abuse or neglect, the court's assessment of the risk of future abuse of neglect "must of necessity be predictive in nature").

[3] Respondent next contests the court's finding number 34 that "[t]he injuries received by B[.W.] constitute aggravated factors as defined by N.C. Gen. Stat. [§] 7B-201." Respondent argues that the purported finding of fact is actually a conclusion of law. Moreover, she contends that B.W.'s injuries were not "chronic or

torturous," and thus did not satisfy the statutory standard for aggravated circumstances under N.C. Gen. Stat. § 7B-101(2). We note that the court's finding mistakenly refers to "factors[,]" rather than "circumstances[,]" as used in N.C. Gen. Stat. § 7B-101(2), and cites to an inapposite statute dealing with the court's jurisdiction, N.C. Gen. Stat. § 7B-201. In dispositional conclusion number 5, however, the court corrects these errors, stating, "[t]he injuries suffered by this child constitute aggravated circumstances as defined by N.C. Gen. Stat. [§] 7B-101(2)."

As a general rule, "any determination requiring the exercise of judgment . . . or the application of legal principles . . . is more properly classified a conclusion of law." *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (citations omitted). However, our appellate courts have repeatedly found a trial court's mis-classification of a conclusion of law as a finding of fact, or *vice versa*, to be "inconsequential." *In re R.A.H.*, 182 N.C. App. 52, 60, 641 S.E.2d 404, 409 (2007); *see also State ex rel. Utilities Comm v. Eddleman*, 320 N.C. 344, 352, 358 S.E.2d 339, 346 (1987) (holding that such "mislabeling is merely an inconvenience to the courts"). If a contested "finding" is more accurately characterized as a conclusion of law, we simply apply the appropriate standard of review and determine whether the remaining facts found by the court support the conclusion. *R.A.H.*, 182 N.C. App. at 60, 641 S.E.2d at 409 (quoting *In re M.R.D.C.*, 166 N.C. App. 693, 697, 603 S.E.2d 890, 893 (2004)). Here, the court's classification of finding number 34 is particularly inconsequential, inasmuch as it reiterated this finding as dispositional conclusion of law number 5.

The Juvenile Code defines an aggravated circumstance as "[a]ny circumstance attending to the commission of an act of abuse or neglect which increases its enormity or adds to its injurious consequences, including, but not limited to, abandonment, torture, chronic abuse, or sexual abuse." N.C. Gen. Stat. § 7B-101(2) (2007). The determination that a given set of facts meets a statutorily imposed standard is properly reviewed as a conclusion of law. We agree with the district court's conclusion that the serial infliction of multiple fractures of the skull, leg, and ribs upon a prematurely born and malnourished infant during his first eight weeks of life qualifies as "aggravated circumstances" under N.C. Gen. Stat. § 7B-101(2). Accordingly, we overrule respondent's assignment of error.

II

[4] Respondent next claims that the district court abused its discretion by failing to order a relative placement for the minor child with his maternal grandparents pursuant to the mandate of N.C. Gen. Stat. § 7B-903(a)(2)(c) (2007). We disagree.

The district court has broad discretion to fashion a disposition from the prescribed alternatives in N.C. Gen. Stat. § 7B-903(a), based upon the best interests of the child. *In re Pittman*, 149 N.C. App. 756, 766, 561 S.E.2d 560, 567, *disc. review denied*, 356 N.C. 163, 568 S.E.2d 608 (2002), *cert. denied*, 538 U.S. 982, 155 L. Ed. 2d 673 (2003). If the court elects to place the child outside the home, it must determine "whether a relative of the juvenile is willing and able to provide proper care and supervision of the juvenile in a safe home." N.C. Gen. Stat. § 7B-903(a)(2). Placement with a qualifying relative is required "unless the court finds that the placement is contrary to the best interests of the juvenile." *Id.*

We review a dispositional order only for abuse of discretion. *Pittman*, 149 N.C. App. at 766, 561 S.E.2d at 567. "An abuse of discretion occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision." *In re Robinson*, 151 N.C. App. 733, 737, 567 S.E.2d 227, 229 (2002) (citations and quotations omitted).

We find no abuse of discretion here. The district court's consideration of the maternal grandparents as a placement option for B.W. is reflected in the following findings:

> 30. The parents' unwillingness to acknowledge the nature and extent of B[.W.]'s injuries, as well as their lack of an emotioned response, together with an unwillingness of either to address the causes of B[.W.]'s multiple fracture history at 52 days of age render any placement with them not viable and places the maternal grandparents in the untenable position of having [to] exclude their daughter from their home for the next seventeen and a half years in order to provide any hope of safety to this child.
>
> . . .
>
> 35. Placement with the relatives is not indicated due to the parents' and the grandparents unwillingness to consider or explain the source of the injuries.

> 36. The [m]aternal grandfather underwent inpatient treatment for alcoholism in December 2006 and January 2007 and was then recommended to attend intensive outpatient substance abuse treatment.

The court expressly concluded that "[p]lacement of the minor child with a relative is contrary to the best interest of the minor child." Inasmuch as "the child's interest in being protected from abuse and neglect is paramount[,]" *Pittman*, 149 N.C. App. at 761, 561 S.E.2d at 564, we cannot say that the court's concerns about a placement with the grandparents were manifestly unreasonable.

Respondent suggests that the court's findings are insufficient to explain its disposition. Respondent's claim that "the court did not find that the grandparents were unwilling to consider or explain the source of the child's injuries" is simply contradicted by finding number 35, which cites "the grandparents' unwillingness to consider or explain the source of the [child's] injuries." We note that a "court is not required to make findings of fact on all the evidence presented," but need only "make brief, pertinent and definite findings and conclusions about the matters in issue[.]" *In re J.A.A.*, 175 N.C. App. 66, 75, 623 S.E.2d 45, 51 (2005) (citation omitted). The findings in the instant case reflect that the court complied with N.C. Gen. Stat. § 7B-903(a) by properly considering and rejecting a placement with the grandparents. This assignment of error is overruled.

III

[5] In her final assignment of error, respondent challenges the court's decision to cease all efforts to reunify her with B.W. Respondent argues the court's decision was "premature and unecessary[,]" in view of the limited information obtained by Dr. Kilpatrick from his single interview with the parents. Given the possibility that she would prove amenable to treatment and would come forward with information about B.W.'s injuries, respondent contends the court mistakenly found additional efforts toward reunification to be futile.

Section 7B-507(b) of the Juvenile Code provides as follows:

> In any order placing a juvenile in the custody or placement responsibility of a county department of social services, whether an order for continued nonsecure custody, a dispositional order, or a review order, the court may direct that reasonable efforts to eliminate the need for placement of the juvenile shall

> not be required or shall cease if the court makes written findings of fact that:
>
> (1) Such efforts clearly would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time; [or]
>
> (2) A court of competent jurisdiction has determined that the parent has subjected the child to aggravated circumstances as defined in G.S. 7B-101[.]

N.C. Gen. Stat. § 7B-507(b)(1)-(2) (2007). "This Court reviews an order that ceases reunification efforts to determine whether the trial court made appropriate findings, whether the findings are based upon credible evidence, whether the findings of fact support the trial court's conclusions, and whether the trial court abused its discretion with respect to disposition." *In re C.M.*, 183 N.C. App. 207, 213, 644 S.E.2d 588, 594 (2007).

In support of its decision to cease reunification efforts, the court concluded both that "[f]urther efforts to reunify the child with either parent would clearly be futile and inconsistent with [his] need for a safe permanent home within a reasonable period of time[,]" and that "[t]he injuries suffered by this child constitute aggravated circumstances as defined by N.C. Gen. Stat. § 7B-101(2)." Although either of these conclusions is sufficient grounds to support a cessation of reunification efforts under N.C. Gen. Stat. § 7B-507(b), we have already herein upheld the trial court's determination that B.W.'s injuries constituted an "aggravated circumstance" under N.C. Gen. Stat. § 7B-101(2). Therefore, we now hold that the court's decision to cease reunification efforts was supported by the necessary finding under N.C. Gen. Stat. § 7B-507(b)(2). Contrary to respondent's unsupported assertion, nothing in the statute requires "*another* court 'of competent jurisdiction' " to find aggravated circumstances before a court may cease reunification efforts pursuant to N.C. Gen. Stat. § 7B-507(b)(2) (emphasis added).[2]

The evidence before the district court showed that respondent had displayed no concern for B.W. and no inclination to come to

2. "In any order placing a juvenile in the custody or placement responsibility of a county department of social services, whether an order for continued nonsecure custody, a dispositional order, or a review order, the court may direct that reasonable efforts to eliminate the need for placement of the juvenile shall not be required or shall cease if the court makes written findings of fact that: . . . (2) A court of competent jurisdiction has determined that the parent has subjected the child to aggravated circumstances as defined in G.S. 7B-101[.]" N.C. Gen. Stat. § 7B-507(b)(2) (2007).

terms with the gravity of the abuse he suffered while in her care. Her "defensive" and "faking good" responses during her interview with Dr. Kilpatrick precluded any meaningful psychological evaluation and evinced no inclination toward treatment. Respondent also chose to remain silent at the dispositional hearing. *Pittman*, 149 N.C. App. at 760, 561 S.E.2d at 564 (holding that a parent enjoys no Fifth Amendment privilege in a juvenile proceeding). Under these circumstances, we find no abuse of discretion by the court in ceasing reunification efforts. To the extent that respondent separately excepts to the decision to cease her visitation with the child, we again find no abuse of the court's discretion.

For the foregoing reasons, the order of the trial court is affirmed.

Affirmed.

Judges WYNN and McCULLOUGH concur.

STATE OF NORTH CAROLINA v. LAMAR DAMEIAN BASS

No. COA07-604

(Filed 6 May 2008)

1. Homicide— first-degree murder—premeditation and deliberation—evidence sufficient

Defendant's statements and conduct before and after a shooting, ill will between the parties, and the nature and number of the victim's wounds provided sufficient evidence of premeditation and deliberation in a first-degree murder prosecution involving teenagers on a bus and in a shopping mall.

2. Homicide— first-degree murder—no instruction on lesser offense—no plain error

No instruction on second-degree murder was warranted, and there was no plain error in not giving that instruction, where defendant did not present evidence to negate the elements of first-degree murder. The victim's verbal reaction to defendant's comment about his sister does not negate those elements; moreover, defendant shot the victim in the back.

3. Evidence— hearsay—other evidence to same effect

There was no prejudice in a first-degree murder prosecution in the admission of a declarant's out-of-court hearsay statement. There was other competent testimony to same effect.

Appeal by defendant from judgment entered 25 January 2007 by Judge Henry W. Hight, Jr. in Durham County Superior Court. Heard in the Court of Appeals 28 November 2007.

Attorney General Roy Cooper, by Assistant Attorney General C. Norman Young, Jr., for the State.

Paul F. Herzog, for defendant-appellant.

CALABRIA, Judge.

Lamar Dameian Bass ("defendant") appeals from a judgment entered upon a jury verdict finding him guilty of first-degree murder. We find no prejudicial error.

At trial, the State presented evidence showing that several people boarded a bus in downtown Durham, North Carolina on 26 December 2005. Brittany Johnson ("Johnson"), then fifteen years old, was already seated when defendant boarded the bus then sat down at the back of the bus near Johnson. Lazarren Tyqwan McClean ("the victim"), his brother David Barnhill, Jr. ("Barnhill"), the victim's younger sister, Shenalda McClean ("Shenalda"), then fourteen years old, and some friends also boarded the bus. Shenalda and her friend sat in two empty seats at the front of the bus. Johnson testified the bus was packed and defendant said "there's some seats back here," and told the victim "as long as we separate you cool." Some of the girls on the bus knew Shenalda's brother and his friends and offered to give up their seats so the girls could sit on their laps. A boy who sat with defendant said "there ain't no room on the bus, you all are going to have to stand up." The victim sat near the middle of the bus in front of defendant and Johnson. The victim did not move to the back of the bus, but remained in his seat.

Johnson observed an imprint of a gun in the defendant's pants pocket and after defense counsel's objection was overruled by the trial court, Johnson testified she heard someone say "Lamar got that burner." (The word "burner" is slang for a gun.) An unidentified boy on the bus wearing a yellowish gold jacket ("boy with the gold jacket") and sitting next to the defendant said "my boy got

a gun." Johnson said defendant smiled and said "I'm not going to shoot nobody."

The bus arrived at Northgate Mall in Durham, and stopped at the bus stop closest to Hechts department store ("Hechts"). The victim and his companions exited the bus followed by defendant and his friends. Defendant remarked to his friends, "I'm going to have to snatch her up," referring to the victim's sister. The victim replied, "ain't nobody going to snatch my sister up." When Shenalda and the victim exited the bus, the boy with the gold jacket said "we['d] like to snatch the shorty in the white coat." (The word "shorty" is slang for a girl.) Shenalda was wearing a white coat. Defendant said, "yeah, we'd like to snatch the shorty in the white coat." The victim replied "you all ain't about [to] snatch the shorty in the white coat because that's my little sister."

Shenalda testified that the boy in the gold jacket replied "we was just playing." Shenalda stated the victim answered "if you're just playing then why would you say something like that . . . because stuff can get serious around here." Shenalda testified that "[defendant] and some other boys that [were] behind [the boy] in the yellowish gold[] coat . . . was saying[,] then what's popping. Popping meaning like what you want to do." The victim turned around and started walking to Northgate Mall when the shooting started.

Quinzell Williamson ("Williamson") testified he was also on the bus. After he exited and was walking to the mall, he was shot in the back. Williamson was taken to the hospital and treated for his injuries.

Johnson saw the victim run towards Hechts and defendant ran in the opposite direction around Hechts. Johnson did not see the gun or the shooting, but described what she saw and heard. She found the victim lying at the entrance to Hechts, saw blood running down his chest into his boxers and she heard him gasping for breath.

Barnhill testified some boys said they would "snatch" the "shorty in the white coat" and the victim said "you all ain't going to touch my sister." The victim turned around and started walking to the mall. Barnhill heard gunshots, ducked to the side, and saw his brother run in front of him. Barnhill saw the defendant pointing a gun behind his brother and shooting.

Dr. Deborah Radisch, an associate chief medical examiner, performed an autopsy on the victim and determined the cause of death

was a gunshot wound to "the left posterior chest or back." The defendant was charged with first-degree murder and assault with a deadly weapon inflicting serious injury.

The trial was held in Durham County Superior Court on 22 January 2007, before the Honorable Henry W. Hight, Jr. At the close of the State's evidence, defendant moved to dismiss for insufficient evidence. The trial court denied the motion. Defendant did not present any evidence at trial. At the close of all the evidence, defendant moved to dismiss for insufficient evidence and the trial court denied the motion.

On 25 January 2007, the jury returned a verdict finding defendant guilty of first-degree murder of the victim and not guilty of assault with a deadly weapon inflicting serious injury on Williamson. Defendant was sentenced to life imprisonment without parole in the North Carolina Department of Correction. Defendant appeals.

I. Insufficient Evidence

[1] Defendant contends the trial court erred in denying his motion to dismiss at the close of all the evidence because the State failed to present sufficient evidence to support a charge of first-degree murder. We disagree.

The standard of review on a motion to dismiss for insufficient evidence is whether there is substantial evidence of each element of the offense charged and whether the defendant is the perpetrator. *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). Substantial evidence is relevant evidence 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 reviewing court considers the evidence in the light most favorable to the State, giving the State every reasonable inference arising from the evidence. *Powell*, 299 N.C. at 99, 261 S.E.2d at 117.

"First degree murder consists of the unlawful killing of another with malice, premeditation and deliberation." *State v. Williams*, 144 N.C. App. 526, 529, 548 S.E.2d 802, 805 (2001) (citation omitted). "Premeditation means that the defendant thought about the killing for some length of time, however short, before he killed." *State v. Fields*, 315 N.C. 191, 200, 337 S.E.2d 518, 524 (1985) (internal quotations omitted). "Deliberation means that the intent to kill was formulated in a cool state of blood, one not under the influence of a violent

passion suddenly aroused by some lawful or just cause or legal provocation." *Id.* Cool state of blood means that the defendant's anger or emotion was not "such as to overcome the defendant's reason." *State v. Elliott*, 344 N.C. 242, 267, 475 S.E.2d 202, 212 (1996).

This Court in *State v. Williams*, outlined a "non-exclusive list of factors to be considered in determining whether the defendant committed the crime after premeditation and deliberation . . . ." *Williams*, 144 N.C. App. at 530, 548 S.E.2d at 805 (citing *State v. Hamlet*, 312 N.C. 162, 170, 321 S.E.2d 837, 843 (1984)). Those factors are: (1) lack of provocation on the part of the deceased; (2) the defendant's conduct and statements before and after the killing; (3) the defendant's threats and declarations before and during the course of the occurrence giving rise to the death of the deceased; (4) ill will or previous difficulty between the parties; (5) the dealing of lethal blows after the deceased was rendered helpless; and (6) evidence that the killing was done in a brutal manner. *Id.* The nature and number of the victim's wounds is also "a circumstance from which an inference of premeditation and deliberation can be drawn." *State v. Hunt*, 330 N.C. 425, 428, 410 S.E.2d 478, 481 (1991) (citing *State v. Bullard*, 312 N.C. 129, 161, 322 S.E.2d 370, 388 (1984)).

The defendant asserts this case is controlled by *State v. Corn*, 303 N.C. 293, 278 S.E.2d 221 (1981) and *State v. Williams*, 144 N.C. App. 526, 548 S.E.2d 802 (2001). In *Corn*, the defendant was lying on his sofa in his home, when the victim entered his home, sat beside him and began to argue with him. *Corn*, 303 N.C. at 295, 278 S.E.2d at 222. Defendant testified the victim grabbed him, began slinging him around, tried to hit him and accused him of being a homosexual. *Id.* Defendant pulled a .22 caliber rifle from a crack between the sofa cushion and the back of the sofa and shot the victim eight to ten times in the chest. *Id.* After the shooting, defendant called the police department and waited for law enforcement officers to arrive. *Id.* Defendant was convicted of first-degree murder and appealed, arguing lack of evidence to support premeditation and deliberation. *Id.*, 303 N.C. at 296, 278 S.E.2d at 223. The Supreme Court remanded the case for a new trial, noting that

> [t]he shooting was a sudden event, apparently brought on by some provocation on the part of the deceased. The evidence is uncontroverted that [the victim] entered defendant's home in a highly intoxicated state, approached the sofa on which defendant was lying, and insulted defendant by a statement which

> caused the defendant to reply "you son-of-a-bitch, don't accuse me of that."

Id., 303 N.C. at 297-98, 278 S.E.2d 223-24.

In *Williams*, the victim was at a dance club when two patrons of the club started fighting. *Williams*, 144 N.C. App. at 527, 548 S.E.2d at 803. The fight ended and the club closed. *Id.* Soon thereafter, the patrons started fighting again and a crowd gathered outside the club to watch the fight. *Id.* Defendant and another man pushed people away to allow the two patrons to continue fighting. *Id.* Defendant pushed the victim back and "told him to allow a 'one on one fight.' " *Id.* The victim punched the defendant in the jaw, defendant pulled a handgun and fired a shot which hit the victim in the neck and killed him. *Id.*, 144 N.C. App. at 527, 548 S.E.2d at 804. Although defendant left the scene, the next day he surrendered to the sheriff's department. *Id.* Defendant was convicted of first-degree murder and appealed. *Id.*, 144 N.C. App. at 526, 548 S.E.2d at 803. This Court held there was insufficient evidence to support premeditation and deliberation because there was no evidence the victim and defendant knew each other before the incident, defendant had not made threatening remarks to the victim, defendant was provoked by the victim's assault, the shooting occurred immediately after the victim's assault, and defendant turned himself in the next day. *Id.*, 144 N.C. App. at 530-31, 548 S.E.2d at 805.

In *State v. Hunt*, the Supreme Court held there was sufficient evidence to support premeditation and deliberation, 330 N.C. at 429, 410 S.E.2d at 481. In *Hunt*, the defendant and the victim (the "deceased") were on a hill near a canal looking for an eight-ball of cocaine hidden near a tree. *Id.*, 330 N.C. at 425-26, 410 S.E.2d at 479. After they were unable to locate the cocaine, the deceased became angry, called the defendant names and pushed him down the hill. *Id.* When the deceased started walking up the hill, the defendant took his pistol out of his pocket and shot the deceased three times. *Id.* There was evidence that the deceased's actions angered the defendant until "he formed the intention to kill the deceased and carried out this plan. The deceased was moving away from the defendant and there was sufficient time for the defendant to weigh the consequences of his act." *Id.*, 330 N.C. at 429, 410 S.E.2d at 481.

In the case *sub judice*, viewed in the light most favorable to the State, there is sufficient evidence to support the elements of premeditation and deliberation in the form of defendant's statements and

conduct before and after the killing, ill will between the parties, and the nature and number of the victim's wounds. *Hunt*, 330 N.C. at 428, 410 S.E.2d at 481.

Unlike the defendants in *Williams* and *Corn*, in the instant case there was sufficient time for the defendant to contemplate his actions. Johnson testified she saw the imprint of a gun in defendant's pocket on the bus, the defendant told Johnson he was not going to "shoot nobody." Shenalda testified another boy on the bus told her the defendant had a gun. Evidence was submitted that defendant told the victim "as long as we separate you cool." A rational juror could infer that the defendant's remark was a threat. Three witnesses testified that the defendant made a remark about "snatching" the victim's sister. The victim responded to the remark, then turned around and started walking to the mall. Barnhill and Shenalda testified the victim had his back turned away from the defendant when defendant started shooting. Defendant did not surrender to law enforcement but was arrested. In addition, evidence was presented that the victim was shot twice in the back of the chest and in the back left shoulder.

Contrary to the defendant's characterization that the victim "initiated a quarrel by confronting Lamar Bass and his friends," viewed in the light most favorable to the State, the victim's response to defendant's comment about "snatching" his sister, does not rise to the level of provocation such as the physical altercations that provoked the defendants in *Williams* and *Corn*. Furthermore, just as the defendant in *Hunt* shot the victim in the back, the victim here had his back turned when defendant fired his weapon, giving defendant adequate time to "weigh the consequences of his act." *Hunt*, 330 N.C. at 429, 410 S.E.2d at 481. We conclude no error.

II. Jury Instructions on Second-Degree Murder—Plain Error

[2] Defendant next contends the trial court's failure to instruct the jury on the charge of second-degree murder as a lesser included offense of first-degree murder was error. To the extent this error was not preserved, defendant asserts plain error. Defense counsel did not request an instruction from the trial court on the lesser included offense of second-degree murder, therefore we review this error under a plain error analysis. *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983).

Plain error is a fundamental error, so lacking in its elements that justice cannot be done. *State v. Murray*, 310 N.C. 541, 546, 313 S.E.2d

523, 527-28 (1984), *disapproved on other grounds by State v. White*, 322 N.C. 506, 369 S.E.2d 813 (1988) (citations and internal quotations omitted). Plain error amounts to a denial of a fundamental right of the accused such as denial of a fair trial or the error seriously impacted the fairness, integrity or public reputation of the judicial proceedings, or where "it can fairly be said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty." *Id.*

"[A] [d]efendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury to rationally find him guilty of the lesser offense and acquit him of the greater." *State v. Leazer*, 353 N.C. 234, 237, 539 S.E.2d 922, 924 (2000) (internal quotations omitted) (citing *Keeble v. United States*, 412 U.S. 205, 208, 36 L. Ed. 2d 844, 847 (1973)). "Where there is no evidence to negate [the elements of the crime charged] other than defendant's denial that he committed the offense, the trial judge should properly exclude from jury consideration the possibility of a conviction of [a lesser included offense.]" *State v. Reid*, 175 N.C. App. 613, 623, 625 S.E.2d 575, 584 (2006) (citations and internal quotations omitted); *see also State v. Locklear*, 331 N.C. 239, 247, 415 S.E.2d 726, 730 (1992) (where State's evidence supported each element of first-degree murder, no instruction on second-degree murder was warranted).

Defendant contends Shenalda's testimony establishes that the victim provoked the defendant. Shenalda testified that after the defendant said "yeah, we'd like to snatch the shorty in the white coat," the victim "threatened them like, you all ain't about to snatch the shorty in the white coat because that's my little sister." We disagree.

The victim's verbal response is unlike the provocation in *Williams* and *Corn*, where the victims in those cases reacted with physical violence. Furthermore, the witness' characterization of the event, "threatened them like," was not supported by any other evidence that the victim used violence or threatened violence in relation to his reactive statement regarding his sister. Given the encounter between the defendant and victim on the bus and defendant's comment to the victim "as long as we separate we cool," the victim's verbal reaction to defendant's comment about his sister does not negate the elements of premeditation and deliberation. In addition, defendant shot the victim after the victim had his back turned. "Premeditation means that the defendant thought about the killing for some length of time, however short, before he killed." *Fields*, 315 N.C. at 200, 337 S.E.2d at 524 (quotation and citation omitted).

Without evidence to negate the elements of first-degree murder, no instruction on second-degree murder was warranted.

Defendant also contends that the fact the jury took two days to deliberate and a juror's comment that "it took us a long time" to arrive at a verdict, "cries out" for a second-degree murder instruction. We disagree.

The standard of review is whether a jury could rationally find the defendant guilty of the lesser offense. *Leazer*, *supra*. We conclude that the evidence supports the elements of first-degree murder and the defendant did not present evidence to negate first-degree murder. Therefore, no instruction on second-degree murder is warranted. This assignment of error is overruled.

III. Admissibility of Evidence

[3] Next defendant asserts the trial court committed prejudicial error by admitting over the defendant's hearsay objection, two statements that were out-of-court statements in violation of N.C. Gen. Stat. § 8C-1, Rules 802 & 803 and N.C. Gen. Stat. § 15A-1442(4)(c) (2007). We disagree.

The standard of review on admissibility of evidence is abuse of discretion. *State v. Wood*, 185 N.C. App. 227, 231-32, 647 S.E.2d 679, 684, *rev. denied by*, 361 N.C. 703, 655 S.E.2d 402 (2007) ("[O]n appeal, the standard of review of a trial court's decision to exclude or admit evidence is that of an abuse of discretion.") (citation and internal quotation omitted). "A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Hayes*, 314 N.C. 460, 471, 334 S.E.2d 741, 747 (1985) (citation omitted).

Defendant asserts he properly objected to the admission of Johnson's testimony regarding a declarant's out-of-court statement and preserved this error for prejudicial error review. We agree. Defendant timely objected to the testimony, the trial court ruled on defendant's objection and defendant excepted from the trial court's ruling. N.C.R. App. P. Rule 10 (2007). We also note defendant properly objected to admission of Shenalda's testimony that a boy said on the bus, "my boy got a gun."

North Carolina Rules of Evidence 802 provides that "[h]earsay is not admissible except as provided by statute or by these rules." N.C.

Gen. Stat. § 8C-1, Rule 802. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801. The State does not contest that the statements in question are hearsay. Therefore, we examine whether the trial court abused its discretion in admitting the statements over defendant's objection.

N.C. Gen. Stat. § 8C-1, Rule 803(1) & (2) provide that

> [t]he following are not excluded by the hearsay rule, even though the declarant is available as a witness: (1) Present Sense Impression.—A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter. (2) Excited Utterance.—A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

N.C. Gen. Stat. § 8C-1, Rule 803(1-2) (2007).

Defendant contends Johnson's testimony that she heard a boy on the bus say, "Lamar got that burner" and Shenalda's testimony that she heard an unknown declarant on the bus state, "my boy got a gun" while gesturing to the defendant, are inadmissible under either the present sense impression or under the excited utterance exceptions. In addition, defendant argues the record is devoid of evidence to support the admission of the hearsay statements.

Even if we assume that the State presented no evidence to support admission of the hearsay statements under either the present sense impression or excited utterance exceptions, and the admission of the hearsay statements was an abuse of discretion, we find no prejudicial error. N.C. Gen. Stat. § 15A-1442(4)(c). In this case, other evidence established that defendant was armed while on the bus. First, Johnson testified she saw an imprint of a gun in defendant's pocket while on the bus. Second, Johnson testified defendant told her, "I'm not going to shoot nobody." Defendant does not allege error in admitting this statement. Third, David Barnhill testified that after they exited the bus, he saw defendant point his weapon and shoot it in the direction of the victim. Since other testimony establishes the fact that defendant was armed, the admission of the hearsay statements did not prejudice the defendant.

No prejudicial error.

Judges HUNTER and STROUD concur.

BRUCE BARBEE, PLAINTIFF v. JOHN LINWOOD JOHNSON AND WIFE BARBARA H. JOHNSON, DEFENDANTS

No. COA07-510

(Filed 6 May 2008)

1. Rules of Civil Procedure— Rule 12(b)(6)—treated as summary judgment

The trial court properly treated a motion to dismiss under Rule 12(b)(6) as a motion for summary judgment where it considered matters outside the pleadings.

2. Real Property— competency to sign lease-purchase agreement—summary judgment

There was not a material issue of fact concerning the mental competency of the signatory of a lease when she signed the lease, and the trial court did not err by granting defendants' motion for summary judgment. Depositions showed that the person signing the lease fluctuated between lucidity and confusion, but there was no indication that she was not lucid or lacked the mental capacity to appreciate what she was doing in the forty-five minutes leading up to the signing of the lease.

3. Real Property— consent to lease—ratification—summary judgment

There was a genuine issue of fact as to whether plaintiff knew that monthly payments received from defendants were made in accordance with an agreement in a lease, and the trial court erred by entering summary judgment for defendant. Although there was a genuine issue about whether plaintiff authorized his wife to sign his name to a lease, there was also an issue of ratification.

4. Real Property— lease—undue influence in obtaining signature

There was a genuine issue of fact as to whether defendants exercised undue influence in obtaining a signature on a lease, and the trial court should not have granted summary judgment for

defendants. It is clear that at least three of the seven factors indicative of undue influence exist in this case, as well as the issue of consideration for the lease's option to purchase.

Appeal by plaintiff from order entered 18 October 2006 by Judge W. Allen Cobb, Jr., in Onslow County Superior Court. Heard in the Court of Appeals 14 November 2007.

Collins and Maready, P.A., by George L. Collins, for plaintiff-appellant.

Mast, Schulz, Mast, Johnson & Wells, P.A., by Bradley N. Schulz, and Armstrong & Armstrong, P.A., by L. Lamar Armstrong, Jr., for defendant-appellees.

BRYANT, Judge.

Bruce Barbee (plaintiff) appeals from an order entered 18 October 2006 granting John Linwood and Barbara H. Johnson's (defendants') motion to dismiss and motion for summary judgment. We reverse the trial court's order.

Plaintiff and Kathryn Barbee (deceased) owned vacation property on Topsail Island, North Carolina. On 3 April 2004, plaintiff visited Kathryn at Britthaven Rest Home in Jacksonville, North Carolina, where she was recovering from a hip fracture. The same day, defendants, defendants' friend Sharon Stanley, and Ms. Bobby Allen, a Johnston County notary public, came to the rest home to bring a Lease with an Option to Purchase (Lease) the Topsail property. Defendants were long time friends of plaintiff and Kathryn. The lease provided for a five-year rental period, during which defendants would pay $300.00 per month, and an option to purchase plaintiff and Kathryn's Topsail property by 31 January 2009 for $150,000.00. Kathryn, plaintiff, defendants, Ms. Stanley, and Ms. Allen engaged in discussion for approximately an hour before Kathryn signed her name to the Lease and, because plaintiff was unable to see, signed plaintiff's name as well. The document was signed in the presence of defendants, Ms. Stanley, and Ms. Allen.

On 6 December 2004, Kathryn died, and plaintiff inherited her estate. On 29 April 2005, plaintiff, in Onslow County District Court, filed a complaint alleging defendants leased his property pursuant to an oral agreement that allowed plaintiff to terminate defendants' lease "at will." Plaintiff also alleged that defendants failed to vacate

his property upon his demand. In answer, defendants alleged they were in possession of plaintiff's land pursuant to the valid terms of the Lease, and plaintiff's demand was wrongful. On 28 June 2005, the trial court, by consent of the parties, granted defendants' motion to transfer the case to superior court. On 2 June 2006, plaintiff filed an amended complaint acknowledging defendants' allegation of a valid Lease with an Option to Purchase but argued defendants failed to provide consideration for the option, committed overreaching, obtained Kathyrn Barbee's signature by undue influence, and breached a fiduciary duty. Plaintiff also alleged Kathryn lacked the mental capacity to enter into an agreement.

On 3 August 2006, defendants answered the amended complaint and simultaneously filed a motion to dismiss under North Carolina Civil Procedure Rule 12(b)(6). Defendants then filed a motion for summary judgment along with an affidavit from a registered nurse summarizing Kathryn's medical history, and deposition transcripts from Sharon Stanley, Bobby Allen, Barbara Johnson and Johnny Johnson. In response, plaintiff filed affidavits from, among others, Kathryn's treating physician, Dr. Ojebuoboh, and Paul Bryan, a family friend.

In an order dated 18 October 2006, the Onslow County Superior Court allowed defendants' motion for summary judgment and defendants' motion to dismiss. From that order, plaintiff appeals.

Plaintiff makes four arguments on appeal: (I) the trial court erred in simultaneously granting defendants' motion to dismiss and defendants' motion for summary judgment; and the trial court erred in granting summary judgment where genuine issues of material fact existed as to whether (II) Kathryn was competent to sign the agreement, (III) Kathryn was authorized to sign the Lease with an Option to Purchase for plaintiff, and (IV) defendants exercised undue influence over plaintiff and Kathryn.

I

[1] Plaintiff first questions whether the trial court erred in simultaneously granting defendants' motion to dismiss and defendants' motion for summary judgment. Plaintiff argues that simultaneously granting defendants' motion to dismiss pursuant to North Carolina Rule of Civil Procedure 12(b)(6) and defendants' motion for summary judgment is contradictory. Where a complaint fails to state a claim upon which relief can be granted there is no need to address the ques-

tion of summary judgment, and where a trial court reaches the question of summary judgment, the trial court has determined the complaint survives a 12(b)(6) motion.

Ordinarily, on a Rule 12(b)(6) motion, if the trial court considers matters outside the pleading, "the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56[.]" N.C. Gen. Stat. § 1A-1, Rule 12(b); *see Industries, Inc. v. Construction Co.*, 42 N.C. App. 259, 262-63, 257 S.E.2d 50, 53 (1979) ("when outside matter is presented to and not excluded by the court on a motion under . . . Rule 12(b)(6) . . ., it should be treated as one for summary judgment under Rule 56").

Here, the trial court stated that

> [a]fter reviewing the pleadings, the file, affidavits submitted and hearing arguments of counsel, it appears to the Court that there is no genuine issue of material fact and that Defendant's Motion for Summary Judgment should be allowed; and, it further appearing to the Court that the Defendant's Motion to Dismiss should be allowed.

Because the trial court clearly considered matters outside the pleadings, we hold the trial court properly treated defendants' Rule 12(b)(6) motion to dismiss as a motion for summary judgment. Accordingly, this assignment of error is overruled.

II

[2] Plaintiff next questions whether the trial court erred in granting defendants' motion for summary judgment arguing there remains a genuine issue of material fact as to whether Kathryn was mentally competent to contract when she signed the Lease. We disagree.

We review a trial court order allowing summary judgment de novo. *Litvak v. Smith*, 180 N.C. App. 202, 206, 636 S.E.2d 327, 329 (2006). Summary judgment shall be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with 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). As a general principle, summary judgment is a drastic remedy which must be used cautiously so that no party is deprived of trial on a disputed factual issue. *Billings v. Harris Co.*, 27 N.C. App. 689, 696, 220 S.E.2d 361, 367 (1975), *aff'd*, 290 N.C. 502, 226 S.E.2d 321 (1976). The moving party

bears the burden of establishing the lack of a triable issue of fact. *Pridgen v. Hughes*, 9 N.C. App. 635, 639, 177 S.E.2d 425, 428 (1970). But, the motion must be denied where the non-moving party shows an actual dispute as to one or more material issues. *Page v. Sloan*, 281 N.C. 697, 705, 190 S.E.2d 189, 194 (1972).

> It has been said that an issue is material if the facts alleged are such as to constitute a legal defense or are of such nature as to affect the result of the action, or if the resolution of the issue is so essential that the party against whom it is resolved may not prevail.

Kessing v. Mortgage Corp., 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971). And, "[e]vidence presented . . . is viewed in the light most favorable to the non-movant." *Summey v. Baker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003) (citation omitted).

Where the issue is competency and the mental capacity required to enter into contractual agreements, this Court has stated the following standard:

> [A] person has mental capacity sufficient to contract if he knows what he is about, and that the measure of capacity is the ability to understand the nature of the act in which he is engaged and its scope and effect, or its nature and consequences, not that he should be able to act wisely or discreetly, nor to drive a good bargain, but that he should be in such possession of his faculties as to enable him to know at least what he is doing and to contract understandingly.

Ridings v. Ridings, 55 N.C. App. 630, 633, 286 S.E.2d 614, 616 (1982) (citing *Sprinkle v. Wellborn*, 140 N.C. 163, 181, 52 S.E. 666, 672 (1905)) (internal citations omitted). "Evidence of mental condition before and after the critical time is admissible, provided it is not too remote to justify an inference that the same condition existed at the latter time." *L. Richardson Mem'l Hosp. v. Allen*, 72 N.C. App. 499, 502, 325 S.E.2d 40, 43 (1985) (citation and quotations omitted). "Whether or not such evidence is too remote depends on the circumstances of the case interpreted by the rule of reason and common sense." *Matthews v. James*, 88 N.C. App. 32, 40, 362 S.E.2d 594, 600 (1987) (citations and internal quotations omitted).

Here, Dr. Ojebuoboh, Kathryn's authorized treating physician at Britthaven, testified during his deposition that Kathryn's mental

function tended to "fluctuate." "[S]ometimes she [was] lucid. . . . [S]ometimes she[] [was] very confused . . . ."

While Kathryn recuperated at Britthaven, Paul Bryan and his wife shuttled plaintiff to and from the rest home. In his deposition, Bryan testified that he observed Kathryn every day during her stay at Britthaven. Bryan testified that Kathryn "was in and out in her mind at times." At the time she was discharged on 6 April 2004—just three days after signing the Lease with an Option to Purchase, Bryan expressed his opinion to plaintiff that Kathryn should not be discharged. However, Bryan was not present at or near the time Kathryn signed the Lease.

Bobby Allen, the notary who certified Kathryn's signature, testified during her deposition that she spoke to Kathryn for approximately forty-five minutes prior to Kathryn signing the Lease. According to Allen, Kathryn "talked about her school years, and about what she had done in her lifetime." Allen further testified that she had no concern that Kathryn failed to appreciate what she was doing. Allen "felt comfortable about signing the papers."

These depositions tend to show that Dr. Ojebuohoh and Paul Bryan, over the course of Kathryn's stay at Britthaven, observed Kathryn fluctuate between lucidity and confusion. But, on 3 April 2004, specifically in the forty-five minutes leading up to the moment Kathryn signed the Lease, there was no indication Kathryn was not lucid or lacked the mental capacity to appreciate what she was doing.

Thus, we hold there is no genuine issue as to Kathryn's mental competence at the time she signed the Lease. Accordingly, plaintiff's assignment of error is overruled.

III

[3] Next, plaintiff questions whether the trial court erred by entering summary judgment, arguing there remained a genuine issue of material fact as to whether Kathryn was authorized by plaintiff to sign the Lease on his behalf. We agree.

Plaintiff asserts that because of blindness he was unable to see the document signed 3 April 2005, did not authorize Kathryn to sign for him, and never knew the contents of the document until some point subsequent to his wife's death. Plaintiff further argues that the requirements under North Carolina General Statute 10B-20(e) for a designee to sign his name were not met.

"To form a valid contract there must be an offer and an acceptance, supported by adequate consideration." *George E. Shepard, Jr., Inc. v. Kim, Inc.*, 52 N.C. App. 700, 704, 279 S.E.2d 858, 861 (1981). "When there has been no meeting of the minds on the essentials of an agreement, no contract results." *Creech v. Melnik*, 347 N.C. 520, 527, 495 S.E.2d 907, 912 (1998).

On 3 April 2004, defendants presented to plaintiff and Kathryn a Lease. Defendant Barbara Johnson, in her deposition, testified that "Mrs. Barbee took the Lease Option and the Memorandum and she read it to [plaintiff]." And, after reviewing the agreement plaintiff said, "Kathryn, you sign for me. You always do." After which, plaintiff informed the notary present that Kathryn always signed for him "because he couldn't see."

Plaintiff, in his amended complaint, affidavit, and deposition, averred and testified that he "did not authorize . . . [his] wife to sign a lease and purchase option for . . . [him] and never knew the contents of the document . . . [defendants] contend was signed on . . . [3 April 2004] until sometime in 2005 subsequent to . . . [Kathryn's] death." Further, plaintiff argues that the signature of his name on the Lease was not properly notarized and could not support the validity of the contract.

Under North Carolina General Statute 10B-20(e)

> If a principal is physically unable to sign or make a mark on a record presented for notarization, that principal may designate another person as his or her designee, who shall be a disinterested party, to sign on the principal's behalf pursuant to the following procedure:
>
> (1) The principal directs the designee to sign the record in the presence of the notary and two witnesses unaffected by the record;
>
> (2) The designee signs the principal's name in the presence of the principal, the notary, and the two witnesses;
>
> (3) Both witnesses sign their own names to the record near the principal's signature;
>
> (4) The notary writes below the principal's signature: "Signature affixed by designee in the presence of (names and addresses of principal and witnesses)"; and

(5) The notary notarizes the signature through an acknowledgment, oath or affirmation, jurat, or verification or proof.

N.C. Gen. Stat. § 10B-20(e) (2004).

While the record evidence consistently supports the argument another person made plaintiff's signature on the Lease, there is no evidence the signature was witnessed by two disinterested persons distinct from the notary herself. As there is insufficient evidence to hold the signature of plaintiff's name on the lease is a valid indication of his mutual assent to contract, there remains a genuine issue as to whether plaintiff authorized Kathryn to sign his name to the Lease.

Yet, given the existence of a genuine issue as to whether plaintiff authorized the signature of his name on the agreement, the issue of whether plaintiff, by conduct, ratified the contract still remains. For a principal "will not be permitted to repudiate the act of its agent as being beyond the scope of his authority, and at the same time accept the benefits arising from what he has done while acting in [the principal's] behalf." *Snyder v. Freeman*, 300 N.C. 204, 213, 266 S.E.2d 593, 599-600 (1980) (citation omitted).

The act of a principal will establish ratification of an unauthorized transaction of an agent where "(1) . . . at the time of the act relied upon, the principal had full knowledge of all material facts relative to the unauthorized transaction, and (2) . . . the principal had signified his assent or his intent to ratify by word or by conduct which was inconsistent with an intent not to ratify." *Carolina Equip. & Parts Co. v. Anders*, 265 N.C. 393, 400-01, 144 S.E.2d 252, 258 (1965).

The Lease provided that defendants "shall pay . . . to [plaintiff and Kathryn] . . . monthly rentals in the amount of **Three Hundred Dollars ($300.00)**." (Original emphasis.). Record evidence reflects that between 3 April 2004 and 6 February 2005, defendants paid and plaintiff accepted at least $300.00 per month. We hold plaintiff's acceptance of defendant's monthly rental payments constitutes conduct inconsistent with an intent not to ratify the Lease; therefore, only the issue of plaintiff's knowledge remains.

It is true that a cause of action premised on fraud or misrepresentation may be waived by a plaintiff's affirmative acts that amount to ratification. *Neugent v. Beroth Oil Co.*, 149 N.C. App. 38, 55, 560 S.E.2d 829, 840 (2002). It is equally true "that an act of the victim of any of these wrongs will not constitute a ratification of the transac-

tion thereby induced unless, at the time of such act, the victim had full knowledge of the facts and was then capable of acting freely." *Id.* at 55, 560 S.E.2d at 840 (citation omitted).

Here, plaintiff states he "never knew the contents of the document . . . [defendants] contend was signed on . . . [3 April 2004] until sometime in 2005 subsequent to . . . [Kathryn's] death." Additionally, during his deposition plaintiff responded to a question regarding why he believed defendants were paying him money each month by saying, "I . . . [thought] they wanted to help me, that's all."

It is for the trier of fact to resolve issues of credibility. *See Upchurch v. Upchurch*, 128 N.C. App. 461, 464, 495 S.E.2d 738, 740 (1998) (citation omitted). Thus, we hold the evidence provided, in the light most favorable to plaintiff, raises a genuine issue of material fact as to whether plaintiff knew the monthly payments he received from defendants were made in accordance with an agreement for a Lease.

IV

[4] Plaintiff next questions whether the trial court erred in granting defendants' motion for summary judgment arguing there remained a genuine issue of material fact as to whether defendants exercised undue influence to obtain Kathryn Baxter's signature on the Lease. We agree.

The North Carolina Supreme Court has described undue influence as follows:

> Undue influence is the exercise of an improper influence over the mind and will of another to such an extent that the action is not that of a free agent. It is the unfair persuasion of a party who is under the domination of the person exercising the persuasion or who by virtue of the relation between them is justified in assuming that that person will not act in a manner inconsistent with his welfare. Confidential relationships are not limited to a purely legal setting but may be found to exist in situations which are moral, social, domestic, or merely personal. It is equally well settled that [a] course of dealing between persons so situated is watched with extreme jealousy and solicitude; and if there is found the slightest trace of undue influence or unfair advantage, redress will be given to the injured party.

Curl v. Key, 311 N.C. 259, 265, 316 S.E.2d 272, 276 (1984) (internal citations and quotations omitted).

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

In re Will of Jones, 188 N.C. App. 1, 9, 655 S.E.2d 407, 412-13 (2008) (citations omitted). Perhaps for these reasons our Supreme Court has identified seven factors as probative on the issue of undue influence.

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

Hardee v. Hardee, 309 N.C. 753, 756-57, 309 S.E.2d 243, 245 (1983) (citation omitted).

Here, the record reflects defendants and the Barbees had been long-time friends, though not related. The Barbees owned one lot of vacation property on Topsail Island. Defendants, since March 1987, rented a lot adjacent to the Barbees and saw them nearly every weekend. At some point even the Barbee's only child, Bruce, moved into the vacation home. In September 1996, a storm destroyed defendants' vacation home, and they looked for different housing. Subsequently, tragedy struck the Barbees: Bruce Barbee died. In June 2003, pursuant to conversations between Defendant John Johnson and plaintiff, plaintiff and defendant entered into an oral agreement allowing defendants to rent the Barbee's vacation property.

According to the deposition testimony of Defendant Barbara Johnson, after many discussions between defendants and the Barbees regarding the sale of the vacation property, defendants

presented plaintiff and Kathryn a draft of the lease agreement, absent dollar amounts. Defendants later came to Britthaven with a completed agreement.

At the time of signing, Kathryn was seventy-eight years of age and recuperating in Britthaven rest home from a broken hip. On the afternoon of 3 April 2004, defendants, the notary, and another visitor spoke with Kathryn and plaintiff in Kathryn's room for approximately forty-five minutes, after which defendants spoke with the Barbees alone for twenty to twenty-five minutes. It was after this period, defendants invited the notary back into the room to witness Kathryn's signature. Defendants, as beneficiaries of the lease agreement, had been close friends of plaintiff and Kathryn but were not related to them.

From the evidence before the trial court, it is clear at least three of the seven factors indicative of undue influence exist in this case. Further there remains the issue of consideration for the Lease's option to purchase. The Lease allows defendants to purchase the Barbee's Topsail Island property for $150,000, though there is evidence the fair market value is approximately $450,000. In sum, this evidence raises a genuine issue of material fact as to whether defendants exercised undue influence in obtaining the signature of Kathryn Barbee.

For the foregoing reasons, the trial court's order is reversed.

Reversed.

Judges McGEE and HUNTER concur.

NANCY A. VILLEPIGUE, EXECUTRIX OF THE ESTATE OF JAMES R. VILLEPIGUE, PLAINTIFF v. CITY OF DANVILLE, VIRGINIA; TRAVIS GILES AND WILLIAM CHANEY, DEFENDANTS

No. COA07-876

(Filed 6 May 2008)

1. Police Officers— high speed chase—lack of wanton conduct

In a wrongful death action arising from a police chase, the trial court did not err by basing summary judgment on defendant's lack of wanton conduct. Plaintiff's argument to the contrary

relies on an definition of willful or wanton conduct in an irrelevant statute that deals with punitive damages. Moreover, cases involving excessive speed and ordinary negligence did not concern police pursuits and are also irrelevant.

2. Police Officers— high speed chase—gross negligence contention—summary judgment

There was no material issue of fact as to gross negligence in a wrongful death action arising from a high-speed police chase. The accident was not caused by any action of defendant, but by the pursued driver's reckless driving and ultimate collision with the decedent. The weather was clear, the road relatively straight, it was mid-afternoon on a Sunday, and the officer was unaware of the upcoming intersection's activity, the victim's car, or the stopped line of traffic directly in front of his vehicle.

3. Police Officers— high speed chase—supervision of officer

The trial court did not err in a wrongful death action arising from a high-speed police chase by granting summary judgment for defendants where plaintiff argued that the trial court did not adequately consider facts concerning the supervision of the officer by the Danville Police Department. There was no evidence that defendant's supervisors failed to follow proper procedures under the circumstances of the case; the officer determined (mistakenly) that adequate cause for pursuit existed, radioed in to report his speed, and asked for permission to enter North Carolina. He followed procedure and maintained reasonable contact with dispatch.

Appeal by plaintiff from an order entered 2 April 2007 by Judge Howard E. Manning, Jr. in Caswell County Superior Court. Heard in the Court of Appeals 6 February 2008.

David E. Blum, Pro Hac Vice; Tharrington Smith, L.L.P., by F. Hill Allen, for plaintiff-appellant.

Cranfill Sumner & Hartzog LLP, by Dan M. Hartzog and Kari R. Johnson, for defendant-appellees.

HUNTER, Judge.

Nancy A. Villepigue, as Executrix of the Estate of James R. Villepigue ("plaintiff"), commenced a wrongful death action against the City of Danville, Virginia ("the City"), and Officer Travis Giles

("defendant").[1] Mr. Villepigue was killed in an automobile accident involving a police pursuit of Doyle Terry by defendant. Plaintiff appeals from the trial court's granting of defendants' motion for summary judgment entered on 29 March 2007, dismissing all claims against defendants. After careful consideration, we affirm.

On 16 November 2003, defendant, a Danville police officer, observed a truck "r[oll] through" a stop sign in Danville, stop in the middle of the road, and then accelerate so hard his tires spun. The truck was driven by Doyle K. Terry. Defendant began to follow Terry and activated his blue lights in order to initiate a stop. Terry did not pull over, but began driving at a high rate of speed towards the North Carolina state line. Defendant believed Terry to be driving under the influence and therefore began pursuit.

During the chase, defendant witnessed Terry drive "erratically and recklessly" and left of center, almost hitting the median. Moreover, defendant observed Terry "side swipe[]" another vehicle. Terry again did not pull over. The pursuit was nearing the state line and under Danville Police Department Procedures ("DPDP"), officers may only pursue across state lines subjects who have committed one of certain enumerated felonies. Defendant believed this to be a felony hit-and-run, one such enumerated felony, and believed further that Terry "posed an imminent threat."

As the pursuit neared the state line, as required by the DPDP, defendant radioed dispatch, indicated his speed was sixty-five miles per hour ("m.p.h."), and asked for authorization to continue the pursuit into North Carolina. Authorization was given by Sergeant Thomas A. Brooks. Defendant continued the chase into North Carolina on NC Highway 86. Prior to this point, defendant had used his siren only when necessary; however, after crossing the North Carolina line, he used his siren continuously.

The pursuit continued in North Carolina for approximately twenty seconds, during which there was no communication among defendant, dispatch, or North Carolina authorities. Once in North Carolina, defendant passed multiple cars using his lights and siren. Although the exact speed of defendant cannot be determined, at times his speed exceeded 100 m.p.h.; his on-board Sensing and Diagnostic Module ("SDM") recorded his speed as follows: 106 m.p.h.

1. Although both the City and Officer Giles are defendants in this action, for ease of reference, we use the term "defendant" throughout this opinion to refer to Officer Giles only.

four seconds prior to the accident, ninety-eight m.p.h. three seconds prior, eighty-three m.p.h. two seconds prior, and sixty-eight m.p.h. one second prior.

Shortly before the Highway 86 intersection with RP 1503, Terry's vehicle ran into the left rear of a Plymouth Acclaim heading South on NC Highway 86. Due to the impact, Terry's vehicle veered into the northbound lane, "striking the left front fender area" of a Four-Runner, driven by decedent Villepigue, "at [a] very high speed and shearing the left front wheel." This caused the Four-Runner to spin into the path of defendant's police cruiser, at which point defendant "T-boned" the Four-Runner, causing serious injuries to both himself and Villepigue. Villepigue ultimately died at the scene. The Highway Patrol Report later determined that neither the victim nor defendant caused the accident, although the speed of defendant could have contributed to its severity.

NC Highway 86 is a narrow, two-lane road with no shoulders and a maximum speed limit of fifty-five m.p.h. The road surface is smooth and in good condition. Highway 86 is also straight and not "overly hilly," but there is a "sufficiently steep" grade of the highway which limits a driver's visibility until reaching the crest. Also, the highway intersects with RP 1503 approximately .08 miles from the North Carolina line. [NCHP Report at 3-4] The area is considered light residential and commercial and includes a gas station/convenience store, car dealership lot, and private homes, along with a Caswell County Public School just south of the NC-86/RP 1503 intersection.

At the time of the accident, the conditions were dry and visibility was good. There was moderate traffic in both the southbound and northbound lanes, including an oncoming tractor trailer. There were cars waiting to turn left onto RP 1503 from Highway 86 and pedestrian traffic, including horseback riders, near the intersection.

Plaintiff presents the following issues for this Court's review: (1) whether the trial court committed reversible error in its application of the gross negligence standard as requiring "wanton" conduct; (2) whether the trial court committed reversible error by granting summary judgment; and (3) whether the trial court committed reversible error in that it gave no consideration to the fact issues regarding the failure of supervision by the Danville Police Department.

I.

[1] Plaintiff first argues that the trial court committed reversible error by basing its determination in favor of summary judgment on

defendant's lack of "wanton" conduct. Plaintiff contends that describing gross negligence as "willful or wanton" is not proper due to the definition of that phrase under N.C. Gen. Stat. § 1D-5(7) (2007). This argument is without merit.

Plaintiff's argument relies on the definition of "willful or wanton" conduct from the punitive damage section of the North Carolina General Statutes (§ 1D). N.C. Gen. Stat. § 1D-5(7) defines "willful and wanton" as "the conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably likely to result in injury, damage, or other harm." Plaintiff, in particular, relies on this provision's indication that " '[w]illful or wanton conduct' means more than gross negligence." N.C. Gen. Stat. § 1D-5(7). However, as noted, this definition comes from an entirely irrelevant statute—that concerning punitive damages—and plaintiff fails to consider the appropriate statute, N.C. Gen. Stat. § 20-145 (2007). N.C. Gen. Stat. § 20-145 provides an exemption to North Carolina's speed limitations to emergency vehicles, including police during pursuits. The only limitation put on the exemption is that it "shall not . . . protect the driver of any such vehicle from the consequence of a reckless disregard of the safety of others." N.C. Gen. Stat. § 20-145 (2007). This limitation is sometimes summarized and applied in relevant case law by use of the word "wanton." *See Parish v. Hill*, 350 N.C. 231, 239, 513 S.E.2d 547, 551 (1999) (defining gross negligence as "wanton conduct done with conscious or reckless disregard for the rights and safety of others") (citation omitted); *Bullins v. Schmidt*, 322 N.C. 580, 583, 369 S.E.2d 601, 603 (1988) (same). The inclusion of the word "wanton" in police pursuit cases is simply a shorthand reference to this "reckless disregard" limitation. We see no evidence that suggests it is meant to refer to the definition of the word from a wholly unrelated statute, and as such, plaintiff's argument is without merit.

Plaintiff also argues that excessive speed alone may constitute negligence per se and that an ordinary negligence standard should be used, citing case law related to vehicular accidents in North Carolina. However, this argument is also misplaced because plaintiff relies on cases which do not concern police pursuits. *See Clayton v. Branson*, 153 N.C. App. 488, 570 S.E.2d 253 (2002); *Yancey v. Lea*, 354 N.C. 48, 550 S.E.2d 155 (2001). Therefore, even though speed and an application of ordinary negligence standard are considered in those cases, such considerations are irrelevant under these particular circumstances. Plaintiff's assignments of error are therefore rejected.

II.

[2] Plaintiff next argues that the granting of defendants' motion for summary judgment was improper because there were issues of material fact and, moreover, the evidence was sufficient to show that defendant's conduct was grossly negligent. Although the parties agree as to the majority of facts, whether the standard was actually met depends on the outcome of balancing these particular facts.

We review a trial court's grant of summary judgment *de novo*. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004). "Summary judgment is appropriate 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that [a] party is entitled to a judgment as a matter of law.' " *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003) (alteration in original) (quoting N.C. Gen. Stat. § 1A-1, Rule 56(c)). "Evidence presented by the parties is viewed in the light most favorable to the non-movant." *Id.*

In determining whether gross negligence exists, in addition to the conduct of the pursuing officer and the reasons for the pursuit, "[c]ourts have discussed whether the officer used emergency lights, sirens and headlights, collided with any person, vehicle or object, kept his or her vehicle under control, followed relevant departmental policies regarding chases, violated generally accepted standards for police pursuits, and what the officer's speed was during the pursuit." *Norris v. Zambito*, 135 N.C. App. 288, 295, 520 S.E.2d 113, 117 (1999) (citations omitted).

North Carolina courts have also determined that:

> An officer "must conduct a balancing test, weighing the interests of justice in apprehending the fleeing suspect with the interests of the public in not being subjected to unreasonable risks of injury." "Gross negligence" occurs when an officer consciously or recklessly disregards an unreasonably high probability of injury to the public despite the absence of significant countervailing law enforcement benefits.

Eckard v. Smith, 166 N.C. App. 312, 319, 603 S.E.2d 134, 139 (2004) (citations omitted).

A.

The parties do not dispute that defendant was driving at a high rate of speed, that he passed multiple cars, that he was unfamiliar

with this particular road, and that his previous determination concerning the felony hit-and-run was erroneous. However, plaintiff contends that defendant's speed, traffic and road conditions, and defendant's awareness and judgment create issues of material fact.

As to speed, the parties dispute the amount of time defendant was actually in North Carolina as well as his precise speed during that time. The evidence, taken in the light most favorable to plaintiff, only shows that defendant might have been in North Carolina for longer than twenty seconds and that his speed was 106 m.p.h. four seconds before the accident and sixty-eight m.p.h. one second before the accident. There is no indication that defendant drove at excessive speed for any extended period of time, nor any evidence to support plaintiff's assertion that defendant ever reached 144 m.p.h. Moreover, absent other evidence, this does not contribute to any determination of gross negligence.

The parties also dispute the amount of activity at the intersection of NC-86 and Walter's Mill Road. Plaintiff asserts that this fact was not properly considered by the trial court as evidenced by its omission from the order granting summary judgment. However, findings of fact and conclusions of law are not required in the determination of motions for summary judgment. *See Sunamerica Financial Corp. v. Bonham*, 328 N.C. 254, 400 S.E.2d 435 (1991). Certainly, the trial court might have included them in its balancing test; regardless, the accident occurred before the intersection and involved a car which had already passed through it. As such, this fact appears to this Court irrelevant; at the very least, it is not determinative, nor does it establish an issue of material fact.

B.

Plaintiff next asserts that defendant was unaware of decedent's car and demonstrated a lack of judgment in continuing the pursuit, citing defendant's testimony that he saw the victim's car "only seconds before the collision[.]" Plaintiff argues that this demonstrates defendant's lack of due regard for public safety and, thus, makes summary judgment improper, as it is evidence of defendant's "extreme recklessness." This argument is without merit.

Even taking plaintiff's version of the disputed facts—that defendant was unfamiliar with NC-86 and its traffic patterns, could not identify his speed over sixty-five m.p.h., and did not see the victim's car

until it was hit by Terry—as true, these facts do not contribute to the determination of whether defendant acted without due regard for public safety. They merely indicate that defendant may have been going faster than sixty-five m.p.h., that his attention was focused somewhere other than the victim's vehicle, and that defendant was unaware of the upcoming intersection. *See Jones v. City of Durham*, 361 N.C. 144, 146, 638 S.E.2d 202, 203 (2006) (even though not involving pursuit, the fact police officer knew the area was urban and densely populated contributed to possibility of gross negligence). Therefore, even plaintiff's version of these facts does not raise a material issue of fact as to gross negligence.

Plaintiff also argues that defendant's conduct met the gross negligence standard. This argument is without merit.

In reviewing North Carolina cases involving police pursuits, we can find no case where this Court or our Supreme Court has found that gross negligence existed. *See Bray v. N.C. Dep't of Crime Control and Pub. Safety*, 151 N.C. App. 281, 284, 564 S.E.2d 910, 912-13 (2002) (no gross negligence even where state trooper collided with oncoming vehicle during pursuit after losing control due to excessive speed; Court also noted that gross negligence standard is rarely, if ever, met); *Young v. Woodall*, 343 N.C. 459, 463, 471 S.E.2d 357, 360 (1996) (no gross negligence when officer did not activate his blue lights/siren, traveled at high speeds through intersection, and did not notify his superiors of his intention to pursue, all of which violated procedure); *Bullins v. Schmidt*, 322 N.C. at 582-84, 369 S.E.2d at 603-04 (no gross negligence where officers attempted to box in and slow defendant traveling at speeds near 100 m.p.h. and over long distance causing an accident on two-lane road); *Fowler v. N.C. Dept. of Crime Control and Public Safety*, 92 N.C. App. 733, 736, 376 S.E.2d 11, 13 (1989) (no gross negligence when officer, without lights or siren, speeding over 115 m.p.h., after midnight, through sparsely populated area tried to overtake a suspect after eight-mile chase causing wreck); *Norris v. Zambito*, 135 N.C. App. at 295, 520 S.E.2d at 217-18 (no gross negligence where police officer drove sixty-five m.p.h. in a thirty-five m.p.h. zone in pursuit at 1:00 a.m. even though he knew suspect and where to arrest him later); *Parish v. Hill*, 350 N.C. at 246, 513 S.E.2d at 556 (no gross negligence where police officer reached maximum speed of 130 m.p.h. on I-85.)

Plaintiff relies on the North Carolina Supreme Court decision in *Jones v. City of Durham*, 361 N.C. 144, 638 S.E.2d 202, for her argu-

ment as to gross negligence.[2] There, the Supreme Court reversed this Court's opinion which had reversed the denial of a summary judgment motion by the defendant police officer on the plaintiff's gross negligence claim; the Supreme Court held that genuine issues of material fact did exist. *Jones*, 168 N.C. App. at 452, 608 S.E.2d at 399. *Jones*, however, contains striking differences from the instant case. Most notably, *Jones* did not involve a police pursuit, but rather an officer responding to another officer's call for assistance. *Id.* at 444, 608 S.E.2d at 394. The responding officer was unaware of the details of the call; moreover, the officer knew the peculiarities of the location and the high probability that an accident may occur given his conduct—specifically, his failure to use lights and excessive speed through a residential neighborhood—as well as that other officers had responded to the call. *Id.* The officer in *Jones*, in addition, acted without due regard for public safety by not applying his brakes when he saw the plaintiff in his path. *Id.* Levinson, J., and thus our Supreme Court, concluded that the evidence tended to show that there was a material issue of fact as to whether the law enforcement benefits were outweighed by the likelihood of injury to the public. *Id.*; 361 N.C. at 146, 638 S.E.2d at 203.

In this case, defendant initiated a pursuit after he determined that Terry was intoxicated and on the mistaken assumption that defendant had committed a felony hit-and-run. These facts alone distinguish this case from *Jones*, because a significant public policy and law enforcement interest existed in removing Terry from the road. *See Eckard v. Smith*, 166 N.C. App. at 319, 603 S.E.2d at 139 (stating that in spite of the risks to " 'passengers, pedestrians, and other drivers that high-speed chases engender, but also the fact that if police are

2. The history of *Jones* is somewhat complex. On the first appeal to this Court, *Jones v. City of Durham*, 168 N.C. App. 433, 608 S.E.2d 387 (2005), the majority opinion affirmed the grant of summary judgment to the city on her ordinary negligence claim and reversed the order denying summary judgment to the city on plaintiff's gross negligence claim. Levinson, J., dissented, arguing that a genuine issue of material fact existed as to the gross negligence claim. *Id.* at 443, 608 S.E.2d at 394. This holding was affirmed by our Supreme Court, 360 N.C. 81, 622 S.E.2d 596 (2005), but on a motion for rehearing, the Supreme Court withdrew that opinion and entered the one reported at 361 N.C. 144, 638 S.E.2d 202 (2006). In that opinion, the Supreme Court stated that for the reasons in Levinson, J.'s, dissent, "there exists a genuine issue of material fact regarding plaintiff's gross negligence claim" and remanded the case to this Court. *Id.* at 146, 638 S.E.2d at 203. This opinion, which reversed this Court's opinion *per curiam*, is the one cited by plaintiff. For simplicity's sake, the citations above to the facts of the case and the reasoning of the dissent (on which the Supreme Court opinion relies) are citations to Levinson, J.'s, dissent, rather than to the Supreme Court opinion, as it does not restate this information.

forbidden to pursue, then many more suspects will flee—and successful flights not only reduce the number of crimes solved but also create their own risks for passengers and bystanders' ") (citations omitted). Moreover, the accident in this case was not caused by any action of defendant, but Terry's reckless driving and ultimate collision with the decedent.

Further, the other facts—that defendant traveled at a high rate of speed (somewhere between sixty-five m.p.h. and 106 m.p.h.) and passed multiple cars while using his blue lights and siren on a narrow two-lane road—even taken in conjunction with those facts previously stated, also do not meet the elevated gross negligence standard. The weather was clear; the road relatively straight, with only a slight bend and grade; and it was approximately 2:30-3:00 p.m. on a Sunday afternoon. Defendant was unaware of the upcoming intersection's activity, the victim's car, or the stopped line of traffic directly in front of his vehicle. This certainly does not constitute gross negligence under the standard required by the North Carolina police pursuit cases discussed above. Plaintiff's arguments to the contrary are rejected.

III.

[3] Plaintiff's final argument is that the trial court did not adequately consider any facts relating to its assertion that the Danville Police Department did not properly supervise the actions of defendant. We disagree.

Plaintiff relies for this argument on the following facts: No "timely attempt was made" to determine whether a felony hit-and-run had occurred, the senior police officer in charge failed to devote proper attention to the pursuit, and no contact was made between the City's and North Carolina's authorities. [Appellant's Memo 33-34]. Considering the brevity of the pursuit—there is no evidence, beyond plaintiff's assertions, to show that the pursuit lasted more than approximately twenty seconds in North Carolina—these allegations lend little weight to plaintiff's argument. Defendant determined, although mistakenly, that adequate cause for pursuit existed, radioed in to report his speed, and asked for permission to enter into North Carolina, followed procedure and maintained reasonable contact with dispatch. In addition, no evidence was presented that defendant's supervisors failed to follow proper procedures under the circumstances of this case. As such, this argument is without merit.

IV.

Plaintiff's claims as to reversible error by the trial court due to its granting of a motion for summary judgment and the application of the gross negligence standard are without merit. Defendant's conduct, even taken in a light most favorable to plaintiff, does not amount to gross negligence. We also reject plaintiff's arguments regarding improper supervision by the City.

Affirmed.

Judges BRYANT and JACKSON concur.

STATE OF NORTH CAROLINA v. NATHAN LARELL BATCHELOR

No. COA07-863

(Filed 6 May 2008)

1. Criminal Law— failure to rule on motion to dismiss— prejudice

There was prejudice in a prosecution for armed robbery from the trial court's failure to rule on defendant's motion to dismiss at the close of the State's evidence, which was based on the argument that the evidence of defendant being the perpetrator was insufficient. Statements of witnesses about defendant's participation in the robbery that were admitted only for impeachment purposes were never admitted as substantive evidence.

2. Criminal Law— failure of trial court to rule on motion to dismiss—burden of proof not carried—prosecution dismissed

A conviction for armed robbery was reversed and the charge dismissed where the trial court did not rule on defendant's motion to dismiss based on insufficient evidence of defendant being the perpetrator. The normal remedy would be a remand for a new trial, but in this case the State did not carry its burden.

3. Appeal and Error— Rule 2—failure to rule on motion to dismiss criminal action—burden of proof not carried—manifest injustice

As an alternative basis for overturning an armed robbery conviction, Appellate Rule 2 was invoked to address the sufficiency

of the evidence despite defendant's failure to renew his motion to dismiss at the close of all the evidence. The State failed to meet its burden of proving that defendant was the perpetrator; if the matter is not reviewed, defendant will remain imprisoned for a crime that the State did not prove beyond a reasonable doubt.

Appeal by Defendant from judgment dated 9 January 2007 by Judge William C. Griffin, Jr. in Superior Court, Nash County. Heard in the Court of Appeals 19 February 2008.

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

Brian Michael Aus for Defendant-Appellant.

McGEE, Judge.

Nathan Larell Batchelor (Defendant) appeals from his conviction of robbery with a dangerous weapon. At trial, the State called as a witness one of Defendant's co-defendants, Dion Sykes (Mr. Sykes), who testified that previously he had pleaded guilty to conspiring with Defendant to commit robbery with a dangerous weapon of Griffin's Food Store in Red Oak on 26 July 2005. However, Mr. Sykes then testified that Defendant had not been involved with the robbery of Griffin's Food Store. He also testified that he had not told anyone that Defendant had been involved in the robbery.

The State also called Sondra Harris (Ms. Harris), who testified that she had pleaded guilty to conspiracy to commit robbery with a dangerous weapon arising out of the robbery of Griffin's Food Store. Ms. Harris also testified as follows:

Q. Prior to [26 July 2005] did you have a conversation with Dion Sykes?

A. Yes.

Q. What was that conversation about?

[DEFENSE COUNSEL]: Objection, Your Honor. That's hearsay.

THE COURT: Sustained.

The trial court then dismissed the jury and conducted the following inquiry into the admissibility of Ms. Harris's testimony:

[THE STATE]: The reason we are soliciting this testimony is to simply show that . . . [Mr.] Sykes, on a prior occasion, did make a

> statement inconsistent with what he just testified to on the stand. He testified that he had never made a statement that he and [Defendant] robbed the store. This witness is her[e] to testify that [Mr. Sykes], in fact, did make that statement to her. Her entire statement goes to the inconsistencies . . . .
>
> THE COURT: [Defense Counsel], I believe, if he told, if . . . Defendant told this witness that he did commit the crime,—let me hear exactly what you want.
>
> [THE STATE]: Yes, sir. I can ask her to read her statement.
>
> [DEFENSE COUNSEL]: Yes, I have seen it.
>
> THE COURT: Let me read about it. (Court reads document.) I am going to overrule your objection.

Following this colloquy, Ms. Harris testified in the presence of the jury that she helped Mr. Sykes plan the robbery. Ms. Harris also testified that after the robbery, Mr. Sykes told her ex-boyfriend that Mr. Sykes and Defendant had robbed Griffin's Food Store. Ms. Harris then read a 23 August 2005 statement that she had given to police, in which she stated that on the night after the robbery, Mr. Sykes told her and her ex-boyfriend that

> [Mr. Sykes] and [Defendant] had robbed the store. [Mr. Sykes] told us that [Defendant] tied one of the ladies up in the store and [Mr. Sykes] was with the other lady trying to get her to open the safe. [Mr. Sykes] said that she would not open the safe, so [Mr. Sykes] shot into the floor. [Mr. Sykes] also said that he only got about $100.00 and they both split it in half, between the two of them.

The State also presented the testimony of Sara Williams (Ms. Williams), who testified without objection that "[Mr. Sykes] told [her] that [Mr. Sykes] and [Defendant] were the ones that broke[] into [Griffin's Food Store]." Ms. Williams also testified over objection that Ms. Harris told her that Mr. Sykes and Defendant committed the robbery.

At the close of the State's evidence, the following colloquy occurred:

> THE COURT: Any evidence for . . . Defendant?
>
> [DEFENSE COUNSEL]: I'd like to make a motion at this time.

> THE COURT: I'll put a ruling in [the] record to that later. Do you have any witnesses?
>
> [DEFENSE COUNSEL]: Yes, You[r] Honor.
>
> THE COURT: All right, you may proceed.

Defendant presented evidence, and at the close of all the evidence, Defendant did not make a motion to dismiss. The trial court then instructed the jury on the relevant law. As part of its instructions, the trial court instructed the jury as follows:

> Now members of the jury, when evidence has been received tending to show that [at] an earlier time a witness made a statement which may be consistent, or may conflict with his testimony at this trial, you must not consider such earlier statements as evidence of truth of what was said at that earlier time, because that statement was not made here under oath. If you believe that such earlier statement was made, and that it is consistent or conflicts with the testimony of the witness at this trial, then you may consider this, together with all other facts, and circumstances bearing upon the witness's truthfulness, in deciding whether you will believe, or disbelieve, that witness's testimony at this trial.

Following the jury charge, but before the sheriff delivered the verdict sheet to the jury room, the trial court stated the following outside the presence of the jury: "Let the record show that at the close of the State's evidence, . . . [D]efendant moved to dismiss the case. The [trial court] denied the motion at that time."

The jury found Defendant guilty of robbery with a dangerous weapon. The trial court entered judgment on this conviction and sentenced Defendant to a term of 103 months to 133 months in prison. Defendant appeals.

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[1] Defendant argues that pursuant to N.C. Gen. Stat. § 15A-1227(c), the trial court erred by failing to rule on his motion to dismiss at the close of the State's evidence. N.C. Gen. Stat. § 15A-1227(c) (2007) provides that a "judge must rule on a motion to dismiss for insufficiency of the evidence before the trial may proceed." The State counters that "[D]efendant waived any right to appeal the trial court's handling of this motion due to his lack of objection to the [trial] court's procedure[.]" However, as our Supreme Court has stated, "when a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the [trial] court's action is pre-

served, notwithstanding [the] defendant's failure to object at trial." *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985).

In the present case, the record demonstrates that Defendant made a motion to dismiss at the close of the State's evidence. However, the trial court did not rule on Defendant's motion to dismiss at that time and continued the trial, and we must now determine whether this failure prejudiced Defendant. Pursuant to N.C. Gen. Stat. § 15A-1443(a) (2007),

> [a] defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.

Defendant argues he was prejudiced by this failure because there was no substantial evidence identifying Defendant as the perpetrator of the offense. Defendant argues that absent the hearsay testimony of Ms. Harris and Ms. Williams, "there was not one reasonable inference that could be made, much less any substantial evidence presented, which went to proving that [Defendant] was involved in the robbery." We agree.

N.C. Gen. Stat. § 8C-1, Rule 607 (2007) provides that "[t]he credibility of a witness may be attacked by any party, including the party calling [the witness]." Our Supreme Court has recognized that "where the party calling a witness is genuinely surprised by the witness' change of his or her version of facts, impeachment by prior inconsistent statements is proper." *State v. Miller*, 330 N.C. 56, 62-63, 408 S.E.2d 846, 850 (1991). However, while prior inconsistent statements are admissible for impeachment purposes, they are not admissible as substantive evidence. *State v. Durham*, 175 N.C. App. 202, 207, 623 S.E.2d 63, 67 (2005).

The State argues that the testimony of Ms. Harris and Ms. Williams was admitted solely for the purpose of impeaching Mr. Sykes's earlier testimony. In support of this argument, the State points out that the trial court instructed the jury that it could consider prior inconsistent statements only for impeachment purposes. We agree with the State. However, because the prior inconsistent statements were admitted solely to impeach Mr. Sykes's testimony that Defendant was not involved in the robbery, Mr. Sykes's prior inconsistent statements were not admitted as substantive evidence. *See*

id. (recognizing that while prior inconsistent statements are admissible for impeachment purposes, they are not admissible as substantive evidence). Consequently, the State did not offer any substantive evidence that Defendant was the perpetrator of the robbery.

The State cites *State v. Featherson*, 145 N.C. App. 134, 548 S.E.2d 828 (2001), and argues that Mr. Sykes's prior inconsistent statements implicating Defendant in the crime constituted sufficient evidence that Defendant was the perpetrator. In *Featherson*, the defendant's co-defendants had made statements to police following their arrest, implicating the defendant in the crimes. *Id.* at 137, 548 S.E.2d at 830. However, their testimony at trial "exonerated [the] defendant from any participation in the crimes charged." *Id.* Our Court recognized that the pre-trial statements of the defendant's co-defendants were admissible to impeach their trial testimony. *Id.* However, our Court also held that "statements made by [the defendant's] codefendants were also properly admitted as substantive evidence." *Id.* at 137, 548 S.E.2d at 831. Specifically, one of the co-defendants testified on direct, without objection, as to what he had told police regarding the defendant's involvement. *Id.* Moreover, after the defendant objected to the admission of that co-defendant's written statement, "[t]he State then asked [the co-defendant] what he told the Detective, and no timely objection was made." *Id.* Therefore, the defendant waived his challenge to the admission of the written statement. *Id.* Our Court also emphasized that the challenged evidence "was admitted without any limitation." *Id.* at 138, 548 S.E.2d at 831. Furthermore, the defendant elicited the pre-trial statement of the other co-defendant on cross-examination of an investigator, and therefore waived his objection to that testimony. *Id.* As to the sufficiency of the evidence, our Court in *Featherson* held:

> [T]he trial court properly denied [the] defendant's motion to dismiss as to those charges. The alleged hearsay evidence was either properly admitted, or admitted without objection. This evidence includes statements by codefendants which implicate [the] defendant in the crimes. This evidence, standing alone, constitutes sufficient evidence to deny [the] defendant's motion to dismiss.

Id. at 139, 548 S.E.2d at 831-32.

In the present case, unlike in *Featherson*, the testimony of Ms. Harris and Ms. Williams that Mr. Sykes told them Defendant had participated in the robbery was never admitted as substantive evidence.

Mr. Sykes, unlike the co-defendant in *Featherson*, never testified that he told anyone that Defendant had been involved in the robbery. Moreover, in the present case, unlike in *Featherson*, the trial court instructed the jury that it could consider the prior inconsistent statements only for impeachment purposes and not as substantive evidence. This jury instruction made it clear that Mr. Sykes's prior inconsistent statements were admitted solely as impeachment testimony and not as substantive evidence.

The State also contends that Defendant lost the benefit of his objection to Ms. Harris's testimony by failing to object again when Ms. Harris read her statement. However, it appears, based upon the colloquy following Defendant's objection, recited above, that Defendant's objection covered the entire line of questioning, including the reading of the statement. The State also asserts that Defendant elicited Mr. Sykes's prior statements on cross-examination of Ms. Harris and Ms. Williams and waived any challenge to that evidence. However, as our Supreme Court has recognized, "[n]ormally, the objecting party does not waive an objection to evidence the party contends is inadmissible by trying to explain it, impeach it, or destroy its value on cross-examination." *State v. Alford*, 339 N.C. 562, 570, 453 S.E.2d 512, 516 (1995).

In the present case, it is clear that Defendant elicited this information on cross-examination in order to explain it, impeach it and destroy its value. On cross-examination, Ms. Harris testified as follows:

> Q. Ms. Harris[], you don't know for a fact that [Defendant] participated in that robbery, do you?
>
> A. No.
>
> Q. The only thing that you know is that you heard something from Dion Sykes?
>
> A. Yes, sir.
>
> Q. Now, Dion[] didn't tell you that he put [Defendant's] name into it, because he was mad at [Defendant] for trying to make time with his girl, did he?
>
> A. No. I don't know about that.
>
> Q. He didn't tell you that part, did he?
>
> A. No.

Q. That [Defendant] didn't participate at all really. [Mr. Sykes] was just mad at [Defendant].

A. He didn't tell that.

It does not appear that Defendant elicited any prior statements on his cross-examination of Ms. Williams.

The State also argues that Defendant's own witness, Sequam Hussy, testified that Mr. Sykes told him that Mr. Sykes and Defendant had committed the crime. However, Sequam Hussy did not testify to that effect. Rather, he testified as follows:

Q. What, if anything, did Mr. Sykes tell you?

. . .

A. He told me that [Defendant] didn't have anything to do with it. And that he wanted to get back at [Defendant] because of [Defendant] having sex with [Mr. Sykes's] baby's momma.

Moreover, even if Defendant failed to object every time a witness testified as to Mr. Sykes's prior inconsistent statements, any such statements were not admitted as substantive evidence. Most importantly, the State's proffered purpose for the evidence, both at trial and on appeal, and the trial court's instruction to the jury, demonstrate that evidence of Mr. Sykes's prior inconsistent statements served only to impeach Mr. Sykes's trial testimony. This testimony did not constitute substantive evidence that Defendant was involved in the robbery. Accordingly, we hold that the State failed to present substantial evidence that Defendant was the perpetrator.

The State also asserts that other evidence presented was sufficient to identify Defendant as the perpetrator. We disagree. The State asserts that the following evidence was sufficient to identify Defendant as the perpetrator: (1) Mr. Sykes called Defendant's house from jail and asked an unknown person whether police found anything when they searched Mr. Sykes's house; (2) a gun was found at Defendant's house which the State asserts could have been used by Defendant when holding one of the victims during the robbery; and (3) testimony that Defendant wore earrings like the masked gunman shown holding one of the victims in the photographs admitted at trial. However, this evidence did not identify Defendant as the perpetrator. Regarding Mr. Sykes's call to Defendant's house, the State, in its brief, asks rhetorically, "If . . . [D]efendant was not involved, why would Mr.

Sykes even call his house[?]" However, this evidence does not tend to identify Defendant as the perpetrator. As to the 22-caliber handgun found in Defendant's house, police determined that it was not the weapon fired during the robbery. While one of the victims testified that she "felt what [she] thought was a gun stuck in [her] side," she did not see whether the person who held her had a gun. Finally, the State did not proffer any clear evidence that Defendant wore earrings. Moreover, even if Defendant wore earrings, as did one of the participants in the robbery, this fact was insufficient to identify Defendant as the perpetrator. Both of the participants in the robbery were masked at the time, and neither of the victims identified Defendant as a participant in the crime.

[2] For the reasons stated above, we hold that Defendant was prejudiced by the failure of the trial court to rule on his motion to dismiss at the close of the State's evidence because there was insufficient evidence that Defendant was the perpetrator. We note that the normal remedy would be to vacate the conviction and remand the case for a new trial. However, because the State failed to meet its burden at Defendant's trial, we must reverse Defendant's conviction and dismiss the charge. *See State v. Mueller*, 184 N.C. App. 553, 561, 647 S.E.2d 440, 447, *cert. denied*, 362 N.C. 91, 657 S.E.2d 24 (2007) (reversing the defendant's conviction of taking indecent liberties with a minor and dismissing the charge because the State presented insufficient evidence of that offense).

[3] In the alternative to his argument under N.C.G.S. § 15A-1227(c), Defendant requests that we invoke N.C.R. App. P. 2 to prevent manifest injustice. Again, Defendant argues that absent the hearsay testimony of Ms. Harris and Ms. Williams, "there was not one reasonable inference that could be made, much less any substantial evidence presented, which went to proving that [Defendant] was involved in the robbery."

The record demonstrates that Defendant made a motion to dismiss at the close of the State's evidence. However, Defendant did not renew that motion at the close of all the evidence and therefore waived appellate review of the denial of his motion to dismiss. *See* N.C.R. App. P. 10(b)(3). Nevertheless, assuming *arguendo* that Defendant's argument under N.C.G.S. § 15A-1227(c) was not preserved, this is an appropriate case in which to invoke Rule 2 to address the issue of the sufficiency of the evidence. *See State v. Moncree*, 188 N.C. App. 221, 231, 655 S.E.2d 464, 470-71

(2008) (addressing the issue of the sufficiency of the evidence pursuant to N.C.R. App. P. 2 notwithstanding the defendant's failure to make a motion to dismiss at the close of all the evidence because our Court agreed with the defendant that two of the three charges should be vacated).

N.C.R. App. P. 2 provides:

> To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions.

Our Supreme Court recently reiterated that "[a]side from the possibility of plain error review in criminal appeals, Rule 2 permits the appellate courts to excuse a party's default in both civil and criminal appeals when necessary to 'prevent manifest injustice to a party' or to 'expedite decision in the public interest.' " *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 192 N.C. ——, ——, 657 S.E.2d 361, 364 (2008) (citing N.C.R. App. P. 2). However, our Supreme Court cautioned that "Rule 2 . . . must be invoked 'cautiously,' " and reaffirmed its prior holdings "as to the 'exceptional circumstances' which allow the appellate courts to take this 'extraordinary step.' " *Id.* at ——, 657 S.E.2d at 364 (quoting *State v. Hart*, 361 N.C. 309, 315-17, 644 S.E.2d 201, 205-06 (2007) and *Steingress v. Steingress*, 350 N.C. 64, 66, 511 S.E.2d 298, 299-300 (1999)).

In the present case, we hold that the State failed to meet its burden of proving that Defendant was the perpetrator of the crime charged, which failure warranted the dismissal of the charge of robbery with a dangerous weapon. However, Defendant's trial counsel failed to renew Defendant's motion to dismiss at the close of all the evidence. If we do not review the issue of the sufficiency of the evidence in the present case, Defendant would remain imprisoned for a crime that the State did not prove beyond a reasonable doubt. Such a result would be manifestly unjust and we are therefore compelled to invoke Rule 2 under these exceptional circumstances. For the reasons stated above, Defendant's conviction of robbery with a dangerous weapon is reversed and the charge is dismissed. We need not address Defendant's remaining arguments.

Reversed.

Judges WYNN and CALABRIA concur.

IN THE MATTER OF: J.M., R.H. JR., C.S., A.S., R.M., AND B.M., MINOR CHILDREN

No. COA07-1246

(Filed 6 May 2008)

Child Abuse and Neglect— adjudication—reliance on prior hearing—hearsay

An adjudication of juveniles as being neglected and abused was vacated and remanded where the court relied on testimony from prior hearings and based its findings on hearsay evidence. The State was not required to offer proof that these statements fell within any hearsay exception, defendant did not have a meaningful adjudication hearing, and she was deprived of her fundamental right to due process.

Judge GEER concurring in the result.

Appeal by respondent-mother from order entered 19 June 2007 by Judge Stanley L. Allen in Rockingham County District Court. Heard in the Court of Appeals 18 February 2008.

Richard E. Jester, for respondent-appellant mother.

Womble Carlyle Sandridge & Rice, by G. Wriston Marshburn, Jr., for Guardian ad Litem.

JACKSON, Judge.

Kimberly H. ("respondent") appeals from an order entered 19 June 2007 adjudicating J.M., R.H., C.S., A.S., and B.M. neglected juveniles, R.M. both neglected and abused, and entering disposition. For the following reasons, we vacate the order of adjudication and disposition, and remand for a new hearing.

On 21 February 2007, the Rockingham County Department of Social Services ("DSS") filed a juvenile petition alleging that respondent's minor children—J.M., R.H., C.S., A.S., R.M., and B.M.—were abused and neglected juveniles. DSS alleged that it received a report

on 4 December 2006 that respondent's husband, Rene H., had sexually abused respondent's ten-year-old daughter, R.M. On the same day that DSS received the report, Rene H. was interviewed by a DSS social worker and a Rockingham County Sheriff's Department detective. Rene H. admitted touching R.M. "on weekends" and when he had been "drinking." His description of the abuse closely matched the description given by R.M., and he was arrested on charges relating to the abuse.

When DSS first approached respondent regarding the alleged abuse, she denied the possibility that the allegations were true. Respondent claimed that R.M. "must have been having 'flashbacks' to previous sexual abuse by her previous step-father Daryl [S] and that [Rene H.] must not have understood what he was saying during his confession."

In addition to alleging that R.M. was abused, DSS alleged in the petition that the juveniles were neglected. Specifically, DSS noted that R.M.'s younger sisters continued to have unsupervised contact with Rene H., placing them "at risk of future sexual abuse." DSS further alleged that at least some of R.M.'s siblings had been exposed to the sexual abuse, noting that R.M.'s "younger sisters slept on the bottom bunk bed while [R.M.] was being abused in her top bunk bed." DSS alleged that A.S. had "been awakened at night when [Rene H.] stood on her bed to climb into [R.M.'s] bed and she had heard [R.M.] saying 'no' and pushing her step-father off her mattress." Thereafter, DSS obtained custody of the juveniles by non-secure custody order.

At a non-secure custody hearing on 27 February 2007, the trial judge noted that he had heard the related criminal matter regarding Rene H., and that he had found probable cause to believe that the crimes had taken place. The trial judge further stated that there was a factual basis to believe that the allegations in the petition were true. Accordingly, the trial court ordered that custody of the juveniles remain with DSS.

Following a hearing on 22 May 2007, the trial court entered an adjudication and disposition order on 19 June 2007. The court found that R.M. was abused and neglected and that J.M., R.H., C.S., A.S., and B.M. were neglected. Thereafter, respondent filed timely notice of appeal.

On appeal, respondent argues that the trial court erred by taking judicial notice of prior hearings—specifically, the non-secure custody hearing held on 27 February 2007 and Rene H.'s probable cause hear-

ing held on 8 January 2007. Respondent further argues the trial court erred in basing its factual findings of abuse and neglect exclusively on the prior probable cause and non-secure custody hearings, and refusing to allow any additional evidence at the 22 May 2007 hearing. We agree in part.

> "The allegations in a petition alleging abuse, neglect, or dependency shall be proved by clear and convincing evidence." N.C. Gen. Stat. § 7B-805 (2003). A proper review of a trial court's finding of . . . neglect [or abuse] entails a determination of (1) whether the findings of fact are supported by "clear and convincing evidence," and (2) whether the legal conclusions are supported by the findings of fact. The "clear and convincing" standard is greater than the preponderance of the evidence standard required in most civil cases. Clear and convincing evidence is evidence which should fully convince.

In re J.A.G., 172 N.C. App. 708, 712, 617 S.E.2d 325, 329 (2005) (internal citations and quotations omitted).

The trial court may take judicial notice of prior hearings. *In re J.W.*, 173 N.C. App. 450, 455, 619 S.E.2d 534, 539 (2005). However, the trial court is required to consider those prior proceedings in accordance with the North Carolina Rules of Evidence, and to disregard any evidence not admissible under the Rules. *In re Morales*, 159 N.C. App. 429, 433, 583 S.E.2d 692, 694 (2003) ("In a bench trial, 'the court is presumed to disregard incompetent evidence.' ") (citation omitted). A " 'judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.' N.C. Gen. Stat. § 8C-1, Rule 201(b) (2001)." *Davis v. McMillian*, 152 N.C. App. 53, 56, 567 S.E.2d 159, 161 (2002).

Article 8 of the North Carolina Juvenile Code guarantees a parent the right to a hearing before her child is adjudicated abused, neglected, or dependent. Specifically, North Carolina General Statutes, section 7B-802 provides that

> [t]he adjudicatory hearing shall be a judicial process designed to adjudicate the existence or nonexistence of any of the conditions alleged in a petition. In the adjudicatory hearing, the court shall protect the rights of the juvenile *and the juvenile's parent to assure due process of law*.

N.C. Gen. Stat. § 7B-802 (2007) (emphasis added). A parent's due process rights include the right to present evidence, and the right to confront and cross-examine witnesses. *Thrift v. Buncombe County Dep't of Soc. Servs.*, 137 N.C. App. 559, 561, 528 S.E.2d 394, 395 (2000).

In the instant case, the trial court precluded respondent from presenting her evidence at the 22 May 2007 adjudication hearing, and denied her the right to confront the State's evidence against her. At a 12 April 2007 hearing, set for adjudication, but continued due to the absence of the Spanish interpreter, the attorney for Rene H., James Reaves, stated that he believed the continued hearing would take one to one and one half days to complete. The trial court responded: "I wonder why it would take that long since I've—isn't this the one I've heard the probable cause hearing and the two-hour non-secure custody hearing on?" The trial court continued: "I'm not sure I'm going to need that—a day and a half worth of evidence. I'm not saying I've made up my mind, but I'm just saying I've heard a bunch of this case already."

On 22 May 2007, the trial court conducted the adjudication and disposition hearings. Wendy Walker, representing the Department of Social Services, moved the trial court to take judicial notice of the prior probable cause and non-secure custody hearings, which the trial court did. Craig Blitzer, attorney for respondent, requested the opportunity to present evidence in addition to the prior hearings on the matter of adjudication. The trial court responded that it would:

> find the matters set forth in the [DSS] petition. By clear, cogent and convincing evidence Mr. Blitzer, your client was ably represented by Miss Burnett [respondent's prior attorney] in the non-secure custody hearing. Had plenty of opportunity to cross-examine. And that is a, that was a recorded hearing. I don't believe anything could be enlisted as far as adjudication that would change the Court's mind. So I'm going to overrule any objection that you might have in that regard. So, Miss Walker, if you will, draw that order making the findings in the petition.

Respondent was not afforded the opportunity to present evidence at the 22 May 2007 adjudication hearing, nor to confront the evidence against her. This was a violation of North Carolina General Statutes, section 7B-802 (2007). *See also In re L.B.D.*, 168 N.C. App. 206, 208-09, 617 S.E.2d 288, 290 (2005); *Thrift*, 137 N.C. App. at 561, 528 S.E.2d at 395.

Further, when "the juvenile is alleged to be abused, neglected, or dependent, the rules of evidence in civil cases shall apply." N.C. Gen. Stat. § 7B-804 (2007). " 'As the link between a parent and child is a fundamental right worthy of the highest degree of scrutiny, the trial court must fulfill all procedural requirements in the course of its duty to determine whether allegations of neglect are supported by clear and convincing evidence.' " *In re Shaw*, 152 N.C. App. 126, 129, 566 S.E.2d 744, 746 (2002) (quoting *Thrift*, 137 N.C. App. at 563, 528 S.E.2d at 396).

The Rules of Evidence include the prohibition against hearsay evidence, except as explicitly allowed under the rules. N.C. Gen. Stat. § 8C-1, Rules 802 (2007). R.M. did not testify at the prior non-secure custody hearing. R.M. did testify at the probable cause hearing, but that hearing was not recorded. Further, R.M.'s testimony at the probable cause hearing contradicted her statements to law enforcement and DSS implicating Rene H. Nonetheless, the trial court based a number of its findings of fact on hearsay statements made by R.M. to law enforcement and DSS, as well as hearsay statements made by some of R.M.'s siblings, respondent, and Rene H. The prior testimony of law enforcement and DSS personnel also constituted inadmissable hearsay evidence, absent a finding that it fell within the bounds of any hearsay exception. N.C. Gen. Stat. § 7B-804 (2007); N.C. Gen. Stat. § 8C-1, Rules 802 (2007).

DSS never moved for the admission of testimony from any prior hearing, and no showing was made that any prior testimony satisfied the Rules of Evidence for the admission of hearsay evidence. *Id*. In the instant case, the trial court was permitted, even required, to consider any relevant and *admissible* evidence, including testimony from prior hearings not from the same case. *Speagle v. Seitz*, 354 N.C. 525, 533-34, 557 S.E.2d 83, 88 (2001). The *Speagle* decision, however, does not sanction the admission of or consideration of inadmissible evidence. Clearly prior testimony which was not admitted pursuant to any hearsay exception was not admissible, and should not have been considered. N.C. Gen. Stat. § 8C-1, Rule 804 (2007). The trial court could not thwart the protections of the Rules of Evidence by taking judicial notice of this testimony. A contrary finding would eviscerate the Rules of Evidence in custody hearings, in direct conflict with North Carolina General Statutes, section 7B-804, and prior decisions of our appellate courts. *See Speagle*, 354 N.C. at 533-34, 557 S.E.2d at 88; *Shaw*, 152 N.C. App. at 129, 566 S.E.2d at 746. Additionally, judicial notice of this kind of prior testimony clearly is

not envisioned under North Carolina General Statutes, section 8C-1, Rule 201(b) (2007).

In the absence of a meaningful adjudication hearing, the State was not required to offer proof that these hearsay statements fell within any of the hearsay exceptions included in the Rules of Evidence. This lack of a meaningful hearing deprived respondent of her fundamental right to due process.

The trial court, having relied solely on testimony from the prior hearings, one of which was not even recorded, and the reports of DSS and law enforcement, based its findings of fact on hearsay evidence. Because there was no showing by the State that this evidence was admissible under any hearsay exception in the Rules, nor any opportunity given by the trial court for such a showing, nor opportunity given to respondent to rebut same, we must hold that the trial court's findings of fact do not support its conclusions of law, and thus do not support its 19 June 2007 order of adjudication and disposition. We therefore vacate the 19 June 2007 order, and remand to the trial court for new proceedings consistent with this opinion.

Vacated and Remanded.

Judge TYSON concurs.

Judge GEER concurs in the result in a separate opinion.

GEER, Judge, concurring in the result.

In this case, the trial court did not just take judicial notice of prior proceedings in the same matter, but rather appeared to believe that it could take judicial notice of testimony in other hearings. The primary question presented by this appeal is thus whether the trial court could, by invoking the doctrine of judicial notice, base its findings of fact solely on testimony from other proceedings not admitted into evidence. I believe this is a slightly different question than that addressed by the majority opinion and, therefore, concur in the result of that opinion.

It is first important to emphasize what actually occurred in this case. DSS did not move the admission of the transcript of any testimony given at any hearing. Indeed, the probable cause hearing was not transcribed. Although the trial court reported that it had handwritten notes of what occurred at the probable cause and nonsecure

custody hearings, those notes were not made part of the record. Thus, we are not talking about the admission into evidence of testimony, but rather of a court's taking judicial notice of the substance of prior testimony.

To put it succinctly, no authority in this State supports taking judicial notice of the content of testimony in another hearing. This Court has, of course, "repeatedly . . . held that a trial court may take judicial notice of earlier proceedings in the same case." *See In re W.L.M.*, 181 N.C. App. 518, 523, 640 S.E.2d 439, 442 (2007). This principle cannot, however, under any view, apply to the probable cause hearing because it was not an earlier proceeding "in the same case." *Id.* It was a criminal matter not involving respondent.

Nevertheless, this principle has not been extended beyond taking judicial notice of prior orders or reports filed with the court. *Id.* at 522, 640 S.E.2d at 442 (rejecting respondent's contention that trial court erred "in taking judicial notice of the prior orders and various court reports in the juveniles' underlying case files"). To now extend this principle to testimony in prior proceedings would be inconsistent with N.C.R. Evid. 804(b)(1).

Rule 804(b)(1) provides that if the declarant "is unavailable as a witness," then the hearsay rule does not exclude "[t]estimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." If a court could take judicial notice of prior testimony, there would be no need to ever show that the witness was unavailable as a witness or that the opposing party had an opportunity to examine the witness, as indeed this case demonstrates.

Here, DSS made no showing that any of the witnesses at the nonsecure custody or probable cause hearings were unavailable, and it is undisputed that respondent had no opportunity to question the witnesses at the probable cause hearing. Thus, the trial court took judicial notice of what amounts to inadmissible hearsay. It eviscerated Rule 804(b)(1).

While North Carolina has not specifically addressed whether a court may take judicial notice of prior testimony, other jurisdictions have. The courts have reached the same conclusion as I have and held

that judicial notice of the content of testimony in other hearings—even if in the same or related proceedings—is improper and a violation of the hearsay rule. *See*, *e.g.*, *Williams v. Wraxall*, 33 Cal. App. 4th 120, 130 n.7, 39 Cal. Rptr. 2d 658, 663 n.7 ("We . . . cannot take judicial notice of the truth of hearsay statements in decisions or court files, including pleadings, affidavits, *testimony*, or statements of fact." (Emphasis added.)), *modified on other grounds*, 34 Cal. App. 4th 199b, 1995 Cal. App. LEXIS 458 (1995); *In re Zemple*, 489 N.W.2d 818, 820 (Minn. Ct. App. 1992) ("Appellant also claims that the trial court erred when it took judicial notice of testimony given at the domestic abuse proceeding. We agree. . . . The testimony given by appellant's father was inadmissible hearsay."); *Chapman v. Chapman*, 96 Nev. 290, 293, 607 P.2d 1141, 1143 (1980) (holding, in termination of parental rights case, that trial court erred in taking judicial notice of evidence before him in guardianship hearing in same case); *May v. May*, 829 S.W.2d 373, 376 (Tex. Ct. App. 1992, *writ denied*) ("Generally, a trial judge cannot consider testimony taken at a previous trial in a subsequent trial unless such testimony is admitted into evidence."); *Jakab v. Jakab*, 163 Vt. 575, 579, 664 A.2d 261, 263 (1995) (holding that "[i]t is improper to judicially notice the content of testimony in another proceeding" and noting that the method for introducing testimony from a past proceeding is set forth in Rule 804(b)(1) of the Rules of Evidence).

Thus, pursuant to Rule 804(b)(1), DSS could have, upon a proper showing, sought to introduce the transcript of the testimony of witnesses in the nonsecure custody hearing who were unavailable for the adjudication hearing. DSS did not, however, attempt to do so. Since respondent had no opportunity to examine witnesses at the probable cause hearing, evidence of that testimony was necessarily inadmissible hearsay.

The procedure followed in this case is troubling even apart from Rule 804(b)(1)'s application because no transcripts of the prior testimony even existed at the time of the adjudicatory hearing. The trial court relied upon notes of the testimony—notes that were never shared with the parties, were not admitted into evidence, and are not part of the record on appeal. There is thus no means of determining whether the trial court had an accurate summary of the actual testimony in the prior proceedings when it made its decision.

The trial court's adjudication was based exclusively on the court's notes of the prior testimony. Since the court could not take judicial notice of that testimony, its adjudication is not supported by compe-

tent evidence. I agree that we are required to vacate the order and remand for a new adjudication hearing at which evidence is admitted in accordance with the Rules of Evidence.

STATE OF NORTH CAROLINA, PLAINTIFF v. DEMAR RYAN WORRELL, DEFENDANT

No. COA07-1120

(Filed 6 May 2008)

1. Constitutional Law— representation by counsel—revocation of waiver

The trial court did not err when it allowed a robbery defendant to be represented by counsel rather than proceed pro se where there is no evidence that the trial court expressly forced appointed counsel on defendant or pressured, coerced, or badgered defendant into accepting appointed counsel; the court indulged in every reasonable presumption against waiver of the right to counsel; and it conducted a thorough inquiry before defendant voluntarily revoked his waiver of the right to counsel.

2. Criminal Law— continuances—considerations—standard of review

Before ruling on a motion to continue, the trial court shall consider the complexity of the case as a whole, and errs when it denies a continuance for a defendant who does not have ample time to confer with counsel and prepare a defense. Review is for abuse of discretion, but denial provides grounds for a new trial only when defendant can show prejudice.

3. Criminal Law— continuance—denial

There was no error in the denial of defendant's pro se motion to continue his robbery prosecution where nearly three months had passed between defendant's indictment and the trial date, defendant offered the names of no witnesses who were necessary to his defense, and he made no showing as to any relevant facts for which he needed time to gather evidence.

4. Criminal Law— continuance—denial—no prejudice

The trial court was presented with a sufficient reason for a robbery defendant's requested continuance, but any error arising from the denial of the continuance was not prejudicial.

Appeal by defendant from judgment entered on or about 3 April 2007 by Judge Ripley Eagles Rand in Wayne County Superior Court. Heard in the Court of Appeals 2 April 2008.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Amar M. Majmundar, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Kristen L. Todd, for defendant-appellant.

STROUD, Judge.

Defendant Demar Ryan Worrell appeals from judgment entered upon jury verdicts finding him guilty of robbery with a dangerous weapon and possession of a firearm by a convicted felon. Defendant contends that the trial court erred by denying: (1) his constitutional right to represent himself, and (2) his motions to continue. After careful review of the record we conclude that defendant received a fair trial, free of reversible error.

I. Background

At trial, the State presented the following evidence: On 19 July 2005 a four-door silver sedan belonging to defendant's mother, Gloria Worrell, pulled into the parking lot of Wachovia Bank in Mount Olive, Wayne County. Defendant and one other person ("Jack") emerged from the sedan, donned orange masks and entered the bank. The driver of the sedan left the bank and waited about a block away.

Upon entering the bank, defendant announced his intention to commit a robbery and demanded that the tellers "[g]ive me your money." Defendant then jumped over the counter and proceeded to take money from a teller drawer. During this time, Jack brandished a silver pistol and threateningly displayed it to the various bank personnel.

After taking the money, defendant jumped back over the counter and left the bank with Jack. Defendant and Jack ran back to the silver sedan and fled the area.

On 2 January 2007, the Wayne County Grand Jury indicted defendant for armed robbery and possession of a firearm by a convicted felon. Defendant was tried before a jury in Superior Court, Wayne County, from 26 March to 3 April 2007. The jury found defendant guilty of robbery with a dangerous weapon and possession of a

firearm by a convicted felon. Upon the jury's verdict, the trial court sentenced defendant to 77 to 102 months. Defendant appeals.

II. Criminal Defendant's Right to Appear *Pro Se*

[1] Defendant, citing *State v. Walters*, contends that a trial court errs when a competent, understanding defendant, in the voluntary exercise of his free will, "clearly and unequivocally declare[s] before trial that he want[s] to represent himself and d[oes] not want assistance of counsel," but is not allowed to represent himself. 182 N.C. App. 285, 291, 641 S.E.2d 758, 761 (2007). Defendant contends that his case is "strikingly similar" to *Walters* and to *Faretta v. California*, 422 U.S. 806, 45 L. Ed. 2d 562 (1975), a United States Supreme Court case recognizing a criminal defendant's constitutional right to represent himself.

However, "courts indulge in every reasonable presumption against waiver . . . of the right to counsel[.]" *Brewer v. Williams*, 430 U.S. 387, 404, 51 L. Ed. 2d 424, 440 (1977) (citations omitted) (holding that the defendant had not waived right to counsel and affirming suppression of incriminating statements made without the presence of counsel). "[T]he trial court must conduct a thorough inquiry" before it allows a criminal defendant to waive appointed counsel. *State v. Thomas*, 331 N.C. 671, 674, 417 S.E.2d 473, 476 (1992) (granting a new trial when the trial court allowed the defendant to waive appointed counsel without conducting a thorough inquiry to ensure that defendant understood the consequences of proceeding *pro se*).

After review of the record, we do not find that this case is "strikingly similar" to *Faretta* or *Walters*. In *Faretta*, the defendant was granted a new trial when the trial court "required that [the defendant's] defense be conducted only through the appointed lawyer from the public defender's office," 422 U.S. at 811, 45 L. Ed. 2d at 568, even though the defendant was "literate, competent, and understanding" and "clearly and unequivocally declared to the trial judge that he wanted to represent himself and did not want counsel." *Id.* at 835, 45 L. Ed. 2d at 582. In *Walters*, this Court extended the holding in *Faretta* to a case where the trial court badgered an unwilling defendant until he accepted a court-appointed attorney:

> [The trial court:] We're burning daylight. We're wasting time . . . . Now, if you want to be stupid and try your own case . . . . then you can be stupid and do that. That's your choice. . . . [Y]ou can be obstinate and you can be stupid and *you can go to prison*

> *because you didn't listen to a professional*. Or you can do it like somebody that's smart and participate in your defense using a professional. Your choice. . . . Now, I'm going to give you about two minutes to discuss this with your lawyer and then you make your decision. . . .
>
> . . . .
>
> [Y]ou don't understand it. You have been watching too much TV. Now are you ready to proceed?

Walters, 182 N.C. App. at 288-89, 641 S.E.2d at 759-60 (emphasis added) (quoting from the trial transcript).

The facts in the record *sub judice* are manifestly different from *Walters* and *Faretta*. Here, the trial court questioned defendant about his ability to represent himself, noted for the record that defendant "answered all of my questions and that he knowingly, intelligently, voluntarily, and as his informed choice has waived any right to a lawyer[,]" and then recognized James Copeland, who had previously been appointed, as standby counsel. The trial court heard defendant's *pro se* pre-trial motions. The trial court granted some of his motions and denied others,[1] treating defendant with respect throughout the hearing. After defendant appeared confused during the hearing on his motion for discovery, the trial court told defendant:

> If you want Mr. Copeland to represent you, I'll make that available to you one more time. . . . You've obviously worked very hard in reviewing all the paperwork that the State has given you in making yourself aware of the different procedural motions that [you] can make. . . . [Y]ou've made what I would consider . . . a fairly effective presentation about the facts in your case and the things that you want to see happen. . . .
>
> [Y]ou've done a lot of work, but Mr. Copeland [has been practicing law a long time, and] he knows more about it than you do, quite frankly.

Defendant then moved for continuance, and told the trial court that he would have "no choice" but to accept court-appointed counsel if the trial court did not continue his case. The trial court then denied defendant's motion for continuance.[2]

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1. Other than the motion to continue which is reviewed *infra*, none of the trial court's rulings on defendant's *pro se* pre-trial motions were made the subject of this appeal.

2. The trial court properly denied defendant's motion for continuance. *See infra*.

After the denial of his motion for continuance, defendant realized that he was not capable of adequately providing his own defense. He voluntarily revoked his waiver of appointed counsel and informed the trial court that he would no longer represent himself, but would be represented by Mr. Copeland as his court-appointed attorney. The trial court asked again, to ensure that representation by Mr. Copeland was fully defendant's choice, before appointing Mr. Copeland as defense counsel.

There is no evidence in the record that the trial court expressly forced appointed counsel on defendant, as in *Faretta*, 422 U.S. at 811, 45 L. Ed. 2d at 567, nor is there any evidence that the trial court pressured, coerced, or badgered defendant into accepting appointed counsel, as in *Walters*, 182 N.C. App. at 293, 641 S.E.2d at 762. Rather, the trial court "indulge[d] in every reasonable presumption against waiver of the right to counsel[,]" *Brewer*, 430 U.S. at 404, 51 L. Ed. 2d at 440, and "conduct[ed] a thorough inquiry[,]" *Thomas*, 331 N.C. at 674, 417 S.E.2d at 476, before defendant voluntarily revoked his waiver of the right to counsel. Accordingly, we hold that the trial court did not err when it allowed defendant to be represented by counsel.

III. Continuances

[2] Defendant contends that he was prejudiced by the trial court's denial of his motions for continuance, the first made *pro se*, the second made by his appointed counsel. Defendant, citing *State v. Rogers*, contends that "when a motion to continue raises a constitutional issue, . . . the trial court's ruling is fully reviewable by an examination of the particular circumstances of each case." 352 N.C. 119, 124, 529 S.E.2d 671, 675 (2000) (citation and internal quotation marks omitted). The State relies on *State v. Branch*, to contend that the denial of defendant's motions to continue should be reviewed only for abuse of discretion. 306 N.C. 101, 104, 291 S.E.2d 653, 656 (1982) (noting both standards of review, and concluding that the record showed neither abuse of discretion nor prejudice to defendant in the denial of the motion to continue). We agree with defendant's standard of review, with the added proviso that "the denial of a motion to continue, whether a constitutional issue is raised or not, is sufficient grounds for the granting of a new trial only when the defendant is able to show that the denial was erroneous and *that he suffered prejudice as a result of the error*." *Rogers*, 352 N.C. at 124, 529 S.E.2d at 675 (emphasis added).

Before ruling on a motion to continue, the trial court shall consider, *inter alia*, "[w]hether the case taken as a whole is so unusual and so complex, due to the number of defendants or the nature of the prosecution or otherwise, that more time is needed for adequate preparation[.]" N.C. Gen. Stat. § 15A-952(g)(2) (2005). Consideration of a motion to continue pursuant to section 15A-952(g)(2) is heavily fact-based, and disposition of the motion is to be determined by weighing the complexity of the charges, including the number of incidents, the number of witnesses, the number of locations involved, and the severity of the punishment, against the amount of time available for preparation of a defense. *Rogers*, 352 N.C. at 125, 529 S.E.2d at 675.

A trial court errs when it denies a motion to continue where the defendant "d[oes] not have ample time to confer with counsel and to investigate, prepare and present his defense." *Rogers*, 352 N.C. at 125, 529 S.E.2d at 675 (citation and quotation marks omitted) (holding that a motion to continue was improperly denied when the crimes committed involved "multiple incidents in multiple locations over a two-day period" and counsel had only thirty-four days to prepare for a bifurcated capital trial); *but see Branch*, 306 N.C. at 105-06, 291 S.E.2d at 657 (holding that the motion to continue was properly denied when four months had passed between indictment and trial and the defendant did not support his motion with the names of any witnesses necessary to his defense); *State v. Searles*, 304 N.C. 149, 154-55, 282 S.E.2d 430, 433-34 (1981) (holding that a motion to continue was properly denied when eight weeks had passed between appointment of counsel and trial and the defendant gave the trial court only the nickname of a potential witness and made no showing of why the witness was necessary to his defense).

A. Defendant's First Motion to Continue

[3] On the day defendant's case was called for trial, before jury selection, defendant moved *pro se* to continue for the following reasons:

> I have more evidence that I would like to bring forth and subpoena the witnesses I would like to bring on my behalf. . . .
>
> . . . .
>
> I just ask I may be granted a continuance based on my ignorance, and I would like to at least be having a chance to have evidence on my behalf that I need to bring forth [to] the Court, too. . . .
>
> . . . .

> I didn't even think this case was going to be on the docket for at least another seven, eight months. So I really wasn't—I was, pretty much, getting down pat about my investigation, who I wanted to subpoena around the time when I went to court last week and [Judge] Weeks told me about them taking this to trial Monday, today. . . .
>
> . . . .
>
> I didn't think this case was going to come up so fast.

As in *Rogers*, defendant's motion to continue was on the grounds of insufficient time to prepare an adequate defense and therefore raises constitutional questions which will be "fully review[ed] by an examination of the particular circumstances of [the] case." *Rogers*, 352 N.C. at 124, 529 S.E.2d at 675.

Defendant was proceeding *pro se* when he first moved for a continuance, so the first prong of *Rogers*, "ample time to confer with counsel[,]" 352 N.C. at 125, 529 S.E.2d at 675, is irrelevant to defendant's first motion to continue and we need to consider only whether defendant had sufficient time "to investigate, prepare and present his defense." *Id.* The record shows that nearly three months had passed between defendant's indictment and the trial date. Defendant offered the names of no witnesses who were necessary to his defense and made no showing as to any relevant facts for which he needed time to gather evidence. On this record, we conclude that defendant's first motion to continue is inapposite to *Rogers*. Rather, it is apposite to *Branch*, 306 N.C. at 105-06, 291 S.E.2d at 657, where this Court found no error in the denial of a motion to continue when four months had passed between indictment and trial and the defendant did not support his motion with the names of any witnesses necessary to his defense. Accordingly, we hold that the trial court did not err when it denied defendant's first motion to continue.

B. Defendant's Second Motion to Continue

[4] The day after defendant began to be represented by court-appointed counsel, he moved for continuance a second time through counsel, arguing to the trial court:

> I will need to get a continuance [in order for a private detective] to be of any assistance to me at all. . . .
>
> Additionally, Your Honor, I sent Mr. Worrell's mother out to get a witness [who] would corroborate what he told police . . . . about

> what happened on that day. . . . [The witness] [d]idn't really know him but remembered the incident happening. . . . [S]he remembered him trying to get into her house, use the phone, but she wouldn't let him in.
>
> I got the name of that person. . . . [S]he apparently is, I'm guessing, an elderly woman.
>
> . . . .
>
> . . . . [S]he is apparently a reluctant witness to come up here[.]

The trial court denied defendant's second motion for continuance and proceeded to jury selection.

Mr. Copeland was appointed on Friday, 16 March 2007, as standby counsel, a role limited "to assist[ing] the defendant when called upon and to bring[ing] to the judge's attention matters favorable to the defendant[.]" N.C. Gen. Stat. § 15A-1243 (2005); *see also Thomas*, 331 N.C. at 677, 484 S.E.2d at 478. Mr. Copeland learned on Tuesday, 20 March 2007, that the case was calendared for trial on Monday, 26 March 2007. Jury selection began on Tuesday, 27 March 2007. Defense counsel had been involved in the case in the very limited role of standby counsel for only ten days, and had less than twenty-four hours from when he was appointed to prepare for trial as sole counsel on a charge of armed robbery, a Class D Felony. Defendant supported his motion to continue by describing an essential witness in detail and forecasting relevant evidence to which the witness was expected to testify.

Even though the crimes for which defendant was being tried involved only one incident in one location and a small number of witnesses, less than one day with Mr. Copeland as sole counsel was not sufficient to allow defendant "ample time to confer with counsel and to investigate, prepare and present his defense." *Rogers*, 352 N.C. at 125, 529 S.E.2d at 675. Accordingly, we conclude that the trial court was presented with sufficient basis for continuance.

In deciding this case, we are careful to avoid chilling a criminal defendant's right to represent himself, *Rogers*, 352 N.C. at 126, 529 S.E.2d at 675, but we note that "[a] defendant is not prejudiced . . . by error resulting from his own conduct[,]" N.C. Gen. Stat. § 15A-1443(c) (2005), and we are wary of actions by a criminal defendant which tend to "disrupt or obstruct the orderly progress of the court under the guise of . . . nonmeritorious motions to continue[,]" *Rogers*, 352

N.C. at 126, 529 S.E.2d at 676 (internal citation and quotation marks omitted). Defendant's insistence on representing himself, which he later revoked, contributed to the late date at which Mr. Copeland was appointed as defense counsel. Further, the trial court granted a recess of two business days at the close of the State's evidence on Wednesday, resuming court the next Monday, in order for defendant to procure his witness, and a witness matching the description given by defendant—Annie Mae Thompson—appeared and testified on Monday following the recess:

> Q. Okay. Now, during the summer of 2005, did anything unusual happen at your house that you recall, ma'am?
>
> A. Yes. . . . Someone knocked on the door[.]
>
> . . . .
>
> He said . . . , "Miss, may I use the telephone, please?" I said, "No. I don't open my door at night." But I didn't tell him why.
>
> Q. Did you ever open the door to see who he was?
>
> A. No.

On this record, we conclude defendant's contribution to the delay in appointment of counsel, combined with the trial court's grant of a two business day recess for the procurement of the necessary witness, and the witness' appearance and testimony to the facts forecast in support of the motion to continue leave no basis for defendant to complain on appeal that he was prejudiced by the denial of his second motion to continue. This assignment of error is overruled.

IV. Conclusion

We conclude that the trial court did not err when it allowed defendant to be represented by counsel and denied defendant's first motion to continue. We further conclude that any error arising from the trial court's denial of defendant's second motion to continue did not prejudice defendant. Accordingly, we hold that defendant received a fair trial, free of reversible error.

No error.

Judges HUNTER and ELMORE concur.

JOHN R. KUCAN, JR., AND TERRY COATES, PLAINTIFFS v. ADVANCE AMERICA, CASH ADVANCE CENTERS OF NORTH CAROLINA, INC.; ADVANCE AMERICA, CASH ADVANCE CENTERS, INC.; AND WILLIAM M. WEBSTER, IV, DEFENDANTS

LISA HAGER AND IRA NEBRASKA HALL, ON BEHALF OF THEMSELVES AND ALL OTHER PERSONS SIMILARLY SITUATED, PLAINTIFFS v. CHECK INTO CASH OF NORTH CAROLINA, INC., CHECK INTO CASH, INC., JONES MANAGEMENT SERVICES, LLC, W. ALLAN JONES, AND STEPHEN M. SCOGGINS, DEFENDANTS

ADRIANA MCQUILLAN AND SANDRA K. MATTHIS, ON BEHALF OF THEMSELVES AND ALL OTHER PERSONS SIMILARLY SITUATED, PLAINTIFFS v. CHECK 'N GO OF NORTH CAROLINA, INC.; CNG FINANCIAL CORPORATION; JARED A. DAVIS AND A. DAVID DAVIS, DEFENDANTS

No. COA06-447
No. COA06-505
No. COA06-506

(Filed 6 May 2008)

Unfair Trade Practices— check cashing—waiver of class action—test for unconscionability

A case involving check cashing businesses and agreements with waivers of class actions was remanded where the trial court acted before the new test of unconscionability promulgated in *Tillman v. Commercial Credit Loans, Inc.*, 362 NC 93.

Appeal by plaintiffs from orders entered 12 January 2006 by Judge D. Jack Hooks, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 9 January 2007.

Hartzell & Whiteman, L.L.P., by J. Jerome Hartzell; North Carolina Justice Center, by Carlene McNulty; Trial Lawyers for Public Justice, by F. Paul Bland, Jr. and Richard Frankel; Financial Protection Law Center, by Mallam J. Maynard; Wallace & Graham, P.A., by Mona Lisa Wallace and John Hughes; Richard Fisher Law Office, by Richard A. Fisher, for plaintiff-appellants.

Womble Carlyle Sandridge & Rice, PLLC, by Johnny M. Loper; Skadden, Arps, Slate, Meagher & Flom, LLP, by Saul M. Pilchen, Pro Hac Vice; Marshall, Williams & Gorham, LLP, by Lonnie B. Williams and John L. Coble, for defendant-appellees Advance America, Cash Advance Centers of North Carolina, Inc.; Advance America, Cash Advance Centers, Inc.; and William M. Webster, IV.

Poyner & Spruill, LLP, by Edwin M. Speas, Jr. and David M. Barnes; Manatt, Phelps & Phillips, LLP, by Claudia Callaway, for defendant-appellees Check Into Cash of North Carolina, Inc., Check Into Cash, Inc., Jones Management Services, LLC. W. Allan Jones, and Stephen M. Scoggins.

Kilpatrick Stockton, LLP, by Alan D. McInnes, Alfred P. Carlton, Jr., and Gregg E. McDougal; Squire, Sanders & Dempsey, LLP, by Amy L. Brown and Pierre H. Bergeron, for defendant-appellees Check 'n Go of North Carolina, Inc.; CNG Financial Corporation, Jared A. Davis, and A. David Davis.

Yolanda D. McGill and Jonas Monast, for Center for Responsible Lending, amicus curiae.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Gary R. Govert and Assistant Attorney General Philip A. Lehman, amicus curiae (COA06-447).

Director Deborah M. Weissman and Certified Law Student David Donovan, for University of North Carolina School of Law Clinical Programs; Holly M. Bryan for North Carolina Academy of Trial Lawyers, amicus curiae (COA06-506).

Edelstein and Payne, by M. Travis Payne, for AARP, amicus curiae (COA06-505 and COA06-506).

HUNTER, Judge.

(The three above-captioned cases were consolidated for discovery, hearings, and this appeal.)

All three sets of above-named plaintiffs ("Kucan," "Hager," and "McQuillan," respectively) commenced their actions in New Hanover County Superior Court on 27 July 2004, alleging that the lending practices of each defendant ("Advance America," "Check Into Cash," and "Check 'n Go," respectively) violated, among other statutes, the North Carolina Consumer Finance Act, Check Cashing Statute, and Unfair Trade Practice Statute. N.C. Gen. Stat. §§ 53-166(a) & (b), 53-276-283, 75-1.1 (2007). Plaintiffs sought an injunction against defendants and certification as a class for further litigation; defendants moved to compel arbitration as required by the respective written loan agreements signed by plaintiffs and defendants. The cases were consolidated for discovery and hearings by the court because they presented very similar issues. On 30 December 2005, the trial court denied class certification and compelled arbitration. All plaintiffs appealed.

I.

Findings made by the trial court tended to show the following facts. Each defendant company conducts business in the same way: A customer presents a check for an amount that includes the cash he wishes to receive plus a finance charge. Defendant company promises not to present the check for payment for up to fourteen days. If the customer does not return at that time (i.e., the date the loan is due), defendant company deposits the check. If the customer can neither pay the loan nor cover the amount of the check were it to be presented, defendant companies allow the customer to take out a new loan for an additional fee.

All plaintiffs obtained loans in varying amounts from their respective defendants. Specifically, from defendant Check Into Cash: Between June 2002 and January 2004, plaintiff Hager obtained five loans, each for $300.00, with a fee of $54.00; in March 2002, plaintiff Hall obtained one loan for $300.00, with a fee of $52.94. From defendant Advance America: Between May 2003 and August 2004, plaintiff Kucan obtained sixteen loans, each for $425.00 and incurring a fee of $75.00; in December 2003, plaintiff Coates obtained one loan for $200.00 with a fee of $35.00, followed by two rollovers for $300.00, each incurring a fee of $52.50. From defendant Check 'n Go: Beginning in August 2001, plaintiff McQuillan obtained forty-six loans for either $425.00, with a fee of $76.50, or $300.00, with a fee of $50.00; beginning in May 2004, plaintiff Matthis obtained approximately ten loans for either $200.00, with a fee of $36.00, or for $225.00, with a fee of $40.50.

In order to receive funds, all customers were required to sign forms that contained clauses requiring customers to submit disputes to arbitration and prohibiting customers from participating in class action suits against the company. The relevant portion of the agreement between plaintiff McQuillan and defendant Check 'n Go states:

> AGREEMENT TO ARBITRATE ALL DISPUTES: You and we agree that any and all claims, disputes or controversies between you and us . . . shall be resolved by binding individual (and not joint) arbitration by and under the Code of Procedure of the National Arbitration Forum ("NAF") . . . . This agreement to arbitrate all disputes shall apply no matter by whom or against whom the claim is filed . . . . Your arbitration fees may be waived by the NAF in the event you cannot afford to pay them. The cost of any participatory, documentary or telephone hearing, if one is held at

your or our request, will be paid for solely by us as provided in the NAF Rules . . . .

> NOTICE: YOU AND WE WOULD HAVE HAD A RIGHT OR OPPORTUNITY TO LITIGATE DISPUTES THROUGH A COURT AND HAVE A JUDGE OR JURY DECIDE THE DISPUTES BUT HAVE AGREED INSTEAD TO RESOLVE DISPUTES THROUGH BINDING ARBITRATION.

AGREEMENT NOT TO BRING, JOIN OR PARTICIPATE IN CLASS ACTIONS: To the extent permitted by law, you agree that you will not bring, join or participate in any class action as to any claim, dispute or controversy you may have against us . . . . This Agreement does not constitute a waiver of any of your rights and remedies to pursue a claim individually and not as a class action in binding arbitration as provided above.

The relevant portion of the agreement between plaintiff Kucan and defendant Advance America is titled "WAIVER OF JURY TRIAL AND ARBITRATION AGREEMENT" and states:

> [2.] You acknowledge and agree that by entering into this Arbitration Provision:
>
> (a) YOU ARE WAIVING YOUR RIGHT TO HAVE A TRIAL BY JURY TO RESOLVE ANY DISPUTE ALLEGED AGAINST US OR RELATED THIRD PARTIES;
>
> (b) YOU ARE WAIVING YOUR RIGHT TO HAVE A COURT, OTHER THAN A SMALL CLAIMS TRIBUNAL, RESOLVE ANY DISPUTE ALLEGED AGAINST US OR RELATED THIRD PARTIES; and
>
> (c) YOU ARE WAIVING YOUR RIGHT TO SERVE AS A REPRESENTATIVE, AS A PRIVATE ATTORNEY GENERAL, OR IN ANY OTHER REPRESENTATIVE CAPACITY, AND/OR TO PARTICIPATE AS A MEMBER OF A CLASS OF CLAIMANTS, IN ANY LAWSUIT FILED AGAINST US AND/OR RELATED THIRD PARTIES.
>
> 3. Except as provided in Paragraph 6 below, all disputes including any Representative Claims against us and/or related third parties shall be resolved by binding arbitration only on an individual basis with you. THEREFORE, THE ARBITRATOR SHALL NOT CONDUCT CLASS ARBITRATION; THAT IS, THE ARBITRATOR SHALL NOT ALLOW YOU TO SERVE AS A REPRESENTATIVE,

AS A PRIVATE ATTORNEY GENERAL, OR IN ANY OTHER REPRESENTATIVE CAPACITY FOR OTHERS IN THE ARBITRATION.

. . .

6. All parties, including related third parties, shall retain the right to seek adjudication in a small claims tribunal for disputes within the scope of such tribunal's jurisdiction. Any dispute, which cannot be adjudicated within the jurisdiction of a small claims tribunal, shall be resolved by binding arbitration. Any appeal of a judgment from a small claims tribunal shall be resolved by binding arbitration.

The relevant portion of the agreement between plaintiff Hager and defendant Check Into Cash is titled "ARBITRATION AGREEMENT AND WAIVER OF JURY TRIAL" and states:

3. **Waiver of Jury Trial and Participation in Class Action**. You acknowledge and agree that by entering into this Arbitration Agreement:

(a) YOU ARE GIVING UP YOUR RIGHT TO HAVE A TRIAL BY JURY TO RESOLVE ANY DISPUTE ALLEGED AGAINST US OR RELATED THIRD PARTIES;

(b) YOU ARE GIVING UP YOUR RIGHT TO HAVE A COURT, OTHER THAN A SMALL CLAIMS COURT, RESOLVE ANY DISPUTE ALLEGED AGAINST US OR RELATED THIRD PARTIES; and

(c) YOU ARE GIVING UP YOUR RIGHT TO SERVE AS A REPRESENTATIVE, AS A PRIVATE ATTORNEY GENERAL, OR IN ANY OTHER REPRESENTATIVE CAPACITY, AND/OR TO PARTICIPATE AS A MEMBER OF A CLASS OF CLAIMANTS, IN ANY LAWSUIT FILED AGAINST US AND/OR RELATED THIRD PARTIES.

4. **No Class Arbitration**. Except as provided in Paragraph 7 below, all disputes including any Representative Claims against us and/or related third parties shall be resolved by binding arbitration only on an individual basis with you. THEREFORE, THE ARBITRATOR SHALL NOT CONDUCT CLASS ARBITRATION; THAT IS, THE ARBITRATOR SHALL NOT ALLOW YOU TO SERVE AS A REPRESENTATIVE, AS A PRIVATE ATTORNEY GENERAL, OR IN ANY OTHER REPRESENTATIVE CAPACITY FOR OTHERS IN THE ARBITRATION.

. . .

6. **Payment of Arbitration Fees**. Regardless of who demands arbitration, at your request we will advance your portion of the expenses associated with the arbitration, including the filing, administrative, hearing and arbitrator's fees . . . . Throughout the arbitration, each party shall bear his or her own attorneys' fees and expenses[.]

7. **Small Claims Court**. All parties, including related third parties, shall retain the right to seek adjudication in a small claims court for disputes within the scope of such court[']s jurisdiction. Any dispute, which cannot be adjudicated within the jurisdiction of a small claims court, shall be resolved by binding arbitration. Any appeal of a judgment from a small claims court shall be resolved by binding arbitration de novo (i.e. upon a fresh review of the facts).

II. *Tillman*

On 25 January 2008, our Supreme Court filed an opinion in *Tillman v. Commercial Credit Loans, Inc.*, 362 N.C. 93, 655 S.E.2d 362 (2008), agreeing with the result reached by the dissenting opinion from this Court in *Tillman v. Commercial Credit Loans, Inc.*, 177 N.C. App. 568, 629 S.E.2d 865 (2006). Because that case provides a new method of analysis for cases going forward, it behooves us to summarize the reasoning of that case before delving into the one at hand.

The parties in *Tillman* were in much the same position as those in this case; the plaintiffs were borrowers looking to invalidate binding arbitration provisions in their loan agreements on the grounds that they were unconscionable, and the defendants were the lenders from whom the loans were taken. The defendants made a motion to compel arbitration; that motion was denied by the trial court on the basis that the arbitration clause was unconscionable and therefore unenforceable. The defendants appealed, and a split panel of this Court reversed the trial court's order. *Tillman*, 177 N.C. App. at 569, 629 S.E.2d at 867-68. The plaintiffs appealed to the Supreme Court.

A. New Test for Unconscionability

The Court began its analysis by clarifying that the issue before it was whether the arbitration clause in the loan agreement was unconscionable. *Tillman*, 362 N.C. at 94, 655 S.E.2d at 365. The Court then stated: "Because the clause is one-sided, prohibits joinder of claims and class actions, and exposes claimants to prohibitively high costs,

we hold that the trial court did not err in concluding as a matter of law that the clause is unconscionable." *Id.*

Before considering the issues of procedural and substantive unconscionability, the Court outlined a sliding-scale test for evaluating these two factors:

> [W]e note that while the presence of both procedural and substantive problems is necessary for an ultimate finding of unconscionability, such a finding may be appropriate when a contract presents pronounced substantive unfairness and a minimal degree of procedural unfairness, or vice versa. . . .
>
> We conclude that, taken together, the oppressive and one-sided substantive provisions of the arbitration clause at issue in the instant case and the inequality of bargaining power between the parties render the arbitration clause in plaintiffs' loan agreements unconscionable.

Id. at 103, 655 S.E.2d at 370 (citation omitted).

B. Procedural Unconscionability

As to procedural unconscionability, the Supreme Court held that the following three findings of fact, made by the trial court and supported by competent evidence in the record, made a "sufficient showing to establish procedural unconscionability":

> "[(1) plaintiffs] were rushed through the loan closings, and the [defendant's] loan officer indicated where [plaintiffs] were to sign or initial the loan documents. There was no mention of [the disputed terms] at the loan closings." [(2)] In addition, defendants admit that they would have refused to make a loan to plaintiffs rather than negotiate with them over the terms of the arbitration agreement. [(3)] Finally, the bargaining power between defendants and plaintiffs was unquestionably unequal in that plaintiffs are relatively unsophisticated consumers contracting with corporate defendants who drafted the arbitration clause and included it as boilerplate language in all of their loan agreements.

Id. (quoting finding of fact from trial court order).

C. Substantive Unconscionability

As to substantive unconscionability, the Supreme Court gave three overarching reasons that combined to produce substantive unconscionability:

> (1) the arbitration costs borrowers may face are "prohibitively high"; (2) "the arbitration clause is excessively one-sided and lacks mutuality"; and (3) the clause prohibits joinder of claims and class actions. We agree that here, the collective effect of the arbitration provisions is that plaintiffs are precluded from "effectively vindicating [their] . . . rights in the arbitral forum."

Id. at 104, 655 S.E.2d at 370-71 (citation omitted; alteration in original).

As to the first reason—the prohibitively high cost of arbitration—the Court noted:

> the combination of the loser pays provision, the *de novo* appeal process, and the prohibition on joinder of claims and class actions creates a barrier to pursuing arbitration that is substantially greater than that present in the context of litigation. We agree with the trial court that "[d]efendant's arbitration clause contains features which would deter many consumers from seeking to vindicate their rights."

Id. at 106, 655 S.E.2d at 372.

As to the second reason given regarding substantive unconscionability—that " 'the arbitration clause is excessively one-sided and lacks mutuality' "—the Court stated simply that "every time defendants have taken legal action against a borrower, they have managed to avoid application of the arbitration clause." *Id.* at 107, 655 S.E.2d at 372.

Finally, the Court stated that the third reason—"the clause prohibits joinder of claims and class actions"—"affects the unconscionability analysis in two specific ways":

> First, the prohibition contributes to the financial inaccessibility of the arbitral forum as established by this arbitration clause because it deters potential plaintiffs from bringing and attorneys from taking cases with low damage amounts in the face of large costs that cannot be shared with other plaintiffs. Second, the prohibition contributes to the one-sidedness of the clause because the right to join claims and pursue class actions would benefit only borrowers.

Id. at 108, 655 S.E.2d at 373.

The Court concluded by stating that "we hold that the provisions of the arbitration clause, taken together, render it substantively

unconscionable because the provisions do not provide plaintiffs with a forum in which they can effectively vindicate their rights."[1] *Id.*

III.

The same argument is made by all plaintiffs as to the trial court's denial of class certification—specifically, that the trial court erred by denying class certification on the basis of the class action ban because undisputed evidence was presented that the class action ban deprives borrowers of the protection and penalties of North Carolina law. As is evident from the outline of *Tillman* above, that opinion imposes a new framework on the case at hand. Because the lower court did not have the benefit of the new test for unconscionability promulgated in *Tillman* at the time it made its holdings, its findings of fact and conclusions of law do not fit the framework and new test precisely enough for us to review the orders on appeal. In light of this, we remand this case so that the superior court may reexamine the facts in light of *Tillman*.

Remanded.

Judges WYNN and STEELMAN concur.

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1. The Supreme Court's votes were split 3-2-2 in this case, meaning that the preceding analysis is of a plurality, not a majority. However, the concurrence by Justice Edmunds follows essentially the same reasoning as the plurality opinion discussed above. The primary difference between the two is that, where the plurality adopted the balancing approach set out in 1 James J. White & Robert S. Summers, *Uniform Commercial Code* § 4-7, at 315 (5th ed. 2006), and a case from Washington, the concurrence relies solely on the reasoning of the opinion in *Brenner v. School House, Ltd.*, 302 N.C. 207, 274 S.E.2d 206 (1981). In *Brenner*, the Court set out a "totality of the circumstances" test that required examination of the circumstances of the contract to determine whether both procedural and substantive unconscionability exist. *Id.* at 213, 274 S.E.2d at 210. In application, it is for practical purposes almost identical to the test outlined by the plurality opinion. In his concurrence, Justice Edmunds sets out the totality of the circumstances test and then examines many of the same facts as the plurality, particularly emphasizing the high cost of arbitration, before concluding that the circumstances around the contract "effectively prevented plaintiffs from vindicating their rights under the contract in any forum" and, thus, the contract was unconscionable. *Tillman*, 362 N.C. at 109-11, 655 S.E.2d at 374 (Edmunds, J., concurring).

JONES v. ROBBINS

[190 N.C. App. 405 (2008)]

JOHN E. JONES AND WIFE, FRANCES E. JONES, PETITIONERS v. GEORGE D. ROBBINS, JR., MAXINE ROBBINS BRINKLEY, AND HUSBAND, MARTIN C. BRINKLEY, MARY P. COSTON, BRIAN F. COSTON AND WIFE, TRACY H. COSTON, WILLIAM H. COOK AND WIFE, JACQUELINE L. COOK, WILLIAM H. ROBBINS, JR., CORBETT INDUSTRIES, INCORPORATED, BLUE BANKS PLANTATION, LLC, AND FIRST BAPTIST CHURCH OF WILMINGTON, NORTH CAROLINA, SUCCESSOR IN INTEREST TO THE ESTATE OF JAMES H. SMITH, RESPONDENTS

No. COA07-375
No. COA07-488

(Filed 6 May 2008)

1. Highways and Streets— cartway proceeding—sufficiency of evidence

The trial court did not err by denying respondent Corbett Industries' motion for judgment notwithstanding the verdict in a cartway proceeding where Corbett contended that petitioners did not present sufficient evidence about the location of its property, petitioners' property, and public roads, and that petitioners were required to show that its land would be affected by the proposed cartway. The petition must be served on those whose property will be affected, ensuring that any party whose land may be affected by the placement of the cartway has notice and an opportunity to be heard. The location of the cartway is for the jury of view. Corbett is seeking to add a fourth element to petitioners' burden of proof in the first part of the cartway proceeding.

2. Highways and Streets— cartway proceeding—jury instruction—use of property

The trial court did not abuse its discretion in a cartway proceeding by refusing to give a jury instruction requested by respondent Corbett on the use of the property. The case on which Corbett relies was tried before a judge without a jury, and jury instructions were not an issue. The court's instructions here fairly and accurately stated the element of proof as to the use of the property; petitioners are not required to prove that one of the statutory purposes was the exclusive use or the proposed use of the land.

3. Highways and Streets— order for jury view—not a judgment

The trial court erred in a cartway proceeding by determining that a prior ruling was a judgment and setting an appeal bond

where the prior ruling remanded the case to the clerk for a jury view to establish the location of the cartway. That prior order did not direct the sale or delivery of possession of the property, which is the definition of a judgment in N.C.G.S. § 1-292.

Appeal by respondent Corbett Industries, Incorporated from judgment entered 23 August 2006 and order entered 1 November 2006 by Judge Ola M. Lewis in Brunswick County Superior Court. Heard in the Court of Appeals 13 November 2007.

Lawrence S. Craige & Associates, P.A., by Lawrence S. Craige, for petitioners-appellees.

Stevens, McGhee, Morgan, Lennon, Toll & Carter, L.L.P., by Richard M. Morgan, for respondent-appellant Corbett Industries, Incorporated.

Crossley, McIntosh & Collier, PLLC, by Clay Allen Collier, for respondent-appellee First Baptist Church of Wilmington, North Carolina.

STEELMAN, Judge.

Where the precise location of respondents' properties and the location of a proposed cartway were not an issue before the jury, the trial court did not err in denying appellant's motions for directed verdict or judgment notwithstanding the verdict. The trial court did not abuse its discretion in refusing to give a proposed jury instruction pertaining to appellant's assertion that petitioners intended to develop the property for residential purposes. The trial court erred in setting an appeal bond in this matter.

I. Factual and Procedural History

Petitioners are the owners of a tract of land located in Brunswick County, North Carolina. Respondents are owners of properties that adjoin the petitioners' property or that lie between petitioners' property and a public road. Petitioners' property does not abut a public road. In 2004, respondent Robbins locked a gate barring petitioners from access to their property over a road that they had used for many years. On 18 February 2005, petitioners instituted this action seeking to have a cartway established to provide access to their property, pursuant to N.C. Gen. Stat. §§ 136-68 and 136-69.

The petition alleged that petitioners were "engaged in the cultivation of said land and/or the cutting and removal of standing timber"

and that "there is no public road or adequate means of transportation, other than over the Respondent's land, to the Petitioner's property." On 3 June 2005, the Clerk of Superior Court denied the petition. This ruling was appealed to the Superior Court. On 8 February 2006, Judge Lewis entered an order allowing Corbett Industries, Incorporated ("Corbett Industries" or "appellant"), Blue Banks Plantation, and the Estate of James H. Smith as additional respondents. The order stated that these respondents were "parties who own property which may be considered as the location of reasonable access to the Petitioner's tract. . . ." On 27 June 2006, an order was entered substituting First Baptist Church of Wilmington, North Carolina as a respondent in lieu of the Estate of James H. Smith. The church was the devisee of the lands in question under the Smith will.

This matter came on for trial at the 26 June 2006 session of Superior Court. A single issue was submitted to the jury: "Are the petitioners entitled to the establishment of a means of entry to and exit from their land over the land of the respondents?" The jury answered the question in the affirmative. On 23 August 2006, Judge Lewis entered a judgment in favor of petitioners and ordered the matter remanded to the Clerk of Superior Court for "appointment of a jury view."

On 6 September 2006, respondent Corbett Industries filed notice of appeal from this judgment (COA07-375).

On 2 October 2006, petitioners filed a motion seeking access over respondents' lands pending Corbett Industries' appeal. On 1 November 2006, Judge Lewis entered an order denying petitioners' motion, but holding that the judgment entered on 23 August 2006 was a judgment under N.C. Gen. Stat. § 1-292, and that if Corbett Industries desired to stay execution of the judgment, it was required to post a bond. The court set the amount of the bond at five hundred dollars ($500.00). On 27 November 2006, respondent Corbett Industries filed notice of appeal from this order (COA07-488).

II. Appeal of 23 August 2006 Judgment

A. Denial of Corbett Industries' Rule 50 Motions

[1] In its first argument, Corbett Industries contends that the trial court erred in denying its motions for a directed verdict at the close of petitioners' evidence and at the close of all the evidence, and for judgment notwithstanding the verdict. We disagree.

We first note that following the denial of its motion for a directed verdict at the close of petitioners' evidence, respondent Corbett Industries offered evidence. By offering evidence at trial, Corbett Industries has waived appellate review of the denial of this motion. *Woodard v. Marshall*, 14 N.C. App. 67, 68, 187 S.E.2d 430, 431 (1972). However, by moving for judgment notwithstanding the verdict, it preserved for appellate review its arguments made at the close of all the evidence. *Id.*

In reviewing motions for a directed verdict or for judgment notwithstanding the verdict, this Court examines the evidence in the light most favorable to the non-moving party, giving that party the benefit of every reasonable favorable inference, and determines whether there was sufficient evidence to submit the issue to a jury. *E.g.*, *Hawley v. Cash*, 155 N.C. App. 580, 582, 574 S.E.2d 684, 686 (2002). The trial court correctly denies such motions where "there is more than a scintilla of evidence supporting each element of the non-movant's claim." *Id.* (internal quotations and citations omitted). The reviewing court does not weigh the evidence or assess credibility, but takes petitioners' evidence as true, resolving any doubt in their favor. *E.g.*, *In re Will of Dupree*, 80 N.C. App. 519, 521, 343 S.E.2d 9, 10 (1986).

Cartway proceedings are governed by the provisions of N.C. Gen. Stat. §§ 136-68 and 136-69, which contemplate a bifurcated procedure. First, it must be determined whether the petitioner has a right to a cartway. In order to establish such a right, the petitioner must establish three things:

> 1) the land in question is used for one of the purposes enumerated in the statute; 2) the land is without adequate access to a public road or other adequate means of transportation affording necessary and proper ingress and egress; and, 3) the granting of a private way over the lands of *other persons* is necessary, reasonable and just.

Greene v. Garner, 163 N.C. App. 142, 147, 592 S.E.2d 589, 592-93 (2004) (quoting *Davis v. Forsyth County*, 117 N.C. App. 725, 727, 453 S.E.2d 231, 232, *disc. review denied*, 340 N.C. 110, 456 S.E.2d 313 (1995)). Second, "[o]nce the right to a cartway has been determined, the mechanics of locating and laying it off is for the jury of view—it is for them to determine the location, its termini, and the land to be burdened thereby." *Candler v. Sluder*, 259 N.C. 62, 67,

130 S.E.2d 1, 5 (1963) (citing G.S. 136-69; *Triplett v. Lail*, 227 N.C. 274, 41 S.E.2d 755).

In the instant case, respondent Corbett Industries contends that petitioners failed to present sufficient evidence as to the precise location of its property in relation to the property of petitioners and to public roads. It further contends that petitioners were required to show that its land would be affected by the proposed cartway. Counsel for Corbett Industries openly acknowledges that there is no case in North Carolina raising this issue.

Corbett Industries' argument places the cart before the horse. N.C. Gen. Stat. § 136-68 (2007) requires that the petition be served upon "persons whose property will be affected thereby." This ensures that any party, including appellant, whose land may be affected by the eventual placement of a cartway has notice and an opportunity to be heard on the issue of whether petitioner has the right to a cartway. However, the location of a cartway "is for the jury of view," *Candler*, 259 N.C. at 67, 130 S.E.2d at 5, not for the first phase of the bifurcated proceedings. *Candler* makes it clear that a party to a cartway proceeding has a right to appeal both the entitlement of the petitioner to a cartway and its ultimate location by jury view. *Id.* at 66-67, 130 S.E.2d at 4-5. Corbett Industries is seeking to add a fourth element to petitioners' burden of proof in the first part of the cartway proceeding. We decline to adopt such a requirement when this very issue is reserved for the second phase.

This argument is without merit.

B. Jury Instructions

[2] In its second argument, Corbett Industries contends that the trial court erred in refusing to give a jury instruction requested by Corbett. We disagree.

This issue pertains to the jury instructions on the element of petitioners' claim to establish the right to a cartway, requiring petitioners to show that their land was being used for one of the purposes enumerated in the statute. The trial court instructed the jury that petitioner had to prove by the greater weight of the evidence:

> . . . that the petitioners are engaged in, or are preparing to engage in one or more of the activities for which the law provides a right to claim a means of entry to and exit from their land. These activities include cultivation of land, and/or cutting or removal of

> standing timber. The petitioners are not required to prove that their land will be used only for the cultivation of land, and/or the cutting and removal of standing timber, and for no other purpose. It is sufficient that the cultivation of land and/or the cutting and removal of standing timber is one of the uses to which their land is, or will be put. In this case, the petitioners claim to be engaged in cultivation and/or preparing for cultivation, of their land. To be engaged in cultivation means to use the land for raising crops for either commercial purposes or personal use. To be prepared for the cultivation of land and/or the cutting and removal of standing timber, means that the petitioners are ready to begin cultivating the land, and/or cutting and removing standing timber once they have a means of entry to and exit from their land. The petitioners need not have taken action on the land itself, to prove that they are preparing to begin cultivating the land, and/or cutting and removing standing timber. Other activities by the petitioners relating to the proposed use of the land, would constitute some evidence that the petitioners are preparing for cultivating the land, and/or cutting and removing standing timber.

This instruction conformed with North Carolina pattern jury instructions. 1 N.C.P.I.—Civil 840.30 (2000).

Respondent Corbett Industries requested the following additional language:

> However, in deciding whether petitioners are engaged in (or are preparing to engage in) one or more of the activities for which the law provides a right to claim a means of entry to and exit from their land, you may consider evidence that tends to show the petitioners seek to establish a cartway over the respondents' land for the residential development of petitioners' land rather than the cultivation or cutting and removal of standing timber from petitioners' land.

In reviewing whether the trial court erred in denying appellant's request for jury instructions, we must review the jury instruction "contextually and in its entirety." *Bass v. Johnson*, 149 N.C. App. 152, 160, 560 S.E.2d 841, 847 (2002) (citation omitted). The charge will be deemed sufficient if it presents the law of the case so that there is no reasonable cause to believe that the jury was misled. *Id.* "Refusal of a requested charge is not error where the instructions fairly represent the issues. The decision whether to give [an] instruction[] is within

the trial court's sound discretion, and will not be overturned absent an abuse of discretion." *Osetek v. Jeremiah*, 174 N.C. App. 438, 440, 621 S.E.2d 202, 204 (2005) (internal citations omitted).

We note that Corbett Industries bases its entire argument upon one case, *Turlington v. McLeod*, 79 N.C. App. 299, 339 S.E.2d 44 (1986) ("*Turlington I*"), where this Court held that a petitioner with reasonable access through a permissive right of way is not entitled to a cartway. *Id.* at 305, 339 S.E.2d at 49. *Turlington I* was followed by *Turlington v. McLeod*, 323 N.C. 591, 374 S.E.2d 394 (1988) ("*Turlington II*"), in which our Supreme Court upheld the awarding of a cartway to Turlington, based upon the harvesting of timber for firewood, an activity specifically found by the trial court in *Turlington I*. Appellant contends that the *Turlington I* Court held that "a cartway will not be allowed when the petitioner is not legitimately putting his land to an approved use but is instead . . . attempting to show a statutory use in order to establish a cartway to further his actual intended use, which was a commercial use not allowed by statute."

We hold that *Turlington I* is not controlling in the question of Corbett Industries' proposed jury instructions in this case. *Turlington I* was tried before a judge and not a jury. Thus, jury instructions were not at issue. In concluding that the "question of usage was properly one for the factfinder[,]" the *Turlington I* Court observed that "the trial court was obviously familiar with the rule of *Candler* that petitioner's commercial use of the land would not defeat his right to a cartway if he could also show a legitimate statutory use of the land." *Turlington I*, 79 N.C. App. at 303, 339 S.E.2d at 47. Indeed, the *Candler* rule succinctly states the law of this case.

The trial court's instructions fairly and accurately stated the petitioners' element of proof as to the use of their property. *Candler*, 259 N.C. at 65, 130 S.E.2d at 4. Appellant's requested instructions gave undue emphasis to Corbett Industries' contention that petitioners intended to use the land for future residential development, which, while not enumerated under the statute, does not defeat petitioners' right to a cartway. *Id.* The statute does not require petitioners to prove that one of the statutory purposes was the exclusive usage or proposed usage of the land. We thus hold that the trial court did not abuse its discretion in refusing to give appellant's requested instruction.

This argument is without merit.

III. Appeal of Order of 1 November 2006

[3] In its third argument, Corbett Industries contends that the trial court erred in ruling that the judgment of 23 August 2006 was a judgment under N.C. Gen. Stat. § 1-292 and setting an appeal bond. We agree.

N.C. Gen. Stat. § 1-292 provides that, when a judgment "directs the sale or delivery of possession of real property, the execution is not stayed, unless a bond is executed[.]" N.C. Gen. Stat. § 1-292 (2007).

In her order of 1 November 2006, Judge Lewis denied petitioners' motion to gain access over respondents' lands pending the outcome of appeal COA07-375. The 23 August 2006 judgment remanded the case to the Clerk of Superior Court for a jury view to establish the location of the cartway. As such, it does not "direct the sale or delivery of possession of real property." As discussed above, the judgment of 23 August 2006 only established petitioners' right to a cartway, not its location.

We hold that the trial court erred in setting an appeal bond in this matter.

As to appeal COA07-375: NO ERROR.

As to appeal COA07-488: REVERSED.

Judges WYNN and GEER concur.

DEBORAH DODSON, PLAINTIFF v. DAVID DODSON, DEFENDANT

No. COA06-969-2

(Filed 6 May 2008)

1. Divorce— alimony—modification—increase in income—surrounding factors

In an alimony modification proceeding, the trial court correctly found that plaintiff's income had increased, but failed to consider all of the factors surrounding the increase in her income. The court's failure to make findings of fact about

plaintiff's reasonable current financial needs and expenses and the ratio of those needs and expenses to her income constituted error.

2. Divorce— alimony—modification—reduction of supporting spouse to poverty

Alimony payments cannot reduce the supporting spouse to poverty. In this case, the trial court's calculation of defendant's income was erroneous, and, since it appears that defendant's current salary is insufficient to pay his reasonable monthly expenses plus his alimony payment, the trial court abused its discretion in the award.

3. Divorce— alimony modification—change in circumstances and expenses—findings

In an alimony proceeding, the trial court incorrectly found that plaintiff's fixed expenses increased, and failed to make findings on a number of issues, including the standard of living in the latter half of the parties' marriage, mortgage payments and rental expenses, and rental payments received by plaintiff from adult children residing with her.

Appeal by defendant from order entered 12 August 2005 by Judge Donna Stroud in Wake County District Court. Originally heard in the Court of Appeals on 8 May 2007. An opinion affirming the order of the trial court was filed by this Court on 7 August 2007. Petition for Rehearing by defendant was filed on 22 August 2007, granted on 29 November 2007, and heard without additional briefs or oral argument. This opinion supersedes the previous opinion filed on 7 August 2007.

No brief filed for plaintiff-appellee.

Shanahan Law Group, by Brandon S. Neuman & Kieran J. Shanahan, for defendant-appellant.

CALABRIA, Judge.

This matter was previously heard and a decision was rendered by this Court on 8 May 2007. Pursuant to Rule 31 of the North Carolina Rules of Appellate Procedure, this Court granted defendant's petition for rehearing and subsequently obtained a complete transcript of the trial court proceedings. The issue for this Court is whether the trial court erred in calculating the correct amount of

David Dodson's ("defendant") alimony liability when the court modified the alimony order.

Deborah Dodson ("plaintiff") and defendant (collectively, "the parties") were married on 8 October 1977 and separated on 28 January 2002. Prior to the parties' divorce on 30 April 2004, plaintiff filed a complaint requesting post separation support, alimony, and attorney's fees. The parties entered into an arbitration agreement regarding alimony, equitable distribution, and attorney's fees. At the time of the arbitration hearing on 10 May 2004, two of the parties' three children had reached the age of majority, and two of them lived with the plaintiff. One of the children living with the plaintiff was home-schooled at the age of eighteen and the other child was the parties' minor child with severe medical conditions requiring supervision.

Since plaintiff was unemployed at the time of the arbitration, the arbitrator imputed plaintiff's income at the rate of $6.00 per hour for thirty hours a week and determined plaintiff's reasonable and necessary living expenses were approximately $2,330.00 per month. The arbitrator further determined that defendant had the ability to pay alimony in the amount of $2,200.00 per month based on his salary and monthly expenses. On 4 June 2004, the arbitrator ordered defendant to pay alimony in the amount of $2,200.00 per month for ten years as well as attorney's fees in the amount of $5,739.99. On 16 July 2004, the trial court confirmed the arbitrator's decision regarding the amount and the duration of the alimony and awarded attorney's fees.

On 17 August 2004, defendant filed motions for tax exemptions and a modification of the alimony award, alleging a change in circumstances. The circumstances included, *inter alia*, the children were no longer minors, plaintiff's monthly income was actually higher, and defendant's income was substantially lower than the amounts the arbitrator had determined.

On 12 August 2005, the trial court denied the motion requesting dependency tax exemptions for the 2003 and 2004 tax years because all three children had reached the age of majority and the defendant's child support obligation had terminated. On that same date, the trial court granted defendant's motion to modify alimony due to his reduction in income. His monthly alimony payments were modified from $2,200.00 per month to $1,826.00 per month.

On 22 August 2005, defendant filed a motion to reconsider the 12 August 2005 order modifying alimony. On 10 February 2006, the

trial court denied most of defendant's requests and preserved the amount of alimony from the previous alimony order in the amount of $1,826.00 per month. From the 12 August 2005 order, defendant appeals.

Defendant contends that the trial court erred by (I) failing to consider plaintiff's increased income; (II) incorrectly calculating defendant's income; and (III) increasing the amount of plaintiff's fixed household expenses when modifying defendant's alimony obligation.

I. Standard of Review

"Decisions regarding the amount of alimony are left to the sound discretion of the trial judge and will not be disturbed on appeal unless there has been a manifest abuse of that discretion." *Bookholt v. Bookholt*, 136 N.C. App. 247, 249-50, 523 S.E.2d 729, 731 (1999) (citing *Quick v. Quick*, 305 N.C. 446, 453, 290 S.E.2d 653, 658 (1982)). The review of the trial court's findings are limited to "whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law." *Hartsell v. Hartsell*, 99 N.C. App. 380, 385, 393 S.E.2d 570, 573 (1990) (quoting *Adkins v. Adkins*, 82 N.C. App. 289, 292, 346 S.E.2d 220, 222 (1986)).

Pursuant to N.C. Gen. Stat. § 50-16.9 (2005), an award of alimony may be modified upon a showing of changed circumstances. Our case law interpreting N.C. Gen. Stat. § 50-16.9 reveals:

> it is apparent that not *any* change of circumstances will be sufficient to order modification of an alimony award; rather, the phrase is used as a term of art to mean a *substantial* change in conditions, upon which the moving party bears the burden of proving that the present award is either inadequate or unduly burdensome.

Britt v. Britt, 49 N.C. App. 463, 470, 271 S.E.2d 921, 926 (1980) (citations omitted).

II. Plaintiff's Increased Income

[1] Defendant argues the trial court failed to consider the increase in plaintiff's income at the modification hearing when defendant's alimony obligation was modified. We agree.

The trial court must consider the income that the dependent spouse generates in assessing whether and to what extent to modify the alimony payments. *Sayland v. Sayland*, 267 N.C. 378, 382, 148 S.E.2d 218, 222 (1966). When a determination is made that there has

been a change in circumstances that mandates a modification of alimony, the trial court should consider all factors which were relevant to the original determination of the alimony amount. *Broughton v. Broughton*, 58 N.C. App. 778, 781, 294 S.E.2d 772, 776 (1982). However, it is error to modify alimony based on only one factor, such as a change in a party's income. *Id.* at 474, 271 S.E.2d at 928. Rather, "[t]he present overall circumstances of the parties must be compared with the circumstances existing at the time of the original award in order to determine if there has been a substantial change." *Id.* Our Supreme Court previously determined that it was error for a trial court to modify an alimony award based solely on a change in the parties' earnings and held:

> A modification should be founded upon a change in the overall circumstances of the parties. A change in income alone says nothing about the total circumstances of a party. The significant inquiry is how that change in income affects a supporting spouse's ability to pay or a dependent spouse's need for support. The trial court should have considered the *ratio* of defendant's earnings to the funds necessary to maintain her accustomed standard of living.

Rowe v. Rowe, 52 N.C. App. 646, 655, 280 S.E.2d 182, 187 (1981), *aff'd in part, rev. in part and remanded*, 305 N.C. 177, 287 S.E.2d 840 (1982); *see also Self v. Self*, 93 N.C. App. 323, 326-27, 377 S.E.2d 800, 801-02 (1989). In addition, "the question of alimony . . . is a question of fairness to all the parties." *Beall v. Beall*, 290 N.C. 669, 679, 228 S.E.2d 407, 413 (1976).

In the instant case, the uncontradicted evidence shows that plaintiff's income increased from an imputed net income of $600.00 to an actual net income of $1,725.28 per month. While the trial court correctly found that plaintiff's income increased, the trial court failed to consider all factors surrounding the increase in plaintiff's income, such as how her change in income affects her "need for support" when determining the modified alimony payment. *Rowe*, 52 N.C. App. at 655, 280 S.E.2d at 187. Therefore, we conclude the trial court's failure to make findings of fact regarding plaintiff's reasonable current financial needs and expenses and the ratio of those needs and expenses to her income constituted error.

III. The Calculation of Defendant's Income

[2] Defendant next argues that the trial court's calculation of his annual income as $53,910.00 was error. We agree.

At the 12 August 2005 hearing, the court reviewed a pay stub dated 15 April 2005 and found that defendant's annual income was 17 percent less than at the time of the prior order. The court divided the year-to-date earnings ($15,508.36) from that pay stub by 105 days then annualized that amount to reach $53,910.00. However, this pay stub included an annual bonus ($1,428.59) that, when annualized, falsely inflated defendant's income. Additionally, the year-to-date earnings shown on the pay stub reflected earnings through 22 April 2005, making it proper to divide the year-to-date amount by 112, rather than 105, before annualizing to reach an annual income. Calculated correctly plaintiff's yearly income would be $47,312.38 (((($15,508.36—$1,428.59) / 112 * 365) + $1,428.59). This calculation shows a decrease in defendant's income not by 17 percent, but by at least 27 percent.

Therefore, defendant's net monthly income is $3,371.00, rather than $3,841.08, the amount the trial court calculated as his monthly income in the August 2005 order. The arbitrator determined defendant's reasonable and necessary living expenses were approximately $2,300.00 per month. Thus, after deducting defendant's $1,826.00 monthly alimony payment from his net monthly income, defendant is left with a negative balance. Alimony payments cannot reduce the supporting spouse to poverty. *See Quick*, 305 N.C. at 457, 290 S.E.2d at 661 ("A spouse cannot be reduced to poverty in order to comply with an alimony decree."). Since it appears from the record that defendant's current salary is insufficient to pay his reasonable monthly expenses in addition to his alimony payments, we conclude the trial court abused its discretion in the alimony award.

IV. Plaintiff's Fixed Household Expenses

[3] Defendant next argues that the trial court incorrectly found that plaintiff's fixed expenses increased by $630.50. We agree.

The trial court appears to have calculated $630.50 by determining the difference between plaintiff's present rent and her one-half mortgage payment on the marital home. Defendant correctly contends that absent further findings, this calculation is not supported by competent evidence.

It is well established that, as much as possible, alimony should allow the dependent spouse to maintain his or her accustomed standard of living that was attained during the marriage. *Id.* at 453, 290 S.E.2d at 658. However, in the instant case, the trial court failed to

make findings concerning the parties' standard of living at the latter half of their marriage, plaintiff's present standard of living, whether the cost of rent in South Carolina was anticipated and included in the arbitrator's initial award of alimony, and whether the contributions of others should be accounted for when determining plaintiff's reasonable monthly expenses. Prior to their separation and divorce, the parties lived in a manufactured home. It is unclear from the record whether the three-bedroom house in which plaintiff currently resides increases plaintiff's standard of living. If so, the burden of this higher standard of living should not be borne by the defendant. *Id.*

Additionally, the trial court's findings appear to indicate that the arbitrator only allocated one-half of the mortgage payment towards plaintiff's reasonable monthly expenses. The evidence indicates that rental values in North Carolina and South Carolina were presented to the arbitrator when alimony was initially determined. Further, the arbitrator ordered the sale of the marital home, therefore he anticipated that both parties would reside elsewhere. Presumably with this in mind, he did not calculate their mortgage payment as a housing cost going forward when determining their monthly expenses.

Finally, the trial court erred by not making findings concerning the additional support plaintiff receives in meeting her monthly expenses. When determining the amount and duration of alimony, the court, when relevant, shall consider the contribution of others to assess a dependent spouse's financial need. N.C. Gen. Stat. § 50-16.3A (2005). Our case law reveals that in order for third-party income to substantially contribute to a dependent spouse's income, the additional income must be reliable, *Fink v. Fink*, 120 N.C. App. 412, 426, 462 S.E.2d 844, 854 (1995), and the income must be used for household support. *Broughton*, 58 N.C. App. at 786, 294 S.E.2d at 778. In this case, the contributions by the parties' adult children may meet those requirements, though it is unclear what amount each child used for his or her own needs, and what amount was used to supplement plaintiff's needs. This also hinges on a determination of the change in standard of living. If the court determines that the dependent spouse has raised her standard of living, these contributions by the adult children may be a means of supporting that increase.

Therefore, after a careful review of the record and transcript, we conclude there is no competent evidence to support the trial court's finding of fact that plaintiff's fixed household expenses have increased by $630.50 based upon her change in residence.

V. Conclusion

The trial court abused its discretion in determining the amount of defendant's alimony liability in the modification order. When modifying an alimony order the court should evaluate all changes in circumstances. *Britt*, 49 N.C. App. at 474, 271 S.E.2d at 928. Neither party should be forced to bear an unfair burden. *Beall*, 290 N.C. at 679, 228 S.E.2d at 413. More importantly, neither party should be forced to deplete their assets and be reduced to poverty to maintain the support of the other. *Quick*, 305 N.C. at 457, 290 S.E.2d at 661. In the present case, the court incorrectly determined that the defendant's net monthly income was $3,841.08 and reasonable monthly expenses were $2,300.00. The correct amount of defendant's net monthly income should have been $3,371.00 and his reasonable monthly expenses were at least $2,300.00. After defendant pays his monthly alimony obligation of $1,826.00, the balance remaining to meet his reasonable monthly expenses of $2,300.00 is $1,545.05. Thus, defendant is left with a negative cash flow. However, plaintiff's net monthly income, including alimony, totals $3,314.28. If her monthly expenses of less than $3,000.00 are deducted, a positive balance in the amount of at least $314.00 remains. Defendant should not be forced to deplete his assets, while at the same time plaintiff is left with a surplus.

We reverse and remand this matter to the trial court to correct the amount of defendant's yearly income. We also remand to the trial court to determine plaintiff's reasonable and necessary living expenses, considering both her accustomed standard of living during the latter years of the parties' marriage and the rental payments she currently receives from her adult children residing with her.

Reversed and remanded with instructions.

Judges WYNN and TYSON concur.

STATE OF NORTH CAROLINA v. CESARIO ZAMORA-RAMOS

No. COA07-738

(Filed 6 May 2008)

1. Criminal Law— discovery—statements of informant—reports sufficient

The trial court did not err in a cocaine trafficking prosecution by admitting the testimony of an informant where defendant contended that conversations between the informant and a detective were not recorded in writing in sufficient detail to comply with N.C.G.S. § 15A-903(a)(1). The State provided defendant with all reports in its file and with notice of the substance of the informant's statements, and defendant did not suffer prejudice or unfair surprise.

2. Drugs— trafficking by transportation—defendant in telephone contact—not constructively present

The trial court erred by denying defendant's motion to dismiss a charge of trafficking in cocaine by transportation where the State did not produce evidence that defendant himself transported the cocaine or was present or constructively present at the scene of the crime. Although the evidence shows that defendant maintained telephone contact with an accomplice during the crime, it does not show that he was present or nearby.

Appeal by defendant from judgments entered 28 March 2007 by Judge J.B. Allen, Jr., in Wake County Superior Court. Heard in the Court of Appeals 9 January 2008.

Attorney General Roy Cooper, by Assistant Attorney General LaShawn L. Strange, for the State.

Kimberly P. Hoppin for defendant appellant.

McCULLOUGH, Judge.

Cesario Zamora-Ramos ("defendant") was tried before a jury at the 26 March 2007 Session of Wake County Superior Court after being charged with one count of Level I and one count of Level III trafficking in cocaine by possession, one Level I and one Level III count of trafficking in cocaine by sale and delivery, one count of Level III trafficking in cocaine by transportation, and one count of conspiracy to traffic in cocaine by sale and delivery.

The relevant evidence tended to show the following: In December of 2005, Miguel Flores Figuero ("Figuero") began working as an informant for the Raleigh Police Department ("the Department"). Figuero provided Detective A. H. Pennica ("Detective Pennica") with the names of local cocaine dealers that he knew. Figuero knew defendant to be a cocaine dealer by the name of "Ramos" or "Angel."

Both Detective Pennica and Figuero testified at trial that under the supervision of Detective Pennica, Figuero engaged in a series of controlled buys with defendant. During each of these controlled buys, the Department provided Figuero with money to use to purchase the narcotics and set up a team of detectives to follow Figuero and conduct surveillance during the buy. The Department searched Figuero before and after each buy, confiscated the cocaine that Figuero purchased from defendant, and stored that cocaine as evidence in the Department's evidence locker.

The first of these controlled buys occurred on 23 June 2006. On that day, Figuero met defendant at a Wendy's located on Wake Forest Road and New Hope Church Road and purchased 15.4 grams of cocaine for $360.

Subsequent to the buy at Wendy's, Figuero was instructed to purchase a larger amount of cocaine from defendant and to discuss whether Figuero could purchase a half kilo of cocaine. On 14 July 2006, under the watch of a surveillance team, defendant and Figuero met at an Exxon station on Gorman Street at approximately 10:05 p.m. When Figuero arrived at the gas station, defendant was there with an ounce of cocaine.[1] That ounce of cocaine was purchased "on the front," and Figuero was expected to pay defendant $650 for that cocaine at a later date. Defendant told Figuero that it would cost $10,000 to $11,000 to purchase a half kilo of cocaine.

Subsequently, by telephone, Figuero and defendant made arrangements for Figuero to buy a half kilo of cocaine on 19 July 2006. Sometime between 14 July 2006 and 19 July 2006, defendant called Armando Oregon ("Oregon") and directed him to pick up a half kilo of cocaine from a park in Cary and to watch over it for defendant for a few days. When Oregon arrived at the park, he found defendant waiting for him in a parked grey car. Defendant gave Oregon a half kilo of cocaine packed in nylon wrapping.

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1. The Department later determined that the actual total weight of cocaine was 29.0 grams.

At approximately 7:00 p.m. on 19 July 2006, Figuero met defendant at the parking lot of Denny's Restaurant on Wake Forest Road. Because of the large quantity of cocaine involved, Detective Pennica videotaped the exchange using an eight-millimeter videotape. The parking lot was well lit, and Detective Pennica observed defendant arrive alone in a silver Toyota Corolla.

Defendant instructed Figuero to wait in the Denny's parking lot for the cocaine to be delivered by a blue Honda. Defendant left the parking lot and headed toward his house in Johnston County. The department continued to follow defendant's vehicle by helicopter. At 10:30 p.m., Figuero called defendant to find out what was taking so long. Then, according to defendant's cell phone records, at 10:39 p.m, defendant called Oregon's cell phone. Between 10:41 p.m. and 11:47 p.m. on 19 July 2006, Oregon and defendant engaged in multiple telephone conversations.

At around 11:45 p.m. that night, a blue Honda arrived and pulled beside Figuero's vehicle. Oregon got out of the passenger side of the Honda and placed a Gain Laundry detergent box filled with a half kilo of cocaine into Figuero's trunk.[2] Figuero payed Oregon the $650 that he owed defendant from the 14 July 2006 buy. Immediately after this exchange, Figuero and the blue Honda left the parking lot.

On 24 July 2006, Figuero met defendant to pay him $11,000 for the half kilo of cocaine. The Department tape-recorded Figuero and defendant's conversation. As soon as the conversation was complete, the Department detained defendant. The Department also arrested Oregon.

Defendant was found guilty of one count of Level I trafficking in cocaine by sale and delivery, one count of Level III trafficking in cocaine by transportation, and one count of Level III trafficking in cocaine by sale and delivery. The trial court sentenced defendant to consecutive terms of imprisonment of 35 months to 42 months, 175 months to 219 months, and 175 to 219 months, respectively. Defendant was also found guilty of one count of Level I trafficking in cocaine by possession and one count of conspiracy to traffic in cocaine by sale and delivery, but the trial court continued judgment with respect to those counts.

On appeal, defendant contends that the trial court erred by: (1) allowing Miguel Figuero to testify at trial in violation of N.C. Gen.

2. The Department later determined that the actual total weight of the cocaine was 501.0 grams.

Stat. § 15A-903 (2007), and (2) denying defendant's motion to dismiss the Level III charge of trafficking in cocaine by transportation.

I. Discovery

[1] First, defendant contends that the trial court erred by admitting Figuero's testimony in violation of N.C. Gen. Stat. § 15A-903. Defendant contends that Figuero should not have been allowed to testify at trial because the State did not provide defendant with detailed written accounts of each of the statements made by Figuero to Detective Pennica during the debriefing sessions that took place after each drug buy. Defendant does not contend that the State failed to provide him with all reports contained in its file or that those reports did not contain summaries of what Figuero told Detective Pennica; rather, defendant contends that the conversations between Figuero and Detective Pennica were not recorded in writing with sufficient detail to comply with § 15A-903. We disagree.

N.C. Gen. Stat. § 15A-903 provides:

> (a) Upon motion of the defendant, the court must order the State to:
>
> (1) Make available to the defendant the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant. The term "file" includes the defendant's statements, the codefendants' statements, witness statements, investigating officers' notes, results of tests and examinations, or any other matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant.

"[T]he purpose of discovery under our statutes is to protect the defendant from unfair surprise by the introduction of evidence he cannot anticipate." *State v. Payne*, 327 N.C. 194, 202, 394 S.E.2d 158, 162 (1990), *cert. denied*, 498 U.S. 1092, 112 L. Ed. 2d 1062 (1991). Defendant cites our decision in *State v. Shannon*, 182 N.C. App. 350, 357-64, 642 S.E.2d 516, 522-26 (2007), in support of his contention that, pursuant to N.C. Gen. Stat. § 15A-903(a)(1) and N.C. Gen. Stat. § 15A-501(6), law enforcement has an affirmative duty to take detailed notes of every conversation that it has with a witness. First, the facts of *Shannon* are distinguishable from the case *sub judice*. In *Shannon*, the defendant sought notes of pretrial conversations that the prosecution had with a witness. The substance of those conver-

sations was not reduced to writing at all. Here, the substance of Figuero's statements to law enforcement was reduced to writing and was provided to defendant. Furthermore, to the extent that this Court held in *Shannon* that a prosecutor has an affirmative duty to reduce the substance of witness statements to writing under N.C. Gen. Stat. § 15A-903(a)(1), the General Assembly has expressly rejected that holding. By amendment, the statute now provides that a prosecutor does not have an affirmative duty to reduce to writing the substance of an oral statement made by a witness outside of the presence of law enforcement and investigators unless that statement is significantly different from prior statements made by that witness. N.C. Gen. Stat. § 15A-903(a)(1). This amendment seems to be consistent with the overall goal of our discovery statutes, preventing unfair surprise at trial. *Payne*, 327 N.C. at 202, 394 S.E.2d at 162.

Here, the State provided defendant with all reports contained in its file, which included reports from the dates of each offense, notations of Detective Pennica's meetings with Figuero after each buy as well as a summary of what Figuero told Detective Pennica during each meeting. Defendant was provided with notice of the substance of Figuero's statements, and he did not suffer prejudice or unfair surprise as a result of the admission of Figuero's testimony. *See State v. Murillo*, 349 N.C. 573, 584-85, 509 S.E.2d 752, 758-59, *cert. denied*, 528 U.S. 838, 145 L. Ed. 2d 87 (1998) (distinguishing substance from form of discovery and reasoning that for purposes of our discovery statutes, a defendant must simply be provided with the substance or essence of a witness's oral statement); *see also State v. Toler*, 189 N.C. App. 212, 657 S.E.2d 446 (2008) (unpublished) (holding that where a defendant has notice of the substance of a witness statement made to law enforcement, the trial court has discretion to admit testimony under N.C. Gen. Stat. § 15A-903(a)(1)). Accordingly, we hold that this argument is without merit.

II. Motion to Dismiss Charge of Trafficking by Transportation

[2] Next, defendant contends that the trial court erred in denying his motion to dismiss the Level III charge of trafficking in cocaine by transportation because the State failed to produce evidence that defendant himself transported the half kilo of cocaine, or in the alternative, that defendant was present or constructively present at the scene of the crime when Oregon transported the cocaine. We agree, and reverse with respect to this charge.

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 relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.*

In order to sustain a conviction under N.C. Gen. Stat. § 90-95(h)(3) (2007), the State must prove that the defendant (1) knowingly (2) transported a given controlled substance, and that (3) the amount transported was greater than the statutory threshold amount. *State v. Shelman*, 159 N.C. App. 300, 307, 584 S.E.2d 88, 94, *disc. review denied*, 357 N.C. 581, 589 S.E.2d 363 (2003). Here, defendant was charged with transporting more than 400 grams of cocaine, a Class D felony under the statute. N.C. Gen. Stat. § 90-95(h)(3)(c).

Transportation includes any actual carrying about or movement of a particular quantity of drugs from one place to another. *See State v. Outlaw*, 96 N.C. App. 192, 197, 385 S.E.2d 165, 168 (1989), *disc. review denied*, 326 N.C. 266, 389 S.E.2d 118-19 (1990). Although we have not applied the doctrine of constructive transportation to N.C. Gen. Stat. § 90-95(h)(3), we have held that the State may satisfy the transportation element by demonstrating that a defendant acted in concert with another person to move the drugs from one place to another. *State v. Lorenzo*, 147 N.C. App. 728, 732-33, 556 S.E.2d 625, 627 (2001). Under this theory, however, it is necessary that a defendant be actually or constructively present during the commission of the crime. *State v. Barnes*, 345 N.C. 184, 233, 481 S.E.2d 44, 71 (1997). "A person is constructively present during the commission of a crime if he is close enough to provide assistance if needed and to encourage the actual execution of the crime." *State v. Gaines*, 345 N.C. 647, 675-76, 483 S.E.2d 396, 413, *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997).

Here, even in the light most favorable to the State, there is no evidence that defendant was actually or constructively present during the time that Oregon transported the half kilo of cocaine. Although the State's evidence shows that defendant maintained telephone contact with Oregon during the commission of the crime, it does not show that defendant was present or nearby when Oregon retrieved the half kilo of cocaine from his home nor when he drove it to

Denny's Restaurant. The State did not produce any evidence that defendant was close enough during the commission of the crime to provide assistance to Oregon if needed or to encourage the actual execution of the crime. Thus, we agree with defendant that the State failed to carry its burden with respect to this charge, and the trial court erred in denying defendant's motion to dismiss the charge of trafficking by transportation. Accordingly, we reverse with respect to this charge.

III. Jury Instruction

Because we reverse defendant's Level III conviction of trafficking by transportation, we need not address defendant's argument concerning the jury instruction regarding that charge. Accordingly, we find no error in part and reverse in part.

No error in part, and reversed in part.

Judges STEELMAN and GEER concur.

JEREMY ANDRUS, PLAINTIFF v. IQMAX, INC., A FOREIGN CORPORATION, DEFENDANT

No. COA07-186

(Filed 6 May 2008)

Statutes of Limitation and Repose— renewed promise to pay— emails not sufficiently definite

The trial court properly entered summary judgment for defendant on a contract action on the ground that the action was barred by the statute of limitations where plaintiff pointed to an exchange of emails as an acknowledgment of the debt and a new promise to pay, but the emails did not manifest a definite and unqualified intention to pay the debt. N.C.G.S. § 1-26.

Appeal by plaintiff from order entered 7 December 2006 by Judge Richard D. Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 13 September 2007.

Dozier, Miller, Pollard & Murphy, LLP, by Richard S. Gordon, for plaintiff-appellant.

Katten Muchin Rosenman LLP, by Jeffrey C. Grady and Christopher A. Hicks, for defendant-appellee.

GEER, Judge.

Plaintiff Jeremy Andrus appeals from the trial court's order granting defendant IQMax, Inc. summary judgment. The sole issue presented by this appeal is whether the trial court properly concluded that Andrus' breach of contract claim is barred by the statute of limitations. Although Andrus acknowledges that he filed this action more than five years after sending his ultimately unpaid invoice, he contends that IQMax, in e-mails sent in 2005, acknowledged the debt and made a new promise to pay, thereby extending the time to collect his debt. Based upon our review of the e-mails between the parties, we hold that Andrus has failed to present evidence that IQMax, in its e-mails, "manifest[ed] a definite and unqualified intention to pay the debt." *American Multimedia, Inc. v. Freedom Distrib., Inc.*, 95 N.C. App. 750, 752, 384 S.E.2d 32, 34 (1989), *disc. review denied*, 326 N.C. 46, 389 S.E.2d 84 (1990). Without such a showing, any writing of IQMax is insufficient to renew the three-year statute of limitations. We, therefore, hold that the trial court properly granted IQMax summary judgment based on the statute of limitations.

Facts

On 8 February 2000, Andrus and IQMax entered into a consulting agreement pursuant to which Andrus agreed to work with IQMax in improving its business plan for purposes of generating investment. The agreement specified (1) the scope of the services Andrus would perform, (2) that Andrus would be paid $125.00 per hour, and (3) that the parties estimated Andrus would spend 50 to 70 hours on the project. IQMax also made an initial payment to Andrus of $2,500.00.

Andrus provided consulting services from 9 February 2000 through 16 June 2000. On 27 December 2000, he sent IQMax an invoice for 120 hours of work with a total amount due of $15,000.00. IQMax did not pay the invoice. It now contends that it ultimately did not need Andrus to work on its business plan and that the initial $2,500.00 payment fully compensated Andrus for any services rendered.

Andrus did not immediately file suit. Sometime in 2005, however, Andrus contacted IQMax and requested payment of the $15,000.00 invoice. After a series of e-mails between Andrus and Paul Adkison, IQMax's chief executive officer, Andrus filed suit on 25 April 2006. When Andrus filed suit, it was almost six years after the last date he rendered services (16 June 2000) and was over five years from the date of the invoice (27 December 2000).

In its answer, IQMax asserted that Andrus' claim was barred by the applicable statute of limitations, N.C. Gen. Stat. § 1-52(1) (2007). On 22 November 2006, Andrus filed a motion for partial summary judgment on the statute of limitations issue, contending that the e-mails between Andrus and Adkison constituted a new promise to pay within the meaning of N.C. Gen. Stat. § 1-26 (2007). On the same day, IQMax also moved for summary judgment based on the statute of limitations. On 7 December 2006, the trial court granted IQMax's motion for summary judgment on the ground that Andrus' claim was barred by the statute of limitations. Andrus timely appealed that order to this Court.

Discussion

"Although the statute of limitations on contract obligations is three years, a new promise to pay or partial payment of an existing debt may extend the time to collect the debt up to three years from the time of the new promise or partial payment." *Coe v. Highland Sch. Assocs. Ltd. P'ship*, 125 N.C. App. 155, 157, 479 S.E.2d 257, 259 (1997) (internal citation omitted). Our General Assembly has specified, however, that "[n]o acknowledgment or promise is evidence of a new or continuing contract, from which the statutes of limitations run, unless it is contained in some writing signed by the party to be charged thereby; but this section does not alter the effect of any payment of principal or interest." N.C. Gen. Stat. § 1-26. Appellate courts, in construing N.C. Gen. Stat. § 1-26, have held that the writing specified in the statute must: (1) show the nature and amount of the debt[1] and (2) " 'manifest a *definite* and *unqualified* intention to pay the debt.' " *Coe*, 125 N.C. App. at 157, 479 S.E.2d at 259 (quoting *American Multimedia*, 95 N.C. App. at 752, 384 S.E.2d at 34).

In this case, the parties do not dispute that there was a "writing," within the meaning of § 1-26, in the form of Adkison's e-mails. The

1. This requirement may also be met by a " 'distinct[] ' " reference to a writing by which the nature and amount of the debt may be determined. *American Multimedia*, 95 N.C. App. at 752, 384 S.E.2d at 34 (quoting *Faison v. Bowden*, 72 N.C. 405, 407 (1875)).

parties also do not dispute that the e-mails were sent and received. The issue posed by this appeal is whether one or more of Adkison's e-mails comply with the test set forth in *Coe* and *American Multimedia*. Because we view the second element set forth in *Coe* as dispositive, we need not address whether Adkison's e-mails sufficiently show the nature and amount of the debt. Andrus argues that this case is controlled by *Coe*, while IQMax relies upon *American Multimedia*.

In *Coe*, the plaintiff performed electrical and plumbing work for the defendants, submitting invoices totaling $11,258.46. 125 N.C. App. at 156, 479 S.E.2d at 258. More than six months after completion of the work, the defendants' counsel sent a letter to the plaintiff explaining that in an effort to avoid bankruptcy, the defendant partnership was attempting to work out payment with all creditors. *Id.* The letter then stated:

> In an effort to avoid bankruptcy, the Partnership proposes to pay all creditors the principal amount in full due to them plus 6% interest. No attorneys' fees or late penalties will be paid. Payment will be made in two equal installments in March of 1992 and March of 1993. The Partnership also intends to give a promissory note secured by the property to each creditor. The funds to make the installment payments under the Partnership's proposal will be derived from syndication proceeds received by the Partnership over the next several years.

Id. The letter closed by requesting that the plaintiff sign the " 'appropriate response below.' " *Id.* at 157, 479 S.E.2d at 258. At the bottom of the page, there were two lines labeled " 'Accepted' " and " 'Rejected.' " *Id.* The plaintiff accepted the proposal, but the defendants failed to make the payments set forth in the proposal, and plaintiff brought suit. *Id.*

In concluding that the defendants' letter was sufficient to renew the statute of limitations under the *American Multimedia* test, the Court observed that "[t]he letter 'proposes' or offers to 'pay all creditors [including this plaintiff] the principal amount in full due to them plus 6% interest,' . . ., and to do so ('payments will be made') 'in two equal installments in March of 1992 and March of 1993.' " *Coe*, 125 N.C. App. at 157-58, 479 S.E.2d at 259. The Court held that "[t]his language manifests a 'definite and unqualified' intention to pay the debt." *Id.* at 158, 479 S.E.2d at 259.

In *American Multimedia*, the parties entered into an agreement on 30 October 1984, under which the defendant was required to pay the plaintiff $172,068.14. 95 N.C. App. at 757, 384 S.E.2d at 33. On 14 December 1984, the defendant sent the plaintiff a letter that stated in pertinent part: "We are budgeting our payment schedule now and plan to pay you $15,000.00 this month and every month up to June of 1985 of which [sic] we expect to pay the balance. Please review this statement and if you should have any questions do not hesitate to call me." *Id.* When the defendant failed to make the payments set out in the letter, the plaintiff filed suit within three years of the letter, but not within three years of the original agreement. *Id.* As in this case, the plaintiff argued that the December letter extended the statute of limitations. *Id.* at 752, 384 S.E.2d at 33.

This Court noted that the December letter "merely state[d] that 'we plan to pay' and 'we expect to pay' the debt." *Id.*, 384 S.E.2d at 34. The Court held that "[t]hese conditional expressions of defendant's willingness to pay the plaintiff are not sufficiently precise to amount to an unequivocal acknowledgment of the original amounts owed." *Id.* The Court held that the statements "at best demonstrate a willingness to pay based on defendant's ability to make the monthly payments" and, therefore, that "promise [was] insufficient to repel the statute of limitations." *Id.* at 753, 384 S.E.2d at 34.

In this case, Andrus points to his e-mail to Adkison on 17 October 2005, which stated: "Paul, wanted to follow up with you based on our conversation Friday. Can you confirm that the wheels are in motion on generating a $15k check for me? Thanks." The next day, Adkison replied: "Yes, I can. We will have to make payments to you so it won't be $15k upfront [sic]. I am working the details and will have this complete on Friday COB."

Andrus argues that "[b]y any rational reading" of his 17 October e-mail, "the plain meaning" was: " 'Are you going to pay me the $15,000.00 that you owe me?' " He then contends that "[t]o this blunt question, IQMax did not respond that it 'hoped to pay' or 'planned to pay' or 'expected to pay'. Rather, its response was: 'Yes, I can. . . .' " The flaw in Andrus' argument is that his e-mail did not ask the "blunt question," but rather asked whether Adkison could confirm that "the wheels are in motion" on generating a check. Adkison's affirmative response to the question simply agreed that "the wheels are in motion," but included the caveat that he was still "working the details."

On 28 October 2005, 10 days later, Adkison wrote in response to a further inquiry by Andrus: "I have a meeting with my CFO on Tuesday am to discuss. *I would anticipate this*. A letter stating our payment options with the first check then payments on a regular basis per the letter." (Emphasis added.) Later that same day, Adkison reported by e-mail to Andrus: "I got to speak with my CFO today (briefly) and *we are talking about* $2k now and then $2k per month for 6 months starting in January with the final payment being $3k." (Emphasis added.) Finally, Adkison e-mailed Andrus on 30 October 2005: "I need to get the paper work over to you sometime this week. Probably e-mail you can execute and fax back. Then we will send our executed version with a check."

We believe this case more closely resembles *American Multimedia* than *Coe*. Adkison's e-mails cannot be viewed as manifesting "a definite and unqualified intention to pay the debt." *American Multimedia*, 95 N.C. App. at 752, 384 S.E.2d at 34. Adkison confirmed that "the wheels [were] in motion" in getting Andrus a check, but added that he was still "working [on] the details." Subsequent e-mails, addressing the details, "anticipate[d]" possible payment options over time, but said only that Adkison and his chief financial officer were "talking about" a particular proposal. Adkison then indicated that he would provide the paperwork "sometime this week"—something that apparently did not happen. As in *American Multimedia*, we are confronted in the e-mails with "conditional expressions of defendant's willingness to pay the plaintiff"—statements "not sufficiently precise to amount to an unequivocal acknowledgment of the original amounts owed." *Id. See also Wells v. Hill*, 118 N.C. 900, 904-05, 24 S.E. 771, 772 (1896) (construing together four separate letters written by a debtor and holding that letters constituted "acknowledgment" of the subsisting debt, but that statements "running through all the letters" were no more than conditional promises to pay).

In contrast, in *Coe*, there was a concrete, unequivocal proposal to resolve the debt by specified payments over time. Had Andrus received "the paperwork," this case might then have fallen within the scope of *Coe*. The e-mail language upon which Andrus relies does not, however, provide the same degree of definiteness. *See also Johnson Neurological Clinic v. Kirkman*, 121 N.C. App. 326, 332, 465 S.E.2d 32, 35 (1996) (holding that debtor's statement that he " 'plan[ned] to re-file this on my insurance and [handle] the balance myself' " was not sufficiently definite and unqualified so as to extend the statute of

limitations). Accordingly, the trial court properly entered summary judgment in favor of IQMax on the ground that Andrus' action was barred by the statute of limitations.

Affirmed.

Judges BRYANT and STEELMAN concur.

C. TOM GARDNER, PLAINTIFF v. EBENEZER, LLC AND JOSEPH P. SPEIGHT, III, DEFENDANT

No. COA07-1190

(Filed 6 May 2008)

Landlord and Tenant— commercial lease—damage to building not repaired—ejectment for nonpayment

The trial court did not err by granting summary ejectment for the lessor of commercial property where, after a fire in the building which had been sublet, the tenant stopped paying rent rather than repairing the damage and recovering the costs from the landowner or moving out and claiming constructive eviction. N.C.G.S. § 42-3.

Appeal by plaintiff and defendant Ebenezer, LLC, from order entered 20 February 2007 by Judge Quentin T. Sumner in Superior Court, Dare County. Heard in the Court of Appeals 18 March 2008.

Aldridge, Seawell, Spence & Felthousen, LLP, by W. Mark Spence, for plaintiff-appellant.

Hornthal, Riley, Ellis & Maland, L.L.P., by M.H. Hood Ellis and L. Phillip Hornthal, III, for defendant-appellant Ebenezer, LLC.

Gray & Lloyd, by E. Crouse Gray, Jr., for defendant-appellee Speight.

WYNN, Judge.

Where a commercial lease does not expressly provide for the lessor's reentry upon the tenant's nonpayment of rent, forfeiture of the lease is implied upon the tenant's "failure to pay the rent within

10 days after a demand is made by the lessor . . . for all past-due rent[.]"[1] Here, the lessee and sub-lessee argue that the trial court erred by granting summary ejectment against them and in favor of the lessor. Despite the lessor's failure to repair the property after a fire, because the tenants failed to pay rent, we affirm.

Defendant-appellee Joseph P. Speight, III is the owner of a lot and building located in Duck, North Carolina. On 24 November 1993, Mr. Speight entered into a commercial real estate lease agreement with Plaintiff-appellant C. Tom Gardner. Under the lease agreement, Mr. Gardner was given the right to assign or sublet the premises, and Mr. Speight agreed "to carry sufficient fire and flood insurance." Additionally, the lease contained a provision that stated:

> Should the building upon the leased space be destroyed or rendered unfit for the use and occupancy by fire or other casualty, the lease shall hereupon terminate. Should the building be partially destroyed, then Lessor shall make repairs to replace and restore building to the original standards of said lease.

Mr. Gardner owned and operated a restaurant in the leased premises until April 1996, when he sold the restaurant business to Ted Millican and Scott Kelly, and subleased the property to them. In turn, Mr. Millican and Mr. Kelly subleased the restaurant property to Whalebone Junction Resort, LLC, which subleased the property to Defendant-appellant Ebenezer, LLC, on 3 January 2005, with an effective date of the lease of 15 January 2005. As the sub-lessee, Ebenezer began operating a restaurant on the premises.

On 14 October 2005, a fire occurred in the restaurant. Although the premises were not destroyed by the fire, all the parties agree that the property was damaged to the point that a restaurant could not be operated until repairs were made.

After the fire, Ebenezer's managing member, Joel Jordan, initiated efforts to clean up and repair the restaurant. Ebenezer hired a contractor and obtained a demolition permit from the Town of Duck, which was limited to fire damage repairs only. However, in the process of its repairs, Ebenezer began additional, unauthorized remodeling and construction, including building a new deck and replacing old restaurant equipment with new equipment. On 15

1. N.C. Gen. Stat. § 42-3 (2005); *see also Charlotte Office Tower Associates v. Carolina SNS Corp.*, 89 N.C. App. 697, 700, 366 S.E.2d 905, 907 (1988) (stating that section 42-3 "applies only when a lease does not expressly provide for the landlord's reentry upon nonpayment of rents.").

November 2005, Ebenezer's insurance company indicated that Ebenezer did not have insurance coverage on the building. As a result, Ebenezer stopped work and initiated a clean up process which was completed on 18 November.

Mr. Speight admitted to making a written claim against his insurance carrier for the fire damage and receiving $45,443.46 from his insurance company. In his response to plaintiff's request for admissions, Mr. Speight asserted that he used the insurance proceeds "to pay for survey of property, fees to attorneys to deal with the Town of Duck to obtain permits; [and] Cost of permits." All parties agree that Mr. Speight did not use his insurance proceeds to pay for repairs of the premises.

Ultimately, as a result of the unrepaired fire damage, Ebenezer stopped paying rent to Mr. Gardner, and in turn, Mr. Gardner stopped paying rent to Mr. Speight.

On 28 June 2006, Mr. Gardner filed a complaint against Ebenezer and Mr. Speight, requesting a declaratory judgment that Ebenezer's sublease be terminated and Ebenezer ordered to vacate the premises, and that the lease with Mr. Speight continue in full force and effect, with Mr. Gardner entitled to possession of the premises. The parties then filed a series of answers, counterclaims, and cross-claims. Mr. Speight requested that the court eject Mr. Gardner and Ebenezer from the premises and, in the alternative, Mr. Speight's complaint provided notice to Mr. Gardner that the right of occupancy would be forfeited "upon failure to pay all present and back rent within ten (10) days after date of service." However, Ebenezer requested that the lease and sublease continue, with the rent abated, until the premises were repaired.

On 31 October 2006, Mr. Speight filed a motion for summary judgment. A hearing was held on 15 January 2007, and on 12 February 2007, the trial court issued an order of partial judgment, granting summary ejectment in favor of Mr. Speight, by ordering Mr. Gardner and Ebenezer be removed from the premises and Mr. Speight be put in possession of the premises, but denying summary judgment for Mr. Speight's other claims.

On appeal, Mr. Gardner and Ebenezer argue that the trial court erred by granting summary ejectment in favor of Mr. Speight.

A trial court conducting a summary ejectment proceeding for a commercial tenant obtains its jurisdiction from section 42-26 of our

General Statutes.[2] *ARE-100/800/801 Capitola, LLC v. Triangle Labs., Inc.*, 144 N.C. App. 212, 216, 550 S.E.2d 31, 34 (2001). Section 42-3 has also been applied to commercial leases to create an additional ground for summary ejectment. *Id.* Section 42-3 states:

> In all verbal or written leases of real property of any kind in which is fixed a definite time for the payment of the rent reserved therein, there shall be implied a forfeiture of the term upon failure to pay the rent within 10 days after a demand is made by the lessor or his agent on said lessee for all past-due rent, and the lessor may forthwith enter and dispossess the tenant without having declared such forfeiture or reserved the right of reentry in the lease.

N.C. Gen. Stat. § 42-3 (2005). However, section 42-3 "applies only when a lease does not expressly provide for the landlord's reentry upon nonpayment of rents." *Charlotte Office Tower Assoc. v. Carolina SNS Corp.*, 89 N.C. App. 697, 700, 366 S.E.2d 905, 907 (1988).

In this case, the lease agreement did not contain a provision by which Mr. Speight could terminate the lease or re-enter the premises for nonpayment of rent. Therefore, section 42-3 creates an implied "forfeiture of the term upon failure to pay the rent within 10 days after a demand is made . . . for all past-due rent." N.C. Gen. Stat. § 42-3. Mr. Speight demanded payment of all past-due rent in his answer, counterclaim, and cross-claim filed 27 July 2006. However, Mr. Gardner and Ebenezer argue that no rent was due under N.C. Gen. Stat. § 42-3 because Mr. Speight breached the terms of the lease when he failed to repair the fire damage, thereby entitling them to rent abatement. We disagree.

Our Legislature has recognized the mutuality of landlord and tenant lease obligations in the residential context under section 42-41 of our General Statutes, which states: "The tenant's obligation to pay rent under the rental agreement or assignment and to comply with G.S. 42-43 [tenant to maintain dwelling unit] and the landlord's obligation to comply with G.S. 42-42(a) [landlord to provide fit prem-

2. Section 42-26 allows for the removal of a tenant or lessee, and their assigns "(1) When a tenant in possession of real estate holds over after his term has expired; (2) When the tenant or lessee, or other person under him, has done or omitted any act by which, according to the stipulations of the lease, his estate has ceased; (3) When any tenant or lessee of lands or tenements, who is in arrear for rent . . . deserts the demised premises, and leaves them unoccupied and uncultivated." N.C. Gen. Stat. § 42-26 (2005).

ises] shall be mutually dependent." *Id. §* 42-41. However, no such mutuality has been recognized in commercial leases. Rather, in a commercial lease,

> [t]he duty of the tenant, if the landlord fails to perform his contract to repair, is to do the work himself, and recover the cost in an action for that purpose, or upon a counterclaim in an action for rent, or if the premises are made untenable by reason of the breach of contract, the tenant may move out and defend in an action for rent as upon an eviction.

Cato Ladies Modes of North Carolina, Inc. v. Pope, 21 N.C. App. 133, 135, 203 S.E.2d 405, 406 (1974) (citing *Jordan v. Miller*, 179 N.C. 73, 101 S.E. 550 (1919)).

Thus, where a landlord breaches his duty to repair in a commercial lease, the tenant may: (1) sue the landlord for damages equal to "the difference between the rental value of the premises for the term, in the condition as contracted to be, and the rental value in their actual condition," *Brewington v. Loughran*, 183 N.C. 558, 564, 112 S.E. 257, 259 (1922); (2) make the repairs and collect from the landlord the reasonable cost of such repairs, *Pope*, 21 N.C. App. at 135, 203 S.E.2d at 406; or (3) move out and claim constructive eviction. *Id.*; *see K & S Enter. v. Kennedy Office Supply Co., Inc.*, 135 N.C. App. 260, 266-67, 520 S.E.2d 122, 126 (1999) ("[C]onstructive eviction takes place when a landlord's breach of duty under the lease renders the premises untenable. A tenant seeking to show constructive eviction has the burden of showing that he abandoned the premises within a reasonable time after the landlord's wrongful act."), *aff'd*, 351 N.C. 470, 527 S.E.2d 644 (2000). Additionally,

> [a] subletting, although assented to by the lessor, does not in any way affect the liability of the original lessee on the covenants of the lease unless there is a surrender and substitution of tenants. The original lessee is responsible for any violation of the covenants of the lease by the sublessee.

Dixie Fire & Cas. Co. v. Esso Standard Oil Co., 265 N.C. 121, 126, 143 S.E.2d 279, 283 (1965).

Here, rather than repairing the fire damage and recovering the costs from Mr. Speight, suing Mr. Speight for damages, or moving out and claiming constructive eviction, Ebenezer continued to occupy the premises but stopped paying rent to Mr. Gardner, who in turn stopped paying rent to Mr. Speight. Under our case law, Mr. Gardner

was obligated to continue paying rent regardless of Mr. Speight's failure to repair the fire-damaged property.

Although the fire occurred in October 2005 and Mr. Gardner continued paying rent to Mr. Speight through January 2006, Mr. Gardner failed to pay rent from 1 February 2006 through the date of the hearing, 16 January 2007. Accordingly, Mr. Gardner owed past-due rent to Mr. Speight. Pursuant to N.C. Gen. Stat. § 42-3, when Mr. Gardner failed to pay the past-due rent within ten days of 27 July 2006, the date Mr. Speight demanded payment of all past-due rent, forfeiture of the lease was implied. *See* N.C. Gen. Stat. § 42-3. Because Mr. Speight had a right to dispossess Mr. Gardner and Ebenezer under N.C. Gen. Stat. § 42-3, we cannot conclude that the trial court erred in granting summary ejectment in favor of Mr. Speight.

Affirmed.

Judges BRYANT and JACKSON concur.

STATE OF NORTH CAROLINA v. HOWARD THOMAS JACKSON

No. COA07-933

(Filed 6 May 2008)

1. Probation and Parole— revocation—pro se representation at hearing

A probation revocation was vacated where the record contained no indication that a defendant who chose to represent himself understood or appreciated the consequences of his decision or comprehended the nature of the proceedings and the range of permissible punishments. N.C.G.S. § 15A-1242.

2. Probation and Parole— revocation hearing—timing of hearing—finding

The record provided sufficient evidence for the trial court to find that the State made reasonable efforts to conduct a probation hearing prior to the expiration of defendant's probation. However, the case was remanded for the court to enter sufficient findings. N.C.G.S. § 15A-1344(f).

STATE v. JACKSON

[190 N.C. App. 437 (2008)]

Appeal by defendant from judgment entered 8 March 2007 by Judge Beverly T. Beal in Caldwell County Superior Court. Heard in the Court of Appeals 14 April 2008.

Attorney General Roy Cooper, by Assistant Attorney General Richard H. Bradford, for the State.

John T. Hall for defendant-appellant.

BRYANT, Judge.

Defendant Howard Jackson appeals from a judgment and commitment upon revocation of probation for the underlying offenses of driving while impaired and possession of stolen goods.

Facts

The record indicates that on 5 March 2003, defendant pled guilty to felony possession of stolen goods. Caldwell County Superior Court entered a judgment of ten months active time then suspended the sentence and placed defendant on supervised probation for a term of thirty-six months. Defendant was also ordered to pay restitution and other fees in the amount of $1,227.00.

On 12 December 2002, upon defendant's plea of guilty, Caldwell County District Court entered judgment and commitment against defendant for impaired driving. Defendant was sentenced as a Level One offender with an active sentence of twenty-four months. On 7 November 2003, the trial court suspended the sentence and placed defendant on supervised probation for a term of forty months, and ordered defendant to pay a monetary fee of $774.00 to the Caldwell County Clerk of Superior Court. As a special condition of defendant's probation for impaired driving, defendant was to comply with the conditions imposed as a result of his conviction for possession of stolen goods, and if defendant's sentence was activated, it was to run consecutive to the sentence imposed for possession of stolen goods.

On 9 March 2006, Caldwell County Superior Court found that defendant had violated the terms of his probation by, among other things, failing to pay the monetary fees associated with his conviction for possession of stolen goods and driving while impaired. Defendant was in arrears in the amount of $1,351.00 on the fee associated with his conviction for possession of stolen goods case and $450.00 on the fee for the driving while impaired case. In addition, defendant owed $600.00 for a substance abuse assessment and treatment. The trial

court amended defendant's sentence for conviction of possession of stolen goods by ordering the probation officer to provide a new payment schedule and extending defendant's sentence from 5 March 2006 to 5 March 2007.

On 25 August 2006, the trial court amended defendant's sentence on his conviction for driving while impaired by again ordering defendant to comply with conditions imposed in the sentence for possession of stolen goods. The trial court amended defendant's sentence on his conviction for possession of stolen goods by ordering that defendant pay $100.00 per month until his balance was paid.

On 26 January 2007, defendant's probation officer reported that defendant willfully violated the terms of his probation by failing to pay the monetary fees imposed as a condition of probation on charges of driving while impaired and felony possession of stolen goods. Defendant's probation officer reported that defendant failed to make any payments after 25 August 2006 in violation of a court order requiring him to make payments of $100.00 per month until his balance was paid in full. According to the record, on the monetary fee associated with the charge of driving while impaired, defendant was in arrears $125.00. On the charge of felony possession of stolen goods, defendant was in arrears a total of $500.00. Moreover, defendant was in arrears one or more payments to the Clerk of Superior Court on his probation supervision fee which amounted to $345.00.

On 8 March 2007, the trial court found defendant willfully and without lawful excuse violated a valid condition of his probation on his conviction for driving while impaired and ordered that defendant's probation be revoked, that the suspended sentence be activated, and that defendant be imprisoned for a term of twenty-four months. Additionally, the trial court found defendant willfully violated a valid condition of his probation on his conviction for possession of stolen goods and ordered that defendant's probation be revoked, his suspended sentence be activated, and that defendant be imprisoned for a term of ten to twelve months.

From the activation of defendant's suspended sentences, defendant appeals.

On appeal, defendant raises the following three questions: did the trial court err by (I) allowing defendant to proceed *pro se*; (II) revoking defendant's probation and activating his sentence; and (III) finding defendant's violation of monetary conditions to be willful.

(I)

[1] Defendant first questions whether the trial court erred by allowing defendant to proceed *pro se*. Defendant argues that his waiver of counsel on 5 March 2007 at the probation violation hearing was not knowing, intelligent, or voluntary because the trial court failed to ascertain whether defendant knew the consequences of his decision, the nature of the charges, and the range of possible punishments as required under N.C. Gen. Stat. § 15A-1242.

"The probationer is entitled to be represented by counsel at the [probation revocation] hearing . . . ." N.C. Gen. Stat. § 15A-1345(e) (2007). "Inherent to that right to assistance of counsel is the right to refuse the assistance of counsel and proceed pro se." *State v. Evans*, 153 N.C. App. 313, 315, 569 S.E.2d 673, 675 (2002) (citations omitted) (emphasis omitted). Where the defendant requests to proceed pro se, the provisions of North Carolina General Statute 15A-1242 are mandatory. *State v. Debnam*, 168 N.C. App. 707, 708, 608 S.E.2d 795, 796 (2005) (citation omitted). Under North Carolina General Statute 15A-1242

> A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:
>
> (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
>
> (2) Understands and appreciates the consequences of this decision; and
>
> (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

N.C. Gen. Stat. § 15A-1242 (2007). Where a defendant is allowed to proceed pro se, "[t]he record must reflect that the trial court is satisfied regarding each of the three inquiries listed in the statute." *State v. Stanback*, 137 N.C. App. 583, 586, 529 S.E.2d 229, 230 (2000) (citation omitted).

"A signed written waiver is presumptive evidence that a defendant wishes to act as his or her own attorney. However, the trial court must still comply with N.C. Gen. Stat. § 15A-1242 . . . ." *State v. Whitfield*, 170 N.C. App. 618, 620, 613 S.E.2d 289, 291 (2005) (internal

citation omitted). "A written waiver is something in addition to the requirements of N.C. Gen. Stat. § 15A-1242, not . . . an alternative to it." *Evans*, 153 N.C. App. at 315, 569 S.E.2d at 675 (citation and internal quotations omitted).

Here, the record reflects the following exchange between the trial court and defendant which occurred 5 March 2007:

Court: [Defendant] do you have an attorney?

Defendant: No, sir.

Court: Do you want the court to appoint you an attorney?

Defendant: No, sir.

Court: Do you understand that if you cannot afford an attorney one would be appointed to represent you?

Defendant: Yes, sir.

Court: Do you understand that an attorney's services might be helpful to you in this situation?

Defendant: Yes, sir.

Court: But you want to proceed without an attorney?

Defendant: Yes, sir.

Court: Come around and sign the waiver if that's what you wish to do.

Clerk: Place you left hand on the Bible and raise your right.

Do you understand that by signing this waiver you are giving up your right to be assisted by counsel and plan to proceed on your own as you own counsel?

Defendant: Yes.

This exchange presents no indication defendant understood or appreciated the consequences of his decision or comprehended the nature of the proceedings and the range of permissible punishments. *See* N.C. Gen. Stat. § 15A-1242 (2), (3) (2007).

Accordingly, the trial court's judgments revoking defendant's probation are vacated, and the matter is remanded for the trial court to determine whether defendant is entitled to the assistance of counsel.

(II)

[2] Defendant questions whether the trial court had subject matter jurisdiction to revoke defendant's probation. Defendant argues that the trial court's hearing to revoke defendant's probation occurred after the term of defendant's probation had expired and the trial court failed to make a finding that the State made reasonable efforts to hold the hearing during defendant's probationary term. We agree.

Under North Carolina General Statute 15A-1344(f),

> The court may revoke probation after the expiration of the period of probation if:
>
> (1) Before the expiration of the period of probation the State has filed a written motion with the clerk indicating its intent to conduct a revocation hearing; and
>
> (2) The court finds that the State has made reasonable effort to notify the probationer and to conduct the hearing earlier.

N.C. Gen. Stat. § 15A-1344(f) (2007). In *State v. Daniels*, 185 N.C. App. 535, 649 S.E.2d 400 (2007), this Court reasoned that where record evidence supports a finding that the State made reasonable efforts to conduct a hearing prior to the expiration of the defendant's probation, the matter is remanded to the trial court to enter sufficient material findings. *Id.* at 537, 649 S.E.2d at 401.

Here, defendant's probationary term for his conviction for possession of stolen goods ended Monday, 5 March 2007, and his probationary term for his conviction for driving while impaired ended Saturday, 3 March 2007. Defendant concedes that the State timely filed written notices of its intention to revoke defendant's probation. The record reflects that on 5 March 2007 defendant appeared before the trial court and waived counsel. On 8 March 2007, defendant waived his right to a violation hearing and admitted to the trial court he violated the terms of his probation as to his convictions for driving while impaired and possession of stolen goods. The trial court failed to make factual findings with regard to the State's reasonable efforts to notify defendant and hold the hearing within the probationary period.

Pursuant to *Daniels*, we hold the record provides sufficient evidence for the trial court to find that the State made reasonable efforts to conduct a hearing prior to the expiration of defendant's probation.

Accordingly, this case is remanded to the trial court to enter sufficient material findings.

(III)

Last, defendant questions whether the trial court erred by finding defendant's violation of monetary conditions to be willful.

As we have vacated the trial court order revoking defendant's probation and remanded the matter, we need not reach defendant's third question.

Vacated in part; reversed in part; and remanded.

Chief Judge MARTIN and Judge ARROWOOD concur.

ADVANTAGE ASSETS, INC. II ASSIGNEE OF MBNA AMERICA BANK, PLAINTIFF v. TOMMY A. HOWELL, DEFENDANT

No. COA07-878

(Filed 6 May 2008)

1. Arbitration and Mediation— FAA—applicable

The Federal Arbitration Act applied to an arbitration agreement for a credit card account where that agreement was pursuant to a transaction involving interstate commerce and specified that it should be governed by the FAA. Plaintiff asked for relief under North Carolina's revised Uniform Arbitration Act, but does not explain why the RUAA applies. This agreement appears to have been last revised before the effective date of the RUAA.

2. Arbitration and Mediation— award affirmed—not properly challenged

A superior court order affirming an arbitration award was affirmed where defendant received notice of the hearing and the subsequent award and chose not to challenge the existence of an arbitration agreement. His response to plaintiff's motion to confirm was not the appropriate response given the procedural posture of the case.

Appeal by defendant from order entered 30 April 2007 by Judge John L. Holshouser, Jr., in Anson County Superior Court. Heard in the Court of Appeals 16 January 2008.

Smith Debnam Narron Wyche Saintsing & Myers L.L.P., by Christina McAlpin and Caren D. Enloe, for plaintiff.

Law Office of Henry T. Drake, by Henry T. Drake, for defendant.

ELMORE, Judge.

This appeal arises out of a challenge by Tommy A. Howell (defendant) to an order confirming an arbitration award rendered in favor of Advantage Assets, Inc. II (plaintiff), an assignee of MBNA America Bank. The superior court ruled that the arbitration award, rendered through the services of the National Arbitration Forum, was properly entered and should be confirmed and enforced. The superior court further found that defendant had "failed to comply with the Award of the Arbitrator" and "failed to timely make application to modify, correct, or vacate the" award. The superior court confirmed the arbitrator's award of $40,969.26 plus interest. Defendant now appeals. He argues that the superior court erred by entering a judgment when there were issues of fact in controversy, and by failing to make sufficient findings of fact. Defendant also asserts that the court erred by failing to dismiss plaintiff's action. For the reasons stated below, we affirm the superior court's order.

Defendant established a revolving credit account with plaintiff in 1992 and subsequently defaulted on the terms of payment. Plaintiff filed an arbitration demand with the National Arbitration Forum pursuant to the binding arbitration clause set forth in the credit card agreement. The credit card agreement containing the arbitration clause was last revised in April of 2001 and is not signed. The arbitrator found that the parties had agreed to a binding arbitration agreement, reviewed the evidence, and awarded plaintiff $40,969.26 plus interest. This arbitration award was entered on 4 January 2006. Defendant received notice of the arbitration award by mail.

Plaintiff filed a motion to confirm the arbitration award in Anson County Superior Court on 2 June 2006. Defendant was served notice of the motion to confirm on 16 June 2006. Defendant filed a response to the motion to confirm on 7 July 2006, in which he denied the existence of any agreement to arbitrate and alleged that there was no evidence of debt presented. Plaintiff countered this allegation by pre-

senting an affidavit by a collection specialist. The affidavit stated, in relevant part:

> 5. Defendant obtained a revolving credit account pursuant to an extension of credit by MBNA America Bank, N.A. on the 26 day of Aug., 1992, made purchases on that account, and subsequently defaulted on the terms for repayment of that account.
>
> 6. Plaintiff and Defendant agreed to arbitrate any claims arising out of that revolving credit account.

The superior court heard plaintiff's motion to confirm arbitration on 16 April 2007. Defendant filed an affidavit with the court stating, in relevant part, that he "need not file any Motion to Vacate any award, because [he] never entered into any agreement to arbitrate, or any contract with the Plaintiff." The superior court filed the order confirming the arbitration award on 30 April 2007.

[1] Defendant first argues that the superior court improperly "substituted it's [sic] own Judgment for that of a Jury" by affirming the arbitration award. Defendant contends that he was entitled to a jury trial to determine "whether or not, under State Law, a valid contract exists" because he had denied the existence of a contract. We disagree.

"Since this appeal arises from a decision on a motion to confirm an arbitration award, we first note 'that a strong policy supports upholding arbitration awards.' " *WMS, Inc. v. Weaver*, 166 N.C. App. 352, 357, 602 S.E.2d 706, 709 (2004) (quoting *Cyclone Roofing Co. v. David M. LaFave Co.*, 312 N.C. 224, 234, 321 S.E.2d 872, 879 (1984)). The threshold determination here is whether the alleged arbitration agreement is governed by the FAA or state law. "This question cannot be bypassed as the FAA preempts conflicting state law, including state law addressing the role of courts in reviewing arbitration awards." *Weaver*, 166 N.C. App. at 357-58, 602 S.E.2d at 710 (citation omitted). "The FAA governs any 'contract evidencing a transaction involving commerce.' . . . [T]he FAA's term 'involving commerce' is considered the functional equivalent of 'affecting commerce.' It is broader than the term 'in commerce' and 'signals an intent to exercise Congress' commerce power to the full.' " *Id.* at 358, 602 S.E.2d at 710 (citations omitted). Here, the arbitration agreement specifies that it "is made pursuant to a transaction involving interstate commerce, and shall be governed by the Federal Arbitration Act." Plaintiff proceeded under the FAA and defendant never challenged the FAA's

application to his case. In his brief, defendant asks for relief under North Carolina's Revised Uniform Arbitration Act (RUAA), but does not explain why the RUAA applies to his case. We note that the RUAA only "governs an agreement to arbitrate made on or after January 1, 2004." N.C. Gen. Stat. 1-569.3 (2007). The arbitration agreement in question appears to have been last revised in April of 2001, and therefore the RUAA could not apply to the agreement, even if defendant had offered support for its application. Therefore, because the agreement was "made pursuant to a transaction involving interstate commerce," and in the absence of any evidence or explanation to the contrary, we apply the FAA to the arbitration agreement at issue.

[2] The FAA allows a party to challenge the existence of a valid arbitration agreement. If a party refuses to arbitrate under an arbitration agreement, the other party may petition a federal district court to issue an "order directing that such arbitration proceed in the manner provided for in such agreement." 9 U.S.C. § 4 (2007). Furthermore,

> [f]ive days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. *If the making of the arbitration agreement* or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. . . . *Where such an issue is raised, the party alleged to be in default may . . . demand a jury trial of such issue*, and upon such demand the court shall make an order referring the issue or issues to a jury . . . or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed.

Id. (emphasis added). The record before us does not include documentation of the steps that plaintiff took before it filed its motion to confirm, but it appears that plaintiff provided notice to defendant that it would proceed to arbitration, that defendant did not respond to that notice, and that the arbitration hearing occurred without defendant's participation. Defendant did not avail himself of the proper procedural mechanism to challenge the existence of an arbitration agreement provided by 9 U.S.C. § 4.

A trial court's role when hearing a motion to confirm is limited:

> [A]t any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court *must* grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. . . . Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding.

9 U.S.C. § 9 (2007) (emphasis added). A party may move to vacate, modify, or correct the award under 9 U.S.C. §§ 10 or 11, but the grounds for such motions are very limited. *See* 9 U.S.C. § 10 (2007) (limiting orders to vacate to cases in which the arbitrator engaged in corruption, fraud, or other misconduct); 9 U.S.C. § 11 (2007) (limiting orders to modify or correct to cases in which there was "an evident material mistake in the description of any person, thing, or property referred to in the award" or the "material miscalculation of figures"; "the arbitrators have awarded upon a matter not submitted to them"; or "the award is imperfect in matter of form *not affecting the merits of the controversy*") (emphasis added).

Plaintiff offers no legal authority to support a reversal of the superior court's order confirming the arbitration award. He does not question the FAA's applicability. It appears that plaintiff received notice of the arbitration hearing and the subsequent award, and chose not to challenge the existence of an arbitration agreement. His response to plaintiff's motion to confirm—that there was no arbitration agreement—was simply not an appropriate response given the procedural posture of the case. The question of the arbitration agreement's existence was not properly before the superior court, and the superior court did not have the power to dismiss plaintiff's motion as plaintiff argues. It also had no jurisdiction to dismiss plaintiff's motion, as defendant argues. Under 9 U.S.C. § 9, the superior court's only option was to grant plaintiff's motion. Accordingly, we affirm the order of the superior court.

Affirmed.

Judges McCULLOUGH and ARROWOOD concur.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, PLAINTIFF v. LINDA P. GAYLOR AND PAUL E. GAYLOR, DEFENDANTS

No. COA07-1421

(Filed 6 May 2008)

1. Statutes of Limitation and Repose— underinsured motorists coverage—filing of action not timely

The trial court did not err when it granted State Farm's motion to dismiss defendants' counterclaim in an action to declare the rights between the parties regarding underinsured motorists coverage in an action arising from an automobile accident. Undisputed evidence shows that defendants failed to file their counterclaims within the applicable three-year statute of limitations.

2. Insurance— uninsured motorist coverage—summary judgment for insurance company

There was no genuine issue of material fact about whether defendants had underinsured motorists coverage at the time of an accident, and the court did not err when it granted the insurance company's motion for summary judgment.

Appeal by defendants from orders entered 15 November 2006 by Judge Michael E. Beale and 23 April 2007 by Judge Kimberly S. Taylor in Rowan County Superior Court. Heard in the Court of Appeals 17 April 2008.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Scott Lewis and Ellen J. Persechini; and Golding, Holden & Pope, L.L.P., by Robert J. Aylward, for plaintiff-appellee.

Doran, Shelby, Pethel and Hudson, P.A., by Michael Doran, for defendant-appellants.

TYSON, Judge.

Linda P. Gaylor ("Mrs. Gaylor") and Paul E. Gaylor ("Mr. Gaylor") (collectively, "the Gaylors") appeal from orders entered, which granted State Farm Mutual Automobile Insurance Company's ("State Farm") motions to dismiss the Gaylors' counterclaims and for summary judgment. We affirm.

I. Background

On 30 March 2006, State Farm filed a complaint and sought a declaration of rights between the parties as a result of the Gaylor's selection of uninsured motorists coverage for personal injury damages sustained by Mrs. Gaylor in an automobile accident on 26 March 2002. State Farm sought, *inter alia*, for "the Court [to] determine and adjudicate that [it] is not required to provide underinsured motorists coverage to [Mrs.] Gaylor[.]" On 25 May 2006, the Gaylors filed their answer and asserted counterclaims against State Farm for: (1) reformation of contract due to mutual mistake and misrepresentation; (2) negligent failure to procure insurance; and (3) misrepresentation.

On 21 July 2006, State Farm filed a Motion to Dismiss and Answer to Counterclaims. State Farm's motion was heard 13 November 2006. On 15 November 2006, the superior court granted State Farm's motion to dismiss the Gaylors' counterclaims.

On 16 November 2006, State Farm filed a Motion for Summary Judgment on its remaining claim. State Farm's motion was heard 16 January 2007. On 23 January 2007, the superior court denied State Farm's motion as premature. The superior court's order was entered without prejudice to State Farm's right to refile its motion after the conclusion of Mrs. Gaylor's underlying case, which stemmed from the 26 March 2002 automobile accident.

On 6 March 2007, State Farm refiled its Motion for Summary Judgment on its remaining claim. State Farm's motion was heard 16 April 2007. On 23 April 2007, the superior court granted State Farm's motion for summary judgment. The Gaylors appeal the superior court's granting of State Farm's motions to dismiss and for summary judgment.

II. Issues

The Gaylors argue the superior court erred when it: (1) dismissed their counterclaims and (2) granted summary judgment for State Farm.

III. Standard of Review

> Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that a party is entitled to a judgment as a matter of law. On appeal of a trial court's allowance of a motion for

> summary judgment, we consider whether, on the basis of materials supplied to the trial court, there was a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. Evidence presented by the parties is viewed in the light most favorable to the non-movant.

Summey v. Barker, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003) (internal citation and quotation omitted). "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 citation and quotation omitted).

IV. Motion to Dismiss

[1] The Gaylors argue the trial court erred when it dismissed their counterclaims "due to the expiration of the applicable statutes of limitation . . . ." We disagree.

N.C. Gen. Stat. § 1A-1, Rule 12(b) (2005) states, "[i]f, on a motion asserting the defense numbered (6), to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, *the motion shall be treated as one for summary judgment* . . . ." (Emphasis supplied). In its order dated 15 November 2006, the superior court stated that "upon [State Farm]'s motion to dismiss the [Gaylors'] counterclaims pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure[,] [this court] . . . reviewed the pleadings and considered the arguments and submissions of counsel . . . ." Because the superior court considered matters outside the pleading when it heard State Farms's motion to dismiss, we review the superior court's grant of State Farm's motion to dismiss as the grant of a motion for summary judgment. *Id.*

The Gaylors asserted counterclaims against State Farm for: (1) reformation of contract due to mutual mistake and misrepresentation; (2) negligent failure to procure insurance; and (3) misrepresentation. The Gaylors' counterclaims are subject to a three-year statute of limitations pursuant to N.C. Gen. Stat. § 1-52(5) and (9) (2005).

This Court recently considered similar facts to those at bar in *State Farm Fire & Cas. Co. v. Darsie*. 161 N.C. App. 542, 589 S.E.2d 391 (2003), *disc. rev. denied*, 358 N.C. 241, 594 S.E.2d 194 (2004). In *Darsie*, the insurer instituted the action for determina-

tion of the parties' rights and obligations under an automobile insurance policy and personal liability umbrella policy. 161 N.C. App. at 544, 589 S.E.2d at 394. The insured counterclaimed and the insurer filed a motion for summary judgment based, *inter alia*, on the affirmative defense of statute of limitations. *Id.* at 544, 589 S.E.2d at 395. The superior court denied the insurer's motion for summary judgment based on the statute of limitations defense. *Id.* This Court reversed and stated:

> [I]n cases such as insurance claims, when a claim becomes ripe and due under a policy requiring action on the part of the insured, at that point or a reasonable time thereafter, the policyholder is charged with more than a cursory knowledge of the extent of their coverage. . . .
>
> [W]hen the statute of limitations' trigger is based on discovery by reasonable diligence, . . . there must be some competent evidence as to when discovery . . . was reasonable. Or alternatively, when it was otherwise reasonable to discover, there must be some competent evidence that plaintiff lacked capacity and opportunity at all time while discovery was reasonable and before the three years preceding the claims.

Id. at 552, 589 S.E.2d at 399 (internal quotation omitted).

The record contains no evidence that the Gaylors lacked any opportunity or capacity to inquire into their coverage at all times after the 26 March 2002 accident and before they filed their counterclaims on 25 May 2006. *Id.* Consistent with this Court's reasoning in *Darsie*, the Gaylors were charged with due diligence to notify State Farm within a year of the accident, or by 26 March 2003. 161 N.C. App. at 552, 589 S.E.2d at 399. Based on the uncontroverted evidence in the record, we hold that an "otherwise reasonable" time for the Gaylors to discover a mutual mistake, misrepresentation, or negligent failure to procure insurance occurred when the terms of the policy required certain claims be brought to the attention of State Farm for the purpose of determining coverage. *Id.*

The Gaylors failed to file their counterclaims within the three-year statute of limitations period as prescribed by N.C. Gen. Stat. § 1-52(5) and (9). The superior court did not err when it granted State Farm's motion to dismiss the Gaylors' counterclaims. *Summey*, 357 N.C. at 496, 586 S.E.2d at 249. This assignment of error is overruled.

V. Motion for Summary Judgment

[2] The Gaylors argue the superior court erred when it granted State Farm's motion for summary judgment because "[t]here were genuine issues of material fact . . . ." We disagree.

> Persons entering contracts of insurance, like other contracts, have a duty to read them and ordinarily are charged with knowledge of their contents. . . . Where a party has reasonable opportunity to read the instrument in question, and the language of the instrument is clear, unambiguous and easily understood, failure to read the instrument bars that party from asserting its belief that the policy contained provisions which it does not.

Baggett v. Summerlin Ins. & Realty, Inc., 143 N.C. App. 43, 53, 545 S.E.2d 462, 468-69 (Tyson, J. dissenting) (internal citation and quotation omitted), *rev'd*, 354 N.C. 347, 347, 554 S.E.2d 336, 337 (2001) (per curium) ("For the reasons stated in the dissenting opinion by Judge Tyson, the decision of the Court of Appeals is reversed.").

Here, the record shows that on 23 June 1992, Mr. Gaylor executed a "Selection/Rejection Form" pursuant to N.C. Gen. Stat. § 20-279.21(b)(4). The "Selection/Rejection Form" states, "I choose to reject Combined Uninsured/Underinsured Motorists Coverage and select Uninsured Motorists Coverage at limits of: Bodily Injury 100/300; Property Damage 50[.]" The record further shows that on 27 December 2002, Mrs. Gaylor executed a new "Selection/Rejection Form," which changed the Gaylors' coverage to "Combined Uninsured/Underinsured Motorists Coverage at limits of: Bodily Injury 100,000/300,000; Property Damage 50,000[.]"

Reviewing the evidence in the light most favorable to the Gaylors, no genuine issues of material fact exist of whether the Gaylors had underinsured motorists coverage at the time of the 26 March 2002 accident. *Summey*, 357 N.C. at 496, 586 S.E.2d at 249. The superior court did not err when it granted State Farms's motion for summary judgment. *Id*. This assignment of error is overruled.

VI. Conclusion

Undisputed evidence in the record shows the Gaylors failed to file their counterclaims within the applicable three-year statute of limitations. The superior court did not err when it granted State Farm's motion to dismiss the Gaylors' counterclaims. No genuine issue of any material fact exist of whether the Gaylors had underin-

sured motorists coverage at the time of the 26 March 2002 accident. The superior court did not err when it granted State Farm's motion for summary judgment and its orders are affirmed. *Summey*, 357 N.C. at 496, 586 S.E.2d at 249.

Affirmed.

Judges McCULLOUGH and STROUD concur.

STATE OF NORTH CAROLINA v. CRYSTAL ELAINE NEAL

No. COA07-1145

(Filed 6 May 2008)

Search and Seizure— strip search—consent

Defendant knowingly and voluntarily consented to the search of her person which revealed cocaine. A reasonable person would have understood from the circumstances and exchanges that the police intended to conduct a strip search.

Appeal by Defendant from order entered 12 January 2007 by Judge James E. Hardin, Jr. and judgment entered 16 November 2006 by Judge Catherine C. Eagles in Superior Court, Guilford County. Heard in the Court of Appeals 1 April 2008.

Attorney General Roy Cooper, by Special Deputy Attorney General Robert T. Hargett, for the State.

Charles L. White, for defendant-appellant.

WYNN, Judge.

To determine whether the scope of a defendant's consent to a search includes the removal of clothing, we apply the standard of " 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?"[1] Here, we conclude that the interactions between Defendant Crystal Elaine Neal and the police officers in question would have led a reasonable person to believe that the police would

1. *Florida v. Jimeno*, 500 U.S. 248, 251, 114 L. Ed. 2d 297, 302 (1991).

be conducting a strip search of Defendant. Because Defendant consented to the search and did not withdraw that consent, we affirm the trial court's order denying her motion to suppress evidence gathered subsequent to the search.

On the afternoon of 25 April 2006, Officer Roman Watkins was conducting surveillance of a gas station located in a well-known drug area on East Market Street in Greensboro. Officer Watkins observed a male exit the convenience store at the gas station; he was acting "nervous" and subsequently got in his car and left the gas station "very slowly," failing to use his turn signal when leaving. Officer Watkins followed the vehicle, an older model Honda, and ran a record check of the license plate number. When the check showed that the car was owned by an individual with a suspended driver's license, Officer Watkins pulled the Honda over based on that information and the driver's earlier failure to use his turn signal. He subsequently arrested the driver, Douglas Campbell, for driving while license revoked.

Officer Nicholas Ingram, who responded to Officer Watkins's request for assistance, arrived and asked Defendant, who was seated in the passenger seat of the car, to step out of the vehicle so that it could be searched incident to Mr. Campbell's arrest. No controlled substances or contraband was found in the car. Officer Ingram testified that Defendant was quite nervous when he approached the car, and that he detected a mild odor of marijuana coming from the passenger side of the car, where Defendant was seated. Officer Ingram asked Defendant for her consent to conduct a pat-down search of her person to check for weapons, as well as her consent to search her purse. Defendant agreed, and Officer Ingram used the back of his hand to pat her down, finding no weapons or contraband on her person and $1,095 in small denomination bills in her purse.

The officers then requested a canine unit to assist in the search. After Officer S.J. Langholz arrived with his drug dog, Doc, the two searched the car, and Doc "reacted very well" to the front passenger seat, where Defendant had been sitting. Officer Langholz asked Defendant if she could have the odor of narcotics on her person, and she responded that her clothing could possibly have been in contact with illegal drugs that day. While the search was being conducted, Officers Watkins and Ingram observed Defendant acting very nervously and fidgeting, often putting her hands in and out of the back part of the waistband of her pants. The officers also noticed a "bulge"

in the back of her pants; they instructed Defendant to keep her hands away from her waistband.

At that point, Officer Watkins informed Defendant that he wanted to conduct a "better" search to determine what was located in the back of her pants and that he had contacted a female police officer for assistance. He asked Defendant if she would mind undergoing a "more thorough" search; she responded that she would not. When Officer Jennifer Mauney arrived, she was informed that Defendant had consented to the search. She took Defendant to a nearby business and conducted a search of Defendant in the women's bathroom, with one of the other officers standing outside the door. Before beginning the search, Officer Mauney explained to Defendant that she would be conducting a more thorough search; Defendant indicated that she understood. Officer Mauney then had Defendant turn sideways, according to police procedure, and asked her to lift her shirt, then unzip her pants and lower them. She then asked Defendant to lower her underwear, at which point a package of what was later determined to be cocaine fell out. According to Officer Mauney's later testimony, Defendant was "very cooperative, extremely cooperative" during the search and at no point expressed any misgivings or argued with Officer Mauney about the scope of the search.

After the trial court denied Defendant's motion to suppress the evidence gathered subsequent to this search, she pled guilty to possession with intent to sell and deliver cocaine, trafficking in cocaine by possession, and trafficking in cocaine by transportation, and was sentenced to a minimum of thirty-five months and a maximum of forty-two months in prison. Defendant now appeals the denial of her motion to suppress, arguing that the trial court erred by concluding as a matter of law that (I) she knowingly and voluntarily gave specific consent to be strip-searched, and (II) there was probable cause sufficient to justify a warrantless search.

These two arguments are closely related; Defendant essentially contends that her consent to be searched was general, not specific, such that its scope did not include a strip search, and alternatively that the search was not supported by probable cause sufficient to overcome the need for a warrant. However, because our conclusion from the record and transcript that Defendant consented to the strip search is dispositive in determining her appeal, we decline to consider the question of whether there was sufficient probable cause.

According to the United States Supreme Court, "[t]he standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Florida v. Jimeno*, 500 U.S. 248, 251, 114 L. Ed. 2d 297, 302 (1991). In the context of a search upon probable cause, the test of reasonableness "requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Bell v. Wolfish*, 441 U.S. 520, 559, 60 L. Ed. 2d 447, 481 (1979). Finally, "[t]he scope of the search can be no broader than the scope of the consent. . . . When an individual gives a general statement of consent without express limitations, the scope of a permissible search is not limitless. Rather it is constrained by the bounds of reasonableness[.]" *State v. Johnson*, 177 N.C. App. 122, 124-25, 627 S.E.2d 488, 490 (quotations and citations omitted), *vacated in part on other grounds*, 360 N.C. 541, 634 S.E.2d 889 (2006).

The Supreme Court of North Carolina recently considered a similar question in *State v. Stone*, in which a police officer pulled a defendant's sweatpants away from his body and shined a flashlight on his genitals, revealing a pill bottle that was later found to contain crack cocaine. 362 N.C. 50, 52, 653 S.E.2d 414, 416 (2007). According to the police officer's testimony in that case, he had no particular suspicion that the defendant was hiding drugs in his genital area; rather, he conducted the search as a matter of course, after a first search turned up nothing. *Id.* at 56, 653 S.E.2d at 419. Moreover, the defendant in *Stone* had agreed to the first search but objected when the police officer pulled away his sweatpants and shined the flashlight on his genitals. *Id.* The search took place in the early morning hours, in the parking lot of an apartment complex. *Id.* at 51-52, 653 S.E.2d at 416.

According to the Court, they were "considering for the first time the question of whether the scope of a general consent search necessarily includes consent for the officer to move clothing in order to observe directly the genitals of a clothed suspect." *Id.* at 56, 653 S.E.2d at 418. Nevertheless, the Court noted that "today's decision is necessarily predicated on its facts," and observed that "different actions by the officer could have led to a different result." *Id.* at 56-57, 653 S.E.2d at 419. For example, in that case, "[the defendant's]

subjective response, while not dispositive of the reasonableness of the search, is an indication that it exceeded his expectations." *Id.* at 55, 653 S.E.2d at 418. The Court ultimately found that, "[t]he search of these intimate areas would surely violate our widely shared social expectation; these areas are referred to as 'private parts' for obvious reasons[,]" and concluded that the search had exceeded the scope of the defendant's consent and was unreasonable. *Id.* at 55-57, 653 S.E.2d at 418-19.

In the instant case, however, a reasonable person would have understood from the circumstances and exchanges between the officers and Defendant that the police intended to conduct a strip search of Defendant. *See Jimeno*, 500 U.S. at 251, 114 L. Ed. 2d at 302. Officer Watkins informed Defendant that he needed to conduct a "better" search to determine what was in Defendant's pants and that a female police officer was on her way. Defendant consented to a "more thorough" search. Officer Mauney asked Defendant if she understood what was going to happen; Defendant responded that she did. Defendant was "extremely cooperative" during the search and never indicated that her consent did not extend to a strip search. Being taken to a women's restroom was another sign that the police intended to search inside of Defendant's clothing.

Moreover, the "scope of the particular intrusion, the manner in which it [was] conducted, the justification for initiating it, and the place in which it [was] conducted," *Bell*, 441 U.S. at 559, 60 L. Ed. 2d at 481, all support a finding of reasonableness. Defendant was taken to a relatively private location, with another police officer standing outside to prevent any strangers from walking in. Officer Mauney did not touch Defendant directly but rather only observed as she removed her own clothing for a short period of time. Accordingly, we find that Defendant knowingly and voluntarily consented to the search conducted by Officer Mauney.

Affirmed.

Judges BRYANT and JACKSON concur.

STATE OF NORTH CAROLINA v. ARTHUR EUGENE YOUNG, III, DEFENDANT

No. COA07-671

(Filed 6 May 2008)

1. Probation and Parole— revocation—firearms possession—sufficiency of evidence

A judge's decision to revoke a probationary sentence was supported by competent evidence showing constructive possession of firearms in violation of a condition of the probation. Although the State was not able to show that defendant had exclusive possession of the premises, defendant knew the precise location of several firearms during a search by an officer, needed no assistance in locating them, appeared to make statements demonstrating ownership, did not object to statements suggesting ownership, and offered no evidence to the contrary.

2. Probation and Parole— revocation—only one ground necessary—other issues not considered on appeal

Evidence of firearms possession was sufficient to show a violation of a probation condition and to support revocation, and issues relating to drug possession were not considered on appeal.

Appeal by defendant from judgment entered 1 March 2007 by Judge James W. Morgan in Mecklenburg County Superior Court. Heard in the Court of Appeals 8 January 2008.

Attorney General Roy Cooper, by Assistant Attorney General Spurgeon Fields, III, for the State.

Jon W. Myers, for defendant.

ELMORE, Judge.

Prior to a probation revocation hearing on 28 February 2007, Arthur Eugene Young, III (defendant), pled guilty to two separate crimes in separate proceedings. Defendant received a suspended sentence and supervised probation in each instance.

During the probationary period, defendant received a visit by a police officer at the home he shared with his girlfriend and another person. Defendant's name was not on the lease. The facts tended to show that the officer requested permission from defendant

to enter the home to conduct a narcotics investigation. Defendant granted permission.

While inside, the officer asked if there were any drugs in the house. In response, defendant went to the refrigerator freezer and retrieved what appeared to be two bags of marijuana. The officer then asked if there were any more drugs in the house. Defendant led him to a bedroom where what appeared to be cocaine was in plain view. The detective also found what appeared to be cocaine in defendant's rear pants pocket. The officer then asked if there were any weapons in the house. Defendant led the officer through the house and produced four weapons.

Defendant was charged with violating the conditions of his probation by having controlled substances in his possession, by violating the rules of the structured day program by having controlled substances in his possession, and by having deadly weapons in his possession.

Prior to the probation revocation hearing, defendant's motion for discovery directed to alleged controlled substances was denied. At the probationary hearing, defendant renewed his motion for discovery, which was again denied. Defendant presented no evidence at the hearing and made no motions or objections regarding the handguns. The court found defendant in violation of each of the three conditions of probation. Defendant now appeals the revocation of probation and activation of the suspended sentences.

A hearing to revoke a defendant's probationary sentence only requires "that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has willfully violated a valid condition of probation or that the defendant has violated without lawful excuse a valid condition upon which the sentence was suspended." *State v. Hewett*, 270 N.C. 348, 353, 154 S.E.2d 476, 480 (1967). The judge's finding of such a violation, if supported by competent evidence, will not be overturned absent a showing of manifest abuse of discretion." *State v. Guffey*, 253 N.C. 43, 45, 116 S.E.2d 148, 150 (1960) (citations omitted).

[1] Defendant first argues that there was insufficient evidence to revoke his probation on the basis of firearm possession, contending that there is insufficient evidence that he exercised ownership or exclusive possession of the firearms.

"Possession of a firearm may . . . be actual or constructive." *State v. Boyd*, 154 N.C. App. 302, 307, 572 S.E.2d 192, 196 (2002) (citation omitted). Constructive possession of an item exists when a person does not have the item in "physical custody, but . . . nonetheless has the power and intent to control its disposition." *State v. Alston*, 131 N.C. App. 514, 519, 508 S.E.2d 315, 318 (1998) (citation omitted). The State does not dispute defendant's contention that no firearms were found in his actual possession. However, the question remains whether the firearms located in the home were in his constructive possession. Defendant argues that there was insufficient evidence to show constructive possession of the firearms. In particular, defendant highlights the State's failure to offer physical evidence, such as fingerprints, permits, or other proof of ownership linking him to the weapon. Although these might be the ideal forms of evidence to support a finding of constructive possession, other facts support such a finding.

At the hearing, the officer explained how the weapons were found:

> Q. Was the defendant asked if there was [sic] any weapons in the residence?
>
> A. Yes; he was.
>
> Q. What was the defendant's response, if any?
>
> A. He advised *he did have weapons* at which time he directed us through the residence to locate same.
>
> Q. How many weapons did you find?
>
> A. There were a total of four weapons found.
>
> Q. Can you describe where these weapons were found and what exactly these weapons were?
>
> A. Yes; one weapon was a Tech 9 which was located under the pillow in the master bedroom. The other was a shotgun, Mossberg 12 gauge shotgun, which was located under the mattress of the bed. The other was a 38 cal. handgun. It was found in the sofa, stuck down in the sofa. *And the other weapon was a revolver that was also found under the mattress in his bedroom.*

(Emphasis added). The testimony showed that defendant claimed ownership of firearms and that at least one of the firearms was purportedly located in his bedroom. Though the formal rules of

evidence do not apply in a probation revocation hearing, N.C. Gen. Stat. § 15A-1345(e) (2007), defendant raised no objection to these statements suggesting ownership and offered no evidence to the contrary. Further testimony showed that defendant told the officer exactly where each of the weapons was located. On cross-examination, the officer stated, "All I can say is when asked about those items he took us directly to them and told us exactly where they were."

That defendant knew the precise location of the several firearms, needed no assistance in locating them, and appeared to make statements demonstrating ownership, is strong evidence that defendant had the power and intent to control them. Furthermore, defendant never made statements either during the search or at trial denying ownership.

Defendant nevertheless contends that there is no proof of possession of the firearms because there is no evidence demonstrating that he had exclusive possession or control over the residence.

Though ownership or lease of a premises in which contraband is found can give rise to the inference of constructive possession, "the State is not *required* to establish that a defendant owned or leased the premises on which contraband is found in order to prove control of such premises by defendant." *State v. Tate*, 105 N.C. App. 175, 179, 412 S.E.2d 368, 371 (1992) (citing *State v. Leonard*, 87 N.C. App. 448, 456, 361 S.E.2d 397, 402 (1987)). "[W]here there is no evidence of ownership or of exclusive possession of the premises on which controlled substances are found, constructive possession may be inferred if the defendant has nonexclusive possession of the premises and there are accompanying incriminating circumstances." *Id.* at 180, 412 S.E.2d at 371 (citing *State v. McLaurin*, 320 N.C. 143, 146, 357 S.E.2d 636, 638 (1987)).

Though the State was not able to show that defendant had exclusive possession of the premises, the evidence showing ownership of the firearms, described above, establishes sufficient incriminating circumstances to support constructive possession. Though evidence showed that another person was at the residence at the time of the search, defendant needed no assistance in locating and procuring the firearms; he went directly to the places in the leased premises and retrieved the items himself. During the search, defendant never stated that the weapons were not his, nor did he make such a claim at the revocation hearing.

The judge's decision to revoke the probationary sentence was supported by competent evidence showing constructive possession of firearms in violation of a condition of probation. As defendant failed to offer any evidence showing that the violation was not willful or with lawful excuse, we find no error.

[2] Defendant also argues that denial of his motion for discovery relating to drug possession was reversible error. However, we need not address this issue, because the "breach of any single valid condition upon which the sentence was suspended will support an order activating the sentence." *State v. Braswell*, 283 N.C. 332, 337, 196 S.E.2d 185, 188 (1973). Because evidence presented as to the firearms possession was sufficient to show a violation of a probation condition, the violation of that condition of probation alone was sufficient for the court to revoke his probationary sentence.

Having conducted a thorough review of the briefs and records, we find no error.

No error.

Judges WYNN and BRYANT concur.

BABB v. GRAHAM

[190 N.C. App. 463 (2008)]

R. KENNETH BABB, PUBLIC ADMINISTRATOR, CTA OF THE ESTATE OF REBA BURTON NEWTON; R. KENNETH BABB, PUBLIC ADMINISTRATOR, CTA OF THE ESTATE OF JERRY LEWIS NEWTON, JR.; R. KENNETH BABB, SPECIAL TRUSTEE OF THE TRUST ESTABLISHED BY JERRY LEWIS NEWTON, JR., UNDER THE WILL OF JERRY LEWIS NEWTON, JR., DATED SEPTEMBER 29, 1992; R. KENNETH BABB, SPECIAL TRUSTEE OF THE TRUST ESTABLISHED BY JERRY LEWIS NEWTON, JR., UNDER A CERTAIN REVOCABLE TRUST AGREEMENT DATED SEPTEMBER 29, 1992; AND R. KENNETH BABB, SPECIAL TRUSTEE OF THE TRUST ESTABLISHED BY REBA BURTON NEWTON, UNDER A CERTAIN REVOCABLE TRUST AGREEMENT DATED SEPTEMBER 29, 1992, PLAINTIFFS v. ANNE NEWTON GRAHAM; JERRY L. NEWTON, III; JOSEPH WESLEY NEWTON; PAUL JEFFREY NEWTON; JERRY L. NEWTON, III, TRUSTEE UNDER THE WILL OF REBA BURTON NEWTON; JERRY L. NEWTON, III, TRUSTEE UNDER THE INTER VIVOS TRUST OF REBA BURTON NEWTON; AND JERRY L. NEWTON, III, TRUSTEE UNDER THE WILL OF JERRY LEWIS NEWTON, JR., DEFENDANTS

No. COA07-848

(Filed 20 May 2008)

1. Judges— motion to recuse—denied—no error

In an action arising from the administration of trusts, there was no error in the trial court's denial of a motion to recuse based on previous removal of the trustee.

2. Fraud— constructive—administration of trusts—directed verdict

The trial court did not err by entering a directed verdict for plaintiffs and cross-claimants on claims for breach of fiduciary duty and constructive fraud where the trusts in issue required appellant trustee to make distributions, appellant sought to obtain payment for the provision of services unrelated to the trusts before he made distributions under the trusts, and he continued to receive fees while refusing to make distributions. Even if appellant increased the value of the assets of the trusts, that fact is irrelevant to the determination of whether appellant failed to distribute the assets to his own benefit.

3. Damages— directed verdict—punitive damages

In an action arising from the administration of trusts, appellant's assertion that the trial court directed a verdict of liability for punitive damages was without factual support.

4. Trusts— punitive damages—fraud and malice—evidence sufficient

In an action rising from the administration of trusts, there was sufficient evidence of intent, fraud, malice and willful

and wanton conduct to submit the amount of punitive damages to the jury.

5. Damages— punitive—written opinion not issued

The trial court did not err by failing to issue a written opinion about the reasons for a punitive damages award where the award did not exceed the allowable limit. N.C.G.S. §§ 1D-25(b), 1D-50.

6. Trusts— distribution not made—written objections to accountings not made

Claims relating to the administration of trusts were not barred by provisions of the trusts concerning written objections to yearly accountings. The trusts clearly required distribution of the assets, appellant refused to do so, and nothing in the cited provisions caused cross-claimants to waive their right to distribution of the assets.

7. Trusts— constructive fraud—statute of limitations—continuing wrong doctrine

Claims arising from the administration of trusts were not barred by the three-year statute of limitations. A claim of constructive fraud based upon a breach of fiduciary duty falls under the ten-year statute of limitations. Even assuming that these claims were governed by a three-year statute of limitations, appellant refused to make distributions required by the trusts, and the claims are saved by the continuing wrong doctrine.

8. Discovery— plaintiff testifying as expert and offering exhibits—called by cross-claimant

The trial court did not err in an action arising from the administration of trusts by allowing plaintiff Babb to offer exhibits and testify as an expert. Although appellant argues that this was inconsistent with Babb's answer to interrogatories and his response to requests for production of documents, Babb deferred to cross-claimants for the presentation of the evidence, and the cross-claimants then called Babb as an expert. The cross-claimants were not served with discovery requests about the expert witnesses they intended to call.

9. Trials— deferral of evidence—discretion of court

The trial court did not abuse its discretion by allowing a plaintiff to defer presentation of evidence until the cross-claimants had presented their evidence. A trial court has broad

authority to structure the trial logically and to set the order of proof.

10. Trusts— constructive fraud—directed verdict—affirmative defenses irrelevant

The trial court did not err by granting a directed verdict on claims arising from constructive fraud in an action arising from the administration of trusts. Although appellant contended that he was prevented from offering certain affirmative defenses, those defenses were irrelevant to the claims for constructive fraud based upon a breach of fiduciary duty.

11. Trusts— removal of trustee—separate action—award of attorney fees—recovery of commissions

The trial court did not err by awarding to cross-claimants attorney fees that were incurred in separate proceedings for removal of appellant as trustee, and the recovery of trustee commissions. Although appellant argues that these matters should have been dealt with in separate removal proceedings, the removal proceedings were confined to removal and did not involve damages or costs; the award of damages and costs in this action was designed to restore the trust to the position it would have occupied had no breach occurred.

12. Pleadings— amendment—no abuse of discretion

The trial court did not abuse its discretion in an action arising from the administration of trusts by allowing amendment of plaintiffs' complaint and the cross-claims.

13. Costs— determination of amount after notice of appeal—jurisdiction retained by trial court

The trial court retained jurisdiction to tax costs after notice of appeal was filed from a directed verdict order and judgment. The parties were aware that the court had ordered that costs be taxed against appellant and that the trial court would thereafter specifically determine the amount of the costs.

14. Judgments— money judgment not stayed—required deposits with clerk not made

The trial court did not err by failing to order a stay of execution on a money judgment where appellant did not satisfy the statutory requirements by making the requisite deposit with the clerk.

Appeal by Defendant Jerry L. Newton, III from order entered 10 October 2006, from order and judgment entered 29 December 2006, and from orders entered 22 January 2007, 22 March 2007, and 17 May 2007 by Judge Michael E. Helms in Superior Court, Forsyth County. Heard in the Court of Appeals 19 February 2008.

R. Kenneth Babb for Plaintiffs-Appellees; Bennett & Guthrie, P.L.L.C., by Richard V. Bennett and Roberta B. King, for Defendant-Appellee Anne Graham Newton; Wilson & Coffey, LLP, by G. Gray Wilson, J. Chad Bomar, and Stuart H. Russell, for Defendant-Appellee Joseph Wesley Newton; and Bailey & Thomas, P.A., by Wesley Bailey, for Defendant-Appellee Paul Jeffrey Newton.

Stephen E. Lawing for Defendant-Appellant Jerry L. Newton, III.

McGEE, Judge.

Defendant Jerry L. Newton, III appeals from orders and judgment of the trial court. For the reasons set forth below, we affirm.

R. Kenneth Babb, as Public Administrator, CTA of the Estate of Reba Burton Newton and as Public Administrator, CTA of the Estate of Jerry Lewis Newton, Jr. (Plaintiffs) filed a complaint for declaratory judgment on 18 February 2002 against Anne Newton Graham; Jerry L. Newton, III; Joseph Wesley Newton; Paul Jeffrey Newton; Jerry L. Newton, III, as Trustee under the Will of Reba Burton Newton; Jerry L. Newton, III, as Trustee under the *inter vivos* trust of Reba Burton Newton; Jerry L. Newton, III, as Trustee under the Will of Jerry Lewis Newton, Jr.; and Gordon W. Jenkins. Plaintiffs alleged the following:

> [P]laintiffs' and [D]efendants' rights, duties and obligations with regard to the aforementioned estates and trusts arise under and by virtue of authority of the Will of Reba Burton Newton, the Will of Jerry Lewis Newton, Jr., a Trust created by the Will of Reba Burton Newton, an inter vivos Trust created by Reba Burton Newton and a trust created by the Will of Jerry Lewis Newton, Jr. Copies of the Wills and Trusts are attached hereto, marked "Exhibit A" (Reba Burton Newton Will), "Exhibit B" (Jerry Lewis Newton, Jr. Will), "Exhibit C" (Reba Burton Newton inter vivos Trust dated September 29, 1992) and "Exhibit D" (Jerry Lewis Newton, Jr. inter vivos Trust dated September 29, 1992) and incorporated by reference as if fully set out herein.

We hereinafter refer to the above-listed trusts collectively as "the trusts." Plaintiffs alleged that Anne Newton Graham, Jerry L. Newton, III, Joseph Wesley Newton, and Paul Jeffrey Newton were beneficiaries of the estates of their parents, Reba Burton Newton and Jerry Lewis Newton, Jr., and were beneficiaries of the trusts created by their parents. Plaintiffs alleged several claims seeking to resolve all issues related to the administration of the trusts. Plaintiffs filed an amendment to their complaint on 3 October 2002.

Jerry L. Newton, III filed a motion for a more definite statement and a motion to dismiss dated 4 October 2002. Paul Jeffrey Newton and Anne Newton Graham filed an answer and cross-claim against Jerry L. Newton, III on 18 November 2002 and 9 December 2002, respectively. Joseph Wesley Newton filed an answer on 8 January 2003. Jerry L. Newton, III filed a response to the answer and cross-claim of Paul Jeffrey Newton and of Anne Newton Graham, along with a motion to dismiss those cross-claims, on 14 January 2003 and 4 February 2003, respectively. Jerry L. Newton, III also filed cross-claims against Paul Jeffrey Newton and Anne Newton Graham, to which they responded on 18 February 2003 and 11 March 2003, respectively.

Plaintiffs filed a motion for partial summary judgment on 30 January 2004, and Anne Newton Graham filed a motion for partial summary judgment on 2 February 2004. Paul Jeffrey Newton and Joseph Wesley Newton each filed a motion for partial summary judgment on 3 February 2004. The trial court granted those motions in an order entered 8 March 2004. Jerry L. Newton III, individually, and as trustee of the Jerry L. Newton, Jr. trust, appealed and our Court affirmed the trial court's order. *See Babb v. Graham*, 171 N.C. App. 364, 615 S.E.2d 434 (unpublished), *disc. review denied*, 360 N.C. 174, 625 S.E.2d 781 (2005).

In separate proceedings, the trial court removed Jerry L. Newton, III as trustee of the trusts, and our Court affirmed his removal. *See In re Estate of Newton*, 173 N.C. App. 530, 619 S.E.2d 571, *disc. review denied*, 360 N.C. 176, 625 S.E.2d 786 (2005). R. Kenneth Babb was appointed as trustee of the trusts on 3 June 2004.

R. Kenneth Babb, as trustee of the trusts, filed an amended complaint in the present case on 23 June 2006. Anne Newton Graham, Joseph Wesley Newton, and Paul Jeffrey Newton gave written consent to the filing of the amended complaint on 22 June 2006. The amended complaint, like Plaintiffs' original complaint, sought to

determine the rights, duties, and obligations of the parties regarding the trusts. Plaintiffs alleged in their amended complaint that Jerry L. Newton, III, as trustee of the trusts, had failed to distribute the assets of the trusts to Anne Newton Graham, Jerry L. Newton, III, Joseph Wesley Newton, and Paul Jeffrey Newton, notwithstanding the provisions of the trusts that required distribution upon the death of Reba Burton Newton.

Jerry L. Newton, III filed an answer to Plaintiffs' amended complaint on 25 August 2006 and raised several defenses and asserted a counterclaim. Anne Newton Graham filed an answer to Plaintiffs' amended complaint on 29 August 2006. She asserted cross-claims against Jerry L. Newton, III for breach of fiduciary duty, constructive fraud, an accounting, and punitive damages. Joseph Wesley Newton filed an answer to Plaintiffs' amended complaint on 29 August 2006. He asserted cross-claims against Jerry L. Newton, III for breach of fiduciary duty, unfair and deceptive trade practices, an accounting, and punitive damages. Paul Jeffrey Newton filed an answer to Plaintiffs' amended complaint on 11 September 2006. He asserted cross-claims against Jerry L. Newton, III for breach of fiduciary duty, an accounting, and punitive damages.

Jerry L. Newton, III filed a motion for the recusal of Superior Court Judge Michael E. Helms on 25 September 2006, which was denied on 10 October 2006. Plaintiffs filed a notice of voluntary dismissal, without prejudice, of several of their claims on 6 October 2006. Joseph Wesley Newton filed an answer and amended cross-claim on 10 October 2006. He alleged cross-claims against Jerry L. Newton, III for breach of fiduciary duty, constructive fraud, unfair and deceptive trade practices, an accounting, and punitive damages. Jerry L. Newton, III filed answers to the cross-claims of Anne Newton Graham, Joseph Wesley Newton, and Paul Jeffrey Newton on 2 November 2006.

At trial, Plaintiffs, along with Anne Newton Graham, Joseph Wesley Newton, and Paul Jeffrey Newton (hereinafter Cross-Claimants) moved for directed verdict at the close of the presentation of their evidence, and the trial court,

> after viewing the evidence, which included the testimony of Jerry Newton, III, in the light most favorable to . . . Jerry L. Newton, III, finds as a matter of law, Jerry L. Newton, III breached his fiduciary duty to [C]ross-[C]laimants and committed constructive fraud while failing to distribute the proceeds of the . . . trusts[.]

Accordingly, the trial court granted the motions for directed verdict and determined the following:

> Plaintiffs are entitled to recover $60,435 for trustee commissions paid to Jerry L. Newton, III from 1993-2003 and the [trial court] finds that these amounts may be deducted directly from Jerry L. Newton, III's share of the three trusts, to the extent of funds available. The [trial court] determines that the [C]ross-[C]laimants, . . . Anne Newton Graham, Joseph Wesley Newton and Paul Jeffrey Newton are entitled to recover attorneys' fees incurred in the proceeding to remove Jerry L. Newton, III as trustee of the . . . trusts due to the breach of fiduciary duty and constructive fraud of Jerry L. Newton, III. Specifically, Anne Newton Graham is entitled to recover $55,604.89, Paul Jeffrey Newton is entitled to recover $55,000.00 and Joseph Wesley Newton is entitled to recover $52,722.50, and the [trial court] finds that these amounts may be deducted directly from Jerry L. Newton, III's share of the . . . trusts, to the extent of funds available[.]

The trial court also granted Plaintiffs' motion for directed verdict as to Jerry L. Newton, III's counterclaim.

The trial court submitted the remaining issues to a jury, and the jury determined the following issues, on which the trial court entered judgment:

> 1. What amount is . . . Plaintiff [R.] Kenneth Babb, as Trustee, entitled to recover on behalf of the . . . trusts for breach of fiduciary duty and/or constructive fraud?
>
> ANSWER: $34,507
>
> 2. What amount of damages are . . . [C]ross-[C]laimants, Anne Newton Graham, Joseph Wesley Newton and Paul Jeff[rey] Newton entitled to recover for breach of fiduciary duty and/or constructive fraud?
>
> AMOUNT: $52,378
>
> 3. Is Jerry L. Newton, III liable to . . . [C]ross-[C]laimants[] Anne Newton Graham, Joseph Wesley Newton and Paul Jeff[rey] Newton for punitive damages?
>
> ANSWER: Yes
>
> If you answer issue #3 "yes", then answer issue #4. If you answer issue #3 "no", then your deliberations are concluded.

> 4. What amount of punitive damages, if any, does the jury in its discretion award to [C]ross-[C]laimants[] Anne Newton Graham, Joseph Wesley Newton and Paul Jeff[rey] Newton?
>
> AMOUNT: $500,000

The trial court ordered the following:

> It is therefore hereby ORDERED, ADJUDGED and DECREED that . . . Plaintiffs have and recover $94,942.00 from Jerry L. Newton III, and . . . [C]ross-[C]laimants have and recover $715,705.39 from Jerry L. Newton, III, for a total of $810,467.96. Further, interest shall be calculated at 8% per annum from February 18, 2002 on all amounts awarded to Plaintiffs and from October 10, 2006 on all non-punitive amounts awarded to [C]ross-[C]laimants. Further, the costs of this action shall be taxed against Jerry L. Newton, III[.]

The trial court entered an order on 22 January 2007 granting relief from a clerical mistake to amend the total amount owed to Plaintiffs and Cross-Claimants from $810,467.96 to $810,647.39.

Jerry L. Newton, III filed notice of appeal on 25 January 2007 from the order denying his motion for recusal entered 10 October 2006, from the directed verdict order and judgment entered 29 December 2006, and from the order granting relief from a clerical mistake entered 22 January 2007. Jerry L. Newton, III also filed an "undertaking to stay execution on money judgment" on 25 January 2007, and deposited the amount of $810,647.39 with the trial court. Plaintiffs and Cross-Claimants filed a motion to tax costs dated 15 February 2007, seeking "an Order for the payment of costs, including reasonable attorneys' fees, in this action, against Jerry L. Newton, III." Jerry L. Newton, III filed a *pro se* response to the motion to tax costs dated 22 February 2007, seeking to have the motion dismissed. Plaintiffs and Cross-Claimants filed a supplement to their motion to tax costs on 26 February 2007.

Following a hearing, the trial court entered an interim order on the motion to tax costs on 22 March 2007. The trial court ruled as follows:

> (1) The Motion to Tax Costs is properly before [the trial court] and [the trial court] has jurisdiction to hear said Motion. Execution on the money judgment in this case is not stayed because Jerry L. Newton, III has not fully complied with N.C.G.S.

§ 1-289, N.C.G.S. § 1-293, and Rule 62 of the North Carolina Rules of Civil Procedure and the Motion to Tax Costs is not stayed under N.C.G.S. § 1-294;

(2) N.C.G.S. § 6-21(2) applies to the present action and allows [the trial court] to award costs in its discretion, including reasonable attorney's fees;

(3) [The trial court] further finds that N.C.G.S. § 7A-305 and N.C.G.S. § 7A-314 are applicable to the present case and allow [the trial court], in its discretion, to award as costs fees for expert witnesses;

([4]) The February 28, 2007 hearing is adjourned and will reconvene on April 17, 2007 for the purpose of the [trial court's] consideration of the reasonableness of attorney's fees and other costs sought by . . . Defendants and Cross-Claimants and . . . Plaintiffs; and

([5]) On or before April 6, 2007 counsel for the parties shall serve on all other parties, any and all affidavits or other documents which they desire the [trial court] to consider at the hearing on April 17, 2007.

Jerry L. Newton, III filed a response to the motion to tax costs and to the interim order on 12 April 2007. He then filed a notice of appeal on 24 April 2007 from the interim order entered 22 March 2007 and from the final order on the motion to tax costs entered in open court on 17 April 2007. The trial court entered a written order on the motion to tax costs on 17 May 2007, ruling that "the costs set forth herein in the amount of $388,664.54, plus pre-judgment interest as set forth in the Directed Verdict Order and judgment filed on December 29, 2006, are hereby taxed against . . . Jerry L. Newton, III." On 16 June 2007, Jerry L. Newton, III filed notice of appeal from the final order entered in open court on 17 April 2007 and from the order on the motion to tax costs filed 17 May 2007.

I.

[1] Jerry L. Newton, III (hereinafter Appellant) first argues the trial court erred by denying his motion for recusal. Appellant contends that the trial court's impartiality could reasonably be questioned because the trial court, in separate proceedings, had removed Appellant as trustee of the trusts at issue in the present case. Specifically, Appellant relies upon the trial court's previous finding of

fact detailing Appellant's "animosity, hostility, disloyalty, and self-interest" toward Cross-Claimants. *See In re Estate of Newton*, 173 N.C. App. at 539-40, 619 S.E.2d at 576-77. Appellant also relies upon the trial court's previous conclusion of law that Appellant had "violate[d] his fiduciary duty through default and misconduct in the execution of his office as Trustee of said Trusts[.]" *See id.* at 534, 619 S.E.2d at 573.

> " '[T]he burden is upon the party moving for disqualification to demonstrate objectively that grounds for disqualification actually exist. Such a showing must consist of substantial evidence that there exists such a personal bias, prejudice or interest on the part of the judge that he would be unable to rule impartially.' "

Lange v. Lange, 357 N.C. 645, 649, 588 S.E.2d 877, 880 (2003) (citations omitted). "Thus, the standard is whether 'grounds for disqualification actually exist.' " *Id.*

Our Court has made clear that "knowledge of evidentiary facts gained by a trial judge from an earlier proceeding does not require disqualification." *In re Faircloth*, 153 N.C. App. 565, 570, 571 S.E.2d 65, 69 (2002). In *Faircloth*, the respondent in a termination of parental rights proceeding argued that the trial judge erred by refusing to recuse himself from the termination proceeding. *Id.* at 569, 571 S.E.2d at 68. The trial judge had previously presided over a "hearing on allegations that the four children were abused and neglected" and the trial judge had previously adjudicated the four children abused and neglected. *Id.* However, on appeal our Court reversed the abuse and neglect adjudication on the ground that "the trial court applied an erroneous legal standard in denying [the respondent's] request to call three of the children as witnesses." *Id.* (citing *In re Faircloth*, 137 N.C. App. 311, 318, 527 S.E.2d 679, 684 (2000)). Therefore, the respondent argued that the trial judge in the termination proceeding "was biased and could not be impartial because he heard evidence against [the respondent] in the previous abuse and neglect proceeding without hearing from the three children [the respondent] sought to call as witnesses." *Id.* at 569, 571 S.E.2d at 68-69.

Our Court rejected the respondent's argument, recognizing that "knowledge of evidentiary facts gained by a trial judge from an earlier proceeding does not require disqualification." *Id.* at 570, 571 S.E.2d at 69. Our Court also rejected "any contention that [the trial judge] should be disqualified because he earlier adjudicated the four children abused and neglected." *Id.* at 570-71, 571 S.E.2d at 69.

Similarly, Appellant argues that the trial judge should have been disqualified because of his rulings in the previous case. In the present case, as in *Faircloth*, we reject the contention that the trial judge should have been disqualified simply because he had previously ordered that Appellant be removed as trustee of the trusts. *See id.* We hold the trial court did not err by denying Appellant's motion for recusal.

II.

[2] Appellant next argues the trial court erred by entering a directed verdict for Plaintiffs and Cross-Claimants on their claims for breach of fiduciary duty and constructive fraud. We disagree.

> When considering a motion for a directed verdict, a trial court must view the evidence in the light most favorable to the non-moving party, giving that party the benefit of every reasonable inference arising from the evidence. Any conflicts and inconsistencies in the evidence must be resolved in favor of the non-moving party. If there is more than a scintilla of evidence supporting each element of the non-moving party's claim, the motion for a directed verdict should be denied.

Jernigan v. Herring, 179 N.C. App. 390, 392-93, 633 S.E.2d 874, 876-77 (2006) (citations omitted), *disc. review denied*, 361 N.C. 355, 645 S.E.2d 770 (2007). Our Supreme Court has recognized that while rare, it is proper to direct a verdict for the party with the burden of proof "if the evidence so clearly establishes the fact in issue that no reasonable inferences to the contrary can be drawn." *Bank v. Burnette*, 297 N.C. 524, 536, 256 S.E.2d 388, 395 (1979). The Court also stressed that "there are neither constitutional nor procedural impediments to directing a verdict for the party with the burden of proof where *the credibility of movant's evidence is manifest as a matter of law*." *Id.* at 537, 256 S.E.2d at 396. Although there is no general rule to determine when credibility is manifest, our Supreme Court has recognized that credibility is manifest in the following three situations:

> (1) Where non-movant establishes proponent's case by admitting the truth of the basic facts upon which the claim of proponent rests.
>
> (2) Where the controlling evidence is documentary and non-movant does not deny the authenticity or correctness of the documents.

> (3) Where there are only latent doubts as to the credibility of oral testimony and the opposing party has "failed to point to specific areas of impeachment and contradictions."

Id. at 537-38, 256 S.E.2d at 396 (citations omitted).

> In order to maintain a claim for constructive fraud, [the] plaintiffs must show that they and [the] defendants were in a "relation of trust and confidence . . . [which] led up to and surrounded the consummation of the transaction in which [the] defendant[s] [are] alleged to have taken advantage of [their] position of trust to the hurt of [the] plaintiff[s]."

Barger v. McCoy Hillard & Parks, 346 N.C. 650, 666, 488 S.E.2d 215, 224 (1997) (quoting *Rhodes v. Jones*, 232 N.C. 547, 549, 61 S.E.2d 725, 726 (1950)). "Implicit in the requirement that a defendant '[take] advantage of his position of trust to the hurt of [the] plaintiff' is the notion that the defendant must seek his own advantage in the transaction; that is, the defendant must seek to benefit himself." *Id.*

In *Compton v. Kirby*, 157 N.C. App. 1, 577 S.E.2d 905 (2003), our Court held that the trial court properly submitted the issue of breach of fiduciary duty to the jury because the plaintiffs presented evidence in support of their allegation. *Id.* at 15, 577 S.E.2d at 914. Our Court also recognized that "a breach of fiduciary duty amounts to constructive fraud." *Id.* at 16, 577 S.E.2d at 914. Accordingly, because we held that the "plaintiffs established the existence of a fiduciary duty and a breach of that duty, we likewise conclude[d] the issue of constructive fraud was properly submitted to the jury." *Id.* at 16, 577 S.E.2d at 915.

Appellant argues the trial court erred by entering a directed verdict because there was insufficient evidence that he sought to benefit himself by failing to distribute trust assets. We disagree. Appellant cites *Toomer v. Branch Banking & Tr. Co.*, 171 N.C. App. 58, 614 S.E.2d 328, *disc. review denied*, 360 N.C. 78, 623 S.E.2d 263 (2005), where our Court held that the plaintiffs had failed to state a claim for constructive fraud because they failed to allege that the defendant's successor in interest sought to benefit itself. *Id.* at 68, 614 S.E.2d at 336.

In contrast to *Toomer*, Plaintiffs and Cross-Claimants in the present case presented sufficient evidence of constructive fraud. Based on Appellant's own testimony, the credibility of which is manifest, *see Bank*, 297 N.C. at 537, 256 S.E.2d at 396, Plaintiffs and Cross-Claimants demonstrated that Appellant, by his refusal to distribute

trust assets, sought to benefit himself. Appellant testified that he refused to make distributions to the trust beneficiaries until he was paid for work he had done on his father's estate and until the accountings in his father's estate had been approved. However, Appellant admitted that his father's estate was a separate entity from the trusts. This evidence shows that Appellant sought to benefit himself by obtaining payment for the provision of services unrelated to the trusts before he made distributions under the trusts. Appellant also testified that he refused to make distributions to the trust beneficiaries until all litigation had been resolved, but acknowledged that the only litigation pending from June 1999 until 2002 was the action to remove Appellant as trustee. Appellant further testified that he failed to distribute trust assets to the trust beneficiaries because he believed that the trusts did not allow him to make partial distributions. However, Appellant admitted that he did not seek legal advice as to whether he could make a partial distribution under the trusts.

Moreover, the plain language of the trusts required distribution of the trust assets upon the death of Reba Burton Newton. The will of Jerry Lewis Newton, Jr. provided:

> If my wife, REBA BURTON NEWTON, shall survive me, then my Executor shall distribute the balance of my residuary estate to my Trustee to be held, administered and distributed in trust in accordance with the following provisions:
>
> . . .
>
> 6. Upon the death of my wife, the remaining principal of this Trust shall be divided into equal separate shares so as to provide one share for each of my then living children . . . . The share provided for a living child of mine shall be distributed to such child.

The Jerry Lewis Newton, Jr. *inter vivos* trust provided that the trust assets should go to Reba Burton Newton should she survive Jerry Lewis Newton, Jr., and then, if not otherwise disposed of by Reba Burton Newton, the trust assets would be distributed at her death as follows:

> The balance of the principal of this Trust or all of the principal of this Trust, if no amount is distributed under subparagraph (1) shall be divided into equal separate shares so as to provide one share for each of my then living children . . . . The share provided for a living child of mine shall be distributed to such child.

Finally, the Reba Burton Newton *inter vivos* trust provided:

> Upon [Reba Burton Newton's] death, the Trustee shall divide this Trust as then constituted into equal separate shares so as to provide one share for each then living child of [Reba Burton Newton] . . . . The share provided for a living child of [Reba Burton Newton] shall be distributed to such child.

These trusts, the credibility of which is manifest, *see Bank*, 297 N.C. at 537, 256 S.E.2d at 396, required Appellant to make distributions to the trust beneficiaries upon the death of Reba Burton Newton. However, as Appellant testified, he refused to do so for reasons entirely unrelated to the trusts. Moreover, Appellant continued to receive trustee fees during the period of time in which he served as trustee and, therefore, benefitted from his failure to distribute the trust assets. We hold that the above-cited evidence warranted the entry of a directed verdict for Plaintiffs and Cross-Claimants on their claims for breach of fiduciary duty and constructive fraud. Accordingly, the trial court did not err.

Appellant also argues the trial court erred by directing a verdict because Appellant increased the value of the assets of the trusts. However, even if Appellant did so, that fact is irrelevant to the determination of whether Appellant failed to distribute the assets of the trusts for his own benefit.

In conjunction with the arguments already addressed in this section, Appellant also argues the trial court erred by "failing to instruct the jury that damages for breach of trust are such as to restore [the] trust to [the] position [the trust would have been in] had the breach of trust not occurred." However, despite Appellant's contention, the trial judge did instruct the jury as follows: "I instruct you that damages for breach of trust are designed to restore the trust to the same position it would have been in had no breach occurred." Therefore, Appellant's argument is without merit.

III.

[3] Appellant next makes several arguments related to the award of punitive damages. Pursuant to N.C. Gen. Stat. § 1D-15(a) (2007), punitive damages may be awarded "if the claimant proves that the defendant is liable for compensatory damages and that one of the following aggravating factors was present and was related to the injury for which compensatory damages were awarded: (1) Fraud. (2) Malice. (3) Willful or wanton conduct." Our Court has recognized that "[s]o

long as there is 'some fact or circumstance' in evidence from which one of these elements may be inferred, the question of punitive damages is for the jury and not for the court." *Ingle v. Allen*, 69 N.C. App. 192, 198, 317 S.E.2d 1, 4 (citation omitted), *disc. review denied*, 311 N.C. 757, 321 S.E.2d 135 (1984). N.C. Gen. Stat. § 1D-5(4) (2007) provides: " 'Fraud' does not include constructive fraud unless an element of intent is present."

Appellant argues as follows:

> The trial court committed reversible error in directing verdict of liability for punitive damages, and in submitting the issue of the amount of punitive damages, when there was conflicting evidence sufficient to go to the jury, including conflicting evidence as to the intent of [Appellant], as required by [N.C.G.S.] § 1D-5(4), in failing to distribute the proceeds of trusts, which creates a question for the Jury.

Appellant's assertion that the trial court directed a verdict of liability for punitive damages is without factual support. The trial court did not direct a verdict for Cross-Claimants on Appellant's liability for punitive damages. Rather, the trial court submitted the following issue to the jury, which the jury answered in the affirmative: "Is Jerry L. Newton, III liable to . . . [C]ross-[C]laimants[] Anne Newton Graham, Joseph Wesley Newton and Paul Jeff[rey] Newton for punitive damages?" Therefore, this argument is without merit.

[4] We now address Appellant's argument that the trial court erred by submitting to the jury the issue of the amount of punitive damages. Appellant concedes there was sufficient evidence of intent for submission to the jury and, therefore, defeats his own argument. However, even without Appellant's concession, we hold there was sufficient evidence of intent, fraud, malice, and willful and wanton conduct by Appellant.

Appellant admitted that he refused to distribute the assets of the trusts despite the plain language of the trusts that required distribution upon the death of Reba Burton Newton. Based upon the extensive evidence recited above, Appellant admitted that he refused to make such distributions for reasons wholly unrelated to the trusts. Appellant also testified that he held his siblings in contempt and described them as "contemptuous people." Appellant admitted that he had been convicted of assault on a female for slapping his sister, Anne Newton Graham, on the day of their mother's death, and also

admitted that he had attempted to hit his brother, Paul Jeffrey Newton. Appellant further testified that "when [my siblings] are hostile toward me, yes, I am hostile toward them." All of this evidence was sufficient to establish intent, fraud, malice, and willful and wanton conduct. *See Ingle*, 69 N.C. App. at 198-99, 317 S.E.2d at 4-5 (finding sufficient evidence of, *inter alia*, malice, reckless indifference, and wilfulness where the evidence showed that the "defendants distributed more than $130,000 from the trust, contrary to the will and contrary to the advice of counsel, converting trust assets to their own use at a time when they knew the plaintiff had received no payments under the trust for a period of eight years" and where there were "accusations on the part of both [the] defendants blaming [the] plaintiff for the death of the testator."). Moreover, in *Compton*, our Court recognized that "[p]unitive damages are justified in cases of constructive fraud, N.C. Gen. Stat. § 1D-15(a)(1) (2001), as long as 'some compensatory damages have been shown with reasonable certainty.' " *Compton*, 157 N.C. App. at 21, 577 S.E.2d at 917 (quoting *Olivetti Corp. v. Ames Business Systems, Inc.*, 319 N.C. 534, 549, 356 S.E.2d 578, 587, *reh'g denied*, 320 N.C. 639, 360 S.E.2d 92 (1987)). In the present case, Cross-Claimants demonstrated compensatory damages with reasonable certainty.

[5] Appellant also argues that pursuant to N.C. Gen. Stat. § 1D-50, the trial court erred by failing to issue a written opinion regarding the reasons for the award of punitive damages. N.C. Gen. Stat. § 1D-50 (2007) provides as follows:

> When reviewing the evidence regarding a finding by the trier of fact concerning liability for punitive damages in accordance with G.S. 1D-15(a), or regarding the amount of punitive damages awarded, the trial court shall state in a written opinion its reasons for upholding or disturbing the finding or award. In doing so, the court shall address with specificity the evidence, or lack thereof, as it bears on the liability for or the amount of punitive damages, in light of the requirements of this Chapter.

Appellant's argument is foreclosed by *Zubaidi v. Earl L. Pickett Enters., Inc.*, 164 N.C. App. 107, 595 S.E.2d 190, *disc. review denied*, 359 N.C. 76, 605 S.E.2d 151 (2004), where our Court held:

> As the language of the statute does not require judicial review of a punitive damage award to be mandatory and we find no case law holding judicial review to be mandatory except in cases where the award exceeds the statutory limits, the trial court did

> not err in failing to make specific findings of fact and failing to set aside the punitive damages awarded within statutory limits.

Id. at 118, 595 S.E.2d at 196. In the present case, Appellant does not contend that the amount of punitive damages exceeded the statutory limit and it is clear, based upon our review, that the award did not exceed the allowable limit. *See* N.C. Gen. Stat. § 1D-25(b) (2007) (stating that "[p]unitive damages awarded against a defendant shall not exceed three times the amount of compensatory damages or two hundred fifty thousand dollars ($250,000), whichever is greater."). Therefore, the trial court was not required to issue a written opinion regarding the award of punitive damages. *See Zubaidi*, 164 N.C. App. at 118, 595 S.E.2d at 196.

IV.

[6] Appellant next argues that the claims of Plaintiffs and Cross-Claimants were barred by the express provisions of two of the trusts because Cross-Claimants did not issue written objections to Appellant's yearly accountings. The trust provisions of Reba Burton Newton's last will and testament provided as follows:

> The Trustee shall render annual accounts of disbursements, income and principal to each beneficiary, designated and contingent, who is not under a legal disability and to the legal guardian of each beneficiary who is under a legal disability. The written approval of a beneficiary or his guardian shall be binding upon the beneficiary as to all matters and transactions covered by the account. In the event a beneficiary or his guardian does not render a letter of written approval or does not raise an objection within ninety (90) days after receipt of the annual account, his written approval shall be deemed to have been made, and the account approved as of the last day of the ninety (90) day period.

The trust provisions of Jerry Lewis Newton, Jr.'s last will and testament similarly provided:

> The Trustee shall render annual accounts of disbursements, income and principal to each beneficiary, designated and contingent, who is not under a legal disability and to the legal guardian of each beneficiary who is under a legal disability. The written approval of a beneficiary or his guardian shall be binding upon the beneficiary as to all matters and transactions covered by the account. In the event a beneficiary or his guardian does not render a letter of written approval or does not raise an objection

> within ninety (90) days after receipt of the annual account, his written approval shall be deemed to have been made, and the account approved as of the last day of the ninety (90) day period.

Specifically, Appellant argues that because he made annual accountings and because Cross-Claimants did not render written objections to those accountings, "all matters in dispute in this action are thereby approved and binding upon all Beneficiaries, to wit, barring the claims of Cross-Claimants and Plaintiffs." We disagree.

It is well settled that " '[a] phrase should not be given a significance which clearly conflicts with the evident intent and purpose of the testator as gathered from the four corners of the instrument[.]' " *Trust Co. v. Carr*, 279 N.C. 539, 547, 184 S.E.2d 268, 273 (1971) (quoting 7 Strong's North Carolina Index 2d, Wills, § 28, pp. 598-599). In the case before us, as we discussed above, the trusts clearly required Appellant to distribute the assets upon the death of Reba Burton Newton. However, Appellant refused to do so. Although Cross-Claimants did not object to the contents of the accountings, nothing in the trust provisions cited above caused Cross-Claimants to waive their right to distribution of the assets of the trusts. Appellant's argument is without merit.

V.

[7] Appellant also argues that under N.C. Gen. Stat. § 1-52(1), Plaintiffs' and Cross-Claimants' breach of fiduciary duty claims were barred by the three-year statute of limitations. It is true that "[a]llegations of breach of fiduciary duty that do not rise to the level of constructive fraud are governed by the three-year statute of limitations applicable to contract actions contained in N.C. Gen. Stat. § 1-52(1) (2003)." *Toomer*, 171 N.C. App. at 66-67, 614 S.E.2d at 335. "However, '[a] claim of constructive fraud based upon a breach of fiduciary duty falls under the ten-year statute of limitations contained in N.C. Gen. Stat. § 1-56 [2003].' " *Id.* at 67, 614 S.E.2d at 335 (quoting *NationsBank of N.C. v. Parker*, 140 N.C. App. 106, 113, 535 S.E.2d 597, 602 (2000)).

The case before us involves claims for constructive fraud based upon a breach of fiduciary duty, and we have already held that the trial court did not err by granting a directed verdict for Plaintiffs and Cross-Claimants on those claims. Therefore, we hold that Plaintiffs' and Cross-Claimants' claims were not barred by the applicable ten-year statute of limitations. *See id*; *see also* N.C. Gen. Stat. § 1-56 (2007) (providing that "[a]n action for relief not otherwise limited by

this subchapter may not be commenced more than 10 years after the cause of action has accrued.").

Even assuming, *arguendo*, that the claims for breach of fiduciary duty were governed by a three-year statute of limitations, the breach of fiduciary duty claims were not time-barred under the continuing wrong doctrine. Our Supreme Court has recognized the continuing wrong doctrine as an exception to the general rule that a claim accrues when the right to maintain a suit arises. *Williams v. Blue Cross Blue Shield of N.C.*, 357 N.C. 170, 178-79, 581 S.E.2d 415, 423 (2003). "When this doctrine applies, a statute of limitations does not begin to run until the violative act ceases." *Id.* at 179, 581 S.E.2d at 423. Our Supreme Court also stated that " '[a] continuing violation is occasioned by continual unlawful acts, not by continual ill effects from an original violation.' " *Id.* (quoting *Ward v. Caulk*, 650 F.2d 1144, 1147 (9th Cir. 1981)). In order to determine whether a continuing violation exists, we examine " '[t]he particular policies of the statute of limitations in question, as well as the nature of the wrongful conduct and harm alleged,' as set out in *Cooper v. United States*, 442 F.2d 908, 912 (7th Cir. 1971)." *Id.*

In the present case, Cross-Claimants alleged, and Appellant testified, that Appellant continuously refused to make distributions under the trusts until he was removed as trustee on 3 June 2004. Therefore, Appellant's wrongful conduct, the refusal to make distributions, continued until he was removed as trustee on 3 June 2004. The three-year statute of limitations would not have begun to run until 3 June 2004 and, therefore, the breach of fiduciary claims in the case before us would not have been barred.

VI.

[8] Appellant next argues that "the trial court err[ed] when [it] allowed [R. Kenneth Babb] to offer exhibits and testify as an expert, inconsistent with his answers to interrogatories and response to requests for production of documents[.]" However, R. Kenneth Babb did not answer untruthfully when he stated that he did not intend to call expert witnesses. Because of the unusual posture of this case, R. Kenneth Babb deferred to Cross-Claimants for the presentation of the evidence. Cross-Claimants then called R. Kenneth Babb as an expert witness. Appellant does not contend that the presentation of R. Kenneth Babb as an expert witness for Cross-Claimants was inconsistent with any of Cross-Claimants' discovery responses. In fact, Cross-Claimants were not served with discovery requests regarding

the expert witnesses they intended to call. We overrule this assignment of error.

VII.

[9] Appellant next argues "the trial court err[ed] when [it] overruled objections of [Appellant] to the [trial court] allowing R. Kenneth Babb, acting as Plaintiff in this action, to defer presentation of evidence until [Cross-Claimants] had offered evidence." In support of his cursory argument, Appellant briefly cites *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 591 S.E.2d 870 (2004), for the proposition that "[d]ue process requires that persons be given a fair opportunity to litigate their legal rights." *Id.* at 36, 591 S.E.2d at 893. However, this citation is irrelevant, as the Court cited this law when examining the "the rationale for applying the privity concept in the collateral estoppel context." *Id.*

It is well settled that a trial court has broad authority to "structure the trial logically and to set the order of proof. Absent an abuse of discretion, the trial judge's decisions in these matters will not be disturbed on appeal." *In re Will of Hester*, 320 N.C. 738, 741-42, 360 S.E.2d 801, 804 (citations omitted), *reh'g denied*, 321 N.C. 300, 362 S.E.2d 780 (1987). Appellant has not demonstrated that the trial court abused its discretion, and we overrule this assignment of error.

VIII.

[10] Appellant next argues that "the trial court err[ed] in directing verdict and entering judgment on the grounds that the directed verdict prevented [Appellant] from offering the defenses of good faith, prudent investor, and delegation of duties, by failing to charge on said defenses[.]" However, the claims for constructive fraud were based upon Appellant's refusal, for his own benefit, to make distributions under the trusts when he was required to do so. We have already held that the trial court did not err by directing a verdict for Plaintiffs and Cross-Claimants. These affirmative defenses were irrelevant to the claims for constructive fraud based upon a breach of fiduciary duty. Therefore, the trial court did not err.

IX.

[11] Appellant next argues the trial court erred by awarding to Cross-Claimants attorney's fees that were incurred by them in the separate proceedings for removal of Appellant as trustee. Appellant also argues the trial court erred by "awarding as compensatory damages recovery of trustee commissions paid by the Trusts to

[Appellant], which should have been addressed in the separate special proceeding[.]" We disagree. N.C. Gen. Stat. § 6-21(2) (2007) provides as follows:

> Costs in the following matters shall be taxed against either party, or apportioned among the parties, in the discretion of the court:
>
> . . .
>
> (2) Caveats to wills and any action or proceeding which may require the construction of any will or trust agreement, or fix the rights and duties of parties thereunder; provided, that in any caveat proceeding under this subdivision, the court shall allow attorneys' fees for the attorneys of the caveators only if it finds that the proceeding has substantial merit.

The statute further provides that "[t]he word 'costs' as the same appears and is used in this section shall be construed to include reasonable attorneys' fees in such amounts as the court shall in its discretion determine and allow[.]" *Id.* Moreover, in *In re Trust Under Will of Jacobs*, 91 N.C. App. 138, 370 S.E.2d 860, *disc. review denied*, 323 N.C. 476, 373 S.E.2d 863 (1988), our Court recognized that "damages for breach of trust are designed to restore the trust to the same position it would have been in had no breach occurred." *Id.* at 146, 370 S.E.2d at 865. Our Court further stated that "the court may fashion its order 'to fit the nature and gravity of the breach and the consequences to the beneficiaries and trustee.' " *Id.* (quoting Bogert, The Law of Trusts and Trustees, section 543(V) (rev. 2d. ed. 1982)). Accordingly, our Court held that the trial court's "order mandating payment of costs, witness fees, and attorney's fees was a proper assessment of damages." *Id.*

In the case before us, the trial court awarded Cross-Claimants attorney's fees they incurred in the separate proceedings to remove Appellant as trustee. The trial court also awarded Plaintiffs the "trustee commissions paid to [Appellant] from 1993-2003[.]" Appellant argues that these expenses should have been dealt with in the separate removal proceedings. However, it appears that the removal proceedings were confined to the issue of whether Appellant should be removed as trustee of the trusts; Plaintiffs and Cross-Claimants did not seek damages or costs in those proceedings. *See In re Estate of Newton*, 173 N.C. App. 530, 619 S.E.2d 571, *disc. review denied*, 360 N.C. 176, 625 S.E.2d 786 (2005). Therefore, Plaintiffs and Cross-Claimants appropriately sought recovery of these expenses in the present case. We hold that the award of attorney's fees and the award

of trustee commissions were "designed to restore the trust to the same position it would have been in had no breach occurred" and that the awards " 'fit the nature and gravity of the breach and the consequences to the beneficiaries and trustee.' " *See In re Trust Under Will of Jacobs*, 91 N.C. App. at 146, 370 S.E.2d at 865 (quoting Bogert, § 543(V)). We overrule these assignments of error.

X.

[12] Appellant also argues the trial court erred by allowing Plaintiffs' complaint and the cross-claims to be amended. Appellant's entire argument under this section is as follows: "Said pleadings were not proper under N.C. Gen. Stat. § 1A-1, Rule 12 and were filed without leave pursuant to N.C. Gen. Stat. § 1A-1, Rule 15(a), and should be stricken."

N.C. Gen. Stat. § 1A-1, Rule 15(a) (2007) provides that after a party has amended his pleading once as a matter of course, "a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." "Rule 15(a) contemplates liberal amendments to the pleadings, which should always be allowed unless some material prejudice is demonstrated." *Stetser v. TAP Pharm. Prods., Inc.*, 165 N.C. App. 1, 31, 598 S.E.2d 570, 590 (2004). A party objecting to the filing of an amended pleading "has the burden of satisfying the trial court that he would be prejudiced by the granting or denial of a motion to amend. The exercise of the court's discretion is not reviewable absent a clear showing of abuse thereof." *Watson v. Watson*, 49 N.C. App. 58, 60-61, 270 S.E.2d 542, 544 (1980) (citations omitted).

In the present case, Plaintiffs filed the amended complaint with the written consent of Anne Newton Graham, Paul Jeffrey Newton, and Joseph Wesley Newton. Plaintiffs also filed a motion to amend their complaint on 27 November 2006, seeking leave of court to file the amended complaint, although such motion was filed after the amended complaint. The trial court allowed the motion to amend. Appellant does not argue that he was prejudiced by the filing of the amended complaint and cross-claims. Moreover, Appellant does not argue that the trial court abused its discretion. We hold the trial court did not abuse its discretion and overrule this assignment of error.

XI.

[13] Appellant argues the trial court erred by entering the interim order on the motion to tax costs on 22 March 2007 and by entering

the final order on the motion to tax costs on 17 May 2007. Appellant contends the trial court lacked jurisdiction to enter these orders because Appellant had previously filed a notice of appeal from the trial court's earlier directed verdict order and judgment.

N.C. Gen. Stat. § 1-294 (2007) provides:

> When an appeal is perfected as provided by this Article it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from.

In *In re Will of Dunn*, 129 N.C. App. 321, 500 S.E.2d 99, *disc. review denied*, 348 N.C. 693, 511 S.E.2d 645 (1998), our Court held:

> In this case, both parties submitted petitions for costs and attorneys' fees with the intent that the court would rule on the matter. The trial court's decision to award costs and attorneys' fees was not affected by the outcome of the judgment from which caveator appealed; therefore, the trial court could properly proceed to rule upon the petitions for costs and attorneys' fees after notice of appeal had been filed and served.

Id. at 329-30, 500 S.E.2d at 104-05.

In the directed verdict order and judgment entered in the case before us, the trial court ordered that "the costs of this action shall be taxed against [Appellant.]" Therefore, the parties were aware that the trial court had ordered that costs be taxed against Appellant and that the trial court would thereafter specifically determine the amount of the costs. We hold that the judgment from which Appellant appealed was not affected by the interim order and final order on the motion to tax costs. Accordingly, the trial court retained jurisdiction to enter the challenged orders.

XII.

[14] Appellant also argues the trial court erred by failing to order a stay of execution on the money judgment. In its interim order on the motion to tax costs, the trial court stated as follows: "Execution on the money judgment in this case is not stayed because [Appellant] has not fully complied with N.C.G.S. § 1-289, N.C.G.S. § 1-293, and Rule 62 of the North Carolina Rules of Civil Procedure[.]"

North Carolina Rule of Civil Procedure 62(d) provides: "When an appeal is taken, the appellant may obtain a stay of execution,

subject to the exceptions contained in section (a), by proceeding in accordance with and subject to the conditions of G.S. 1-289, G.S. 1-290, G.S. 1-291, G.S. 1-292, G.S. 1-293, G.S. 1-294, and G.S. 1-295." N.C. Gen. Stat. § 1A-1, Rule 62(d) (2007). Pursuant to N.C. Gen. Stat. § 1-289(a) (2007),

> [i]f the appeal is from a judgment directing the payment of money, it does not stay the execution of the judgment unless a written undertaking is executed on the part of the appellant, by one or more sureties, to the effect that if the judgment appealed from, or any part thereof, is affirmed, or the appeal is dismissed, the appellant will pay the amount directed to be paid by the judgment, or the part of such amount as to which the judgment shall be affirmed, if affirmed only in part, and all damages which shall be awarded against the appellant upon the appeal, except as provided in subsection (b) of this section.

In the present case, Appellant deposited the sum of $810,647.39 with the clerk of court. However, the directed verdict order and judgment from which he appealed provided that "interest shall be calculated at 8% per annum from February 18, 2002 on all amounts awarded to Plaintiffs and from October 10, 2006 on all non-punitive amounts awarded to [C]ross-[C]laimants. Further, the costs of this action shall be taxed against [Appellant.]" Appellant did not deposit these amounts with the clerk of court and, therefore, did not satisfy the requirements of N.C.G.S. § 1-289 to post a bond in "the amount directed to be paid by the judgment[.]" *See* N.C.G.S. § 1-289(a).

N.C. Gen. Stat. § 1-293 (2007) further provides that a trial court may stay execution of a judgment on special motion after "the undertaking requisite to stay execution on the judgment has been given, and the appeal perfected[.]" However, Appellant in the present case took no action following the insufficient deposit with the clerk of court and, therefore, did not proceed in accordance with N.C.G.S. § 1-293. We overrule these assignments of error.

XIII.

Plaintiff has failed to set forth, or cite authority in support of, his remaining assignments of error, and we deem them abandoned. *See* N.C.R. App. P. 28(b)(6) (stating that "[a]ssignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.").

Affirmed.

Judges WYNN and CALABRIA concur.

CHAPEL HILL TITLE AND ABSTRACT CO., INC., AND JONATHAN STARR AND WIFE, LINDSAY STARR, PETITIONERS v. TOWN OF CHAPEL HILL AND THE TOWN OF CHAPEL HILL BOARD OF ADJUSTMENT, RESPONDENTS v. ROBERT B. FERRIER, HANSON R. MALPASS AND WIFE BETSY J. MALPASS, RESPONDENTS-INTERVENORS

No. COA07-1292

(Filed 20 May 2008)

Zoning— request for variance—Resource Conservation District—effect of restrictive covenants

The trial court erred by concluding that petitioners were entitled to a variance permitting construction of a house within the portion of the property designated as a Resource Conservation District (RCD), and the case is remanded with instructions to reinstate the Board of Adjustment's (BOA) resolution of 30 January 2007 denying the request, because: (1) the trial court considered the effect of the restrictive covenants when determining whether the BOA should have granted petitioners a variance from the requirements of the RCD ordinance, and the plain language of the RCD ordinance and the greater weight of authority from other jurisdictions make clear the BOA was only able to consider the operation of the RCD ordinance when determining whether petitioners met the requirements necessary to secure a variance; (2) the RCD ordinance did not divest the property of any reasonable use, and the fact the Town had previously issued Chapel Hill Title a building permit in December 2002 demonstrated that it was possible to construct a residence on the property in compliance with the RCD ordinance without the need for a variance; (3) it would be adverse to the goals of the RCD ordinance and to the community benefits secured therefrom to allow the terms of a private contract to dictate the BOA's decision on whether to enforce the RCD ordinance; (4) restrictions contained in zoning ordinances and restrictive covenants operate entirely independent of one another; (5) decisions from several other states make clear that restrictive covenants are irrelevant to a BOA's determination of whether a variance is warranted; and (6) a court's review of a

constitutional challenge to a property regulation is limited to the operation of the regulation itself and does not turn on restrictions contained in a private contract.

Judge TYSON dissenting.

Appeal by Respondents and Respondents-Intervenors from order entered 25 July 2007 by Judge Kenneth C. Titus in Orange County Superior Court. Heard in the Court of Appeals 19 March 2008.

The Brough Law Firm, by Michael B. Brough, for Petitioners.

Northen Blue, LLP, by David M. Rooks and Samantha H. Cabe, for Respondents.

Poyner & Spruill, LLP, by Robin Tatum Currin and Andrew J. Petesch, for Respondents-Intervenors.

McGEE, Judge.

Chapel Hill Title and Abstract Company (Chapel Hill Title) owns a vacant lot (the property) located at 901 Coker Drive in Chapel Hill, North Carolina. The property is zoned as an R-1 residential district. The property is subject to a town ordinance that requires building setbacks of twenty-eight feet from the street property line, seventeen feet along the rear property line, and fourteen feet along the remaining property lines. *See* Chapel Hill, N.C., Land Use Management Ordinance (L.U.M.O.) Table 3.8-1 (2007). The property is also subject to an ordinance (the RCD ordinance) regulating development in a Resource Conservation District (RCD), which "applie[s] to the areas within and along watercourses within the town's planning jurisdiction." L.U.M.O. § 3.6.3. A portion of the property lies within the RCD. Additionally, the property is subject to private restrictive covenants that requires a fifty-foot street setback and an 0.60 acre minimum lot size.

Chapel Hill Title applied for a building permit from the Town of Chapel Hill (the Town) in December 2002 to construct a house on the portion of the property located outside the RCD. The proposed structure complied with all relevant town ordinances, and the Town granted the building permit. However, when construction began, neighboring property owners sued to enjoin the construction on the grounds that the total area of the property was smaller than the 0.60 acre minimum lot size, and that the proposed construction violated the fifty-foot setback restriction, as required by the restrictive

covenants. The trial court issued an order on 21 April 2003 enjoining Chapel Hill Title from continuing with the proposed construction in violation of the restrictive covenants.

Following the trial court's order, Chapel Hill Title purchased a small tract of land from a neighboring property owner in order to increase the size of the property to 0.60 acres. Chapel Hill Title then entered into a contract to sell the property to Jonathan and Lindsay Starr (the Starrs) (together with Chapel Hill Title, Petitioners). The Starrs' obligation to purchase the property, however, was contingent on the Town of Chapel Hill Board of Adjustment's (Board of Adjustment) grant of a variance permitting construction of a house within the portion of the property designated as an RCD.

Petitioners applied for a building permit and variance in June 2004. Pursuant to L.U.M.O. § 3.6.3(j)(2)(A), the Board of Adjustment was required to grant a variance to allow Petitioners to construct a house in the RCD if it found:

> (1) That the provisions of [the RCD ordinance] leave an owner no legally reasonable use of the portion of the zoning lot outside of the regulatory floodplain; and
>
> (2) That a failure to grant the variance would result in extreme hardship.

L.U.M.O. § 3.6.3(j)(7) further provided:

> [A] showing that the portion of the [RCD] outside of a regulatory floodplain overlays more than seventy-five (75) per cent of the area of a zoning lot, shall establish a rebuttable presumption that the [RCD] leaves the owner no legally reasonable use of the zoning lot outside of the regulatory floodplain. Such presumption may be rebutted by substantial evidence before the [B]oard of [A]djustment.

The Board of Adjustment denied Petitioners' request for a variance on 1 September 2004. Petitioners appealed to the Orange County Superior Court, and the Superior Court affirmed the Board of Adjustment's decision on 21 April 2005. Petitioners then appealed to our Court. We issued an unpublished opinion on 18 July 2006 finding that the denial of the variance request was not supported by sufficient findings to permit judicial review. We therefore reversed the Superior Court's order and remanded the case to the Board of Adjustment for further findings. *See Chapel Hill Title & Abstract*

Co. v. Town of Chapel Hill, 178 N.C. App. 561, 631 S.E.2d 893 (2006) (unpublished).

The Board of Adjustment adopted a resolution on 30 January 2007 again denying Petitioners' request for a variance and setting out specific findings of fact on which its decision was based. In accordance with those findings, the Board of Adjustment made the following conclusions of law:

> 1. [Petitioners have] established a rebuttable presumption that the provisions of the [RCD] Ordinance leave the property owner with no legally reasonable use of the portion of the zoning lot outside the regulatory floodplain because the [RCD] zoning district overlays 78.5% of the lot, outside the regulatory floodplain.
>
> 2. This rebuttable presumption . . . has been rebutted by evidence that a Building Permit was issued by [the Town] in December 2002 for a single-family residence on [the property] that met the limitations of the [RCD] Ordinance without the need for a variance. Therefore, this evidence shows that there is sufficient area on this lot outside the [RCD] on which to build a residential structure in compliance with Town regulations. The Board [of Adjustment] recognizes the Court Order enforcing the pre-existing restrictive covenants halted construction of the house for which the Town issued the building permit in 2002, but concludes that the provisions of the [RCD] Ordinance are not responsible for the owner having no legally reasonable use of the portion of the zoning lot outside of the regulatory floodplain.

Petitioners filed a "Petition for Review in the Nature of Certiorari" in Orange County Superior Court on 1 March 2007. On 15 June 2007, Robert B. Ferrier, Hanson R. Malpass, and Betsy J. Malpass (Respondents-Intervenors), owners of property abutting the property in question, filed a motion to intervene in the action. The trial court granted Respondents-Intervenors' motion on 19 July 2007.

Following a hearing on the merits, the trial court issued an order on 25 July 2007 reversing the Board of Adjustment's decision and remanding the case to the Board of Adjustment with instructions to issue Petitioners' requested variance. With respect to the Board of Adjustment's second conclusion of law, the trial court found

> that the restrictive covenants that apply to the property in question were adopted in 1959, and that these covenants impose a 50' setback requirement from the front (street) property line, which

> setback is more restrictive than the setback line established by [the Town]'s ordinance (28'). This covenant remains enforceable, as demonstrated by the April 21, 2003 order of this Court enjoining the property owner from constructing a house in a location that violates this covenant. Prior to the adoption of the RCD provisions of the ordinance, the lot in question could have been developed consistent with the provisions of the ordinance then in effect as well as the restrictive covenants. However, when the RCD provisions (which prevent the construction of buildings within the RCD) were adopted in the 1980's, the RCD covered approximately 79% of the subject lot. As a result, following the adoption of the RCD ordinance, the lot is no longer developable. Because the ordinance establishes a rebuttable presumption that the property owner is left with no reasonable use of a lot if the RCD overlays more than 75% of the lot, and because the restrictive covenants were in place at the time the RCD ordinance was adopted, the Court concludes that the RCD in this case leaves the owner no legally reasonable use of the property. Accordingly, the Board [of Adjustment]'s second conclusion of law . . . is in error.

The Town, the Board of Adjustment (together, Respondents), and Respondents-Intervenors filed notices of appeal from the trial court's order.

A.

Respondents-Intervenors argue that the trial court erred by concluding that the RCD ordinance left Petitioners with "no legally reasonable use" of the property. L.U.M.O. § 3.6.3(j)(2)(A)(1). Respondents-Intervenors contend that in deciding whether to grant a variance, the Board of Adjustment properly limited its inquiry to whether the provisions of the RCD ordinance alone left Petitioners with no reasonable use of the property. Therefore, according to Respondents-Intervenors, the trial court erred by asking whether it was the RCD ordinance provisions, *or the private restrictive covenants*, that left Petitioners with no reasonable use of the property.

Petitioners respond that it was proper for the trial court to consider the operation of both the RCD ordinance and the restrictive covenants when determining whether the Board of Adjustment should have granted a variance. Petitioners then ask this Court to adopt a "before-and-after" test to determine whether the RCD ordinance, or the restrictive covenants, were responsible for divesting the

property of any reasonable use. Petitioners note that the restrictive covenants applicable to the property were created in 1959. Between 1959 and the Town's adoption of the RCD ordinance in the 1980s, a residential structure could be built on the property without violating the setback restrictions in the restrictive covenants. However, after the Town enacted the RCD ordinance in the 1980s, it became impossible to erect a residential structure on the property that complied with both the RCD ordinance and the restrictive covenants. Petitioners reason that because the restrictive covenants were in place first, it was the RCD ordinance, and not the restrictive covenants, that left Petitioners with "no legally reasonable use of the portion of the zoning lot outside of the regulatory floodplain[.]" L.U.M.O. § 3.6.3(j)(2)(A)(1).

After careful consideration of the parties' arguments, we agree with Respondents-Intervenors and hold that the trial court erred by considering the effect of the restrictive covenants when determining whether the Board of Adjustment should have granted Petitioners a variance from the requirements of the RCD ordinance. The plain language of the RCD ordinance and the great weight of authority from other jurisdictions make clear that the Board of Adjustment was only able to consider the operation of the RCD ordinance when determining whether Petitioners met the requirements necessary to secure a variance.

B.

We need look no further than the plain language and expressed intent of the RCD ordinance to determine that the Board of Adjustment was unable to consider the existence of the restrictive covenants when rendering its decision. In *Donnelly v. Board of Adjustment of the Village of Pinehurst*, 99 N.C. App. 702, 394 S.E.2d 246 (1990), our Court stated that "with regard to zoning ordinances, '[t]he best indicia of [legislative] intent are the language of the statute or ordinance, the spirit of the act and what the act seeks to accomplish.' " *Id.* at 705, 394 S.E.2d at 248 (quoting *Concrete Co. v. Board of Commissioners*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980)). Further, "[w]hen interpreting zoning ordinances, words are given their ordinary meaning and significance." *Id.* at 707, 394 S.E.2d at 250.

The RCD ordinance clearly states that the Board of Adjustment may only grant a variance if it finds "[t]hat the provisions of *this article* leave an owner no legally reasonable use of the portion of the zoning lot outside of the regulatory floodplain[.]" L.U.M.O.

§ 3.6.3(j)(2)(A)(1) (emphasis added). If the Town intended for the Board of Adjustment to consider the joint operation of the RCD ordinance and any applicable restrictive covenants when determining whether a certain property had a reasonable use, it could have so specified in the RCD ordinance. However, the Town chose to limit the relevant inquiry to the operation of the RCD ordinance alone. Under such an inquiry, it is clear that the RCD ordinance did not divest the property of any reasonable use. The fact that the Town had previously issued Chapel Hill Title a building permit in December 2002 demonstrates that it was possible to construct a residence on the property in compliance with the RCD ordinance, without the need for a variance. This sufficiently rebuts the presumption established by the RCD ordinance that the RCD left no reasonable use of the property because "the portion of the [RCD] outside of [the] regulatory floodplain overlays more than seventy-five (75) per cent of the area of [the] zoning lot[.]" L.U.M.O. § 3.6.3(j)(7).

In addition to the plain language of the RCD ordinance, the spirit and purposes of the RCD ordinance also demonstrate that the Board of Adjustment's inquiry was properly limited to the effect of the RCD ordinance. The RCD ordinance explicitly established that the Town's purpose in creating the RCD was

> to preserve the water quality of the [T]own's actual or potential water supply sources, to minimize danger to lives and properties from flooding in and near the watercourses, to preserve the water-carrying capacity of the watercourses, and to protect them from erosion and sedimentation, to retain open spaces and greenways and to protect their environmentally-sensitive character, to preserve urban wildlife and plant life habitats from the intrusions of urbanization, to provide air and noise buffers to ameliorate the effects of development, and to preserve and maintain the aesthetic qualities and appearance of the town.

L.U.M.O. § 3.6.3(1). The RCD ordinance further provides that it should be "strictly construed in favor of the public interest and community benefit[.]" L.U.M.O. § 3.6.3(a). It surely would be adverse to the important goals of the RCD ordinance, and to the community benefits secured therefrom, to allow the terms of a private contract to dictate the Board of Adjustment's decision on whether to enforce the RCD ordinance. *See*, *e.g.*, *In re Michener's Appeal*, 115 A.2d 367, 369 (Pa. 1955) (instructing that "[z]oning laws are enacted under the police power in the interests of public health, safety and welfare; they have no concern whatever with building or use restrictions contained

in instruments of title and which are created merely by private contracts"). We therefore hold that the trial court erred by considering the operation of restrictive covenants in reaching its conclusion that the RCD ordinance left Petitioners with "no legally reasonable use" of the property.

C.

Commentators and courts from other jurisdictions are in accord with this holding. As one leading commentator notes, restrictions contained in zoning ordinances and restrictive covenants operate entirely independent of one another:

> [Z]oning is entirely divorced in concept, creation, enforcement, and administration from restrictions arising out of agreements between private parties[.] . . . Zoning restrictions and restrictions imposed by private covenants are independent controls upon the use of land, the one imposed by the municipality for the public welfare, the other privately imposed for private benefit.
>
> Both types of land use restrictions are held by courts to legally operate independently of one another.

Arden H. Rathkopf & Daren A. Rathkopf, *Rathkopf's The Law of Zoning and Planning* § 82:2, at 82-3, -4 (5th ed. 2005).

The Supreme Judicial Court of Massachusetts applied this principle in *Brackett v. Board of Appeal of Building Department*, 39 N.E.2d 956 (Mass. 1942). In *Brackett*, a hotel purchased a lot in a "general residence" zoning district that permitted private residences, hotels, and certain other buildings. *Id.* at 957. The lot was also subject to a restrictive covenant that prevented any development other than a single-family residence. *Id.* at 958. The hotel wished to use the lot as a hotel parking lot and sought a variance from the city. As a basis for its variance request, the hotel argued that due to nearby commercial development, the property was no longer suitable for residential use. *Id.* at 958-59. The board of appeals agreed and granted the variance, but the appellate court reversed the board's decision, finding that no hardship existed merely by reason of the restrictive covenant:

> It would seem that the hardship in the case at bar, in so far as the premises in question are concerned, is that they are restricted in development to the erection of a single family dwelling house. . . . [I]t would seem that the board had in mind the disad-

> vantage of the corporation arising from the restriction upon its lot, rather than any disadvantage attributable to the fact that the premises are zoned in a general residence district. In short, apart from the fact that the premises in question are restricted to a single family dwelling, there is no finding that there are any other conditions that render the premises unsuitable for residential and other uses permissible under the zoning law[.]

Id. at 959-60. North Carolina commentators have relied on *Brackett* for the proposition that a board of adjustment may only consider the effect of the zoning ordinance at issue when determining whether to grant a variance. *See* David W. Owens, *Land Use Law in North Carolina* at 132 (2006) (citing *Brackett* for the rule that "the hardship [must] result from the application of the ordinance itself. For example, a hardship caused by a restrictive covenant . . . does not qualify the owner for variance consideration."); Michael B. Brough & Philip P. Green, Jr., *The Zoning Board of Adjustment in North Carolina* at 20 (2d ed. 1984) (relying on *Brackett* to demonstrate that "[i]n deciding whether the facts show such hardship as would justify the issuance of a variance, the Board of Adjustment must limit itself to evidence of hardship resulting from the application of the ordinance to the property involved. Other hardship is irrelevant to this decision.").

In addition to Massachusetts, decisions from several other states make clear that restrictive covenants are irrelevant to a board of adjustment's determination of whether a variance is warranted.[1] *See*, *e.g.*, *Whiting v. Seavey*, 188 A.2d 276, 280 (Me. 1963) (stating that "[t]he law is well established that restrictive covenants in a deed as to use of property are distinct and separate from the provisions of a zoning law and have no influence or part in the administration of a zoning law"); *Michener*, 115 A.2d at 369-70 (stating that "[c]ontracts between property owners . . . should not enter into the enforcement

1. Petitioners and the dissenting opinion correctly note that some courts have held that it is proper for zoning boards to consider restrictive covenants when making other types of zoning determinations. *See*, *e.g.*, *Daro Realty v. Dist. of Columbia Zoning*, 581 A.2d 295, 305 (D.C. 1990); *Capitol Hill Restoration Soc. v. Zoning Com'n*, 380 A.2d 174, 184-85 (D.C. 1977), *overruled on other grounds*, *Citizens Ass'n of Georgetown v. Zon. Com'n*, 392 A.2d 1027, 1036 (D.C. 1978) (en banc). However, these cases merely stand for the proposition that a zoning authority may consider the existence of restrictive covenants when determining whether to *rezone* certain property. They do not address situations where, as here, a board of adjustment must consider whether to grant a variance from an existing zoning regulation. Petitioners have cited no authority suggesting that considerations relevant to rezoning decisions are equally relevant to decisions regarding whether to grant a variance.

of zoning regulations. . . . [I]t has been uniformly held that any consideration of building restrictions placed upon the property by private contract has no place in proceedings under the zoning laws for a building permit or a variance"); *cf. Suess v. Vogelgesang*, 281 N.E.2d 536, 544 (Ind. App. 1972) (holding that because zoning regulations and restrictive covenants operate independently of each other, a petitioner who is otherwise entitled to a variance should not be denied a variance "merely because utilization of the grant may be in violation of private restrictive covenants"); *Lorland Civic Association. v. DiMatteo*, 157 N.W.2d 1, 8 (Mich. App. 1968) (same). *See generally* Rathkopf § 82:3, at 82-13, -14 (discussing the irrelevance of restrictive covenants when a zoning board considers a variance request).

D.

The dissenting opinion asserts that based on our holding in the present case, Petitioners might legitimately challenge the current application of the RCD ordinance on the grounds that it is unreasonable and confiscatory, and that it amounts to an unconstitutional taking without compensation. The dissent's concerns are unfounded. While the present case does not require us to pass upon the legality of the RCD ordinance, we note that the cases cited by the dissent suggest that, as with a board of adjustment's decision to grant a variance, a court's review of a constitutional challenge to a property regulation is limited to the operation of the regulation itself, and does not turn on restrictions contained in a private contract. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016, 120 L. Ed. 2d 798, 813 (1992) (stating that "the Fifth Amendment is violated when [the government's] land[-]use regulation . . . 'denies an owner economically viable use of his land' " (quoting *Agins v. Tiburon*, 447 U.S. 255, 260, 65 L. Ed. 2d 106, 112 (1980), *overruled on other grounds*, *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 161 L. Ed. 2d 876 (2005)); *Responsible Citizens v. City of Asheville*, 308 N.C. 255, 261-62, 302 S.E.2d 204, 208 (1983) (when determining whether a government regulation of private property is an invalid exercise of the police power, a court should ask whether the regulation's "interference with the owner's right to use his property as he deems appropriate" is reasonable). *See also Helms v. Charlotte*, 255 N.C. 647, 653, 122 S.E.2d 817, 822 (1961) (stating that "if the *application of a zoning ordinance* has the effect of completely depriving an owner of the beneficial use of his property by precluding all practical uses or the only use to which it is reasonably adapted, the ordinance is invalid" (emphasis added)).

In sum, allowing a board of adjustment to consider the operation of restrictive covenants when determining whether to grant a variance is supported by neither case law, nor commentators, and is contrary to the language and purposes of the RCD ordinance at issue in this case. We therefore reverse the trial court's order and remand the case with instructions to the trial court to reinstate the Board of Adjustment's resolution of 30 January 2007. Given our holding on this issue, we do not address Respondents' or Respondents-Intervenors' additional arguments.

Reversed and remanded.

Judge STEPHENS concurs.

Judge TYSON dissents with a separate opinion.

TYSON, Judge dissenting.

The majority's opinion: (1) holds the superior court erred when it considered the operation of restrictive covenants when it reached its conclusion that the Resource Conservation District ("RCD") left Chapel Hill Title and Abstract Co., Inc. ("Chapel Hill Title") and Jonathan and Lindsay Starr ("the Starrs") (collectively, "petitioners") with no legally reasonable use of their property and (2) reverses the superior court's order. I vote to affirm the superior court's order and respectfully dissent.

I. Issues

The Town of Chapel Hill ("the Town") and the Town of Chapel Hill Board of Adjustment ("the Board") (collectively, "respondents") and Robert B. Ferrier, Hanson R. Malpass, and Betsy J. Malpass (collectively, "intervenors") argue the superior court erred when it concluded that: (1) the RCD left petitioners with no legally reasonable use and (2) the denial of the variance request would result in extreme hardship.

II. Standard of Review

When a superior court reviews the decision of a town council or administrative body, it should:

> (1) review the record for errors of law, (2) ensure that procedures specified by law in both statute and ordinance are followed, (3) ensure that appropriate due process rights of the petitioner are

> protected, including the right to offer evidence, cross-examine witnesses, and inspect documents; (4) ensure that the decision is supported by competent, material, and substantial evidence in the whole record; and (5) ensure that the decision is not arbitrary and capricious.
>
> The task of this Court in reviewing a superior court order is (1) to determine whether the [superior] court exercised the proper scope of review, and (2) to review whether the [superior] court correctly applied this scope of review.

Humane Soc'y of Moore Cty., Inc. v. Town of Southern Pines, 161 N.C. App. 625, 628-29, 589 S.E.2d 162, 165 (2003) (internal quotations omitted).

III. Proper Scope of Review

When the superior court reviewed the Board's decision, petitioners had only raised questions of law and the superior court "applied the *de novo* standard of review." There is no dispute that the superior court exercised the proper scope of review. *Id.* at 629, 589 S.E.2d at 165.

IV. Application of Proper Scope of Review

The only question before this Court is whether the superior court correctly applied its *de novo* scope of review. *Id.* Respondents and intevenors argue the superior court erred when it found the Board's conclusions of law numbered 2 and 3 "legally erroneous." I disagree.

> The Town's Land Use Management Ordinance states:
>
> The Board . . . *shall grant* a variance, subject to the protections of this Article, if it finds:
>
> (1.) That the provisions of this Article leave an owner no legally reasonable use of the portion of the zoning lot outside of the regulatory floodplain; and
>
> (2.) That a failure to grant the variance would result in extreme hardship.

Chapel Hill, N.C., Land Use Mgmt. Ordinance § 3.6.3(j)(2)(A) (2004) (emphasis supplied). "Any owner of property applying to the Board . . . for a variance . . . shall have the burden of establishing that such variance should be granted by the Board." Chapel Hill, N.C.,

Land Use Mgmt. Ordinance § 3.6.3(j)(6). "[A] showing that the portion of the [RCD] outside of a regulatory floodplain overlays more than seventy-five percent (75%) of the area of a zoning lot, *shall establish a rebuttable presumption* that the [RCD] leaves the owner no legally reasonable use of the zoning lot outside of the regulatory floodplain." Chapel Hill, N.C., Land Use Mgmt. Ordinance § 3.6.3(j)(7) (emphasis supplied). The burden then shifts to the Town to rebut the presumption of no legally reasonable use. *Id.*

A. Legally Reasonable Use

Respondents and intevenors argue, and the majority's opinion agrees, that the superior court erred when it concluded that the RCD left petitioners with no legally reasonable use. I disagree.

On remand from this Court, the Board entered conclusion of law numbered 2, which stated:

> This rebuttable presumption that the provisions of the [RCD] leave no legally reasonable use of the portion of the [property] outside the regulatory floodplain has been rebutted by evidence that a Building Permit was issued by the Town . . . in December 2002 for a single-family residence on this property that met the limitations of the [RCD] without the need for a variance. Therefore, this evidence shows that there is sufficient area on this lot outside the [RCD] on which to build a residential structure in compliance with Town regulations. The Board . . . concludes that the provisions of the [RCD] are not responsible for the owner having no legally reasonable use of the portion of the zoning lot outside of the regulatory floodplain.

The superior court found the Board's conclusion of law numbered 2 to be "legally erroneous." The superior court stated:

> With respect to the Board's second conclusion of law, the Court notes that the restrictive covenants that apply to the property in question were adopted in 1959, and that these covenants impose a 50' setback requirement from the front (street) property line, which setback is more restrictive than the setback line established by [the Town's] ordinance (28'). This covenant remains enforceable, as demonstrated by the April 21, 2003 order of this Court enjoining the property owner from constructing a house in a location that violates this covenant. Prior to the adoption of the RCD provisions of the ordinance, the lot in question could have been developed consistent with the provisions of the ordinance

> then in effect as well as the restrictive covenants. However, when the RCD provisions . . . were adopted in the 1980's, the RCD covered approximately 79% of the subject lot. As a result, following the adoption of the RCD ordinance, the lot is no longer developable. Because the ordinance establishes a rebuttable presumption that the property owner is left with no reasonable use of a lot if the RCD overlays more than 75% of the lot, and because the restrictive covenants were in place at the time the RCD ordinance was adopted, the Court concludes that the RCD in this case leaves the owner no legally reasonable use of the property.

The property and the applicable covenants were created as part of a subdivision in 1959, more than twenty years prior to the enactment of the RCD. Because the fifty-foot street setback limitation contained in the restrictive covenants did not render the lot undevelopable prior to the enactment of the RCD more than twenty years later, the RCD, not the covenants, left Chapel Hill Title with "no legally reasonable use of the portion of the zoning lot outside of the regulatory floodplain . . . ." Chapel Hill, N.C., Land Use Mgmt. Ordinance § 3.6.3(j)(2)(A)(1).

The majority's holding that the Board need not consider preexisting restrictive covenants when determining whether a variance is warranted sets a dangerous precedent. It is undisputed that Chapel Hill Title cannot comply with both the restrictive covenants and the RCD ordinance. Without a variance, Chapel Hill Title is not only left with no legally reasonable or "economically beneficial or productive use[,]" but is left with no affirmative use other than for the property to remain in its natural state. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015, 120 L. Ed. 2d 798, 813 (1992). Chapel Hill Title will be forced to attack application of the ordinance to its property. *See id.* at 1015, 120 L. Ed. 2d at 812-13 (internal citations omitted) ("We have . . . described at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint. The first encompasses regulations that compel the property owner to suffer a physical invasion of his property. . . . The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land."); *see also Responsible Citizens v. City of Asheville*, 308 N.C. 255, 264, 302 S.E.2d 204, 210 (1983) (internal quotations omitted) ("[A] zoning ordinance would be deemed unreasonable and confiscatory, as applied to a particular piece of property, if the owner of the affected property

was deprived of all practical use of the property and the property was rendered of no reasonable value.").

If before the enactment of the ordinance provision in question, a lot was developable, and after the adoption of the ordinance it is not, the adoption of the ordinance has created the hardship. Conversely, if before the adoption of a restrictive covenant the property could be developed consistent with then applicable zoning regulations, and after the adoption of a restrictive covenant the property is undevelopable, the restrictive covenant has created the hardship. Here, "the provisions of [the RCD] leave [Chapel Hill Title] no legally reasonable use of the portion of the zoning lot outside of the regulatory floodplain . . . ." Chapel Hill, N.C., Land Use Mgmt. Ordinance § 3.6.3(j)(2)(A)(1).

A board of adjustment must take into consideration *all* preexisting characteristics of a lot in question, including restrictions imposed by private covenants, when deciding whether a subsequently enacted zoning ordinance has deprived the property owner of any reasonable use of his land and imposed hardships subject to remedy by a variance. *See Capitol Hill Restoration Soc. v. Zoning Com'n*, 380 A.2d 174, 185 (D.C. 1977) ("The existence of lawful private restrictions on land use is an actuality properly to be considered in zoning decisions."), *rev'd on other grounds*, *Citizens Asso. of Georgetown v. Zon. Com'n Etc.*, 392 A.2d 1027 (D.C. 1978).

The superior court did not err when it found the Board's conclusion of law numbered 2 "legally erroneous[]" and substantial evidence in the whole record supports the superior court's conclusion that the RCD "leave[s] [Chapel Hill Title] no legally reasonable use of the portion of the zoning lot outside of the regulatory floodplain . . . ." Chapel Hill, N.C., Land Use Mgmt. Ordinance § 3.6.3(j)(2)(A)(1). Because I would hold the superior court did not err when it concluded the RCD left petitioners with no legally reasonable or "economically beneficial or productive use[,]" I address respondent's second issue on appeal. *Lucas*, 505 U.S. at 1015, 120 L. Ed. 2d at 813.

B. Extreme Hardship

Respondents and intevenors argue the superior court erred when it concluded that the denial of the variance request would result in extreme hardship when petitioners: (1) acquired the property with knowledge of all governmental and private restrictions and (2) presented no evidence of hardship to the Board. I disagree.

1. Knowledge of Governmental and Private Restrictions

On remand from this Court, the Board entered conclusion of law numbered 3, which stated:

> The failure to grant this variance would not result in extreme hardship because the hardship is self-created. This determination is based on evidence that Chapel Hill Title . . . purchased this property knowing that a variance would be necessary in order for the property to be used for a single-family residence. Therefore, the Board concludes that the hardship is self-created and is not one that arises out of application of the ordinance.

The superior court found the Board's conclusion of law numbered 3 to be "legally erroneous." The superior court stated:

> With respect to the Board's third conclusion of law, the Court concludes that the fact that . . . Chapel Hill Title . . . acquired the property with knowledge that a variance would be needed to develop it does not mean that the denial of the variance would not result in extreme hardship or that the hardship was self created. *This Court agrees with the modern view . . . that a purchaser acquires all the rights of the predecessor owner of the property, including the right to obtain a variance.*

(Emphasis supplied).

Whether purchasing property with knowledge of zoning limitations constitutes a self-created hardship is a matter of first impression in this State. *Rathkopf's The Law of Zoning and Planning* details and explains the past and emerging law in this area:

> As early as 1927, it was considered self-created hardship if one purchased property with knowledge of zoning limitations, or with knowledge of a hardship suffered by the land arising from interaction of the zoning ordinance and the particular characteristics of the land. The concern was that a purchaser would attempt to create evidence of hardship by paying an excessive purchase price for restricted property assuming that the hardship thereby established would constitute the basis for a variance needed to use the land profitably. For years, therefore, the general rule was that one who purchased property with actual or constructive knowledge of the restrictions of a zoning ordinance was barred from securing a variance.
>
> While this rule may still be applicable in a few jurisdictions, it has been altogether abandoned, or modified into nonexistence, in

> others. Two basic faults in the old rule have been recognized, and these faults are the reasons behind its demise. First, since hardship can neither be measured by the cost of the property to the owner nor by the difference between the value the land has as restricted and the value it would have if the variance were granted, there is no danger that a knowledgeable purchaser could create evidence of hardship by paying an excessive purchase price for property that is restricted. Second, the old rule failed to acknowledge that if the prior owner would have been entitled to a variance at the time the zoning ordinance restriction was enacted, the right is not lost to a purchaser simply because he bought with knowledge of the regulation. . . .
>
> The "current trend" in the rule, that purchase with knowledge of restrictions either does not prohibit the granting of a variance, or is at most a nondeterminative factor to consider in the granting of a variance, has had proponents at least as early as 1957 when the Supreme Court of Rhode Island rejected the notion that purchase with knowledge of restrictions, in itself, constituted self-created hardship. The "traditional rule" has been relaxed to leave the decision of whether a purchaser with knowledge of restrictions should receive a variance up to the discretion of the board of [adjustment].
>
> It should not be within the discretion of a board of [adjustment] to deny a variance solely because a purchaser bought with knowledge of zoning restrictions. *Instead, the board of [adjustment] should be confined to considering knowledge of restrictions along with all other factors of the particular case.* A purchaser denied a variance because of his knowledge of restrictions would be able to attack application of the ordinance to his property. *To deny a purchaser a variance by such an application of the self-created hardship rule is inconsistent with the purpose of the variance, to prevent attacks on the ordinance as a whole.*

3 Arden H. Rathkopf & Daren A. Rathkopf, *Rathkopf's The Law of Zoning and Planning* § 58:22 (Edward H. Zeigler, Jr., ed., 2006) (citations omitted) (emphasis supplied). The great majority of sister states, who have considered this issue, support this analysis. *Spence v. Board of Zoning Appeals*, 496 S.E.2d 61, 63-64 (Va. 1998) (rejected the argument that the purchase of property with knowledge that a variance was needed to build a house constituted a self-inflicted hardship that barred a lot owner's variance request); *Bd. of Adjustment of*

Oklahoma City v. Shanbour, 435 P.2d 569, 575 (Okla. 1967) (citation omitted) ("[I]t is our opinion that the better rule and the one followed in a number of jurisdictions, is that [a purchase of property with knowledge, actual or presumed, of zoning restrictions] does not prohibit the granting of a variance."); *Twigg v. Town of Kennebunk*, 662 A.2d 914, 918 (Me. 1995) ("[A]ctual or constructive knowledge of the zoning ordinances prior to purchase of the property may be considered by the Board as a factor in evaluating self-created hardship, but it is not determinative of such hardship."); *Sydoriak v. Zoning Bd. of Appeals*, 879 A.2d 494, 502 (Conn. App. Ct. 2005) (internal citation and emphasis omitted) ("Where . . . the hardship is created by the enactment of a zoning ordinance and the owner of the parcel could have sought a variance, a subsequent purchaser has the same right to seek a variance and, if his request is supported in law, to obtain the variance. This right is not lost merely because the subsequent purchaser takes with the knowledge that the current zoning regulations would prohibit the use. Rather, the nonconformity must be attributable to the purchaser or his predecessor in interest in order for the hardship to be considered self-created."). *See Baker v. Connell*, 488 A.2d 1303, 1308 (Del. 1985); *Town of Orrville v. S & H Mobile Homes, Inc.*, 872 So. 2d 856 (Ala. Civ. App. 2003); *Reinking v. Metropolitan Bd. of Zoning Appeals*, 671 N.E.2d 137 (Ind. Ct. App. 1996); *Stansbury v. Jones*, 812 A.2d 312 (Md. Ct. App. 2002); *Graham v. Itasca County Planning Comm'n*, 601 N.W.2d 461 (Minn. Ct. App. 1999); *Harrington v. Town of Warner*, 872 A.2d 990 (N.H. 2005); *Jock v. Zoning Bd. of Adjustment*, 878 A.2d 785 (N.J. 2005); *Solebury Twp. v. Solebury Twp. Zoning Hearing Bd.*, 914 A.2d 972 (Pa. Commw. Ct. 2007); *Lewis v. Pickering*, 349 A.2d 715 (Vt. 1975); *Hoberg v. City of Bellevue*, 884 P.2d 1339 (Wash. Ct. App. 1994); *Schalow v. Waupaca County*, 407 N.W.2d 316 (Wis. Ct. App. 1987).

The modern and majority view holds that the fact that a lot owner has some prior knowledge of the existing zoning regulations applicable to the land does not preclude the right to a variance; it is merely an element to be considered in determining the existence of hardship. In view of the facts before us, this analysis is particularly relevant at bar. The superior court correctly found the Board's conclusion of law numbered 3 "legally erroneous."

2. Evidence of Hardship

Respondents and intevenors argue for the first time on appeal that petitioners presented no evidence of hardship to the Board.

Respondents and intevenors cannot assert a new and different theory on appeal not previously asserted before the superior court or the Board. *See Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934) ("An examination of the record discloses that the cause was not tried upon that theory, and the law does not permit parties to swap horses between courts in order to get a better mount [on appeal]."); *see also Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjustment*, 354 N.C. 298, 309, 554 S.E.2d 634, 641 (2001) (citations omitted) ("This Court has long held that issues and theories of a case not raised below will not be considered on appeal . . . ."). This assignment of error should be dismissed.

V. Conclusion

The superior court exercised "the proper scope of [*de novo*] review" and "correctly applied this scope of review." *Humane Soc'y of Moore Cty., Inc.*, 161 N.C. App. at 629, 589 S.E.2d at 165. The superior court's order should be affirmed. I respectfully dissent.

STATE OF NORTH CAROLINA v. ROY OSWALD BODDEN

No. COA07-719

(Filed 20 May 2008)

1. Evidence— nine-millimeter bullet—not connected to crime or defendant—harmless error

The trial court committed harmless error in a second-degree murder case by admitting a nine-millimeter bullet found near the scene of the crime when there was no evidence that the bullet was connected to the crime because: (1) items that are not connected to the crime charged and which have no logical tendency to prove any fact in issue are irrelevant and inadmissible; (2) in the absence of evidence connecting the nine-millimeter bullet to the victim or to defendant, the bullet does not have any tendency to prove that defendant committed the crime; and (3) the admission was not prejudicial when there was no reasonable possibility that admission of the bullet contributed to defendant's conviction considering the other evidence of defendant's guilt, including witness testimony and the victim identifying defendant as the person who shot him.

2. Evidence— witness afraid to testify for fear of gangs—reference to testimony in closing argument—waiver

The trial court did not abuse its discretion in a second-degree murder case by admitting testimony of a prosecution witness that he was afraid to testify for fear of gangs, and the prosecutor's reference to that testimony during closing arguments did not constitute prejudicial error, because: (1) defendant waived his right to object to the admission of this testimony since the State's witness testified about the coparticipant's involvement in gang activity without any objection by defendant; and (2) the evidence was previously admitted during the trial, and thus allowing repetition of the evidence by the State during closing arguments was permissible.

3. Constitutional Law; Evidence— hearsay—victim's statements—dying declarations—Confrontation Clause

The trial court did not abuse its discretion in a second-degree murder case by admitting the victim's statement to an officer while waiting for an ambulance that defendant was with the person who shot him and his statement to another officer in the emergency room that defendant shot him, even though defendant contends they do not qualify as dying declarations and are barred under the Confrontation Clause of the Sixth Amendment, because: (1) the circumstances surrounding the victim's statements support the requirements for admission of a dying declaration when about three and a half minutes after the victim called 911 he told his mother that he was going to die, the victim had been shot five times and was bleeding, and he was taken to the hospital to receive medical treatment and died the same day; (2) the victim's statements were both testimonial statements, and the confrontation clause allows an exception for testimonial dying declarations; and (3) the question of whether the forfeiture by wrongdoing exception applies need not be addressed since defendant's statements were properly admitted as dying declarations and those statements do not violate the Sixth Amendment right to confrontation.

4. Appeal and Error— motion for appropriate relief—prosecution's theory in separate trial using different inferences for same evidence

Defendant's motion for appropriate relief in a second-degree murder case, based on the prosecution arguing an alleged incon-

sistent theory in a coparticipant's trial regarding the victim's belief of impending death, is denied because: (1) the State's theories were permissible inferences interpreting the same evidence; (2) the prosecution's theory in a separate trial does not taint or negate the permissible inferences regarding admissibility of the pertinent hearsay statements in defendant's trial; (3) defendant concedes the State did not present different theories regarding defendant's culpability and that the officers' testimony about the victim's statements was identical in both trials; and (4) it was appropriate for the State to argue different inferences regarding the same evidence to different juries when the State did not introduce inconsistent evidence.

Appeal by defendant from judgment entered 19 December 2006 by Judge Ripley E. Rand in Durham County Superior Court. Heard in the Court of Appeals 19 February 2008.

Attorney General Roy Cooper, by Assistant Attorney General Daniel P. O'Brien, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Benjamin Dowling-Sendor, for defendant-appellant.

CALABRIA, Judge.

Roy Oswald Bodden ("defendant") appeals a judgment entered upon a jury verdict finding him guilty of second-degree murder of Nathan Alston ("the victim"). We find no error.

On 2 February 2004, Lathan Smith ("Smith") and the victim obtained drugs from one of defendant's drug suppliers for the purpose of selling drugs for defendant. Instead of selling the drugs, Smith and the victim personally used them. Later, at a store adjacent to an Amoco gas station ("the gas station store"), defendant asked Smith whether he had seen the victim. At the time, defendant was unaware that the victim was also at the gas station store. When the victim appeared, defendant confronted him. Defendant told the victim, "you better get my money." The defendant also told the victim he would be right back and left the gas station store. About an hour later, defendant and Michael Goldston ("Goldston") returned to the gas station store looking for the victim. When the victim noticed defendant and Goldston, he started running down the sidewalk. The victim was shot five times in front of his apartment building in Durham, North Carolina around midnight on 3 February 2004.

Durham City Police Officer A. M. Cristaldi ("Officer Cristaldi") responded to a dispatch call just after midnight. Officer Cristaldi arrived at the victim's apartment at 2507 South Roxboro Street in Durham, North Carolina. Officer Cristaldi found the victim bleeding, lying on the floor and screaming for help. Officer Cristaldi asked the victim who shot him. The victim told the officer he was shot outside in the parking lot and he did not know who the shooter was, but the defendant was with him. The victim was transported by ambulance to the emergency room at Duke Hospital. Durham City Police Officer Dana Keith ("Officer Keith") spoke to the victim at the hospital. When Officer Keith asked the victim who shot him, the victim told him "Roy" shot him. Officer Keith asked if Roy's last name was Bodden. The victim answered affirmatively. The victim died from the gunshot wounds. Defendant was charged with first-degree murder of the victim.

On 4 December 2006, defendant was tried in Durham County Superior Court before the Honorable Ripley E. Rand. Defendant filed a pre-trial motion in limine to exclude the victim's statements to Officers Cristaldi and Keith. Defendant's motion was denied. At trial, the State presented evidence regarding how the victim was shot. Smith testified that defendant and Goldston started shooting at the victim after he ran from the gas station store. Pamela Page ("Page"), an acquaintance of the victim, testified she was at the gas station store the night the victim was shot. Page heard defendant tell the victim he was tired of "taking his shit and stuff." Page also heard the defendant say to the victim, "Man, I'm going to get you, I'll kill you." After defendant left the gas station, Page and the victim walked together down a sidewalk. When Page and the victim separated, only the victim continued walking down the sidewalk. Page then heard gunshots coming from the victim's apartment building that was located near the gas station.

The trial court instructed the jury on first-degree murder, second-degree murder, aiding and abetting, and acting in concert. On 13 December 2006, the jury returned a verdict finding defendant guilty of second-degree murder of the victim. Defendant was sentenced to a minimum term of 189 months and a maximum term of 236 months in the North Carolina Department of Correction. Defendant appeals.

I. Admissibility of Evidence: The Nine-Millimeter Bullet

[1] Defendant argues the trial court committed reversible error by admitting a nine-millimeter bullet found near the scene of the crime

because there was no evidence that the bullet was connected to the crime. We agree that the trial court's admission of the nine-millimeter bullet was error, however we disagree that this error was prejudicial.

"Pursuant to North Carolina Rule of Evidence 401, 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." *State v. Grant*, 178 N.C. App. 565, 573, 632 S.E.2d 258, 265 (2006) (quoting N.C. Gen. Stat. § 8C-1, Rule 401 (2005)) (internal brackets and quotations omitted). "Although a trial court's rulings on relevancy are not discretionary and we do not review them for an abuse of discretion, we give them great deference on appeal." *Id.* (citing *State v. Streckfuss*, 171 N.C. App. 81, 88, 614 S.E.2d 323, 328 (2005)).

Items that are not "connected to the crime charged and which have no logical tendency to prove any fact in issue are irrelevant and inadmissible." *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228-29 (1991). For example, in *State v. Patterson*, 59 N.C. App. 650, 653, 297 S.E.2d 628, 630 (1982), where a robbery was committed with a small handgun, admission of a sawed-off shotgun into evidence was error. However, in *State v. Burke*, 342 N.C. 113, 119, 463 S.E.2d 212, 216 (1995), a forty-four caliber handgun with a box of forty-four caliber bullets found in a dumpster were relevant and admissible where the defendant admitted he owned a forty-four caliber handgun.

Here, three bullets from the same revolver were removed from the victim's body. According to Agent Thomas Trochum with the State Bureau of Investigation, the bullets used to shoot the victim were either .38 or .357 caliber bullets. The day after the shooting, the police canvassed the area around the gas station and recovered a nine-millimeter bullet near the mailbox of apartment building 2519, which is approximately halfway between the gas station store and the victim's apartment. This bullet came from a semi-automatic weapon, but it was not the same weapon as the one that fired the bullets that were removed from the victim's body.

The State argues admission of the nine-millimeter bullet was not error because there was some evidence presented that two shooters and two guns were involved in the shooting. However, the issue is whether the admission of the nine-millimeter bullet tends to prove a fact of consequence at issue in the case. *Grant*, *supra*. The fact at consequence is defendant's connection with the crime charged. In the

absence of evidence connecting the nine-millimeter bullet to the victim or to defendant, the bullet does not have any tendency to prove that the defendant committed the crime.

Even if the admission of the nine-millimeter bullet was error, in order to reverse the trial court, the appellant must establish the error was prejudicial. N.C. Gen. Stat. § 15A-1443(a) (2007) (defendant must show there is a reasonable possibility a different result would have occurred but for the error). If the other evidence presented was sufficient to convict the defendant, then no prejudicial error occurred. *State v. Sierra*, 335 N.C. 753, 762, 440 S.E.2d 791, 796 (1994).

The State asserts admission of the evidence, if error, was not prejudicial because the State presented overwhelming evidence that defendant acted in concert with Goldston. We agree. We conclude that admission of the nine-millimeter bullet, although irrelevant, does not amount to prejudicial error, because there is no reasonable possibility that admission of the bullet contributed to the defendant's conviction considering the other evidence presented. Witnesses testified that defendant was at the scene of the murder, argued with the victim before the shooting, and threatened to kill the victim. Furthermore, the victim identified the defendant as the person who shot him. We conclude there was no prejudicial error.

II. Admissibility of Evidence: Reference to Gang Activity

A trial court's rulings on relevancy are not discretionary and not reviewed under an abuse of discretion standard, however such rulings are given great deference on appeal. *Wallace*, 104 N.C. App. at 502, 410 S.E.2d at 228. The standard of review on admission of relevant evidence is abuse of discretion. *Id.* at 504, 410 S.E.2d at 229.

[2] Defendant contends admitting the testimony of a prosecution witness that he was afraid to testify for fear of gangs, and the prosecutor's reference to that testimony during closing arguments constituted prejudicial error.

The State argues defendant waived his right to object to admission of this testimony because the State's witness Derrick Trice ("Trice") testified to Goldston's involvement in gang activity without an objection by the defendant. *State v. Whitley*, 311 N.C. 656, 661, 319 S.E.2d 584, 588 (1984) ("Where evidence is admitted over objection, and the same evidence has been previously admitted or is later admitted without objection the benefit of the objection is lost."). Further, the State contends because this evidence was previously admitted,

allowing repetition of the evidence by the State in closing arguments was not an abuse of discretion. We agree.

Trice testified on direct examination that he was afraid to testify because the defendant "may be involved with certain activities, gangs, and, you know, I have family . . . that's my first priority is to protect my family." Defendant did not object. However, defendant objected to Durham Police Investigator Anthony Smith's later testimony that Trice was reluctant to testify because he was afraid of gangs in the area. Defendant lost the benefit of his objection because the same evidence was previously admitted without objection. *Whitley*, *supra*.

"The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." *See State v. Jones*, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002) (citing *State v. Trull*, 349 N.C. 428, 451, 509 S.E.2d 178, 193 (1998), *cert. denied*, 528 U.S. 835, 120 S.Ct. 95, 145 L. Ed. 2d 80 (1999)).

At closing arguments, the State referenced Trice's testimony that he was afraid to testify because "[h]e knew what was going on in the neighborhood." Defendant did not object to this portion of the State's closing argument. We conclude these remarks do not rise to the level of gross impropriety.

The decision by a trial court to overrule an objection to a closing argument is reviewed under an abuse of discretion standard. *Jones*, 355 N.C. at 131, 558 S.E.2d at 106. "In order to assess whether a trial court has abused its discretion when deciding a particular matter, this Court must determine if the ruling 'could not have been the result of a reasoned decision.' " *Id.* at 131, 558 S.E.2d at 106 (quoting *State v. Burrus*, 344 N.C. 79, 90, 472 S.E.2d 867, 875 (1996)). This Court determines first whether the remarks were improper and, second, if so, whether they were prejudicial. *Id.*

Defendant timely objected to the State's reference to gang activity during closing arguments. The prosecutor stated, "Did you hear why Derrick Trice didn't want to come to court? Do you remember that? Because he was afraid for his family because he knew about the drugs and the gangs in there." We conclude the trial court did not abuse its discretion in overruling defendant's objection to these remarks. This statement is an accurate representation of Trice's testi-

mony, which was admitted without objection earlier during trial. This assignment of error is overruled.

III. Dying Declaration

[3] Defendant argues the trial court erred in admitting the victim's statements in the apartment and in the emergency room because the statements do not qualify as dying declarations and are barred under the Confrontation Clause of the Sixth Amendment. We disagree.

A. Requirements to Admit a Dying Declaration

The standard of review for admission of evidence over objection is whether it was admissible as a matter of law, and if so, whether the trial court abused its discretion in admitting the evidence. *State v. Bell*, 164 N.C. App. 83, 88, 594 S.E.2d 824, 827 (2004). The North Carolina Rules of Evidence permit admission of certain out-of-court statements that would otherwise be inadmissible hearsay statements where such statements meet the following requirements, in pertinent part:

> (b) Hearsay exceptions.—The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> . . . .
>
> (2) Statement Under Belief of Impending Death.—A statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death.

N.C. Gen. Stat. § 8C-1, Rule 804(b)(2) (2007).

The requirements for a dying declaration are: (1) at the time declarant made the statements, the declarant was in actual danger of death; (2) declarant had full apprehension of the danger; (3) death occurred; and (4) declarant, if living, would be a competent witness to testify to the matter. *State v. Richardson*, 308 N.C. 470, 486, 302 S.E.2d 799, 808-09 (1983) (dying declaration properly admitted where declarant repeatedly told police officers "I am dying; somebody please help me").

Defendant argues the victim's statements to the police officers do not satisfy the requirements for a dying declaration because the victim did not believe his death was imminent. Defendant asserts the fact that the victim did not identify Goldston as the shooter indicates he was afraid of retaliation by Goldston, and therefore did not believe his death was imminent.

We disagree and conclude the trial court did not abuse its discretion in admitting this evidence. The trial court found that about three and a half minutes after the victim called 911, he told his mother that he was going to die. The victim had been shot five times and was bleeding. He was taken to the hospital, received medical treatment in the emergency room, and later died the same day. The circumstances surrounding the victim's statements support the requirements for admission of a dying declaration. *See State v. Hamlette*, 302 N.C. 490, 496-97, 276 S.E.2d 338, 343 (1981) ("[A]dmissibility of [dying] declarations is a decision for the trial judge, and appellate review is limited to the narrow question of whether there is any evidence to show the prerequisites of admissibility.").

Defendant also argues that the victim's statements to the police were conflicting and not credible. The victim first told Officer Cristaldi that the defendant was with the shooter, and later told Officer Keith that defendant shot him. Because the weight and credibility of evidence is for the jury to determine, we overrule any assignment of error on those grounds. *State v. Debnam*, 222 N.C. 266, 270, 22 S.E.2d 562, 565 (1942) (weight and credibility of a dying declaration is for the jury to determine; it may be impeached or corroborated in the same manner as any other statement).

B. Dying Declaration and the Confrontation Clause

Defendant next argues the victim's statements violated the Confrontation Clause of the Sixth Amendment because they were testimonial in nature under *Davis v. Washington*, 547 U.S. 813, 165 L. Ed. 2d 224 (2006) and *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004). Defendant asserts that this Court should not find that dying declarations are a historical exception to the Sixth Amendment right of confrontation because *Crawford* rejected reliability as a factor in admitting testimonial statements. The trial court determined that *Crawford* did not bar dying declarations. Defendant's objection was noted for the record.

Crawford v. Washington held that the Confrontation Clause of the Sixth Amendment prohibits admission of testimonial statements of a witness who did not appear at trial, unless he was (1) unavailable to testify and (2) the defendant had a prior opportunity to cross-examine the witness. *State v. Lewis*, 361 N.C. 541, 545, 648 S.E.2d 824, 827 (2007) (citing *Crawford*, 541 U.S. at 53-54, 158 L. Ed. 2d at 194).

The State does not contest that the statements at issue were testimonial. Statements are testimonial when circumstances objectively indicate there is no ongoing emergency and the primary purpose of the interrogation is to establish or prove past events that will be relevant later in a criminal prosecution. *Lewis*, 361 N.C. at 546, 648 S.E.2d at 828 (quoting *Davis*, 547 U.S. at 822, 165 L. Ed. 2d at 237). Statements made in response to police questions in the course of interrogation are testimonial. *State v. Sutton*, 169 N.C. App. 90, 96, 609 S.E.2d 270, 275 (2005) (quoting *Crawford*, 541 U.S. at 52, 158 L. Ed. 2d at 193) (police questioning of victim at crime scene held to be testimonial). Here, the victim's statement to Officer Cristaldi after the shooting, while the victim waited for an ambulance, and the statement to Officer Keith at the hospital were both testimonial statements.

Crawford v. Washington did not decide whether the Sixth Amendment provides an exception for testimonial statements made as a dying declaration. *Crawford*, 541 U.S. at 56, 158 L. Ed. 2d at 195 n.6 ("Although many dying declarations may not be testimonial, there is authority for admitting even those that clearly are. We need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations. If this exception must be accepted on historical grounds, it is *sui generis*." (internal citations omitted)).

Our Supreme Court addressed this issue, prior to *Crawford*, in *State v. Stevens*, 295 N.C. 21, 243 S.E.2d 771 (1978). *See also State v. Penley*, 318 N.C. 30, 40-41, 347 S.E.2d 783, 789 (1986) (concluding defendant's argument that admission of a dying declaration violates the Sixth Amendment is without merit). In *Stevens*, the victim, who was severely burned and was told by his doctor he had a slight chance of surviving his injuries, was questioned by the police at the hospital where he was treated. 295 N.C. at 24-25, 243 S.E.2d at 773-74. He later died from the injuries and his statements were admitted at trial. On appeal, defendant argued that the admission of the dying declaration violated the confrontation clause of the Sixth Amendment. *Id.* at 31, 243 S.E.2d at 777. The Court determined that "the constitutional guaranty of confrontation is not coextensive with the hearsay rule. Further, the public necessity of preventing secret homicides from going unpunished requires the preservation of this uniquely valuable evidence notwithstanding the inability of the defendant to cross-examine his accuser." *Id.* at 32, 243 S.E.2d at 778 (internal citations omitted).

Since the *Crawford* decision, the precise question of whether testimonial dying declarations violate the Sixth Amendment has not been addressed by our Supreme Court. However, in *State v. Calhoun*, 189 N.C. App. 166, 168, —— S.E.2d ——, —— (2008), this Court held that dying declarations do not violate the Sixth Amendment right of confrontation. This Court adopted the reasoning of *People v. Monterroso*, 22 Cal. Rptr. 3d 1, 101 P.3d 956 (Cal. 2004), *writ of cert. denied*, 546 U.S. 834, 163 L. Ed. 2d 89 (2005). *Calhoun*, No. COA07-580, slip op. 9-10 (N.C. App. Mar. 4, 2008). *Monterroso* and cases from other jurisdictions mirror our conclusion that the confrontation clause allows an exception for testimonial dying declarations. *Id.*; *State v. Martin*, 695 N.W.2d 578, 585 (Minn. 2005); *Harkins v. State*, 143 P.3d 706, 711 (Nev. 2006); *People v. Gilmore*, 828 N.E.2d 293, 302 (Ill. App. Ct. 2005); *People v. Durio*, 794 N.Y.S.2d 863, 867 (N.Y. Sup. Ct. 2005). Accordingly, defendant's assignment of error on this ground is overruled.

C. Forfeiture by Wrongdoing

Defendant also contends that the principle of forfeiture by wrongdoing should not be applied in this case because such application would violate the presumption of innocence standard.

Crawford accepted the rule of forfeiture by wrongdoing as a valid exception to the Confrontation Clause. *Crawford*, 541 U.S. at 62, 158 L. Ed. 2d at 199 ("[T]he rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability."). Some courts have determined the rule of forfeiture by wrongdoing could apply to dying declarations where the victim is made unavailable because of defendant's alleged wrongdoing. *See United States v. Mayhew*, 380 F. Supp. 2d 961, 968 (S.D. Ohio 2005) (finding by a preponderance of the evidence that defendant's wrongdoing caused witness' unavailability, where defendant confessed to shooting the victim); *see also Gonzalez v. State*, 155 S.W.3d 603, 610-11 (Tex. Crim. App. 2004) (concluding that defendant's actions precluded him from excluding the victim's excited utterance statements, whether or not defendant intended to prevent witness from testifying at the time he committed the acts); *People v. Giles*, 55 Cal. Rptr. 3d 133, 146, 152 P.3d 433, 445 (Cal. 2007) (concluding the rule of forfeiture by wrongdoing applies where unavailability of the witness is due to defendant's intentional actions, even if the wrongdoing is that same conduct for which the defendant is being

prosecuted), *cert. granted by Giles v. California*, 128 S.Ct. 976, 169 L. Ed. 2d 800 (2008).

However, other jurisdictions have declined to extend the forfeiture exception to dying declarations where the defendant denies killing the declarant, because to do so would violate the presumption of innocence standard. *United States v. Lentz*, 282 F. Supp. 2d 399, 426 (E.D. Va. 2002).

Since we conclude that defendant's statements were properly admitted as dying declarations and those statements do not violate the Sixth Amendment right to confrontation, we need not reach whether the forfeiture by wrongdoing exception applies in this case.

IV. Motion for Appropriate Relief

[4] Prior to oral arguments, defendant filed a motion for appropriate relief asking this Court to reverse defendant's conviction and order a new trial because the prosecution in Goldston's trial argued an inconsistent theory regarding the victim's belief of impending death.

During closing arguments at the trial of defendant's co-defendant, Goldston, the prosecutor argued to the jury that the victim did not believe he was going to die when he told the officers that defendant shot him. In defendant's trial, the same prosecutor argued to the judge that defendant knew he was dying in order to admit the statements under the dying declaration exception.

Defendant contends the State's inconsistent theories regarding the victim's belief of impending death support defendant's argument that the victim's statements do not satisfy the dying declaration exception. Defendant also argues "making diametrically opposed factual claims" in the two trials violated defendant's due process rights. We disagree.

As to defendant's first contention, the State's theories were permissible inferences interpreting the same evidence. In both trials, the State presented identical evidence of the victim's hearsay statements. While the prosecution adopted a different interpretation of those statements in Goldston's trial, we conclude that the trial court could correctly infer the opposite conclusion: the victim believed he was dying since he had been shot multiple times and told his mother repeatedly he loved her and he was going to die. We reject defendant's argument that the prosecution's theory in a separate trial taints or negates the permissible inferences regarding admissibility of the hearsay statements in defendant's trial.

As to defendant's second contention in his motion for appropriate relief, we have examined the cases cited by defendant and find no due process violation. Defendant relies on the principle that in separate trials of co-defendants, the State may argue alternative but not mutually inconsistent factual theories. *State v. Leggett*, 135 N.C. App. 168, 175, 519 S.E.2d 328, 333 (1999). The State responds to this argument by distinguishing the cases cited by the defendant as pertaining to the core issues in the trial and not a tangential issue such as admission of a hearsay statement. We agree with the State's argument.

In *Leggett*, 135 N.C. App. at 175, 519 S.E.2d at 333, during the trial of Leggett's co-defendant, the State sought to impeach two of the co-defendant's witnesses. Later, the State used the same two witnesses at Leggett's trial. *Id.* Leggett argued that because the State sought to impeach the witnesses at his co-defendant's trial, the State could not in good faith offer those same individuals later as credible witnesses. *Id.* at 175, 519 S.E.2d at 333. This Court disagreed and determined that it was appropriate for the State to argue "alternative but not mutually inconsistent theories at different trials. It was also appropriate for the State to argue credibility of the witnesses to the different juries." *Id.* at 176, 519 S.E.2d at 334. The witnesses' statements were consistent with Leggett's admission that he shot the victim. *Id.* at 175, 519 S.E.2d at 333.

In *State v. Flowers*, 347 N.C. 1, 15, 489 S.E.2d 391, 399 (1997), the defendant, a prison inmate, along with three other men, was charged with stabbing another inmate. Defendant admitted to killing the victim and at the trial of the three co-defendants, defendant testified he acted alone in the killing. *Id.* at 15-16, 489 S.E.2d at 399. At the co-defendants' trial, the prosecution argued the defendant was only a lookout and did not participate in the stabbing. *Id.* at 18, 489 S.E.2d at 401. However, at defendant's trial, the prosecution argued defendant was both the lookout and a participant in the stabbing of the victim. *Id.* Defendant appealed his capital conviction and argued the prosecution's inconsistent positions violated his due process rights. *Id.* at 18-19, 489 S.E.2d at 401. Our Supreme Court determined the prosecution relied upon essentially the same evidence in both trials and the inferences by the prosecution were reasonable based on the evidence. *Id.* at 19-20, 489 S.E.2d at 401-02.

We also find the reasoning in *Parker v. Singletary*, 974 F.2d 1562 (11th Cir. 1992), relied upon by the *Leggett* court, applicable to the case at bar. *Parker* involved three defendants charged with first-degree murder. However, there was uncertainty as to who shot the

victim. At the separate trials of the defendants, the prosecution argued different theories as to who committed the killing. The court held that "it was not improper for the State to take inconsistent positions as long as doing so did not involve the use of necessarily contradictory evidence." *Leggett*, 135 N.C. App. at 176, 519 S.E.2d at 333 (citing *Parker*, 974 F.2d at 1578).

Here, the evidence presented at both trials was identical. The statements are the same and the only inconsistency is in the State's argument about whether the defendant was afraid to name Goldston as the shooter. Defendant concedes that the State did not present different theories regarding defendant's culpability and that the officers' testimony about the victim's statements was identical in both trials. In both trials, the State argued that Goldston and defendant acted in concert to kill the victim. We conclude it was appropriate for the State to argue different inferences regarding the same evidence to different juries.

Defendant also cites cases from other jurisdictions, *Bradshaw v. Stumpf*, 545 U.S. 175, 162 L. Ed. 2d 143 (2005)*; Smith v. Groose*, 205 F.3d 1045 (8th Cir. 2000); *Thompson v. Calderon*, 120 F.3d 1045 (9th Cir. 1997), *rev'd on other grounds*, 523 U.S. 538, 140 L. Ed. 2d 728 (1998); *Boyd v. United States*, 908 A.2d 39 (D.C. 2006). We have examined those cases and find them distinguishable.

In *Smith v. Groose*, the Eighth Circuit reversed a thirteen-year-old conviction because the State's use of inconsistent prosecutorial theories violated the inmate's due process rights. 205 F.3d at 1047. The defendant was convicted of felony murder based on the State's theory that the victims were murdered during the commission of a robbery. There was conflicting testimony as to whether the killing was committed by defendant and his co-defendants, or another robber who robbed the victims before the arrival of the defendant and co-defendants. During defendant's trial, the State argued the victims were murdered after defendant arrived to burglarize the house. At the other robber's trial, the State argued the murder occurred before the defendant arrived. Since the State argued factually inconsistent theories regarding the timing of the murder, theories which were based on different evidence, such manipulation of the evidence rendered defendant's trial "fundamentally unfair." *Id.* at 1050-51.

The Ninth Circuit reached a similar result in *Thompson v. Calderon*, 120 F.3d 1045 (9th Cir. 1997). Where the prosecution presented "markedly different and conflicting evidence" at the

two trials of co-defendants for the same crime, the defendant's due process rights were violated. *Id.* at 1056. However, the court also noted that "when there are claims of inconsistent prosecutorial conduct, reversal is not required where the underlying theory remains consistent." *Id.* at 1058-59 (citations and internal quotations omitted). The prosecution presented conflicting theories using different evidence on the motive for the victim's murder, which led to the convictions of two defendants for the same crime under different theories.

In contrast, here, the State did not introduce inconsistent evidence. The inference as to whether the victim was afraid to name Goldston as the shooter was inconsistent with the State's theory in support of admission of the dying declarations in defendant's trial, but this inconsistency was based on the same evidence. This does not rise to the level of fundamental unfairness as in *Groose* or *Thompson*. The Eighth Circuit emphasized that "[t]o violate due process, an inconsistency must exist at the core of the prosecutor's cases against defendants for the same crime." *Groose*, 205 F.3d at 1052. Since the State in this case used the same theory at both trials, that Goldston and defendant acted in concert to kill the victim, we conclude the inconsistency in theories is not at the core of the prosecutor's cases but involves a tangential matter—whether the statements were admissible under the dying declaration hearsay exception in defendant's trial. *See Bradshaw*, 545 U.S. at 187, 162 L. Ed. 2d at 156 (concluding that the prosecutor's use of inconsistent theories as to who was the triggerman in defendant's and co-defendant's trials was immaterial to defendant's conviction for aggravated murder entered on defendant's guilty plea); *Boyd*, 908 A.2d at 51-52 (stating that the presence of inconsistency in prosecutorial theories does not warrant reversal where inconsistency did not exist at the core of the State's case and render the conviction unreliable). Accordingly, defendant's motion for appropriate relief is denied.

V. Conclusion

We conclude the trial court did not commit prejudicial error in admitting the nine-millimeter bullet; that defendant waived his objection to the prosecution witness's testimony that he was afraid of gangs as well as the prosecutor's reference to such testimony in closing arguments; the victim's statements to police were properly admitted under the dying declaration exception to the hearsay rule and the trial court did not err in concluding that dying declarations do not violate the confrontation clause of the Sixth Amendment.

No error.

Judge McGEE concurs.

Judge WYNN concurs in the result.

JONATHAN ROSET-EREDIA, A/K/A LIBORIO VALDAVINOS-BARRIGA, EMPLOYEE-PLAINTIFF v. F.W. DELLINGER, INC., EMPLOYER-DEFENDANT, AND NORTH CAROLINA INSURANCE GUARANTY ASSOCIATION, CARRIER- DEFENDANT

No. COA07-644

(Filed 20 May 2008)

1. Workers' Compensation— disability—limited English skills—illegal alien—ability to find suitable employment

The Industrial Commission did not err by concluding that plaintiff is temporarily totally disabled within the meaning of N.C.G.S. § 97-2(9) where the issue was plaintiff's ability to get a suitable job because his English skills were limited and he is an illegal alien. The Commission found that testimony from plaintiff's vocational expert was credible, and the evidence supported what was essentially a finding of futility. The burden then shifted to defendants, which they did not meet as the Commission rejected as not credible defendants' evidence that suitable jobs were available that plaintiff was capable of obtaining.

2. Workers' Compensation— contact with treating physician—identity of employee not material

The Industrial Commission did not err in a workers' compensation claim by concluding that a *Salaam* violation had occurred in that plaintiff's treating physician was contacted by a rehabilitation employee. The Commission's erroneous finding regarding the identity of the particular employee was not material.

3. Workers' Compensation— updated FCE—adoption of recommendation of vocational expert and doctor

The Industrial Commission did not err by failing to address the issue of whether an updated Functional Capacity Evaluation was warranted, as defendants contended. The Commission addressed the necessity of an FCE by its adoption of the recom-

mendation of plaintiff's vocational expert, as corroborated by plaintiff's treating physician, that plaintiff instead consult a medical specialist.

4. Workers' Compensation— attorney fees for appeal—not properly raised—not granted

The Court of Appeals did not order attorney fees for plaintiff in the appeal from a workers' compensation case where the matter was not properly raised as a cross-assignment of error and, even had it been, the Court would have declined to issue the order.

Appeal by defendants from an Opinion and Award entered 2 February 2007 by the North Carolina Industrial Commission. Heard in the Court of Appeals 28 November 2007.

The Law Offices of Robert J. Willis, by Robert J. Willis, for plaintiff-appellee.

Brooks, Stevens & Pope, P.A., by Robert S. Welch and James A. Barnes IV, for defendants-appellants.

Carol L. Brooke, for North Carolina Justice Center, Amicus Curiae.

STEELMAN, Judge.

When plaintiff presented sufficient evidence of total disability and defendant-employer failed to rebut plaintiff's evidence, the Industrial Commission did not err in concluding that plaintiff is temporarily totally disabled.

I. Factual Background and Procedural History

Jonathan Roset-Eredia, a/k/a Liborio Valdavinos-Barriga (plaintiff), was 35 years of age at the time of the hearing before the deputy commissioner, and was an undocumented worker from Mexico. He can read and write in Spanish, but is functionally illiterate in English. On 27 July 2001, plaintiff broke his right leg and ankle in the course and scope of his duties as an employee of F.W. Dellinger, Inc. ("defendant"). Defendant and its insurance carrier North Carolina Insurance Guaranty Association (hereinafter collectively referred to as "defendants") accepted plaintiff's claim as compensable, began providing temporary total disability benefits on 2 August 2001, and filed a Form 60 in February 2002. Plaintiff has had nine orthopedic and plastic surgeries on his leg. In August 2004, plaintiff's treating

physician, Dr. Hage, found plaintiff to be at maximum medical improvement, found a 35% permanent partial disability to the right leg, released him to work with permanent light-duty restrictions, and referred him to vocational rehabilitation. Plaintiff's physical restrictions included no climbing, no squatting, no standing for more than one hour at a time, and no lifting over 35 pounds.

On 15 July 2003 plaintiff's vocational rehabilitation began. Due to plaintiff's status as an undocumented alien, he was unable to complete an I-9 form to document his legal work status. Angela Prenoveau ("Prenoveau"), a certified rehabilitation counselor at Southern Rehabilitation Network ("SRN") performed two labor market surveys, dated 14 January 2004 and 5 October 2004, to determine what jobs were available in plaintiff's geographic area that plaintiff could do based on his work and education history, transferable skills, and physical restrictions. Prenoveau did not communicate with any of the potential employers listed in her labor market surveys to determine what the jobs required in terms of physical activities, reading, mathematical, and writing skills due to her understanding of the SRN policy regarding federal immigration law limitations on job placement activity for injured workers who declined to complete an I-9 Employment Eligibility Verification form. Prenoveau understood the limitations to prohibit her from such communication with potential employers. However, Prenoveau testified that her former employer, the North Carolina State Division of Vocational Rehabilitation, did not construe federal immigration law to prohibit that type of job placement activity by rehabilitation counselors employed by the State. Likewise, Jane Coburn ("Coburn"), Prenoveau's co-worker, testified that she did not understand SRN policy to prohibit her communication with potential employers listed in a job market survey to determine what the jobs required in terms of physical activities.

The Full Commission filed an Opinion and Award on 2 February 2007, which held that as a result of his work-related injuries, plaintiff was totally disabled from earning wages and ordered the payment of temporary total disability at the rate of $407.95 per week pending further orders of the Commission. The Opinion and Award further directed defendants to pay for plaintiff's ongoing medical treatment and vocational rehabilitation services. Prenoveau and SRN were ordered replaced as the vocational rehabilitation professionals with Stephen Carpenter. Defendants appeal. Plaintiff makes several cross-assignments of error.

II. Commission's Conclusion of Law

[1] In their first argument, defendants contend that the Commission erred in concluding that plaintiff is totally disabled within the meaning of N.C. Gen. Stat. § 97-2(9). Defendants argue that the evidence does not support such a finding, and that the Commission's conclusion of law was in error. We disagree.

The standard of review of an Industrial Commission's Opinion and Award is

> whether any competent evidence supports the Commission's findings of fact and whether [those] findings . . . support the Commission's conclusions of law. The Commission's findings of fact are conclusive on appeal when supported by such competent evidence, even though there [is] evidence that would support findings to the contrary.

McRae v. Toastmaster, Inc., 358 N.C. 488, 496, 597 S.E.2d 695, 700 (2004) (internal citations and quotations omitted). "If the finding of fact is essentially a conclusion of law . . . it will be treated as a conclusion of law which is reviewable on appeal." *Bowles Distributing Co. v. Pabst Brewing Co.*, 69 N.C. App. 341, 344, 317 S.E.2d 684, 686 (1984) (citations omitted). The Commission's conclusions of law are reviewed *de novo*. *McRae* at 496, 597 S.E.2d at 700 (citation omitted).

N.C. Gen. Stat. § 97-2 of the Worker's Compensation Act defines "disability" as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C. Gen. Stat. § 97-2(9) (2007). The employee bears the burden of proving "both the existence of his disability and its degree." *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982) (citation omitted). In order to meet this burden, the employee must show at least one of the following:

(1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment;

(2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment;

(3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions,

i.e., age, inexperience, lack of education, to seek other employment; or

(4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

Russell v. Lowes Prod. Distribution, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (internal citations omitted).

Once the employee presents substantial evidence that he or she is incapable of earning wages, "the employer has the burden of producing evidence to rebut the claimant's evidence." *Burwell v. Winn-Dixie Raleigh*, 114 N.C. App. 69, 73, 441 S.E.2d 145, 149 (1994). "This requires the employer to come forward with evidence to show not only that suitable jobs are available, *but also that the plaintiff is capable of getting one*, taking into account both physical and vocational limitations." *Id.* (citations omitted).

> An employee is "capable of getting" a job if "there exists a reasonable likelihood . . . that he would be hired if he diligently sought the job." It is not necessary . . . that the employer show that some employer has specifically offered plaintiff a job. If the employer produces evidence that there are suitable jobs available which the claimant is capable of getting, the claimant has the burden of producing evidence that either contests the availability of other jobs or his suitability for those jobs, or establishes that he has unsuccessfully sought the employment opportunities located by his employer.

Burwell at 73-74, 441 S.E.2d at 149 (internal citations omitted). Whether the evidence of suitable jobs is sufficient to satisfy the employer's burden is a question of fact for the Commission. *Id.*

Where the injured employee is an illegal alien, the employer must "produce sufficient evidence that there are suitable jobs plaintiff is capable of getting, 'but for' his illegal alien status." *Gayton v. Gage Carolina Metals, Inc.*, 149 N.C. App. 346, 351, 560 S.E.2d 870, 874 (2002). Although federal law prohibits employers from hiring, recruiting or referring for a fee unauthorized aliens, 8 U.S.C. § 1324a(a) (1) (A) (1994), this Court has held that employers may "perform labor market surveys to determine what jobs, if any, are available in the area where plaintiff resides that fit [the injured worker's] physical limitations." *Gayton* at 350, 560 S.E.2d at 873. We are bound by the

holdings of this Court in *Gayton*. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

Defendants argue that plaintiff did not present sufficient evidence to satisfy his burden of proof under *Russell*, *supra*. Specifically, defendants contend that plaintiff did not present adequate evidence that seeking employment is futile because of preexisting conditions, such as his lack of education and English language deficiencies. The parties do not dispute, and the record establishes, that plaintiff is capable of doing some work, that he does not have a job, and that he has not made reasonable efforts to obtain employment. Therefore, the only question is whether plaintiff presented sufficient credible evidence that seeking employment was futile because of preexisting conditions.

The Commission found that:

> 53. Plaintiff's vocational expert, Stephen Carpenter, was of the opinion that plaintiff has no transferable skills from his past work history, that he can no longer perform his former job as a sheet rock finisher, that his work-related injuries and other vocational skills limit him from a full range of light work with a functional capacity of sedentary, and that it is unlikely that plaintiff can find suitable sedentary work, even at the unskilled level, as he has significant English language deficiencies. As a result of these marked physical and vocational limitations, it is Mr. Carpenter's opinion, and the Full Commission finds as fact, that plaintiff has not and will not be able to enter the competitive labor market until he becomes proficient in the English language and retrains pursuant to the recommendations of Mr. Carpenter.

There is evidence in the record that supports this finding. Carpenter testified in his deposition that plaintiff had no transferable skills. Carpenter's Vocational Report, dated 8 November 2004, states that plaintiff would probably not be able to find sedentary work due to his "significant English language deficiencies," as well as "marked physical and vocational limitations." Carpenter's report concluded that plaintiff would "not be able to enter the competitive labor market until he becomes proficient in the English language and retrains."

Defendants assert that Carpenter's testimony is incompetent because he did not "provide his opinions to a reasonable degree of professional certainty." Although "expert opinion testimony [which] is

based merely upon speculation and conjecture, . . . [] is not sufficiently reliable to qualify as competent evidence," *Holley v. ACTS, Inc.*, 357 N.C. 228, 232, 581 S.E.2d 750, 753 (2003), the degree of an expert's certainty goes to the *weight* of his testimony, not its admissibility. *Adams v. Metals USA*, 168 N.C. App. 469, 483, 608 S.E.2d 357, 365 (2005). The Commission found Carpenter's testimony to be credible, and afforded it weight accordingly. In accordance with the applicable standard of review, we decline to reweigh the evidence. *See Matthews v. City of Raleigh*, 160 N.C. App. 597, 599-600, 586 S.E.2d 829, 833 (2003).

The Commission further found:

> 56. Based upon the evidence of record concerning plaintiff's medical, vocational and literacy limitations, the Full Commission finds that plaintiff has met his burden of proof to show that the compensable injury that he suffered to his right foot and ankle on July 27, 2001 caused him and continues to cause him to be unable to earn the wages that he had been able earn [sic] before July 27, 2001 in the same or any other employment from July 27, 2001 through the present and continuing.

We first note that "[a]lthough designated as a finding of fact, the character of this statement is essentially a conclusion of law and will be treated as such on appeal." *Britt v. Britt*, 49 N.C. App. 463, 470, 271 S.E.2d 921, 926 (1980) (citation omitted). We therefore review this finding *de novo* to determine whether it is supported by the Commission's findings.

Although the Commission did not specifically state that it was futile for plaintiff to seek other employment, it found that plaintiff could not enter the labor market due to his limitations, and we hold that finding of fact 53 is essentially a finding of futility. We further hold that finding of fact 56 is supported by finding of fact 53, that plaintiff was unable to earn the wages he was earning before his injury, and that this constituted a disability within the meaning of N.C. Gen. Stat. § 97-2(9).

Defendants argue that evidence was presented that plaintiff was capable of some work and that there was no medical evidence supporting the futility prong, and contend that this evidence negates a finding by the Commission that it would be futile for the plaintiff to seek work. Defendants cite Carpenter's testimony that some of the jobs in the labor market surveys performed by Prenoveau could potentially be modified by the employer to accommodate a para-

plegic worker, and that if a job description accommodated plaintiff's restrictions, plaintiff could perform the job.

As noted in *Johnson v. City of Winston-Salem*, 188 N.C. App. 383, 656 S.E.2d 608 (2008), the North Carolina Supreme Court has held that the relevant inquiry regarding a claimant's capacity to work "is not whether all or some persons with plaintiff's degree of injury are capable of working and earning wages, but whether plaintiff herself has such capacity." *Johnson* at 391, 656 S.E.2d at 613 (quoting *Little v. Food Serv.*, 295 N.C. 527, 531, 246 S.E.2d 743, 746 (1978)). In *Little*, the Court stated that a physician's testimony that "there are some gainful occupations that someone with [plaintiff's] degree of neurological problem could pursue," was "an oblique generality which sheds no light on plaintiff's capacity to earn wages." *Little* at 531, 246 S.E.2d at 746. Carpenter's testimony that it is hypothetically possible that plaintiff could perform some sedentary work if the jobs were modified is a generality which sheds no light on plaintiff's capacity to earn wages. *See id.*; *Johnson* at 391, 656 S.E.2d at 613. Further, we note that Carpenter stated several times that "[r]ealistically, these jobs are far beyond [plaintiff's] abilities and his functional capacity[.]"

Once plaintiff presented substantial evidence that he was unable to earn wages, the burden shifted to defendants to show that suitable jobs were available to plaintiff and that he was capable of getting one of those jobs. *See Burwell* at 73, 441 S.E.2d at 149.

The Commission made the following pertinent findings of fact relating to defendants' evidence:

> 50. In her completion of the October 2004 Labor Market Surveys, Ms. Prenoveau did not communicate in any way with any of the potential employers listed in the October 2004 Labor Market Survey to determine what the particular job(s) actually required in terms of physical activities, reading, mathematical, and writing skills . . .
>
> 51. Despite her use of the Labor Market Survey procedures described, Ms. Prenoveau gave the opinion that p1aintiff "*might* reasonably have expected" to find one of the jobs listed in her Labor Market Surveys if he made reasonable efforts to search for the job, that those jobs "*may* be appropriate for him", that he "*could* have a reasonable chance of obtaining one of those jobs or some of those jobs if you

> made a reasonable effort to search for them", that "there was a reasonable *chance* that he would obtain employment within his restrictions in the area had he signed up with one of those [temporary] agencies", and that "contacting any of those [temporary] agencies *could* lead to employment for him". (emphasis in original)

The Commission found that Prenoveau's opinions

> were either speculative ("could", "might", reasonable "chance") or based in substantial part on labor market surveys which failed to include any specific information as to the actual physical, language and educational requirements of those jobs due to Ms. Prenoveau's failure to directly consult with any of the employers listed in those surveys about those physical, language and educational requirements[.]

In the instant case, the Commission stated that it "gives little weight to these vocational opinions." As the Commission is the sole judge of the credibility of the witnesses and has rejected as not credible defendants' evidence that suitable jobs were available which plaintiff was capable of obtaining, we hold that defendants did not meet their burden of producing evidence to show that suitable jobs were available and that plaintiff was capable of getting one, taking into account plaintiff's physical and vocational limitations. *See Burwell* at 73, 441 S.E.2d at 149.

The facts of the instant case are distinguishable from those in an unpublished decision by this Court, *Nicandro Sosa-Parada v. Custom Maintenance, Inc., et. al.*, No. COA06-89 (2006), cited by defendants. In *Sosa-Parada*, we held that the employer had met his burden of proof by completing a labor market survey which identified numerous jobs within the plaintiff's geographical area and physical restrictions which the plaintiff was capable of securing. A treating physician reviewed the labor market survey and approved four of the job descriptions as appropriate for plaintiff.

In the instant case, Prenoveau did not communicate with any of the employers listed in the labor market surveys to determine what the particular jobs required. Therefore, Prenoveau was unable to demonstrate that the jobs contained in those surveys were suitable for plaintiff or that he was capable of securing one of the jobs listed.

Because the Commission's findings of fact are supported by the evidence, and its conclusions of law are supported by the find-

ings, we affirm the award of the Commission. This argument is without merit.

III. *Salaam* Violation

[2] In their next argument, defendants contend that the Commission erred in concluding that a *Salaam* violation occurred. We disagree.

Pursuant to Rule VII.D of the North Carolina Industrial Commission Rules for Rehabilitation Professionals, promulgated pursuant to N.C. Gen. Stat. § 97-25.5 and clarified by the decision in *Salaam v. N.C. DOT*, 122 N.C. App. 83, 468 S.E.2d 536 (1996), rehabilitation professionals are prohibited from communicating with a treating physician without the prior consent of the injured worker's attorney.

In the instant case, the Full Commission found that Prenoveau "contacted Dr. Hage directly without the consent of plaintiff in an effort to convince Dr. Hage to order a functional capacity evaluation." The Commission concluded that:

> 5. The actions of Angela Prenoveau in contacting Dr. Hage were in violation of the principles set out in *Crist v. Moffatt*, 326 N.C. 326, 389 S.E.2d 41 (1990), and *Salaam v. N.C. Dept. of Transp.*, 122 N.C. App. 83, 468 S.E.2d 536 (1996), *disc. review improvidently allowed*, 345 N.C. 494, 480 S.E.2d 51 (1997). See *Mayfield v. Parker Hannifen*, 174 N.C. App. 386, 621 S.E.2d 243 (2005).

The Commission's award provided that:

> 10. Based upon the *Salaam* violation . . . the Full Commission exercises its discretion to require defendant-carrier to replace both Angela Prenoveau and Southern Rehabilitation Network, Inc. ("SRN") as the vocational rehabilitation professionals assigned to this case with Stephen Carpenter . . .

The progress report from SRN cited by plaintiff as showing a violation of *Salaam* establishes that it was Beth Ezzell, not Prenoveau, who attempted to contact or contacted Dr. Hage's staff in April 2005.

Although the evidence in the record does not support the Commission's finding of fact in this matter, and the Commission's conclusion of law is likewise unsupported, "[t]o warrant reversal, the Industrial Commission's error must be material and prejudicial." *Taylor v. Pardee Hospital*, 83 N.C. App. 385, 387, 350 S.E.2d 148, 150 (1986) (citation omitted).

Our review of the transcripts, records, and briefs supports the Commission's finding that a *Salaam* violation occurred. A report by Beth Ezzell states that she repeatedly communicated with the receptionists and assistant of Dr. Hage to inquire whether Dr. Hage "feels the Functional Capacity Evaluation is necessary to determine the IW's limitations and abilities" pursuant to a request from the adjuster.

Defendants have made no argument as to how the Commission's finding regarding the identity of the particular SRN employee is material in light of the Commission's conclusion that a *Salaam* violation occurred, and its decision to replace SRN with Stephen Carpenter. This argument is without merit.

IV. Functional Capacity Evaluation

[3] In their next argument, defendants contend that the Commission erred in failing to address the issue of whether an updated Functional Capacity Evaluation ("FCE") was warranted. We disagree.

In paragraph 4 of its award, the Commission stated that

> 4. Defendants shall authorize and pay for the additional vocational and medical assistance, evaluation(s), and/or treatment that are described in Paragraphs 1-6 of Mr. Carpenter's report dated November 8, 2004 in order to effect a cure, provide relief, and/or lessen the period of plaintiff's disability.

The first paragraph of the proposed recommendations in Carpenter's report was that plaintiff obtain a

> [c]onsultation with the attending medical specialist to determine the status of the osteomyelitis and other impairments affecting medical stability. Consultation with the physician should include outline of a treatment plan to cure the chronic osteomyelitis and to improve functional capacity so that the client can eventually engage in a full range of competitive work activity.

This recommendation addresses the issue of the necessity of a new FCE and makes clear that, in Carpenter's opinion, an FCE was unwarranted and that plaintiff should instead consult with a medical specialist regarding his physical abilities. Further, during the deposition of Dr. Hage, he was asked about the usefulness of an FCE in determining plaintiff's restrictions. Dr. Hage responded that:

> I felt comfortable, given the restrictions that I gave, based on my exam of the patient and my interpretation of the x-rays, and my

> talking to Mr. Roset-Eredia about his limitations, and what he can or can't do. And I didn't feel like, at that point, a functional capacity exam was necessary . . .

We hold that, by its adoption of Carpenter's recommendation, which is corroborated by Dr. Hage's opinion, the Commission addressed the issue of the necessity of an FCE. This argument is without merit.

V. Plaintiff's Cross-Appeal

[4] Plaintiff presents four cross-assignments of error. Plaintiff acknowledges, and we agree, that these arguments are moot due to our affirming the award of the Full Commission. The only argument in plaintiff/cross-appellant's brief not rendered moot is plaintiff's request for attorney's fees for this appeal.

We note that a request to this Court for an award of fees pursuant to N.C. Gen. Stat. § 97-88 was not properly raised as a cross-assignment of error. N.C.R. App. P. 10(d) (2008).

N.C. Gen. Stat. § 97-88 provides that:

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

N.C. Gen. Stat. § 97-88 (2007). Even assuming plaintiff had properly moved for expenses and fees under N.C. Gen. Stat. § 97-88, in our discretion, we decline to issue such an order.

AFFIRMED.

Judges McCULLOUGH and GEER concur.

AUDREY CARTER, PLAINTIFF v. WEST AMERICAN INSURANCE CO., GRAHAM UNDERWRITERS AGENCY, INC., AND FRANK BIGGERSTAFF, DEFENDANTS

No. COA07-781

(Filed 20 May 2008)

1. Appeal and Error— violations of Rules—raised in brief—not considered

Defendant's argument that plaintiff's appeal should be dismissed because of violations of the Rules of Appellate Procedure was not addressed where defendant attempted to raise this motion in a brief rather than in accordance with Rule 37 of the Rules of Appellate Procedure.

2. Insurance— replacement value of widow's house—equitable reform of policy—denied

Plaintiff did not provide a factual basis to support equitable reformation of an insurance policy on a house destroyed by a fire where she had requested fifteen years earlier that she be provided with the same insurance her deceased husband had carried, there was no evidence of any action by defendants to change from the type and amount of coverage that had been provided to the husband, the coverage was regularly adjusted for inflation and was for more than 92% of the home's value according to an appraisal less than two years before the fire, the coverage amount was clearly stated on the face of the policy, and there is no evidence that plaintiff was not able to understand the policy.

3. Insurance— fiduciary duty of agent to procure policy—previous policy continued—summary judgment for agent

Summary judgment was properly granted for defendant-insurance agent on a claim that he had breached a fiduciary duty to procure insurance for plaintiff that covered the replacement cost of her home. There was no evidence (except evidence from plaintiff's affidavit which was disregarded) that the agent gave an affirmative assurance to procure an insurance policy, other than to renew the policy plaintiff's deceased husband had purchased, and there is no evidence that the deceased husband had purchased a policy other than the one in effect on the date of the fire.

4. Unfair Trade Practices— insurance coverage—no evidence of damages—summary judgment for defendant

The trial court did not err by granting summary judgment for defendants on a claim for unfair and deceptive trade practices arising from the insurance coverage of a house fire where plaintiff did not forecast evidence that she was injured by any unfair or deceptive act on the part of defendants.

Appeal by plaintiff from order entered 27 November 2006 by Judge W. Osmond Smith, III, in Superior Court, Alamance County. Heard in the Court of Appeals 9 January 2008.

Law Offices of Jonathan S. Dills, P.A. by Jonathan S. Dills, for plaintiff-appellant.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Reid Russell, for defendant-appellee West American Insurance Company.

Teague, Rotenstreich, Stanaland, Fox & Holt, LLP, by Stephen G. Teague, for defendant-appellee Graham Underwriters Agency, Inc.

STROUD, Judge.

Plaintiff Audrey Carter appeals from the trial court order granting summary judgment in favor of defendants West American Insurance Company, Inc. ("West American") and Graham Underwriters Agency, Inc. ("Graham") as to all claims. For the following reasons, we affirm.

I. Factual Background

The evidence in the record, drawing all inferences in favor of plaintiff, *Collingwood v. G. E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989), tends to show the following: From 1965 to 2001, plaintiff's home was insured under policies procured by defendant Graham, an insurance agent. Plaintiff's husband, Haywood Jackson Carter ("Mr. Carter" or "Haywood"), handled all of the family's insurance matters until his death in 1985. Sometime before Mr. Carter died, he told plaintiff that the home was insured with "replacement insurance." Shortly before Mr. Carter died, plaintiff had the carpet in her home replaced by insurance because of water damage. The insurance adjuster who handled the claim told her at that time that she had "replacement insurance." After Mr. Carter died, plaintiff told Mary Uttley, an employee of defendant Graham, "when [you] writ[e]

the insurance [you] kn[ow] what Haywood always did, and he believed in good coverage and [you] just . . . cover it."

From February 1991 to February 2001, plaintiff's home was insured under a policy issued by defendant West American which was procured for plaintiff by defendant Graham. The dwelling coverage amount of the policy regularly increased to reflect current local construction costs. Those increases amounted to, approximately, four percent in February 1997, three percent in February 1998, one percent in February 1999, and four percent in February 2000. As of 25 July 2000, the dwelling coverage on plaintiff's home was one hundred nineteen thousand five hundred dollars ($119,500).

Plaintiff's home was appraised on 25 August 1998 for the purpose of re-financing. The total estimated "cost new" on the appraisal was one hundred twenty-nine thousand four hundred ninety-six dollars ($129,496). Graham was not advised of the appraisal.

On 25 July 2000, plaintiff's home suffered extensive damage from a fire which started in an electrical outlet, rendering the home uninhabitable. The fire was reported to West American the same day. On or about 14 August 2000, plaintiff's son Larry Carter estimated the cost to replace the house at over two hundred thousand dollars ($200,000), and indicated he would sue on account of plaintiff being underinsured. In October 2000, West American offered to pay plaintiff $119,500, the limit of her policy, for the loss of her dwelling. She refused. On or about 11 December 2000, plaintiff hired counsel to represent her with respect to her insurance claim.

On 14 June 2001, Ohio Casualty Group (OCG), the parent company of West American, tendered a check to plaintiff in the amount of one hundred twenty-five thousand four hundred seventy-five dollars ($125,475). The memorandum on the face of the check read:

SETTLEMENT OF FIRE AS FOLLOWS:
DWELLING $119,500.00
DEBRIS REMOVAL $5,975.00
REFLECTS TOTAL RECOVERABLE UNDER
THESE COVERAGES

By letter dated 31 October 2001, plaintiff, through her attorney, objected to the wording of the memorandum and requested that OCG reissue the check without the memorandum. OCG reissued the check on 31 January 2002 with a memorandum on the face of the check which read:

FIRE DAMAGE TO DWELLING:	
DWELLING	$119,500.00
DEBRIS REMOVAL	$5,975.00

Plaintiff deposited the 31 January 2002 check.

II. Procedural History

Plaintiff filed a complaint[1] on 15 September 2005, seeking damages from defendant West American for unfair or deceptive trade practices (UDTP), breach of contract, and willful, wanton and oppressive breach of contract. In the same complaint, plaintiff sought damages from defendant Graham for breach of contract and breach of fiduciary duty. The gravamen of the complaint was that even though the written contract of insurance set the dwelling coverage amount at $119,500, defendants had orally agreed or impliedly assumed a duty to cover whatever it cost to replace the house, which plaintiff estimated at two hundred forty-four thousand seven hundred sixty dollars ($244,760). Defendant Graham answered on or about 22 December 2005, denying the existence of any oral agreement to pay for the cost of replacing the house beyond the written coverage amount, denying it assumed any duty to periodically appraise the dwelling and increase the written coverage amount, and asserting plaintiff's contributory negligence as an affirmative defense. The answer of Defendant West American was filed on 30 January 2006 and contained substantially similar defenses.

Defendant West American filed a motion for summary judgment on or about 8 September 2006. Defendant Graham filed a motion for summary judgment on or about 12 October 2006. The trial court entered summary judgment in favor of both defendants as to all claims on or about 27 November 2006. Plaintiff appeals from entry of summary judgment in favor of defendants.

III. Procedural Issues

A. Rules Violations

[1] Defendants argue that plaintiff's appeal should be dismissed because of violations of the Rules of Appellate Procedure. However, we will not address this argument because "such 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." *Freeman v.*

1. The complaint originally named Frank Biggerstaff as a defendant, but he was dismissed without prejudice from the lawsuit before entry of summary judgment.

Rothrock, 189 N.C. App. 31, 35, 657 S.E.2d 389, 392 (2008) (citation, internal brackets and quotation marks omitted) (declining to address appellee's argument that appeal should be dismissed for failure to follow the Rules of Appellate Procedure when the argument was labeled "Motion to Dismiss" in the brief); *but see Cotter v. Cotter*, 185 N.C. App. 511, 514-15, 648 S.E.2d 552, 554 (2007) (addressing and overruling an appellee's argument similar in substance to that in *Freeman* but which was labeled "Argument" in the brief), *and Hammonds v. Lumbee River Elec. Membership Corp.*, 178 N.C. App. 1, 12, 631 S.E.2d 1, 9 (addressing and overruling an appellee's argument similar in substance to that in *Freeman* but which was labeled "Argument" in the brief), *disc. review denied*, 360 N.C. 576, 635 S.E.2d 598 (2006). Nevertheless, we note of our own initiative that failure of plaintiff's counsel to include a statement of the grounds for appellate review and failure to include a standard of review for each question presented as required by Rule 28 are "indicative of inartful appellate advocacy," *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 199, 657 S.E.2d 361, 365 (2008), for which plaintiff's counsel should be chastised "with an admonishment to exercise more diligence . . . in briefs prepared for this Court." *State v. Parker*, 187 N.C. App. 131, 135, 653 S.E.2d 6, 8 (2007).

B. Standard of Review

> The trial court must grant summary judgment upon a party's motion when there is no genuine issue as to any material fact and any party is entitled to a judgment as a matter of law. . . . Summary judgment is appropriate if: (1) the non-moving party does not have a factual basis for each essential element of its claim; (2) the facts are not disputed and only a question of law remains; or (3) if the non-moving party is unable to overcome an affirmative defense offered by the moving party[.]

Griffith v. Glen Wood Co., Inc., 184 N.C. App. 206, 210, 646 S.E.2d 550, 554 (2007) (internal citations, quotation marks, ellipses and footnote omitted). "On appeal, an order granting summary judgment is reviewed *de novo*[,]" *id.*, with the evidence in the record viewed in the light most favorable to the plaintiff, *Collingwood*, 324 N.C. at 66, 376 S.E.2d at 427.

IV. Substantive Issues

A. Breach of Contract

[2] "The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of that contract."

Poor v. Hill, 138 N.C. App. 19, 26, 530 S.E.2d 838, 843 (2000). It is undisputed that defendant West American paid the entire amount promised in the written contract for dwelling insurance coverage: $119,500. However, plaintiff contends that the written contract did not reflect the true agreement of the parties, and should be reformed on account of the inequitable conduct of defendant Graham as agent for West American.

In support of her argument for reformation, plaintiff states the law of equitable reformation by quoting from *Williams v. Greensboro Fire Ins. Co.*, "[i]t is well settled that in equity a written instrument, including insurance policies, can be reformed by parol evidence, for . . . inequitable conduct . . ." 209 N.C. 765, 769, 185 S.E. 21, 23 (1936). However, the ellipses in plaintiff's statement of the law omit an important portion of the law. Stated fully in relevant part, "in equity a written instrument, including insurance policies, can be reformed by parole evidence, for . . . *the mistake of one superinduced* by the fraud of the other or inequitable conduct *of the other*." *Id.* (emphasis added); *see also McCallum v. Old Republic Life Ins. Co.*, 259 N.C. 573, 577, 131 S.E.2d 435, 438 (1963) ("Fraud or inequitable conduct, to warrant relief by way of reformation, has been held to consist in doing acts, or omitting to do acts, which the court finds to be unconscionable, as in drafting, or having drafted, an instrument contrary to the previous understanding of the parties and permitting the other party to sign it without informing him thereof." (Citation, quotation marks and ellipses omitted.)) Furthermore, reformation is available only when the written agreement "leaves it doubtful or uncertain as to what the agreement [intended by the parties] was." *Williams*, 209 N.C. at 771, 185 S.E. at 24; *see also McCallum*, 259 N.C. at 579, 131 S.E.2d at 439 ("The power of a court of equity to reform written instruments so as to speak the real contract of the parties is beyond question[.]" (Citation and quotation marks omitted.)); *Allen v. Roanoke R. & Lumber Co.*, 171 N.C. 339, 342, 88 S.E. 492, 493 (1916) ("[I]n order to . . . exercise [equitable jurisdiction] for the purpose of reforming the instrument *because it does not properly express the agreement* of the parties, it is established that the mistake must be mutual, or it must be the mistake of one superinduced by the fraud of the other.") (Emphasis added.) (cited in 27 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts § 70:26 n.32 (4th ed. 2003)). Thus, to survive summary judgment in an action for equitable reformation of a contract on the basis of inequitable conduct by the promisor, a plaintiff must show a factual basis for four essential elements: (1) the written agree-

ment did not properly express the intent of the parties, *Allen*, 171 N.C. at 342, 88 S.E. at 493, (2) the conduct of the promisor caused the improper expression, (3) relevant, competent evidence exists outside the written documents which shows the intention of the parties, *Williams*, 209 N.C. at 769, 185 S.E. at 23, and (4) injustice will result if the contract is not rewritten, *Swan Quarter Farms, Inc. v. Spencer*, 133 N.C. App. 106, 110, 514 S.E.2d 735, 738, *disc. review denied*, 350 N.C. 850, 539 S.E.2d 651 (1999).

Plaintiff argues that a genuine issue of material fact on this issue is created by evidence from her affidavit filed 18 September 2006, after defendant West American's motion for summary judgment, in which she stated:

> Several years before the fire, and preceding the most recent update in insurance, I requested that Graham make sure that I had adequate replacement cost coverage for my house and its contents, and Graham specifically agreed to do this. After this discussion, Graham came back to me and indicated and confirmed that they had in fact placed adequate replacement cost coverage insurance on my house and its contents.

However, her sworn deposition testimony on 24 March 2004 was:

> Q[:] . . . What did you talk to Mary Uttley [employee of Graham] about the last time you spoke to her before the fire?
>
> . . . .
>
> A[:] I do remember telling her that when she was writing the insurance that she knew what Haywood always did, and he believed in good coverage and for her just to cover it. And I trusted her. She covered it.
>
> . . . .
>
> Q[:] . . . [Y]ou've testified that your husband told you you had replacement cost and [Mary] Uttley said that you were fully covered, and that a USF&G adjustor in the [19]80s said that you had replacement cost coverage?
>
> A[:] Right.
>
> Q[:] Is there anything else, any other basis for your statement of your belief that you had replacement cost coverage before the fire?

A[:] I don't know of any.

"[A] non-moving party cannot create an issue of fact to defeat summary judgment simply by filing an affidavit contradicting his prior sworn testimony[.]" *Belcher v. Fleetwood Enters., Inc.*, 162 N.C. App. 80, 86, 590 S.E.2d 15, 19 (2004) (summarizing the holding of *Wachovia Mortg. Co. v. Autry-Barker-Spurrier Real Estate, Inc.*, 39 N.C. App. 1, 9, 249 S.E.2d 727, 732 (1978). Therefore, we disregard the evidence in the affidavit which contradicts plaintiff's sworn deposition testimony.

Viewing the evidence in the light most favorable to plaintiff, the records shows only that about fifteen years before the fire, plaintiff requested that Graham continue to provide her with the same insurance provided to Mr. Carter. Plaintiff provided no evidence of any action by defendants to change from the type and amount of coverage provided to Mr. Carter. Plaintiff's dwelling coverage was regularly adjusted for inflation, and the coverage was for more than 92% of the home's value according to the appraisal prepared less than two years before the fire. The dwelling coverage amount was clearly stated on the face of the policy, and there is no evidence that plaintiff was unable to read and understand the policy. Plaintiff simply has not provided a factual basis to support equitable reformation of the insurance policy. *See, e.g.*, *McCallum*, 259 N.C. at 581-82, 131 S.E.2d at 441 (reversing dismissal of action for reformation when plaintiff alleged that a one-year life insurance policy was purchased to secure a loan, the effective date of the insurance policy was a few days before the loan was disbursed and the insured died after expiration of the insurance policy but less than one year from the date the loan was disbursed); *Hubbard & Co. v. Horne*, 203 N.C. 205, 209, 165 S.E. 347, 349 (1932) (affirming denial of motion to dismiss action for reformation where the record contained evidence that a lien subordination provision had been made known to the lender's agent but was omitted from the written contract which the lender's agent induced the borrower to sign); *Transit, Inc. v. Casualty Co.*, 20 N.C. App. 215, 201 S.E.2d 216 (1973) (affirming reformation of insurance contract for inequitable conduct when the insurer inserted a mileage limit into a vehicle insurance policy and did not inform the insured of the insertion even though the insurance agent knew the insured's buses routinely traveled more than the mileage limit), *aff'd*, 285 N.C. 541, 206 S.E.2d 155 (1974).

B Breach of Fiduciary Duty

[3] Plaintiff next contends that defendant Graham breached a fiduciary duty to procure insurance for her. She contends that her affidavit cited *supra*, along with expert testimony in the record stating that pursuant to a loss claim in 1997 the insurer should have evaluated her insurance and advised her to increase the coverage if it was not sufficient, constituted an adequate factual basis for this claim.

> Where an insurance agent or broker promises, or gives some affirmative assurance, that he will procure or renew a policy of insurance under circumstances which lull the insured into the belief that such insurance has been effected, the law will impose upon the broker or agent the obligation to perform the duty which he has thus assumed.

Barnett v. Security Ins. Co. of Hartford, 84 N.C. App. 376, 378, 352 S.E.2d 855, 857 (1987) (citations and quotation marks omitted). Further, where the insured in reliance on the affirmative representation of the insurer, "mistakenly believed that certain items were covered by insurance, and did not seek additional coverage[,]" the insured has a cause of action for negligence. *R-Anell Homes v. Alexander & Alexander*, 62 N.C. App. 653, 657, 303 S.E.2d 573, 576 (1983).

Other than the disregarded evidence in plaintiff's affidavit discussed *supra*, there is no evidence in the record that Graham gave affirmative assurance to procure an insurance policy, other than to renew the policy Mr. Carter had purchased. There is no evidence in the record that Mr. Carter had purchased a policy other than the one in effect on the date of the fire: a dwelling policy that regularly adjusted for inflation in local construction costs.

Barnett contains dicta which states, "[a]dditionally, if in their prior dealings, the agent has customarily taken care of the customer's insurance needs without consulting the insured, then a legal duty to procure additional insurance may arise without express orders from the customers and acceptance by the agent." *Barnett*, 84 N.C. App. at 378, 352 S.E.2d at 857. However, we decline plaintiff's invitation to extend *Barnett* and *R-Anell Homes* to include the case *sub judice*, where the insurer in fact renewed the insured's coverage for the property specifically named in the policy. *See Baggett v. Summerlin Ins. & Realty, Inc.*, 143 N.C. App. 43, 55, 545 S.E.2d 462, 469 (Tyson, J., dissenting on the basis that *R-Anell Homes* policy contained flood insurance and the policy expressly excluded coverage for flood

losses), *rvs'd per curiam*, 354 N.C. 347, 554 S.E.2d 336 (2001) (adopting the reasoning of the dissent).

C. Unfair or Deceptive Trade Practices

[4] Plaintiff contends that the trial court erred when it granted summary judgment on her claim for unfair or deceptive trade practices in favor of defendants. We disagree.

Plaintiff argues that evidence of the following acts by defendant West American is sufficient to survive summary judgment on her claim of unfair and deceptive trade practices: (1) defendant West American took eighteen months to pay plaintiff's claim for the dwelling and nearly three years to pay the personalty claim "notwithstanding that there was no dispute regarding coverage," (2) defendant West American did not cancel the policy until it expired on 8 February 2001, (3) the adjuster told plaintiff to pretend that she was not represented by counsel so that they could continue to confer directly, and (4) defendant West American tendered payment with a memorandum on the check that attempted to limit its exposure.

To succeed on a claim for UDTP, a plaintiff must prove: "(1) defendants committed an unfair or deceptive act or practice; (2) in or affecting commerce; and (3) that plaintiff was injured thereby." *First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 252, 507 S.E.2d 56, 63 (1998); N.C. Gen. Stat. § 75-1.1 (2005). "A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981). Pursuant to an insurance policy, " '[n]ot attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear,' " *Country Club of Johnston Cty., Inc. v. U. S. Fidelity & Guar. Co.*, 150 N.C. App. 231, 247, 563 S.E.2d 269, 280 (2002) (quoting N.C. Gen. Stat. § 58-63-15(11)(f)), is "inherently unfair, unscrupulous, and injurious to consumers[,]" *Id.*

Plaintiff's assertion that "there was no dispute regarding coverage" is manifestly contrary to plenary evidence in the record. Plaintiff was offered the full amount of the dwelling policy limits in October 2000, but she chose to refuse it and hire an attorney. Further, plaintiff's refusal to accept the tender of $125,475 on 14 June 2001 is not an unfair or deceptive act on the part of West American. West American's failure to cancel the policy before it expired was neither unfair nor deceptive when plaintiff had not yet filed an inven-

tory of the contents as required by the policy. Advising plaintiff to pretend that she was not represented by counsel may be inappropriate, but there is no evidence that plaintiff suffered damages as a result, as required in a claim for unfair or deceptive trade practices. *First Atl. Mgmt. Corp.*, 131 N.C. App. at 252, 507 S.E.2d at 63. Finally, there was nothing deceptive about the memorandum on the 14 June 2001 tender of payment, as the words "REFLECTS TOTAL RECOVERABLE UNDER THESE COVERAGES" accurately represented the terms of plaintiff's insurance policy. In sum, plaintiff has forecast no evidence that she was injured by any unfair or deceptive act on the part of defendants.

V. Conclusion

Plaintiff failed to forecast evidence in support of the essential elements for any of her claims. Accordingly, we affirm the trial court order granting summary judgment in favor of defendants as to all claims.

AFFIRMED.

Judges HUNTER and CALABRIA concur.

PETROLEUM TRADERS CORPORATION, AN INDIANA CORPORATION, AND OTHERS SIMILARLY SITUATED, PLAINTIFFS v. STATE OF NORTH CAROLINA, MICHAEL F. EASLEY, GOVERNOR OF THE STATE OF NORTH CAROLINA, E. NORRIS TOLSON, SECRETARY OF REVENUE OF THE STATE OF NORTH CAROLINA, THE DEPARTMENT OF REVENUE OF THE STATE OF NORTH CAROLINA, BRITT COBB, SECRETARY OF ADMINISTRATION OF THE STATE OF NORTH CAROLINA, THE DEPARTMENT OF ADMINISTRATION OF THE STATE OF NORTH CAROLINA, GEORGE J. BAKOLIA, CHIEF INFORMATION OFFICER FOR THE STATE OF NORTH CAROLINA, THE OFFICE OF INFORMATION TECHNOLOGY SERVICES OF THE STATE OF NORTH CAROLINA, ROBERT L. POWELL, CONTROLLER OF THE STATE OF NORTH CAROLINA, AND THE OFFICE OF THE STATE CONTROLLER FOR NORTH CAROLINA, DEFENDANTS

No. COA07-1176

(Filed 20 May 2008)

1. Appeal and Error— appealability—interlocutory order—governmental immunity—substantial right

Although defendants' appeal from the denial of its motion to dismiss Counts I and II arising out of the use of the online bidding process through E-Procurement for the sale of fuel to the State of

North Carolina or its governmental entities and agencies is an appeal from an interlocutory order, orders denying dispositive motions grounded on the defense of governmental immunity are immediately reviewable as affecting a substantial right.

2. Constitutional Law; Immunity— N.C. Constitution Declaration of Rights—sovereign immunity

A de novo review revealed that the trial court erred in an action arising out of the use of the online bidding process through E-Procurement for the sale of fuel to the State of North Carolina or its governmental entities and agencies by denying defendants' motion to dismiss for lack of jurisdiction based on the affirmative defense of sovereign immunity because: (1) defendants are state agencies and officials sued in their official capacity, and they did not expressly waive sovereign immunity; (2) sovereign immunity was not waived by either of the pertinent statutes under which plaintiff filed Count I and II; (3) plaintiff's complaint does not allege a violation of any right in the N.C. Constitution's Declaration of Rights, but instead references N.C. Const. Art. II, § 23; (4) *Corum*, 330 N.C. 761 (1992), is limited to the holding that sovereign immunity cannot prevent a plaintiff from asserting a claim alleging violation of his rights under the Declaration of Rights; and (5) even assuming arguendo that generalized language employed by our Supreme Court in various cases could be interpreted to state a waiver of sovereign immunity in every case brought under the N.C. Constitution, that language is mere dicta. N.C.G.S. § 105-267.

Appeal by Defendants from order entered 26 June 2007 by Judge Henry V. Barnette, Jr., in Wake County Superior Court. Heard in the Court of Appeals 3 April 2008.

Locke Reynolds LLP, by Michael S. Elvin, Pro Hac Vice; and Boyce & Isley, PLLC, by G. Eugene Boyce and Philip R. Isley, for Plaintiff-Appellees.

Attorney General Roy Cooper, by Special Deputy Attorney General Ronald M. Marquette, and Special Deputy Attorney General Karen E. Long, for Defendant-Appellants.

ARROWOOD, Judge.

Plaintiff, Petroleum Traders Corporation, is an Indiana corporation that sells gasoline and diesel fuel to its customers, which include

the State of North Carolina and various municipalities and governmental entities. Defendants are the Governor of North Carolina; the North Carolina Department of Administration and the Department of Revenue; the North Carolina Office of Information Technology and Office of State Controller; and the officials in charge of these agencies. Defendants appeal from the trial court's denial of their motion to dismiss Counts I and II of Plaintiff's complaint. We reverse.

For purposes of the issues raised on appeal, the pertinent facts are largely undisputed and may be summarized as follows: Plaintiff previously has executed contracts for the sale of fuel to the State of North Carolina or its governmental entities and agencies (North Carolina). Such contracts are awarded under competitive bidding procedures. Several years ago, North Carolina instituted an online bidding process called "E-Procurement," and the state now requires vendors such as Plaintiff to submit bids online using the E-Procurement website. Although vendors are not charged for using the E-Procurement website, the winning bidder is charged an E-Procurement marketing fee of 1.75% of the contract amount. This fee is authorized by N.C. Gen. Stat. § 66-58.12 (2007), which provides in pertinent part that:

> (a) Public agencies are encouraged to maximize citizen and business access to their services through the use of electronic and digital transactions. . . .
>
> (b) An agency may charge a fee to cover its costs of permitting a person to complete a transaction through the World Wide Web or other means of electronic access. . . .

The E-Procurement website states that this fee "helps pay for the development and ongoing operations of the North Carolina E-Procurement Service; this includes the services required to effectively implement an initiative of this size, develop and execute training required for both buyers and suppliers, and provide the ongoing maintenance and services needed to sustain the Service." Plaintiff has been awarded contracts for which it was charged the E-Procurement marketing fee.

On 19 July 2006 Plaintiff filed suit against Defendants, in a complaint alleging in pertinent part that: (1) vendors are required to use the E-Procurement system to bid on public contracts in North Carolina; (2) successful bidders are charged an E-Procurement fee in the amount of 1.75% of the total dollar amount of the contract; (3) the

dollar amount of E-Procurement fees that are collected is far greater than the amount needed to maintain the E-Procurement system; and that (4) "on information and belief" some of the monies collected as E-Procurement fees have been used to supplement the State's general operating funds and to subsidize shortfalls in its general operating budget. Plaintiff brought the following claims against Defendants:

1. Count I seeks a declaratory judgment that the E-Procurement fee "is a tax not a fee" and that, as a tax "not enacted by the Legislature," it violates Art. II, § 23 of the North Carolina Constitution."

2. Count II is a claim under N.C. Gen. Stat. § 105-267 for refund of the "unconstitutional taxes" that Plaintiff alleges it paid in the form of E-Procurement fees.

3. Count III seeks a declaratory judgment that the E-Procurement fee violates the Commerce Clause of the U.S. Constitution.

4. Count IV seeks a declaratory judgment that the E-Procurement fee violates the Takings Clauses of the U.S. and North Carolina Constitutions.

5. Count V seeks release of certain public records.

On 14 September 2006 Defendants filed a motion to dismiss Plaintiff's action, under N.C. Gen. Stat. § 1A-1, Rule 12(b)(1), (2), and (6) (2007). Defendants asserted, *inter alia*, that Counts I through IV were barred by sovereign immunity; that G.S. § 105-267 did not apply to Count II; and that Count V was moot. On 31 May 2007 the trial court issued a ruling stating its intention to allow Defendants' motion to dismiss as to Counts III, IV, and V, and to deny Defendants' motion for dismissal as to Counts I and II. The trial court ruled that the doctrine of sovereign immunity did not bar Count I or II of Plaintiff's complaint. On 26 June 2007 the trial court entered an order dismissing Counts III, IV, and V, and denying Defendants' motion to dismiss Counts I and II. From this order Defendants have appealed.

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[1] Preliminarily, we note that although Defendants' appeal is interlocutory, it is properly before us because "orders denying dispositive motions grounded on the defense of governmental immunity are immediately reviewable as affecting a substantial right." *Hedrick v. Rains*, 121 N.C. App. 466, 468, 466 S.E.2d 281, 283 (1996).

[2] Defendants argue that the trial court erred by denying their motion to dismiss for lack of jurisdiction based on the affirmative defense of sovereign immunity. Defendants assert that they did not expressly waive sovereign immunity; that there is no statutory waiver applicable to Plaintiff's claims; and that the common law waiver of sovereign immunity identified in *Corum v. University of North Carolina*, 330 N.C. 761, 413 S.E.2d 276 (1992), does not apply to Plaintiff's claims. We agree.

"The standard of review on appeal from a motion to dismiss is *de novo*." *N.C. Ins. Guar. Ass'n v. Bd. of Trs. of Guilford Tech. Cmty. Co.*, 185 N.C. App. 518, 520, 648 S.E.2d 859, 860 (2007) (citing *Hatcher v. Harrah's N.C. Casino Co., LLC*, 169 N.C. App. 151, 155, 610 S.E.2d 210, 212 (2005)). "Under a *de novo* review, the [C]ourt considers the matter anew and freely substitutes its own judgment for that of the [trial court]." *In re Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003) (citations omitted).

" 'As a general rule, the doctrine of governmental, or sovereign immunity bars actions against, *inter alia*, the state, its counties, and its public officials sued in their official capacity.' " *Herring v. Winston-Salem/Forsyth County Bd. of Educ.*, 137 N.C. App. 680, 683, 529 S.E.2d 458, 461 (2000) (quoting *Messick v. Catawba County*, 110 N.C. App. 707, 714, 431 S.E.2d 489, 493 (1993)). Thus, "a state may not be sued . . . unless it has consented by statute to be sued or has otherwise waived its immunity from suit." *Battle Ridge Cos. v. N.C. Dep't of Transp.*, 161 N.C. App. 156, 157, 587 S.E.2d 426, 427 (2003) (citations omitted).

In the instant case, Defendants are state agencies and officials sued in their official capacity. Defendants did not expressly waive sovereign immunity. Accordingly, in the absence of a statutory or implied waiver, Plaintiff's claims are barred by the defense of sovereign immunity.

We first consider whether there is a statutory waiver applicable to Plaintiff's claims. Count I is brought under N.C. Gen. Stat. § Declaratory Judgment Act, N.C. Gen. Stat. §§ 1-253 to 1-267 (2007). Defendants assert that the Declaratory Judgment Act does not waive sovereign immunity, and Plaintiff concedes that it "has not relied on the Declaratory Judgment Act to establish the absence of sovereign immunity." Count II seeks relief under N.C. Gen. Stat. § 105-267 (2007). Defendants assert that G.S. § 105-267 waives sovereign immunity only for claims against the Secretary of Revenue for the refund

of taxes, as defined by statute, and argue that, although N.C. Gen. Stat. § 105-267 provides a limited waiver of sovereign immunity, it "does not waive immunity for the particular claim made by Plaintiff." Plaintiff does not challenge this assertion. We conclude that sovereign immunity is not waived by either of the statutes under which Plaintiff has filed Count I and II.

We next consider the possibility of a non-statutory waiver of sovereign immunity. Plaintiff argues that it has a "common law basis" for its claim, based on a waiver of sovereign immunity that was judicially created in *Corum*. The *Corum* plaintiff asserted a violation of his right to freedom of speech, a personal right guaranteed by the N.C. Constitution. *Corum* recognized a direct cause of action under the N.C. Constitution for alleged violation of personal rights granted by the Declaration of Rights, and held that this cause of action was not barred by sovereign immunity.

Plaintiff's complaint does not allege a violation of any right in the N.C. Constitution's Declaration of Rights. Instead, Plaintiff's complaint alleges a violation of North Carolina Constitution Art. II, Section 23, which provides that:

> 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 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.

Thus, N.C. Const. Art. II, § 23 articulates procedural rules for the passage of a revenue or tax bill, requiring that: (1) the bill must be read three times on three different days; (2) must pass each time; and (3) must be recorded in the journal of the proceedings of the General Assembly. It does not articulate any rights, only procedures to be followed.

The dispositive issue on appeal is the applicability of *Corum* to Counts I and II of Plaintiff's complaint. Defendants argue that *Corum* articulated a waiver of sovereign immunity specifically for claims arising under the Declaration of Rights, and contend that

Corum does not state a generalized waiver of sovereign immunity for all claims that might assert a violation of any provision of the N.C. Constitution. We agree, and conclude that the waiver of sovereign immunity established by *Corum* does not extend to Count I or II of Plaintiff's complaint.

As discussed above, *Corum* held that the doctrine of sovereign immunity could not bar a plaintiff's direct claim under the N.C. Constitution for violation of a right guaranteed by the Declaration of Rights. Our appellate courts have applied the holding of *Corum* to find a waiver of sovereign immunity only in cases wherein the plaintiff alleged a violation of a right protected by the Declaration of Rights. Plaintiff takes the position that it is basically an irrelevant coincidence that *Corum* and all the cases following it have dealt with rights protected by the Declaration of Rights, arguing that these cases "just so happen to involve the Declaration of Rights[.]" We disagree.

A fair reading of *Corum* reveals that its holding was closely focused on the nature of the plaintiff's claim. The North Carolina Supreme Court first discussed the significance of the personal rights guaranteed by the Declaration of Rights:

> Our Constitution states: Freedom of speech and Press. Freedom of speech and of the press . . . shall never be restrained[.] . . . N.C. Const. art. I, § 14. The words shall never be restrained are a direct personal guarantee of each citizen's right of freedom of speech. . . . The civil rights guaranteed by the Declaration of Rights in Article I of our Constitution are individual and personal rights entitled to protection against state action[.] . . . [T]his obligation to protect the fundamental rights of individuals is as old as the State. . . . We give our Constitution a liberal interpretation in favor of its citizens with respect to those provisions which were designed to safeguard the liberty and security of the citizens in regard to both person and property.

Corum, 300 N.C. at 781-83, 413 S.E.2d at ——. The Court stated that it "recognized a direct action under the State Constitution against state officials for violation of rights guaranteed by the Declaration of Rights." *Id.* The Court then held that protection of personal rights guaranteed in the N.C. Constitution Declaration of Rights was of sufficient importance that it should not be barred by the doctrine of sovereign immunity:

> Having determined that there is a direct claim against the State under the Declaration of Rights for the protection of plaintiff's

> free speech rights, we turn to the question of the relevance of the doctrine of sovereign immunity. . . . [C]ourts have deferred to the legislature the determination of those instances in which the sovereign waives its traditional immunity. However, in determining the rights of citizens under the Declaration of Rights of our Constitution, it is the judiciary's responsibility to guard and protect those rights. The doctrine of sovereign immunity cannot stand as a barrier to North Carolina citizens who seek to remedy violations of their rights guaranteed by the Declaration of Rights.

Id. at 785-86, 413 S.E.2d at 291.

This nexus between protection of the fundamental rights guaranteed in the Declaration of Rights and the waiver of sovereign immunity was reiterated by the North Carolina Supreme Court in *Augur v. Augur*, 356 N.C. 582, 589, 573 S.E.2d 125, 130-31 (2002):

> Our courts are obligated to protect fundamental rights when those rights are threatened. . . . Therefore, where it "clearly appears either that property or fundamental human rights are denied in violation of constitutional guarantees," and where a statutory provision is specifically challenged by a person directly affected by it, declaratory relief as to the constitutional validity of that provision is appropriate.

(quoting *Jernigan v. State*, 279 N.C. 556, 562, 184 S.E.2d 259, 264 (1971)) (citations omitted).

We conclude that *Corum* is properly limited to its stated holding, that sovereign immunity cannot prevent a plaintiff from asserting a claim alleging violation of his rights under the Declaration of Rights. We reject Plaintiff's contention to the contrary.

Plaintiff cites *Peverall v. County of Alamance*, 154 N.C. App. 426, 573 S.E.2d 517 (2002), in support of its assertion that it is "well established" that sovereign immunity is waived by claims alleging violation of any part of the N.C. Constitution. Plaintiff supports this contention with generalized language in *Peverall* discussing claims under the N.C. Constitution without specifying a particular part of the constitution. However, as in the other cases that find a waiver of sovereign immunity based on *Corum*, the plaintiff in *Peverall* alleged violation of a right guaranteed by the Declaration of Rights:

> Due Process Claim: . . . [P]laintiff alleged that defendant's actions were arbitrary and capricious and in violation of . . . Article I,

> Section 19 of the North Carolina Constitution. It is well established that sovereign immunity does not protect the state or its counties against claims brought against them directly under the North Carolina Constitution. *See Corum*, 330 N.C. at 785-86, 413 S.E.2d at 291. Because plaintiff brought his due process claim pursuant to Article I, Section 19 of the North Carolina Constitution, defendant is not entitled to the defense of sovereign immunity against this claim.

Id. at 430, 573 S.E.2d at 519-20.

Plaintiff also cites *Sanders v. State Pers. Comm'n*, 183 N.C. App. 15, 644 S.E.2d 10, *disc. review denied*, 361 N.C. 696, 652 S.E.2d 653 (2007), quoting generalized language that refers to claims brought under the N.C. Constitution, without specifying that the claims were brought under the Declaration of Rights. Plaintiff uses this language to support its position that *Corum* extends to the entire N.C. Constitution. However, as in *Peverall* and every other case waiving sovereign immunity based on *Corum*, the *Sanders* plaintiffs alleged a violation of a right protected by the Declaration of Rights, in this case the right to equal protection:

> According to plaintiffs, they have been unlawfully denied the . . . benefits accorded to permanent employees of the State in violation of . . . [Art.] I, [§ §] 1, 19, and 35, of the North Carolina Constitution. . . . In *Corum*, our Supreme Court specifically held: The doctrine of sovereign immunity cannot stand as a barrier to North Carolina citizens who seek to remedy violations of their rights guaranteed by the Declaration of Rights. The Court emphasized that when there is a clash between these constitutional rights and sovereign immunity, the constitutional rights must prevail.

Sanders, 183 N.C. App. at 16-17, 644 S.E.2d at 11 (internal quotation marks omitted).

Sanders and *Peverall* both address the holding of *Corum* in the context of a plaintiff who, like the plaintiff in *Corum*, alleged a violation of a personal right protected by the Declaration of Rights. Accordingly, neither case required the Court to determine whether *Corum* extended beyond its apparent holding. Therefore, even assuming, *arguendo*, that generalized language employed by the Court in those cases could be interpreted to state a waiver of sovereign immunity in every case brought under the N.C. Constitution, this would be

mere dicta. *See, e.g.*, *In re University of North Carolina*, 300 N.C. 563, 576, 268 S.E.2d 472, 476 (1980), holding that the Court's discussion of an issue in an earlier case:

> was *dictum*, as this question of constitutional interpretation was not actually presented nor was it involved in determining the case. As *obiter dictum* it does not constitute precedent controlling our determination of this appeal.

Id. at 576, 268 S.E.2d at 480 (citing *Cemetery, Inc. v. Rockingham County*, 273 N.C. 467, 160 S.E.2d 293 (1968); and *Hayes v. Wilmington*, 243 N.C. 525, 91 S.E.2d 673 (1956)) (other citation omitted). This Court has observed that:

> "Looseness of language and *dicta* in judicial opinions, either silently acquiesced in or perpetuated by inadvertent repetition, often insidiously exert their influence until they result in confusing the application of the law, or themselves become crystallized into a kind of authority which the courts, without reference to true principle, are constrained to follow.' "

State v. Phillips, 171 N.C. App. 622, 632, 615 S.E.2d 382, 388 (2005) (quoting *Smith v. R.R.*, 114 N.C. 728, 749-50, 19 S.E. 863, 869 (1894)).

" 'Waiver of sovereign immunity may not be lightly inferred[.]' " *Meyer v. Walls*, 347 N.C. 97, 104, 489 S.E.2d 880, 884 (1997) (quoting *Guthrie v. N.C. State Ports Auth.*, 307 N.C. 522, 537-38, 299 S.E.2d 618, 627 (1983)). *Corum* contains no suggestion of an intention to eliminate sovereign immunity for any and all alleged violations of the N.C. Constitution. Its holding is closely tethered to its stated policy rationale, that the personal rights guaranteed by the N.C. Constitution Declaration of Rights are of such fundamental importance that their protection should not be barred by the doctrine of sovereign immunity must fail. We conclude that *Corum* is properly limited to claims asserting violation of the plaintiff's personal rights as set out in the N.C. Constitution Declaration of Rights. We further conclude that the trial court erred and that its order denying Defendants' motion to dismiss the claims in Count I and II must be

Reversed.

Judges McCULLOUGH and STEELMAN concur.

STATE OF NORTH CAROLINA, PLAINTIFF v. JAMES ELVIN TOLLISON, DEFENDANT

No. COA07-1125

(Filed 20 May 2008)

1. Indictment and Information— kidnapping—age of victim—variance not fatal

A variance in a kidnapping indictment was not fatal where the indictment erroneously alleged that the victim was 16 years old. The defendant was aware that he was being charged with first-degree kidnapping, defendant was in no danger of double jeopardy, defendant was able to prepare for trial in that he had lived with the victim and was aware of her age, and the trial court was able to properly sentence defendant.

2. Appeal and Error— preservation of issues—different argument below—not considered

Defendant waived his right to appellate review on the issue of consent in a kidnapping prosecution where he only argued below the issue of restraint and double jeopardy.

3. Appeal and Error— preservation of issues—failure to object—plain error not pled—issue not considered

Defendant waived appellate review of the admission of alleged prior acts where he did not object at trial and failed to plead plain error.

4. Kidnapping— variance concerning age of victim—instructions

There was no plain error in the instructions in a kidnapping prosecution where defendant contended that there was a variance concerning the age of the victim.

Appeal by defendant from judgments entered on or about 16 November 2006 by Judge Ronald E. Spivey in Superior Court, Guilford County. Heard in the Court of Appeals 5 March 2008.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Kathleen U. Baldwin, for the State.

Haral E. Carlin, for defendant-appellant.

STROUD, Judge.

Defendant was convicted by a jury of two counts of first degree kidnapping and two counts of indecent liberties with a child. Defendant appeals. The issues before this Court on appeal are whether the trial court committed reversible error in (1) denying defendant's motion to dismiss at the close of the State's evidence, (2) denying defendant's motion in limine regarding the incidents which occurred in Lumberton, North Carolina, and (3) instructing the jury on the charge of first-degree kidnapping. For the following reasons, we conclude the defendant received a fair trial, free from reversible error.

I. Background

The State's evidence tended to show the following: Kim[1] was born on 13 November 1989. Kim lived with her grandmother, who had legally adopted her, her siblings, and defendant, her grandmother's husband. Kim's relationship with defendant was good until she turned around twelve or thirteen. During the summer of 2002, defendant told Kim it was okay to kiss him, and kissed her "try[ing] to stick his tongue in [her] mouth." Kim pulled away. Defendant asked Kim if she had ever seen or touched a penis before to which she responded, "[N]o." Defendant then pulled out his penis and forced Kim to touch it, "rubbing up and down." Defendant told Kim, "[D]on't tell anybody or I'll deny it." Kim struggled to get away and then proceeded to the living room where defendant made her "lay with him on the couch" and put[] his hand down [her] shirt."

During February of 2003, Kim's grandmother had surgery and arranged for Kim and her sister to stay somewhere else. Defendant brought Kim and her sister back home while Kim's grandmother was still in the hospital. Kim was asleep in the living room when defendant took her back to his bedroom and told her to take off all of her clothes so that he could give her a "massage[.]" Defendant rubbed lotion all over Kim's body including her breasts, legs, back, and buttocks. Kim told defendant to stop, and after the massage defendant had Kim put her clothes back on and "hogtied" her by tying her feet and hands behind her back and placing a sock in her mouth.

Later that same day, defendant also told Kim to clean the bathroom door and then barred the door, lifted up her shirt, and touched

1. In order to protect the identity of the victim, we will refer to her by the pseudonym "Kim."

her breasts. Kim's brother walked in; defendant told him to leave and closed the door. Defendant then pulled off Kim's pants and stuck his penis between her legs. Kim cried and asked defendant to stop and saw "white stuff" come out of defendant's penis. Defendant told Kim not to tell anyone, to clean herself off, and forced her to get in the shower.

On 27 February 2003, defendant got Kim out of her bed at approximately 5:30 a.m. and carried her to the bathroom. Defendant again pulled Kim's pants down and "stuck his penis between [her] legs" and told her to stop crying. Again, Kim saw "white stuff" come out of defendant's penis. Defendant wiped himself off with a towel and so did Kim. Defendant carried Kim naked back to bed. That day Kim told her Aunt Cherie what defendant had been doing to her. Kim was taken to the hospital, and later defendant's semen was found on Kim's pants.

On or about 19 May 2003, defendant was indicted on two counts of first degree kidnapping and two counts of indecent liberties with a child based on the February 2003 incidents. On or about 22 August 2006, defendant filed a motion in limine "to prohibit the State . . . from making any reference to an uncharged alleged Indecent Liberties incident in Lumberton, North Carolina between the defendant and the 'victim.' " Trial began on 7 November 2006, and on or about 9 November 2006, defendant was convicted by a jury of two counts of first degree kidnapping and two counts of indecent liberties with a child. The trial judge determined that defendant had a prior record level of three, and on or about 16 November 2006 sentenced defendant consecutively for 110 to 141 months for each of his first degree kidnapping convictions. The trial judge arrested judgment on defendant's two convictions of indecent liberties with a child. Defendant appeals.

The issues before this Court on appeal are whether the trial court committed reversible error in (1) denying defendant's motion to dismiss at the close of the State's evidence, (2) denying defendant's motion in limine regarding the incidents which occurred in Lumberton, North Carolina, and (3) instructing the jury on the charge of first-degree kidnapping.

II. Motion to Dismiss

Defendant first argues

> the court committed reversible error in denying the defendant's motion to dismiss the charge made at the end of the State's

> evidence where the evidence was insufficient to convince the trier of fact of the defendant's guilt to the charge of first-degree kidnapping beyond a reasonable doubt in violation of N.C.G.S. § 15A-1227, the 14th Amendment to the United States Constitution and Article 1, Sections 19, 23 and 27 of the North Carolina Constitution.

Specifically defendant claims the trial court erred in denying his motion to dismiss because (1) there was "[a] fatal variance . . . between the evidence presented at trial and the charge alleged in the indictment[,]" and (2) "the State failed to present sufficient evidence on element number two, that the person had not reached her 16th birthday and her parent or guardian did not consent to this restraint." For the following reasons, we disagree.

A. Indictment

[1] Defendant failed to make a motion to dismiss based on the alleged deficiencies in the indictment; however, "when an indictment is alleged to be facially invalid, thereby depriving the trial court of its jurisdiction, it may be challenged at any time, notwithstanding a defendant's failure to contest its validity in the trial court." *State v. Call*, 353 N.C. 400, 429, 545 S.E.2d 190, 208, *cert. denied*, 534 U.S. 1046, 151 L. Ed. 2d 548 (2001).

Defendant's indictments as to the two charges of first degree kidnapping read,

> The jurors for the State upon their oath present that on or about February 23, 2003 [and February 27, 2003] and in Guilford County, the defendant named above unlawfully, willfully, and feloniously did kidnap [Kim] . . ., a person who had attained the age of sixteen (16) years, by unlawfully restraining the victim, without the consent of the victim's parent or legal guardian, and for the purpose of facilitating the commission of a felony, Indecent Liberties with a Child. [Kim] . . . was sexually assaulted.

However, it is uncontested that at the time of the 23 and 27 February 2003 incidents Kim had *not* yet reached the age of 16. Kim's date of birth is 13 November 1989, and thus she did not reach the age of sixteen until 13 November 2005.

> An indictment . . . is a written accusation of a crime drawn up by the public prosecuting attorney and submitted to the grand jury, and by them found and presented on oath or affirmation as a true bill. To be sufficient under our Constitution, an indictment must

> allege lucidly and accurately all the essential elements of the offense endeavored to be charged.
>
> The purpose of such constitutional provisions is: (1) such certainty in the statement of the accusation as will identify the offense with which the accused is sought to be charged; (2) to protect the accused from being twice put in jeopardy for the same offense; (3) to enable the accused to prepare for trial; and (4) to enable the court . . . to pronounce sentence according to the rights of the case.
>
> Early common law required that indictments allege every element of the crime for which a defendant was charged, the manner in which the crime was carried out, and the means employed.
>
> . . . .
>
> N.C.G.S. § 15-153 [now] provides in substance, that an indictment is sufficient if it expresses the charge against the defendant in a plain, intelligible, and explicit manner; and the same shall not be quashed, nor the judgment thereon stayed, by reason of any informality or refinement, if in the bill or proceeding, sufficient matter appears to enable the court to proceed to judgment.

State v. Hunt, 357 N.C. 257, 267-68, 582 S.E.2d 593, 600-01 (internal citations, internal quotation marks, ellipses, and brackets omitted), *cert denied*, 539 U.S. 985, 156 L. Ed. 2d 702 (2003); *see* N.C. Gen. Stat. § 15-153 (2003).

> In order for a variance in an indictment to warrant reversal, the variance must be material. A variance is not material, and is therefore not fatal, if it does not involve an essential element of the crime charged.

State v. Jones, 188 N.C. App. 562, 565, 655 S.E.2d 915, 917 (2008) (internal citations, internal quotation marks, and brackets omitted). N.C. Gen. Stat. § 14-39 reads in pertinent part:

> (a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
>
> . . . .

> (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony[.]
>
> . . . .
>
> (b) There shall be two degrees of kidnapping as defined by subsection (a). If the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted, the offense is kidnapping in the first degree and is punishable as a Class C felony.

N.C. Gen. Stat. § 14-39(a)(2), (b) (2003). Our Supreme Court has determined that

> the victim's age is not an essential element of the crime of kidnapping itself, but it is, instead, a factor which relates to the state's burden of proof in regard to consent. If the victim is shown to be under sixteen, the state has the burden of showing that he or she was unlawfully confined, restrained, or removed from one place to another without the consent of a parent or legal guardian.

State v. Hunter, 299 N.C. 29, 40, 261 S.E.2d 189, 196 (1980).

> We believe the purposes of an indictment, to
>
> (1) . . . identify the offense with which the accused is sought to be charged; (2) to protect the accused from being twice put in jeopardy for the same offense; (3) to enable the accused to prepare for trial; and (4) to enable the court . . . to pronounce sentence according to the rights of the case[,]

Hunt at 267, 582 S.E.2d at 600, were met here as (1) defendant was aware he was being charged with first-degree kidnapping; (2) defendant was in no danger of "being twice put in jeopardy for the same offense[;]" (3) defendant was able to "prepare for trial" as he knew the offenses he had been charged with and had lived with Kim and was aware of her uncontested age; and (4) the trial court was able to sentence defendant properly pursuant to his convictions. Furthermore, a victim's age is not an essential element of first-degree kidnapping, *see Hunter* at 40, 261 S.E.2d at 196, and therefore the variance in the indictment was not fatal. *See Jones* at 565, 655 S.E.2d at 917.

B. Consent to Restraint

[2] Defendant's argument that there was insufficient evidence that Kim's guardian did not consent to the restraint is not properly be-

fore this Court. At the close of evidence defendant's attorney made a motion to dismiss the charges and the following dialogue took place:

> THE COURT: All right. Outside the presence of the jury are there any motions at the end of all the evidence from the defense?
>
> MS. BAILEY: Yes, Your Honor. I'd like to make a motion to dismiss. Would like to be heard at this time.
>
> THE COURT: Okay.
>
> MS. BAILEY: Your Honor, my client is indicted with two first degree kidnappings, two indecent liberties. The kidnapping alleges that it was done for the purpose of facilitating a commission of a felony, indecent liberties. I have two cases. One is a very recent case, March 2006. It involves kidnapping. In this case, though, it is a robbery case but in the language of the kidnapping it refers that a person cannot be convicted of kidnapping when the only evidence of restraint is that which is an inherent inevitable feature of another felony. And it also discusses the moving, that the moving was necessary for the felony. It cannot be convicted of kidnapping based on these cases. I would contend that the State cannot go forward with the first degree kidnapping. Any movement or any restraint only—in the light most favorable to the State could only have been done for the purpose of an indecent liberties. There is no separate movement or restraint.
>
> May I approach with the two cases, Your Honor. I have copies.
>
> THE COURT: Yes.
>
> MS. BAILEY: The other case is involving kidnapping with sex offenses. Unfortunately I could not find a case on kidnapping, indecent liberties, that backs that charge. The cases I'll be showing to the Court and I have copies for counsel, State versus Antonio Ripley. That was the March 3rd, 2006 case. The other one is State versus Stinson, Court of Appeals, 127 N.C. App. 252. That's a 1997 case. The first case, the robbery case, is a North Carolina Supreme Court case.
>
> (Documents handed to the judge.)
>
> THE COURT: All right. State wish to respond?
>
> MS. BAILEY: Your Honor, I don't think I mentioned that I would make a motion to dismiss on all cases. I'm particularly presenting the case on the kidnapping cases.

Defendant did not make any further comments regarding the motion to dismiss beyond objecting to the trial court's denial of defendant's motion to dismiss. Defendant never mentioned consent, but instead argued solely on the issue of restraint.

"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." N.C.R. App. P. 10(b)(1). "This Court will not consider arguments based upon matters not presented to or adjudicated by the trial tribunal." *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991). Thus, defendant has waived his right to appellate review on the issue of lack of consent as before the trial court he only argued his motion to dismiss on the issue of double jeopardy.

III. Motion in Limine

[3] Defendant next argues,

> the trial court committed reversible error by denying the defendant's motion in limine and allowing into evidence during the State's case-in-chief the testimony of [Kim] concerning the alleged prior bad acts of the defendant that occurred in Lumberton, North Carolina with [Kim] that were remote in time with no linkage to the current offense nor similar in nature as the evidence was irrelevant, prejudicial and incompetent as well as in violation of N.C.R.Evid. 403 and 404 as well as the defendant's rights to a fair trial and due process of law.
>
> However,
>
> Our Supreme Court has consistently held that a motion *in limine* is insufficient to preserve for appeal the question of the admissibility of evidence if the defendant fails to further object to that evidence at the time it is offered at trial. Rulings on motions *in limine* are preliminary in nature and subject to change at trial, depending on the evidence offered, and thus an objection to an order granting or denying the motion is insufficient to preserve for appeal the question of the admissibility of the evidence.

State v. Tutt, 171 N.C. App. 518, 520, 615 S.E.2d 688, 690 (2005) (internal citations, internal quotation marks, and brackets omitted) (discussing conflict between N.C. Gen. Stat. § 8C-1, Rule 103(a)(2) and N.C.R. App. P. 10(b)(1)) (quoting *State v. Hayes*, 350 N.C. 79, 80, 511 S.E.2d 302, 303 (1999) (per curiam) (citing N.C.R. App. P. 10(b)(1);

State v. Dennison, 359 N.C. 312, 608 S.E.2d 756 (2005) (per curiam); *Martin v. Benson*, 348 N.C. 684, 685, 500 S.E.2d 664, 665 (1998)). Defendant failed to plead plain error, and as defendant failed to object to the "alleged prior bad acts of the defendant that occurred in Lumberton, North Carolina" at the time the testimony regarding these acts was presented at trial, he has waived this issue on appeal. *See id.*

IV. Jury Instructions

[4] Lastly, defendant argues,

> The trial court committed reversible plain error by instructing the jury as to the charge of first-degree kidnapping that the child had not reached its 16th birthday and her parent or guardian did not consent to the restraint when the indictment alleged that she had attained the age of 16 years therefore not requiring the consent of a parent or guardian thus changing the burden of proof required by the State of North Carolina in violation of the 6th and 14th Amendments to the United States Constitution and Article 1, Section 22 of the North Carolina Constitution.
>
> [As defendant concedes,] [b]ecause defendant failed to object to the jury instructions in this case, this assignment of error must be analyzed under the plain error standard of review. Plain error with respect to jury instructions requires the error be so fundamental that (i) absent the error, the jury probably would have reached a different verdict; or (ii) the error would constitute a miscarriage of justice if not corrected. Further, in deciding whether a defect in the jury instruction constitutes 'plain error,' the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt.

State v. Wood, 185 N.C. App. 227, 232, 647 S.E.2d 679, 684 (internal citations, internal quotation marks, and brackets omitted) (quoting *State v. Bell*, 359 N.C. 1, 23, 603 S.E.2d 93, 109 (2004); *State v. Holden*, 346 N.C. 404, 435, 488 S.E.2d 514, 531 (1997)), *disc. rev. denied*, 361 N.C. 703, 655 S.E.2d 402 (2007). "In determining whether the variance of the trial court's charge from the precise allegations of the bill constituted prejudicial error requiring reversal, we must look to the purposes served by a bill of indictment." *State v. Rhyne*, 39 N.C. App. 319, 324, 250 S.E.2d 102, 105 (1979).

We have already determined that the four purposes of a bill of indictment have been met in this case as defendant was aware he was

being charged with first degree kidnapping, was not in any danger of being tried twice for the same offense, was able to "prepare for trial" on the appropriate charges, and the court was able to properly sentence him. *Hunt* at 267, 582 S.E.2d at 600. As the purposes of an indictment have been met, and as the trial court properly instructed the jury as to first-degree kidnapping as it applied to the case by stating, "If you do not so find or have a reasonable doubt as to one or more of these things, then it would be your duty to return a verdict of not guilty . . . . [including,] that the person had not reached her sixteenth birthday and her parent or guardian did not consent to this restraint[,]" we do not conclude that there was plain error in the instructions to the jury.

V. Conclusion

For the foregoing reasons, we conclude defendant received a fair trial, free from reversible error.

NO ERROR.

Judges HUNTER and ELMORE concur.

CAROLINA FIRST BANK, PLAINTIFF v. STARK, INC. AND MARCEL STARK, DEFENDANTS

No. COA07-833

(Filed 20 May 2008)

Guaranty— personal guaranty—company name listed incorrectly—collateral—parol evidence rule—creditworthiness exception

The trial court erred by concluding that defendant individual guarantor was not personally liable for any debt incurred by defendant company owed to plaintiff bank, and the case is reversed and remanded to the trial court for entry of judgment against the guarantor, because: (1) a guarantor may be liable on a personal guaranty even where the guaranty incorrectly lists the wrong company as the borrower, the evidence supported a finding that Stark, Inc. and Stark, Inc. dba Dylan Crews are the same entity, and the trial court's conclusion that the guarantor was not personally liable was not supported by its finding that the guarantees were for debts in the name of Stark, Inc. dba Dylan Crews

since the companies were one and the same entity; (2) acceptance of collateral by the bank or extensions or renewals of credit did not affect defendant individual's liability as a guarantor; (3) the parol evidence rule would not apply since the credit memoranda regarding the 2001 loan were created after the execution of the guaranties; the testimony relating to the 2001 loan would also be considered evidence of agreements or understandings after the execution of the guaranties without violating the parol evidence rule; and even assuming arguendo the parol rule did apply, defendants waived any assignment on this basis when they failed to object to the admission of the testimony and credit memorandum at trial; and (4) in regard to the creditworthiness exception to the guaranties, there was no evidence in the record to support the finding that Stark, Inc. met that standard since the bank did consider the guarantor's assets and income in approving the 2001 loan.

Appeal by plaintiff from judgment entered 8 November 2006 by Judge Marvin K. Gray in Mecklenburg County Superior Court. Heard in the Court of Appeals 5 February 2008.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Mark P. Henriques and Sarah A. Motley, for plaintiff-appellant.

Andresen & Associates, by Kenneth P. Andresen and Julian M. Arronte, for defendants-appellees.

CALABRIA, Judge.

Carolina First Bank ("plaintiff") appeals the portion of the trial court's judgment concluding that Marcel Stark ("guarantor") is not personally liable for any debt incurred by Stark, Inc. owed to the plaintiff. The judgment also concluded that defendant Stark, Inc. was liable to the plaintiff for $567,007.24. We reverse.

Stark, Inc., a specialty women's clothing manufacturer, was incorporated in South Carolina in 1994. Marcel Stark is the president of Stark, Inc. In 1997, Stark, Inc. and the guarantor (collectively the "defendants") began a banking relationship with Rock Hill Bank and Trust ("RHB&T"). Also in 1997, Stark, Inc. applied for a line of credit. As part of RHB&T's approval process, C. Robert Herron ("Mr. Herron"), the RHB&T senior vice president for consumer commercial lending reviewed Stark, Inc.'s tax returns, balance sheets, and other financial information. Mr. Herron drafted a credit memorandum

describing the borrower, the financial review, and the repayment analysis. Since it was RHB&T's standard practice to require individual guarantors to support commercial loans, the credit memorandum dated 14 April 1997 included a "Guarantor Review" with guarantor's 10 December 1996 personal financial statement, showing a net worth of $466,000, and Stark, Inc.'s balance sheet, showing assets totaling $472,000 and liabilities totaling $432,000. Mr. Herron recommended the extension of a line of credit to Stark, Inc. based on "documented primary repayment ability," "documented secondary repayment sources," and the experience and expertise of the guarantor. RHB&T approved a line of credit to Stark, Inc. d/b/a Dylan Crews in the amount of $450,000.

On 24 April 1997, the guarantor personally guaranteed to RHB&T the performance and payment of "any and all debt in the name of Stark, Inc. dba Dylan Crews" ("1997 guaranty") by signing the guaranty. On 1 June 1998, the guarantor again signed a guaranty pledging to pay any and all debt in the name of Stark, Inc. dba Dylan Crews ("1998 guaranty," collectively "the guaranties"). Both guaranties contained the following language, in pertinent part:

> the Undersigned guarantees to Lender the payment and performance of each and every debt, liability and obligation of every type and description which Borrower may now or at any time hereafter owe to Lender (whether such debt, liability or obligation now exists or is hereafter created or incurred, and whether it is or may be direct or indirect, due or to become due, absolute or contingent, primary or secondary, liquidated or unliquidated, or joint, several, or joint and several; all such debts, liabilities and obligations being hereinafter collectively referred to as the "Indebtedness"). Without limitation, this guaranty includes the following described debt(s): ANY AND ALL DEBT IN THE NAME OF STARK, INC. DBA DYLAN CREWS The term "indebtedness" as used in this guaranty shall not include any obligations entered into between Borrower and Lender after the date hereof (including any extensions, renewals or replacements of such obligations) *for which Borrower meets the Lender's standard of creditworthiness based on Borrower's own assets and income without the addition of a guaranty* . . . .
>
> . . . . .
>
> 2. This is an absolute, unconditional and continuing guaranty of payment of the Indebtedness and shall continue to be in force

> and be binding upon the Undersigned, whether or not all Indebtedness is paid in full, until this guaranty is revoked by written notice actually received by the Lender . . . .
>
> . . . .
>
> 6. Whether or not any existing relationship between the Undersigned and Borrower has been changed or ended and whether or not this guaranty has been revoked, Lender, may, but shall not be obligated to, enter into transactions resulting in the creation or continuance of Indebtedness, without any consent or approval by the Undersigned and without any notice to the Undersigned. *The liability of the Undersigned shall not be affected or impaired by any of the following acts or things* (which Lender is expressly authorized to do, omit or suffer from time to time, both before and after revocation of this guaranty, without notice to or approval by the Undersigned): (i) any acceptance of collateral security, guarantors, accommodation parties or sureties for any or all Indebtedness; (ii) any one or more extensions or renewals of Indebtedness . . . .

(emphasis added).

On 1 June 2000, RHB&T approved another extension of a line of credit to Stark, Inc. in the amount of $500,000. The same day, Stark, Inc. signed a promissory note promising to repay $500,000. On 20 June 2000, RHB&T approved changing Stark Inc.'s existing line of credit to a revolving line of credit based in part on a review of the guarantor's assets. On 24 May 2001, Stark, Inc. signed a promissory note for $500,000 to renew the existing line of credit ("the 2001 note"). In March 2002, Stark, Inc. renewed the 2001 note. In late 2002, Stark, Inc. dissolved the corporation and defaulted on the 2001 note.

Plaintiff purchased RHB&T's assets in November 2002 and subsequently filed a complaint alleging, *inter alia*, breach of contract by Stark, Inc. and the guarantor. At a bench trial on 30 October 2006 in Mecklenburg County Superior Court, the Honorable Marvin K. Gray ("Judge Gray") concluded Stark, Inc. breached its obligations under the 2001 note and owed plaintiff $567,007.24, which included interest, late fees, attorneys fees and expenses. However, Judge Gray also concluded the guarantor had no personal liability to plaintiff under the terms of the guaranties for any of the corporate defendant's indebtedness. Plaintiff appealed.

Standard of review

According to our standard of review, findings of fact by a trial court are conclusive on appeal if there is competent evidence to support those findings, even if there is evidence that would support findings to the contrary. *Biemann & Rowell, Co. v. Donohoe Cos.*, 147 N.C. App. 239, 242, 556 S.E.2d 1, 4 (2001). Conclusions of law are reviewable *de novo*. *Mann Contr'rs Inc. v. Flair with Goldsmith Consultants-II, Inc.*, 135 N.C. App. 772, 775, 522 S.E.2d 118, 121 (1999).

Judge Gray concluded that the guarantor was not liable for the June 2000, May 2001, and March 2002 notes. The trial court found the boxes were not checked under "related documents" on either the May 2001 note, or the March 2002 renewal note, indicating there was no guaranty related to the documents. Furthermore, the trial court found that the June 2000 note "constituted a new loan to the Corporate Defendant [since the note] did not include the DBA Dylan Crews and was not an extension of any pre-existing loan to Stark, Inc. DBA Dylan Crews."

A personal guaranty is a continuing obligation until it is revoked by the guarantor or terminated by operation of law. *Pee Dee State Bank v. National Fiber Corp.*, 287 S.C. 640, 643, 340 S.E.2d 569, 571 (S.C. Ct. App. 1986). A guaranty is an absolute or unconditional promise to pay a particular debt if it is not paid by the debtor and is immediately enforceable against the guarantor upon the debtor's default. *TranSouth Financial Corp. v. Cochran*, 324 S.C. 290, 295, 478 S.E.2d 63, 66 (S.C. Ct. App. 1996). In order to conclude as a matter of law that Marcel Stark was not personally liable for the debt incurred by Stark, Inc., the trial court must have found one of the following: (I) the guaranty was revoked by the guarantor; (II) the guaranties did not apply to the indebtedness incurred by Stark, Inc., as opposed to indebtedness incurred by Stark, Inc. DBA Dylan Crews; or (III) Stark, Inc. met the standard of creditworthiness exception described in the guaranties.

I. Revocation

The trial court made no findings regarding revocation and the appellees do not raise this issue in their brief. Therefore, we consider whether the guaranties applied to the indebtedness incurred by Stark, Inc. or whether Stark, Inc. met plaintiff's standard of creditworthiness.

II. Indebtedness of Stark, Inc.

The trial court found that Stark, Inc.'s liability for the 2001 note was $567,007.24. The parties do not contest that the guaranties were signed in South Carolina or that they are governed by South Carolina law. The plain language of the guaranties determines their terms. *TranSouth Financial Corp.*, 324 S.C. at 294, 478 S.E.2d at 65 ("A guaranty is a contract and should be construed based on the language used by the parties to express their intention.") (citation omitted). The guaranties state they are absolute, continuing obligations and apply to future debt incurred by "Stark, Inc. DBA Dylan Crews." *See Pee Dee State Bank*, 287 S.C. at 643, 340 S.E.2d at 570 (plain language of agreement established that written guaranty was a continuing guaranty and not limited to initial loan). Therefore, the next issue is whether the guaranties apply to Stark, Inc.'s 2001 debt.

A guarantor may be liable on a personal guaranty even where the guaranty incorrectly lists the wrong company as the borrower. *First Fed. Savings & Loan v. Dangerfield*, 307 S.C. 260, 414 S.E.2d 590 (S.C. Ct. App. 1992). In *First Federal*, the guarantor was the spouse of one of the shareholders of A Professional Moving and Storage of Charleston, Inc. ("the Charleston company"). Around the same time the Charleston company was formed, one of the shareholders of the Charleston company started another moving and storage company named "A Professional Moving and Storage, Inc." operating in Greenville, South Carolina. *Id.* at 262, 414 S.E.2d at 592. The plaintiff-bank approved two loans for the Charleston company, listing the borrower as "A Professional Moving and Storage, Inc." *Id.* The personal guaranty signed by the defendant named the obligor as "A Professional Moving and Storage, Inc." *Id.* The plaintiff-bank approved the loan "with the understanding that the Charleston company was the borrower," the funds were disbursed to the Charleston company, and no evidence was presented that the loans were paid to the Greenville company. *Id.* at 264, 414 S.E.2d at 593.

Here, the evidence presented supports a finding that Stark, Inc. and Stark, Inc. DBA Dylan Crews are the same entity. At the time RHB&T disbursed the 2001 loan, Stark, Inc. was engaged in the sale of women's clothing under the name Dylan Crews. The guarantor testified the 1997 guaranty was "specifically for our garment production." The purpose of the March 2002 renewal loan was to fund the Dylan Crews line of clothing. The trial court's conclusion that the guarantor was not personally liable is not supported by the trial court's finding that the guaranties were for debts in the name

of Stark, Inc. DBA Dylan Crews, since Stark, Inc. and Stark, Inc. DBA Dylan Crews were one and the same entity. *See McGee v. F.W. Poe Mfg. Co.*, 176 S.C. 288, 293, 180 S.E. 48, 51 (S.C. 1935) (language of guaranty contract must be reasonably interpreted according to parties' intentions and read in light of surrounding circumstances and purpose thereof); *see also Tri-County Ice and Fuel Co. v. Palmetto Ice Co.*, 303 S.C. 237, 241, 399 S.E.2d 779, 781 (S.C. 1991) (default judgment entered against company's trade name was valid against company).

Defendants argue that the guaranties were unenforceable as to the 2001 note because RHB&T failed to check a box on the form for the promissory note indicating the guaranties secured the 2001 note. We disagree.

In support of their argument, defendants cite *PPG Industries v. Orangeburg Paint & Dec. Cent.*, 297 S.C. 176, 375 S.E.2d 331 (S.C. Ct. App. 1988). In that case, the guarantor failed to check a box on the guaranty which would limit the scope of his guaranty. *Id.* at 181, 375 S.E.2d at 334. We find this case distinguishable. In the instant case, the box at issue was the box on the note, unlike in *PPG* where the box was on the guaranty. The guarantor's liability is "that amount of loss which the guarantee has sustained by reason of such default [by the principal obligor]." *Id.* Since the guaranty applied to any and all indebtedness, the relevant question is whether the notes qualified as "indebtedness" incurred by Stark, Inc. and guaranteed by the guarantor.

Defendants also cite the fact that the bank identified items required as collateral in exchange for the 2001 line of credit in support of their argument that the 2001 debt was not secured by a guaranty. However, this fact is irrelevant. The plain language of the guaranties provides that:

> *The liability of the Undersigned shall not be affected or impaired by any of the following acts or things* (which Lender is expressly authorized to do, omit or suffer from time to time, both before and after revocation of this guaranty, without notice to or approval by the Undersigned): (i) any acceptance of collateral security, guarantors, accommodation parties or sureties for any or all Indebtedness; (ii) any one or more extensions or renewals of Indebtedness . . . .

(emphasis added). Therefore, acceptance of collateral by RHB&T or extensions or renewals of credit do not affect defendant Marcel Stark's liability as a guarantor.

Parol Evidence Rule

Defendants also argue that consideration of extrinsic evidence, such as credit memoranda, Mr. Herron's testimony, and the guarantor's testimony, violates the parol evidence rule. We disagree.

The parol evidence rule "prevents the introduction of extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of a written instrument when the extrinsic evidence is used to contradict, vary, or explain the written instrument." *Crafton v. Brown*, 346 S.C. 347, 351, 550 S.E.2d 904, 906 (S.C. Ct. App. 2001) (quotation omitted).

The credit memoranda regarding the 2001 loan were created after the execution of the guaranties. Therefore, the parol evidence rule would not apply. Furthermore, the testimony relating to the 2001 loan at issue would also be considered evidence of agreements or understandings after the execution of the guaranties, and would not violate the parol evidence rule. Even assuming *arguendo* the parol evidence rule does apply, defendants waived any argument on this basis when they failed to object to the admission of the testimony and credit memoranda at trial. *Lindsey v. North Carolina Farm Bureau Mut. Ins. Co.*, 103 N.C. App. 432, 436, 405 S.E.2d 803, 805 (1991) ("North Carolina follows the . . . rule holding that, in the absence of an objection to its admission, the trial court is to consider parol evidence.").

III. Standard of Creditworthiness

Plaintiff argues the trial court erred in concluding that guarantor was not personally liable because Stark, Inc. met plaintiff's standard of creditworthiness exception to the guaranties. We agree.

The trial court found that

> From the inception of the Bank's relationship with the Corporate Defendant the Bank never experienced difficulties with collection on any loan that it had made to the Corporate Defendant. Each loan was paid timely. Moreover, it never had to exercise its rights as to any collateral pledged for any such corporate indebtedness. It received timely financial statements and corporate tax returns from the Corporate Defendant and it found the Corporate Defendant's cash flow positions through-

> out the banking relationship to be satisfactory. *All of these items were considered by the Bank in defining its "standard of creditworthiness."*

(emphasis added).

The last sentence in this finding regarding the standard of creditworthiness is not supported in the record. While these factors are considered by plaintiff when determining whether a borrower satisfies its standard of creditworthiness, there is no evidence in the record to support the finding that plaintiff determined Stark, Inc. met that standard. Defendants' expert witness, Travis Moon ("Moon") testified that "[he sees] nothing in the bank documents . . . where the bank says [defendants] have now met this standard." Yet Moon opined that the standard of creditworthiness was met because the 2001 loan documents did not reference a guaranty. Therefore, Moon concluded RHB&T did not require a guaranty for those loans and Stark, Inc. must have met the bank's standard of creditworthiness. The plain language of the guaranties releases a guarantor's liability for future loans "for which Borrower meets the Lender's standard of creditworthiness *based on Borrower's own assets and income* without the addition of a guaranty." (Emphasis added). Moon's conclusion is incorrect because RHB&T did consider the guarantor's assets and income in approving the 2001 loan. Therefore, the finding that Stark, Inc. met plaintiff's standard of creditworthiness is not supported by competent evidence in the record.

IV. Conclusion

Since the trial court's conclusion of law that the guarantor is not personally liable for the debts of Stark, Inc. is not supported by the evidence, we reverse and remand to the trial court for entry of judgment against the guarantor Marcel Stark. The remaining portions of the trial court's order are affirmed.

Reversed and remanded.

Judge McGEE concurs.

Judge WYNN concurs in the result.

STATE OF NORTH CAROLINA, PLAINTIFF v. MARLON GOODWIN, DEFENDANT

No. COA07-1028

(Filed 20 May 2008)

1. Appeal and Error— invited error—failure to instruct on self-defense—defense request that instruction not be given

Defendant waived any appellate review of the court's failure to instruct on imperfect self-defense where he specifically requested that the jury not be instructed on self-defense.

2. Appeal and Error— jury question—instruction on self-defense not given—defense opposition to instruction

Defendant waived his right to appellate review of whether the trial court erred by not giving an instruction on self-defense in response to the jury's question that could be construed as raising issues of self-defense where his attorney specifically stated that he did not want jury instructions on self-defense and never explicitly changed his position even though he was given ample opportunities to do so.

3. Sentencing— prior record level—assignment of points—no prejudice

There was no prejudicial error in the trial court's calculation of defendant's prior record level where defendant argued that he was assigned one point for each of two convictions in the same district court session, and points for both possession of a firearm by a felon and the underlying offense. Defendant's prior record point total would be the same even if defendant was correct about the convictions in the same session, and possession of a firearm by a felon is a separate substantive offense from the underlying felony.

Appeal by defendant from judgment entered 25 September 2006 by Judge William Z. Wood, Jr. in Superior Court, Guilford County. Heard in the Court of Appeals 7 February 2008.

Attorney General Roy A. Cooper, III by Special Deputy Attorney General Edwin W. Welch, for the State.

Kathryn L. VandenBerg, for defendant-appellant.

STROUD, Judge.

Defendant was convicted by a jury of second degree murder and attempted first degree murder. Defendant appeals. The issues before this Court are whether the trial court erred in not giving the jury an instruction on imperfect self-defense and in calculating defendant's prior record level. For the following reasons, we find no prejudicial error.

I. Background

The State's evidence tended to show the following: On the evening of 6 January 2005, Kentrell Lamar Coleman ("Coleman") went to 214 Morgan Place to pick up several ounces of cocaine. Coleman entered the house with Alicia Herndon and saw Leonzo, defendant, and two other males, one of whom Coleman later learned was named John.

Coleman testified as follows:[1] Coleman, Leonzo, and defendant talked for a bit, and then defendant left the room. Defendant returned with a gun, telling Coleman, "This is what's up, this is what it is[.]" Coleman reached for his own gun and saw that Leonzo, John, and the other male also had guns out. Coleman thought Leonzo shot first and Coleman later fired five shots. Everyone was shooting. Coleman was shot five times and was hit in his shoulder, hip, knee, back, and thigh. Coleman saw that Herndon was dead. Coleman crawled into another room "waitin' to die."

On or about 7 January 2005, a warrant was issued for defendant's arrest for murder, attempted first degree murder, and robbery with a dangerous weapon. On 16 May 2005, defendant was indicted on all three counts. On or about 14 July 2006, defendant filed a "Notice of Intent to assert the defense of Self Defense." Trial was held 11 to 25 September 2006. Defendant was convicted of second degree murder and attempted first degree murder.

On 25 September 2006, defendant was sentenced consecutively within the presumptive range on both counts, 251 to 311 months on the charge of second degree murder and 225 to 279 months on the charge of attempted first degree murder. Defendant appeals. The issues on appeal are whether the trial court erred by (1) failing to instruct the jury on imperfect self-defense and (2) miscalculating defendant's prior record level.

---

1. The evidence from witnesses as to which of the four men shot first was not consistent; however, such differences are not dispositive of the issues presented on appeal.

II. Jury Instructions

Defendant assigns error arguing (1) "the trial court committed plain error in failing to instruct the jury on imperfect self-defense", and (2) "the trial court erred in failing to instruct on imperfect self-defense after the jury's note, in violation of N.C. Gen. Stat. [§] 15A-1234(a)(4)." For the following reasons, we disagree.

A. Initial Jury Instructions

[1] On 12 September 2006, before a jury had been chosen the following dialogue took place:

> THE COURT: Does the defendant allege he acted in self-defense or not?
>
> MR. BRYANT: We've given notice of self-defense in this case.
>
> THE COURT: What do you want me to tell the jury that the defendant alleges he acted in self-defense?
>
> MR. BRYANT: Do not tell the jury that, I would ask, your Honor.
>
> THE COURT: All right. I think I have to. If you ask for it, you know, alleged it, I think I've got to tell them.
>
> MR. BRYANT: I'm not asking.
>
> THE COURT: But you've given notice of it.
>
> MR. BRYANT: I've given notice of it, your Honor.
>
> THE COURT: Are you going to argue it?
>
> MR. BRYANT: I don't know at this particular time, your Honor.
>
> THE COURT: Well, okay. Let me see what your client says. Mr. Goodwin, stand up.
>
> (Defendant stands)
>
> THE COURT: Mr. Goodwin, your attorney just told me that although you have alleged or given notice of self-defense that he does not want me to tell the jury that you have alleged that you acted in self-defense. Do you want me to tell the jury that you allegedly acted in self-defense or not?
>
> THE DEFENDANT: Can I talk with my attorney first?
>
> THE COURT: For a minute.

(Defendant and counsel confer momentarily)

(Defendant stands)

THE COURT: Okay.

THE DEFENDANT: I trust my lawyer. I don't wish the jury to be informed of self-defense.

THE COURT: Okay. Thank you, sir. Mr. Bryant, I did notice in the file that you raised self-defense. Don't you think I should tell the jury about any possible issues that might come up, so they will have, uh, be ready for the case, know what it's about?

MR. BRYANT: I don't think you need to at this particular time, your Honor. At this particular time, our position on whether or not we put on evidence may or may not change, your Honor.

THE COURT: Well, you may be able to draw self-defense from the cross-examination. I don't know.

MR. BRYANT: May be able to. We just don't know as yet.

THE COURT: Okay. Mr. Beasley, have you got anything on this?

MR. BEASLEY: No, sir. I received notice for a defense of self-defense when it was filed.

THE COURT: I think if it's in the file, I should give it. And if it doesn't come up, we can always, you know, I'll also be glad to tell the jury at the appropriate time, and probably several times, at least once or twice, that the defendant doesn't have to put on any evidence, and that's not to be held against him, you know, if that's what you elect, Mr. Bryant. You can certainly talk about that in jury selection.

MR. BRYANT: Your Honor, if you are intending to do that, I object to your intentions to do so at this particular time.

THE COURT: If you've given notice, I think I should.

MR. BRYANT: In that event, we withdraw that notice.

THE COURT: You withdraw it?

MR. BRYANT: Yes, sir.

THE COURT: Talk to your client, make sure he knows and understands.

MR. BRYANT: He understands.

THE COURT: I know, but I want to make sure.

(Defendant and counsel confer)

MR. BRYANT: I believe he understands, your Honor. We have had the discussion before, but you're welcome to inquire.

THE COURT: I probably have to. Mr. Goodwin, I hate to bother you again. I need to ask you to stand up.

(Defendant stands)

THE COURT: Your attorney, Mr. Bryant, just told me that you are withdrawing the notice of self-defense, or the intention to allege self-defense in your case. Do you agree to this?

THE DEFENDANT: Yes, sir.

THE COURT: And this is something you've thought about for some time?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Thank you very much, sir. And thank you, Mr. Bryant.

MR. BRYANT: Thank you, your Honor.

During the charge conference defendant's attorney stated, "You asked us about self-defense. We are not requesting that instruction."

"A defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct." N.C. Gen. Stat. § 15A-1443(c) (2005). "Thus, a defendant who invites error has waived his right to all appellate review concerning the invited error, including plain error review." *State v. Barber*, 147 N.C. App. 69, 74, 554 S.E.2d 413, 416 (2001), *rev. dismissed*, 355 N.C. 216, 560 S.E.2d 142 (2002).

Here defendant's attorney specifically stated that defendant was not requesting a jury instruction on self-defense. Furthermore, defendant's attorney had earlier objected to the trial court informing the jury that defendant might possibly claim self-defense and withdrew defendant's notice of self-defense with defendant's explicit consent. Defendant's attorney specifically requested that the jury not be instructed as to self-defense, and thus defendant "has waived his right

to all appellate review concerning the invited error, including plain error review." *See id.*

B. Additional Jury Instructions

[2] During jury deliberations the jury sent a note to the trial court which read,

> Can we hear more specifics on what constitutes "assault"? Is pointing a gun "assault"? Is firing a gun in response to gunfire "assault"? Are there excuses or causes we should consider that would make firing a gun at someone not "assault"? . . . .

After the jury's note, which could certainly be construed as raising issues of self defense, defendant still did not retract his initial pretrial request that the jury not be instructed on self-defense. During the discussion between the trial court and the attorneys on how the court should respond to the jury's note defendant's attorney stated, "I think that it's dangerous territory to try to answer those questions." Near the end of the discussion, defendant's attorney stated he was "batting . . . around" the idea of an instruction on self-defense, but ultimately, never changed his originally stated position that the trial court should not instruct on this issue.

As to the additional jury instructions, defendant waived his right to appellate review as his attorney specifically stated he did not want jury instructions regarding self-defense and never explicitly changed his position on that decision though given ample opportunities to at both the charge conference and upon being informed of the jury's note. *See id.* Defendant will not now be heard to complain that his request was granted. *See id.*

III. Prior Record Level

[3] Defendant also contends his prior record level was miscalculated. He argues he was (1) "assigned one point for each of two offenses for which he was convicted in the same district court session[,]" and (2) "assigned points for the felony of possession of a firearm by a felon and points for the felony charge underlying that offense." The trial court assigned 15 points, finding defendant to be at level V for sentencing purposes.

A. Same District Court Session

> Errors based upon any of the following grounds, which are asserted to have occurred, may be the subject of appellate review

> even though no objection, exception or motion has been made in the trial division.
>
> . . . .
>
> The sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law.

N.C. Gen. Stat. § 15A-1446(d)(18) (2005). The trial court's assignment of a prior record level is a conclusion of law which we review *de novo*. *State v. Fraley*, 182 N.C. App. 683, 691, 643 S.E.2d 39, 44 (2007).

Defendant's prior conviction worksheet, to which defendant stipulated, *see generally* N.C. Gen. Stat. § 15A-1340.14(f)(1) (2005), shows he was convicted of (1) three class A1 misdemeanor offenses on 13 May 1997 and 3 September 2004, (2) three class I felony offenses on 17 December 1997, 19 May 1999, and 13 December 2005, (3) one class G felony offense on 17 May 2000, and (4) three class 1 misdemeanors on 30 May 2003, 29 October 2004, and 13 August 2004. In its brief the State concedes that the record "inaccurately shows that defendant was convicted of 'Asst on Female ('O3CRS73319') on '09/03/2004.' " The correct date for one of defendant's class A1 misdemeanor offenses was in fact 30 May 2003.

> (a) Generally.—The prior record level of a felony offender is determined by calculating the sum of the points assigned to each of the offender's prior convictions that the court, or with respect to subdivision (b)(7) of this section, the jury, finds to have been proved in accordance with this section.
>
> (b) Points.—Points are assigned as follows:
>
> . . . .
>
> (3) For each prior felony Class E, F, or G conviction, 4 points.
>
> (4) For each prior felony Class H or I conviction, 2 points.
>
> (5) For each prior misdemeanor conviction as defined in this subsection, 1 point. For purposes of this subsection, misdemeanor is defined as any Class A1 and Class 1 nontraffic misdemeanor offense[.]
>
> . . . .
>
> (c) Prior Record Levels for Felony Sentencing.—The prior record levels for felony sentencing are:

(5) Level V—At least 15, but not more than 18 points.

(d) Multiple Prior Convictions Obtained in One Court Week.—For purposes of determining the prior record level, if an offender is convicted of more than one offense in a single superior court during one calendar week, only the conviction for the offense with the highest point total is used. If an offender is convicted of more than one offense in a single session of district court, only one of the convictions is used.

N.C. Gen. Stat. § 15A-1340.14 (a)-(d) (2005).

30 May 2003 is the only session during which defendant was convicted for two offenses, one a class A1 misdemeanor and one a class 1 misdemeanor. *See State v. Smith*, 138 N.C. App. 605, 607-08, 532 S.E.2d 235, 237 (2000) (" '[S]ession' designates the typical one-week assignment to a particular location during the term."). Pursuant to N.C. Gen. Stat. § 15A-1340.14(d), only one of those two convictions may be used to calculate defendant's prior record level. *See* N.C. Gen. Stat. § 15A-1340.14(d).

Defendant's three class A1 offenses would be three points. *See* N.C. Gen. Stat. § 15A-1340.14(b)(5). Defendant's three class I offenses total six points. *See* N.C. Gen. Stat. § 15A-1340.14(b)(4). Defendant's class G offense is four points, *see* N.C. Gen. Stat. § 15A-1340.14(b)(3), and defendant's three class 1 misdemeanors would be two points, as only two of the offenses may be counted because one was in the same session as an A1 offense. *See* N.C. Gen. Stat. § 15A-1340.14(b)(5), (d). This brings defendant's total to fifteen points which places him at a prior record level five, *see* N.C. Gen. Stat. § 15A-1340.14(c)(5), the same as found by the trial court.

Even if the defendant were correct in contending the trial court improperly calculated this number "defendant's prior record point total would still yield a prior record level of V[] and he has suffered no prejudice." *State v. Rich*, 130 N.C. App. 113, 118, 502 S.E.2d 49, 52, *disc. rev. denied*, 349 N.C. 237, 516 S.E.2d 605 (1998). This assignment of error is overruled.

B. Points for Possession of Firearm by A Felon and for Felony Underlying that Offense

Defendant relies on *State v. Gentry*, 135 N.C. App. 107, 519 S.E.2d 68 (1999) in asserting that

> Mr. Goodwin's prior record level worksheet assigned four points to the felony of possession of firearm by a felon in case 00 CRS 83227, conviction date May 17, 2000; and two points for the felony of manufacture marijuana, 97 CRS 16855, conviction date December 17, 1997. . . . Prior record level points cannot fairly be imposed both for the possession of firearm by a felon offense and for the felony underlying that offense.

In *State v. Gentry* this Court concluded that a defendant's prior record level for sentencing for habitual DWI may not be calculated using previous DWI convictions because they were the same convictions upon which her habitual DWI charge was based. *See State v. Gentry*, 135 N.C. App. 107, 111-12, 519 S.E.2d 68, 70-71 (1999) ("[O]ur legislature recognized the basic unfairness and constitutional restrictions on using the same convictions both to elevate a defendant's sentencing status to that of an habitual felon, and then to increase his sentencing level.").

Here the same conviction is not being used "to elevate defendant's sentencing status . . . and then to increase his sentencing level." *See Gentry* at 111, 519 S.E.2d at 70. Possession of a firearm by a felon is a separate substantive offense from the defendant's prior felony upon which his status as a felon was based. *See State v. Wood*, 185 N.C. App. 227, 237, 647 S.E.2d 679, 687 ("N.C. Gen. Stat. § 14-415.1[, entitled "Possession of firearms, etc., by felon prohibited[,]"] . . . creates a new substantive offense"), *disc. rev. denied*, 361 N.C. 703, 655 S.E.2d 402 (2007). Defendant's prior record level was correctly calculated pursuant to N.C. Gen. Stat. § 15A-1340.14, *see* N.C. Gen. Stat. § 15A-1340.14, and thus this assignment of error is overruled.

IV. Conclusion

For the foregoing reasons, we find the trial court did not commit prejudicial error in not giving the jury an instruction on self-defense and in calculating defendant's prior record level.

NO ERROR.

Judges TYSON and GEER concur.

IN RE S.M.

[190 N.C. App. 579 (2008)]

IN RE: S.M.

No. COA07-1373

(Filed 20 May 2008)

1. Appeal and Error— preservation of issues—sufficiency of evidence

Although the State contends respondent juvenile waived review of the sufficiency of the evidence against her for the offense of disorderly conduct in a school, her counsel's vigorous argument, after resting her case, that the evidence was insufficient to support the charged offense was sufficient to preserve respondent's right to review.

2. Juveniles— delinquency—burden of proof—motion to dismiss

The trial court did not err in a juvenile delinquency case by allegedly failing to adjudicate a juvenile based on proof beyond a reasonable doubt when the written order stated the facts were proven beyond a reasonable doubt whereas the trial court's oral statements indicated it was considering the evidence in the light most favorable to the State, because although the court ultimately determines the existence of proof beyond a reasonable doubt of respondent's guilt, in considering a motion to dismiss, the evidence is examined in the light most favorable to the State.

3. Juveniles— delinquency—disorderly conduct in school—sufficiency of evidence

The trial court erred in a juvenile delinquency case by concluding there was sufficient evidence of respondent juvenile's guilt of disorderly conduct in a school because: (1) while appellate courts tend to uphold juvenile adjudications for disorderly conduct in school when there is evidence of the use of vulgar language by the student, aggressive or violent behavior by the juvenile, or disruptive behavior serious enough to require the student's teacher to leave the class unattended in order to discipline the student, adjudications have been reversed where the evidence shows no more than ordinary misbehavior or rule-breaking; (2) viewing the evidence in the light most favorable to the State in the instant case revealed that respondent and a friend were walking in the hall when they should have been in class; when asked to stop, they instead grinned, giggled, and ran

down the hall; respondent was stopped by the school resource officer after a brief chase down the hall; and a few students and teachers looked out into the hall while the resource officer was escorting respondent to the school office; (3) there was no evidence that the school or classroom instruction was substantially disrupted, that respondent was aggressive or violent, or that respondent used disturbing or vulgar language, but instead respondent and her friend were described several times as giggling or smiling; and (5) although respondent's behavior was an annoyance to the school administrator, it did not rise to the level of criminal activity.

Appeal by Respondent from judgment entered 5 June 2007 by Judge John Covolo in Nash County District Court. Heard in the Court of Appeals 3 April 2008.

Attorney General Roy Cooper, by Assistant Attorney General Susannah P. Holloway, for the State.

Peter Wood, for Respondent-Appellant.

ARROWOOD, Judge.

Respondent, "S.M."[1] appeals from adjudication and disposition as a delinquent juvenile for disorderly conduct in a school, in violation of N.C. Gen. Stat. § 14-288.4(a)(6). We reverse.

At the hearing on this matter, the State's evidence tended to show, in relevant part, the following: Herman Ivory testified that he was the Dean of Students at Rocky Mount High School. On 6 October 2006 Ivory noticed two female students out in the hall during class hours, both wearing red jackets with hoods. When Ivory called out to them, the girls started "laughing and giggling," pulled up the hoods on their jackets, and went "running and laughing" away. Ivory responded by calling Officer T.C. Wilder, the school's resource officer.

Wilder testified that he was in the school office when Ivory called him to report two students roaming in the hall during class. Wilder "figured [he'd] go and try to look for them after [he] finished [handling another juvenile matter]." A few minutes later, the girls walked past the office and Ivory, who had returned to the office, told Wilder that these were the girls he had seen in the hall. Wilder asked the girls

1. To preserve the privacy of the juvenile, we refer to her in this opinion by the initials "S.M."

several times to stop, saying "Hey you two" and "Girls, y'all stop." The girls just "grinned" and "smiled" and then headed down the hall. Wilder ran after them and caught Respondent at the end of the hall after a brief chase of 10-15 seconds. Wilder informed Respondent that she was "under arrest" and took her back to the office. He testified that as he escorted Respondent back to the office, he saw a few teachers and some students in the hall. At the office, Ivory asked her why she had been running in the hall, and Respondent had no answer.

Before the hearing, Respondent subpoenaed six teachers of the seven teachers with classrooms on the hall by the office, where Respondent was escorted by Wilder. The teachers did not honor the subpoenas, but each made a brief written statement to the effect that the teacher did not remember the incident in question. At the hearing, the State stipulated to the contents of these written statements. Respondent's evidence consisted of these statements. After the presentation of evidence, the trial court found Respondent guilty of disorderly conduct in a school, adjudicated her delinquent, and entered a dispositional order. From this disposition and adjudication, Respondent appeals.

Standard of Review

"Where the juvenile moves to dismiss, the trial court must determine 'whether there is substantial evidence (1) of each essential element of the offense charged, . . . and (2) of [juvenile's] being the perpetrator of such offense.' " *In re Heil*, 145 N.C. App. 24, 28, 550 S.E.2d 815, 819 (2001) (quoting *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980)). "In reviewing a motion to dismiss a juvenile petition, the evidence must be considered in the light most favorable to the State, which is entitled to every reasonable inference that may be drawn from the evidence." *In re B.D.N.*, 186 N.C. App. 108, 111-12, 649 S.E.2d 913, 915 (2007) (citing *In re Brown*, 150 N.C. App. 127, 129, 562 S.E.2d 583, 585 (2002)).

The dispositive issue in this case is the sufficiency of the evidence of Respondent's commission of the offense of disorderly conduct in a school.

[1] Preliminarily, we address the State's argument that Respondent waived review of the sufficiency of the evidence against her. At the close of the State's evidence, Respondent moved for dismissal for insufficient evidence, and her motion was denied. Respondent did not offer any witness testimony; her evidence consisted of the written

statements by several teachers. After Respondent introduced these statements, she rested her case and the trial court immediately asked "Would you like to be heard?" Respondent's counsel argued vigorously that the evidence was insufficient to support the charged offense. We conclude this is sufficient to preserve respondent's right to review.

[2] Respondent first argues that the trial court erred by failing to adjudicate her based on proof beyond a reasonable doubt. The adjudication order states that the facts were "proven beyond a reasonable doubt." Respondent nonetheless argues that the trial court erred because, in its response to Respondent's argument for dismissal, the court stated that it was considering the evidence "in the light, you know, most favorable to the State." The State agrees with Respondent that this was error, but argues that the error was corrected by the written order which controls over the trial court's oral statements. In fact, the court did not err by applying this standard.

Pursuant to N.C. Gen. Stat. § 7B-2409 (2007), "[t]he allegations of a petition alleging the juvenile is delinquent shall be proved beyond a reasonable doubt." Moreover, the court "is required to affirmatively state if it finds that the allegations in the petition have been proven beyond a reasonable doubt. N.C. Gen. Stat. § 7B-2411 [(2007)]." *In re C.B.*, 187 N.C. App. 803, 805, 654 S.E.2d 21, 23 (2007). However, as discussed above:

> "In ruling on a motion to dismiss, the trial court must consider all of the evidence in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence."

In re B.N.S., 182 N.C. App. 155, 157, 641 S.E.2d 411, 412 (2007) (quoting *State v. Wood*, 174 N.C. App. 790, 795, 622 S.E.2d 120, 123 (2005)). Thus, although the court ultimately determines the existence of proof beyond a reasonable doubt of a respondent's guilt, in considering a motion to dismiss, the evidence is examined in the light most favorable to the State. This assignment of error is overruled.

[3] We next consider whether there was sufficient evidence of the Respondent's guilt of disorderly conduct. Disorderly conduct in a school is defined by N.C. Gen. Stat. § 14-288.4(a)(6) (2007) as "a public disturbance intentionally caused by any person who . . . [d]isrupts, disturbs or interferes with the teaching of students at any public or private educational institution or engages in conduct which disturbs

the peace, order or discipline at any public or private educational institution or on the grounds adjacent thereto."

In re Eller, 331 N.C. 714, 417 S.E.2d 479 (1992), is a leading case on the kind of behavior that properly may support an adjudication of delinquency based on disorderly conduct in school. In *Eller*, the North Carolina Supreme Court reviewed a decision by this Court that upheld an adjudication of delinquency based on evidence that the juvenile "[made] a move toward another student" while holding a nail in his hand, and repeatedly banged on a radiator, causing "a rattling metallic noise" that distracted the other students. *Id.* at 715-16, 417 S.E.2d at 481. The Court first discussed *State v. Wiggins*, 272 N.C. 147, 154, 158 S.E.2d 37, 42 (1967), in which it interpreted an earlier version of the disorderly conduct statute:

> [W]e stated that the words in the statute "are to be given their plain and ordinary meaning unless the context, or the history of the statute, requires otherwise." Proceeding to interpret the terms of the statute, we stated: "When the words 'interrupt' and 'disturb' are used in conjunction with the word 'school,' they mean to a person of ordinary intelligence a substantial interference with, disruption of and confusion of the operation of the school in its program of instruction and training of students there enrolled."

Eller, 331 N.C. at 717, 417 S.E.2d at 481 (quoting *Wiggins*, 147 N.C. at 154, 158 S.E.2d at 42). "An example of such conduct [substantial interference] is contained in *State v. Midgett*, 8 N.C. App. 230, 174 S.E.2d 124 (1970). In *Midgett*, students locked the secretary to the principal out of her office, barred entry to the doors and windows with filing cabinets and tables and activated the bell system, resulting in the necessary early dismissal of the students from their classes. This court, applying the language in *Wiggins*, *supra*, held that the students had substantially interfered with the operation of school[.]" *In re Grubb*, 103 N.C. App. 452, 454, 405 S.E.2d 797, 798 (1991). Applying *Wiggins* to the facts in *Eller*, the Court held that the State had not produced "substantial evidence that the respondents' behavior constituted a 'substantial interference.' " *Eller*, 331 N.C. at 718, 417 S.E.2d at 482.

There is no 'bright line' test for what constitutes "substantial interference" with a school. However, appellate cases decided since *Eller* have tended to uphold juvenile adjudications for disorderly conduct in school when there is evidence of, *e.g.*, (1) the use of vulgar

language by the student; (2) aggressive or violent behavior by the juvenile; or (3) disruptive behavior serious enough to require the student's teacher to leave her class unattended in order to discipline the student. Thus, in *In re Pineault*, 152 N.C. App. 196, 566 S.E.2d 854 (2002), this Court upheld the adjudication of a juvenile for disorderly conduct in school where there was evidence that:

> [Respondent's teacher] heard respondent state, in a loud, angry voice, "f--- you." Ms. Carlson was required to stop teaching the class and escort respondent to the principal's office. . . . [Respondent] twice said to her, "f--- you, b--ch," evincing a clear disrespect for her authority. . . . [Ms. Carlson] was away from the classroom for more than several minutes. We hold, given the severity and nature of respondent's language, coupled with the fact that Ms. Carlson was required to stop teaching her class for at least several minutes, that respondent's actions substantially interfered with the operation of Ms. Carlson's classroom[.]

Id. at 199, 566 S.E.2d at 857. *See also*, *e.g.*, *In re M.G.*, 156 N.C. App. 414, 415, 576 S.E.2d 398, 399 (2003) (upholding adjudication where "teacher, heard respondent yell 'shut the f---k up' to a group of students" and "escorted Respondent to the school detention center").

On the other hand, adjudications have been reversed where the evidence shows no more than ordinary misbehavior or rule-breaking. For example, in *In re Brown*, the juvenile respondent was reprimanded for talking during a test. When his teacher found him again talking to another student she "became upset" and "reminded respondent that she could give him a zero, to which he replied, 'Well give me a zero.' " Thereafter:

> Respondent headed back to the classroom and slammed the door behind him. . . . Ms. Carbone called respondent back into the hallway. She began to write a 'referral slip' to send respondent to the office. . . . [R]espondent began begging the teacher not to send him to the office . . . crying and . . . [holding] Ms. Carbone's arm in his attempt to block her.

Brown, 150 N.C. App. at 128, 562 S.E.2d at 584. The respondent was adjudicated delinquent based on disorderly conduct in a school. On appeal, this Court held that the evidence was insufficient:

> The evidence in the case *sub judice* shows a student who talked during a test, slammed a door, and begged a teacher in the hallway that he not be sent to the office. . . . [W]hen students act as

> respondents in this case, they are troublesome and a burden in the classroom. These are the trials faced by teachers in today's schools. But if we were to hold that the present actions are of such gravity that they warrant a conviction of disorderly conduct, every child that is sent to the office for momentary lapses in behavior could be convicted under such precedent.

Id. at 131, 562 S.E.2d at 586. Similarly, in *In re Grubb*, the Respondent "was talking to another student in a loud and disruptive voice" and refused to stop talking when asked by her teacher. *Grubb*, 103 N.C. at 452-53, 405 S.E.2d at 797. Instead, Respondent "made a 'smurky' face and shrugged her shoulders." *Id.* "Other students were distracted by the episode and started looking up from their work" when the Respondent would not stop talking in class. *Id.* This Court held this was insufficient to show a substantial disruption of the school:

> The conduct in the case at bar does not approach the conduct in *Midgett*. . . . [R]espondent stopped talking after being asked a second time and the class was only momentarily disrupted. This evidence even in the light most favorable to the State was insufficient to establish a violation of Section 14-288.4(a)(6) and respondent's motion to dismiss should have been granted.

Grubb, 103 N.C. App. 454-55, 405 S.E.2d at 798-99.

The evidence in the present case, viewed in the light most favorable to the State, tended to show that: (1) Respondent and a friend were walking in the hall when they should have been in class; (2) when asked to stop, they instead grinned, giggled, and ran down the hall; (3) Respondent was stopped by the school resource officer after a brief chase down the hall; and (4) a few students and teachers looked out into the hall while the resource officer was escorting Respondent to the school office. There was no evidence that the school or classroom instruction was substantially disrupted, that Respondent was aggressive or violent; or that Respondent used disturbing or vulgar language. Indeed, Respondent and her friend were described several times as "giggling" or "smiling." We conclude that Respondent's behavior, although no doubt an annoyance to the school administrator, does not rise to the level of criminal activity.

In ruling on Respondent's motion to dismiss, the trial court agreed that Respondent's behavior was "borderline." The court appears to have been influenced by generalized social concerns about violence, even though the evidence bore no indicia of violence. The trial court expressed a concern about school violence nationwide,

asking "[H]ow many kids have walked onto school campuses in the last three years in the United States and shot up the campus?" and speculating on what might have happened if Respondent and her friend had "turned out to be some kind of psycho killers that went on that day to kill 15 students at Rocky Mount Senior High School." The trial court's generalized apprehension about school safety in today's world is understandable, given various highly-publicized incidents in the past few years. Fortunately, the instant case involved no violence, but only foolish mischief.

We conclude, based on the relevant precedent and our review of the facts in this case, that the trial court erred by denying Respondent's motion to dismiss and that the trial court's order of adjudication and disposition must be

Reversed.

Judges McCULLOUGH and STEELMAN concur.

COUNTRYWIDE HOME LOANS, INC., Plaintiff v. BANK ONE, N.A., AS TRUSTEE, and PRIORITY TRUSTEE SERVICES OF NC, L.L.C., as Substitute Trustee, Defendants

No. COA07-1137

(Filed 20 May 2008)

1. Mortgages and Deed of Trust— equitable estoppel—payoff statement—latent error

The trial court properly concluded that the doctrine of equitable estoppel applied to an action involving the cancellation of a mortgage from defendant when the property was transferred and a new mortgage was issued from plaintiff. The attorney who conducted the closing knew that the payoff statement did not account for a few weeks of accrued interest, but did not know and had no way of knowing that the payoff amount included a latent error.

2. Mortgages and Deed of Trust— incorrect payoff statement—court-ordered cancellation

The trial court did not err by ordering the cancellation of defendant's deed of trust where an incorrect payoff statement

was issued when the property was sold and a new deed of trust was issued by plaintiff. Plaintiff agreed to loan the purchase money with the expectation that it would have the only lien on the property and will be prejudiced if defendant is allowed to continue to enforce the lien against the property.

Appeal by Defendants from judgment entered 10 April 2007 by Judge Nathaniel J. Poovey in Iredell County Superior Court. Heard in the Court of Appeals 5 March 2008.

Roberson Haworth & Reese, P.L.L.C., by Alan B. Powell and Christopher C. Finan, for Plaintiff-Appellee.

Morris, Schneider, Prior, Johnson & Freedman, L.L.C., by David O'Quinn, for Defendants-Appellants.

STEPHENS, Judge.

Countrywide Home Loans, Inc. ("Countrywide") commenced this action by filing a complaint on 11 February 2005 seeking to quiet title to a parcel of real property and to stay foreclosure proceedings instituted by Bank One, N.A. ("Bank One") and Priority Trustee Services of NC, L.L.C. ("PTS") (collectively, "Defendants") against the property. Defendants answered the complaint twenty-seven days later. The case was tried before a judge, sitting without a jury, at the 19 February 2007 session of Iredell County Superior Court. In a judgment entered 10 April 2007, the trial court ordered Defendants to cancel the deed of trust on which they were foreclosing. Defendants appeal.

When the trial court sits without a jury, as it did in this case, "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). The trial court's conclusions of law are reviewed *de novo*. *Humphries v. City of Jacksonville*, 300 N.C. 186, 265 S.E.2d 189 (1980). In the case at bar, the trial court's judgment included thirty-four findings of fact. Defendants assigned error to only two of those findings, and, thus, the unchallenged findings are presumed to be supported by competent evidence. *Koufman v. Koufman*, 330 N.C. 93, 408 S.E.2d 729 (1991). Additionally, Defendants concede in their brief that one of the findings to which they assigned error is supported by competent evidence. The supported findings establish the following facts:

Michael and Sonia Friedman ("the Friedmans") owned property encumbered by a deed of trust held by Bank One and recorded in the Office of Iredell County's Register of Deeds. The Friedmans defaulted on the note secured by the deed of trust, and Bank One, through its servicer, Homecomings Financial Network, Inc. ("Homecomings"), referred the loan to PTS to commence foreclosure proceedings. PTS engaged the law firm of Morris, Schneider & Prior, LLC ("MS&P"), to assist with the foreclosure.

On or about 6 November 2001, the Friedmans entered into a contract to sell the property to their daughter, Melissa Friedman, who obtained a purchase money loan from Countrywide to purchase the property. Countrywide intended to pay off and satisfy the note secured by Bank One's deed of trust so that Countrywide would have a first-priority lien against the property.

Attorney Robert Forquer ("Mr. Forquer") was engaged to close the loan, and the closing was scheduled for 8 December 2001. On 12 November 2001, an employee of MS&P sent Mr. Forquer a letter which stated that it was "an attempt to collect a debt" owing on the property, *i.e.*, the money due under the note. The letter stated that the amount necessary to pay off the loan in full was $426,314.28 and that this amount "MUST be in [MS&P's] office on or before November 30, 2001[.]" The letter was generated without involvement from Countrywide or Mr. Forquer. The letter indicated that interest in the amount of $7,443.96 would accrue on the outstanding principal balance through 30 November 2001. This figure was "short" $100,000.00 and, thus, so too was the total amount necessary to pay off the loan in full.[1]

A few days before the scheduled closing, Mr. Forquer arranged for attorney Victoria Sprouse ("Ms. Sprouse") to close the loan. Mr. Forquer delivered his closing file, including the letter from MS&P,[2] to Ms. Sprouse on or about 7 December 2001. After reviewing the file, Ms. Sprouse contacted Mr. Forquer in an effort to obtain an updated payoff amount. Mr. Forquer told Ms. Sprouse to obtain an updated amount directly from MS&P. Ms. Sprouse tried to contact MS&P numerous times on 7 December 2001 at both its Atlanta and Raleigh

1. From the evidence in the record on appeal, it is apparent that MS&P generated its letter exclusively from figures included on a payoff statement provided to MS&P from Homecomings. The Homecomings statement contains an obvious mathematical error in the amount of $100,000.00.

2. Nothing in the record suggests that Mr. Forquer or Ms. Sprouse ever had access to the Homecomings statement.

offices. Ms. Sprouse "finally" was able "to speak with someone at MS&P on Friday, December 7, 2001[,] regarding the payoff . . . . The representative from MS&P indicated to Ms. Sprouse that if there was a problem with the payoff amount . . . MS&P would inform her of any such problem on Monday, December 10, 2001[,] prior to disbursement." Ms. Sprouse closed the loan on 8 December 2001.

At the closing, "Mr. Friedman was adamant that the amount shown on [MS&P's letter] was too high, the correct amount being in the $300,000.00 range." Ms. Sprouse left a voicemail message with MS&P on 10 December 2001 in an attempt to obtain both an updated payoff amount and an itemized list of payoff charges. "Upon failing to receive any word from MS&P," Ms. Sprouse disbursed checks to all parties entitled to receive funds from the closing transaction. Ms. Sprouse disbursed more than $100,000.00 to the Friedmans as proceeds from the sale. Ms. Sprouse overnighted a check which stated that it was for "Payoff of First Mortgage" to MS&P in the amount of $431,314.28, five thousand dollars more than the letter's payoff amount. Ms. Sprouse included the extra money in an effort to estimate the amount of interest which would accrue on the loan between 30 November 2001 and the date on which MS&P would receive the funds. With the check, Ms. Sprouse sent MS&P a "Mortgage Payoff Letter" which referenced the loan number, the amount of the check, and the "book and page" of the recorded deed of trust and specifically requested cancellation of Bank One's deed of trust.

MS&P received the check and letter on 11 December 2001 and deposited the check into one of its accounts. The check "cleared the bank on December 13, 2001." The additional $5,000.00 which Ms. Sprouse added to cover accrued interest was "more than sufficient" to account for interest which had accrued between 30 November 2001 and 13 December 2001.[3] MS&P forwarded the funds to Bank One. On 14 December 2001, Countrywide's deed of trust securing its loan to Melissa Friedman was recorded in the Office of the Register of Deeds. Four to six weeks after Ms. Sprouse disbursed all funds, MS&P notified Ms. Sprouse of the error in the payoff letter. Defendants did not cancel the Bank One deed of trust, and Countrywide filed its complaint.

The trial court concluded that, under the doctrines of both equitable estoppel and quasi-estoppel, Defendants were prevented from

3. Based on the payoff statement generated by Homecomings, the additional $5,000.00 was also sufficient to account for interest accruing between 1 December 2001 and 31 December 2001.

further enforcing the Bank One deed of trust. The primary issues presented by this appeal are whether the trial court erred in reaching these conclusions.

"An action [to quiet title] may be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claims[.]" N.C. Gen. Stat. § 41-10 (2001).

> In order to establish a *prima facie* case for removing a cloud on title, a plaintiff must meet two requirements: (1) plaintiff must own the land in controversy, or have some estate or interest in it; and (2) defendant must assert some claim in the land which is adverse to plaintiff's title, estate or interest.

Chicago Title Ins. Co. v. Wetherington, 127 N.C. App. 457, 461, 490 S.E.2d 593, 597 (1997) (citing *Wells v. Clayton*, 236 N.C. 102, 107, 72 S.E.2d 16, 20 (1952)), *disc. review denied*, 347 N.C. 574, 498 S.E.2d 380 (1998).

North Carolina courts have long recognized the doctrine of equitable estoppel. Generally speaking, the doctrine applies

> when any one, by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence *induces* another to believe certain facts exist, and such other rightfully *relies and acts on* such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts.

State Highway Comm'n v. Thornton, 271 N.C. 227, 240, 156 S.E.2d 248, 258 (1967) (quotation marks and citation omitted).

> In such a situation, the party whose words or conduct induced another's detrimental reliance may be estopped to deny the truth of his earlier representations in the interests of fairness to the other party. In applying the doctrine, a court must consider the conduct of both parties to determine whether each has conformed to strict standards of equity with regard to the matter at issue.

Whitacre P'ship v. Biosignia, Inc., 358 N.C. 1, 17, 591 S.E.2d 870, 881 (2004) (quotation marks and citations omitted). As to the strict standards of equity which a court must consider,

> the essential elements of an equitable estoppel as related to the party estopped are: (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is reasonably calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party afterwards attempts to assert; (2) intention or expectation that such conduct shall be acted upon by the other party, or conduct which at least is calculated to induce a reasonably prudent person to believe such conduct was intended or expected to be relied and acted upon; (3) knowledge, actual or constructive, of the real facts. As related to the party claiming the estoppel, they are: (1) lack of knowledge and the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party sought to be estopped; and (3) action based thereon of such a character as to change his position prejudicially.

Peek v. Wachovia Bank & Trust Co., 242 N.C. 1, 11-12, 86 S.E.2d 745, 753 (1955) (quoting *Hawkins v. M & J Fin. Corp.*, 238 N.C. 174, 177-78, 77 S.E.2d 669, 672 (1953) (citations omitted)).[4]

[1] Defendants argue that the trial court erred in concluding that the doctrine of equitable estoppel applied to prevent the further enforcement of the Bank One deed of trust. In support of this argument, Defendants first contend that the trial court erred in concluding "that any actions of Ms. Sprouse in the conduct of the closing transaction [] are not to be imputed to [Countrywide] such that [Countrywide] should be denied any form of equitable relief[.]" Defendants then argue that the equitable estoppel claim "died the minute [Ms.] Sprouse testified that she knew the payoff amount was incorrect." In other words, Defendants argue that Countrywide did not lack knowledge of the truth as to the facts in question. We are unpersuaded.

By virtue of its deed of trust, Countrywide owned an interest in the property. *See Skinner v. Preferred Credit*, 361 N.C. 114, 638 S.E.2d 203 (2006) (discussing trustee's and lender's interests in property encumbered by a deed a trust), *reh'g denied*, 361 N.C. 371, 643 S.E.2d 591 (2007). Similarly, by virtue of Bank One's deed of trust, Defendants asserted a claim in the property adverse to Countrywide's interest. *See* N.C. Gen. Stat. § 47-20 (2001); *Schuman*

4. Although inapplicable to the case at bar, North Carolina's General Statutes were amended in 2005 to provide that "[a] secured creditor that sends a payoff statement containing an understated payoff amount may not deny the accuracy of the payoff amount as against any person that reasonably and detrimentally relies upon the understated payoff amount." N.C. Gen. Stat. § 45-36.8(b) (2005).

v. Roger Baker & Assocs., Inc., 70 N.C. App. 313, 315, 319 S.E.2d 308, 310 (1984) ("[T]he party winning 'the race to the court house' will have priority in title disputes.") (citation omitted). Accordingly, Countrywide established a *prima facie* case for removing a cloud on the property's title.

Assuming without deciding that Ms. Sprouse's knowledge was imputed to Countrywide, we disagree with Defendants' contention that Countrywide's equitable estoppel claim necessarily fails because Ms. Sprouse knew that the payoff amount in the payoff letter was incorrect. Defendants' argument ignores the specific error in the payoff letter of which Ms. Sprouse had knowledge. Ms. Sprouse only knew that the amount of interest shown on the letter did not include interest accruing between 30 November 2001 and the date on which MS&P would receive the funds. It is undisputed that Ms. Sprouse did not know and had no way of knowing that the payoff amount included in the MS&P letter contained a latent $100,000.00 error. Ms. Sprouse's knowledge that the payoff statement did not account for a few weeks of accrued interest does not defeat Countrywide's equitable estoppel claim.

Moreover, we disagree with Defendants' contention that the trial court erred in admitting the testimony of another real estate attorney concerning the reasonableness of Ms. Sprouse's actions in closing the transaction. Ms. Sprouse contacted MS&P both before and after the closing in an effort to verify the accuracy of the payoff amount, and MS&P directly and tacitly acknowledged that the payoff amount was correct. Ms. Sprouse also added $5,000.00 to the payoff letter's payoff amount in an effort to account for accrued interest. An attorney, accepted by the court as an expert in residential real property closings in and around Iredell County, testified that these actions were reasonable. Because "[a]n essential element of [equitable estoppel] is *reasonable* reliance[,]" *Adkins v. Adkins*, 82 N.C. App. 289, 291, 346 S.E.2d 220, 221 (1986) (emphasis added) (citation omitted), this evidence was properly received. Furthermore, we agree with the trial court that Ms. Sprouse's actions were reasonable. As Defendants present no other argument concerning the application of the doctrine of equitable estoppel, we hold that the trial court properly concluded that the doctrine applies to this case.

[2] Next, Defendants argue that the trial court erred in ordering the cancellation of Bank One's deed of trust because the proper remedy in this case is the subordination of Bank One's deed of trust to Countrywide's deed of trust. Again, we disagree. Countrywide agreed

to loan Melissa Friedman money with the expectation that it would have the only lien on her property. This expectation was induced by Defendants' representation that the amount due under the note secured by Bank One's deed of trust was $426,314.28. Countrywide's expectations will not be met if the Bank One deed of trust is subordinated to Countrywide's lien, and Countrywide, therefore, will be prejudiced if Bank One is allowed to continue to enforce the lien against the property. We agree with the trial court that Bank One's deed of trust should be cancelled.

In light of our holding that the trial court properly applied the doctrine of equitable estoppel and ordered the cancellation of Bank One's deed of trust, we need not address Defendants' additional contention that the trial court improperly applied the doctrine of quasi-estoppel. The judgment of the trial court is

AFFIRMED.

Judges McGEE and TYSON concur.

THE LYNNWOOD FOUNDATION, PLAINTIFF v. NORTH CAROLINA DEPARTMENT OF REVENUE, DEFENDANT

No. COA07-945

(Filed 20 May 2008)

1. Taxes— sales and use—refund—charitable organization

Summary judgment was correctly entered for plaintiff in its action seeking a refund of sales and use taxes where defendant contented that plaintiff did not qualify as a charitable organization within the statutory meaning. There are three types of charitable organizations; defendant focuses on the first (relief or aid of a charitable class), but plaintiff falls within the third type of organization (dispensing public good or benevolence).

2. Taxes— sales and use—refund—charitable organization not operating at profit

A plaintiff seeking a refund of sales and use taxes as a charitable corporation was not operating at a profit, as defendant contended, when all of the categories of its operations were examined.

3. Taxes— sales and use—refund—charitable organization—operation of historical landmark

A charitable organization was entitled to a refund of sales and use taxes, despite defendant's contention that plaintiff did not use its historical property for charitable purposes. Plaintiff sought to recover the taxes it paid on products and services used for carrying out its charitable work; moreover, defendant's contention that plaintiff operates a luxury hotel is without merit because the room rates are necessary to support plaintiff's charitable work and are in keeping with the sites's status as an historical landmark.

Appeal by defendant from an order entered 11 May 2007 by Judge Karl Adkins in Mecklenburg County Superior Court. Heard in the Court of Appeals 6 February 2008.

Robinson, Bradshaw & Hinson, P.A., by John R. Wester and Thomas Holderness, for plaintiff-appellee.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Gregory P. Roney, for defendant-appellant.

JACKSON, Judge.

The North Carolina Department of Revenue ("DOR") appeals the denial of its motion for summary judgment and the granting of the motion for summary judgment filed by The Lynnwood Foundation ("plaintiff"). For the reasons stated below, we affirm.

Plaintiff was incorporated in 1996 as a charitable corporation within the meaning of North Carolina General Statutes, section 55A-1-40(4). Its stated purposes were to preserve and restore the White Oaks Mansion—also known as Duke Mansion—and its special historic and architectural features, and to promote an appreciation for such historic and architectural features.

The corporation was to operate exclusively for charitable and educational purposes. It was not formed for pecuniary profit or financial gain. No part of its earnings could be distributed to or inure to the benefit of any of its officers, directors, or any private person, except as reasonable compensation for services rendered.

In 1997, DOR determined that plaintiff was entitled to a refund of a portion of sales and use taxes paid. In 1998, as part of its fundraising efforts, plaintiff began operating the mansion as a conference and

lodging facility, operated by Benchmark Hospitality. Benchmark Hospitality then paid the sales and use taxes associated with the operation of the mansion for conference and lodging purposes. In 2001, plaintiff terminated its contract with Benchmark Hospitality and assumed direct management of conferences and lodging. At that time, plaintiff began paying sales and use taxes to DOR. It also began receiving refunds of a portion of the sales and use taxes it paid, due to its status as a charitable organization. Although DOR reexamined plaintiff's status in 2002, it continued to refund taxes for 2002, 2003, and the first half of 2004.

In addition to educating the public about the history of Duke Mansion, plaintiff also operates the Lee Institute, the mission of which is to "engage people, organizations, and communities in well-designed, informed and collaborative processes through education, facilitation, and consultation." The Lee Institute (1) provides training in collaborative leadership for leadership teams or entire organizations, (2) facilitates effective collaborative work among constituencies when facing critical issues, and (3) supplies up-to-date information on current regional data and concerns. Additionally, in cooperation with the North Carolina Center for the Advancement of Teaching, it hosts a week-long event at the mansion where the Wachovia Teacher of the Year finalists learn about teacher leadership. It also sponsors the Lee Lecture Series, which presents topics of regional interest twice each year.

However, the flagship program of the Lee Institute is The Charlotte Region Chapter of the American Leadership Forum.[1] Through this program, twenty-five leaders are selected from every sector of the region each year to participate in a year-long intensive leadership development program consisting of monthly seminars and intensive dialogue on collaborative leadership, consensus, conflict management, understanding differences, ethics, and leadership systems. Participants also engage in a five-day wilderness experience, run by North Carolina Outward Bound.

Plaintiff did not change its operations between 2002 and 2004 when DOR determined that plaintiff no longer was entitled to sales and use tax refunds because it was not a charitable organization but a "principally civic" one, not entitled to such refunds. On or about 3

1. The American Leadership Forum is a national non-profit organization dedicated to joining and strengthening established leaders in order to serve the public good. It enhances leadership by building on the strengths of diversity and by promoting collaborative problem-solving within and among communities.

August 2006, plaintiff filed an action seeking to recover a refund of a portion of the sales and use taxes it paid for the second half of 2004 and all of 2005, totaling $14,731.83.

On 8 March 2007, plaintiff filed a motion for summary judgment in the action. DOR filed its motion for summary judgment on 13 March 2007. The cross-motions were heard on 5 April 2007. By order entered 11 May 2007, the trial court denied DOR's motion and granted plaintiff's motion. It is from this order that DOR appeals.

This Court reviews an order allowing summary judgment *de novo*, using the same standard as the trial court. *See Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2007). In deciding a motion for summary judgment, a trial court must consider the evidence in the light most favorable to the non-moving party. *See Summey*, 357 N.C. at 496, 586 S.E.2d at 249. If there is any evidence of a genuine issue of material fact, a motion for summary judgment should be denied. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 471, 597 S.E.2d 674, 694 (2004). In reviewing the evidence at summary judgment, "[a]ll inferences of fact from the proofs offered at the hearing must be drawn against the movant and in favor of the party opposing the motion." *Boudreau v. Baughman*, 322 N.C. 331, 343, 368 S.E.2d 849, 858 (1988) (citing *Page v. Sloan*, 281 N.C. 697, 190 S.E.2d 189 (1972)).

[1] The crux of DOR's argument is that plaintiff does not qualify as a charitable organization within the meaning of North Carolina General Statutes, section 105-164.14, and therefore is not entitled to a refund of sales and use taxes paid. We disagree.

North Carolina General Statutes, section 105-164.14(b) provides, *inter alia*, that

> A nonprofit entity included in the following list is allowed a semi-annual refund of sales and use taxes paid by it under this Article on direct purchases of tangible personal property and services, other than electricity, telecommunications service, and ancillary service, for use in carrying on the work of the nonprofit entity:
>
> . . . .

(2) Educational institutions not operated for profit.

(3) Churches, orphanages, and other charitable or religious institutions and organizations not operated for profit.

N.C. Gen. Stat. § 105-164.14(b) (2007). Thus, plaintiff would be entitled to a refund of sales and use taxes it paid if (1) it was a charitable organization; (2) the purchases were of property used in "carrying on the work" of the organization; and (3) it is not operated for a profit. DOR argues that plaintiff does not qualify for a refund because it (1) does not aid a charitable class, (2) does not operate for public use, (3) operates for a profit, and (4) does not use the taxed property for charitable purposes.

Both parties rely on this Court's decision in *Southminster, Inc. v. Justus*, 119 N.C. App. 669, 459 S.E.2d 793 (1995) to define a charitable organization for purposes of applying the statute at issue.

> "Generally defined, a charitable institution is an organization or other entity engaged in the relief or aid to a certain class of persons, a corporate body established for public use, or a private institution created and maintained for the purpose of dispensing some public good or benevolence to those who require it."

Id. at 674, 459 S.E.2d at 796 (quoting *Darsie v. Duke University*, 48 N.C. App. 20, 24, 268 S.E.2d 554, 556, *disc. rev. denied*, 301 N.C. 400, 273 S.E.2d 445 (1980)). Pursuant to this definition, there are three types of charitable organizations: (1) those that engage in relief or aid to a charitable class; (2) those established for public use; and (3) those created and maintained for the purpose of dispensing public good or benevolence.

DOR focuses primarily on the first type of charitable organization, to the exclusion of the second and third categories. Plaintiff argues that it falls within the second or third type of charitable organization. We agree.

As described above, plaintiff was formed in order to restore and preserve Duke Mansion as an historic site. The mansion is on the National Register of Historic Places.[2] The grounds and common

2. "The National Register of Historic Places is the Nation's official list of cultural resources worthy of preservation. Authorized under the National Historic Preservation Act of 1966, the National Register is part of a national program to coordinate and support public and private efforts to identify, evaluate, and protect our historic and archeological resources. Properties listed in the Register include districts, sites, buildings, structures, and objects that are significant in American history, architecture,

rooms have been restored and are preserved for public viewing, at no charge. In addition, plaintiff hosts special events at the mansion which are open to the public, including an annual Easter egg hunt, Halloween trick-or-treating, and the annual meetings of the Myers Park Homeowner's Association.

> The preservation of historically significant residential and commercial districts protects and promotes the general welfare in distinct yet intricately related ways. It provides a visual, educational medium by which an understanding of our country's historic and cultural heritage may be imparted to present and future generations. That understanding provides in turn a unique and valuable perspective on the social, cultural, and economic mores of past generations of Americans, which remain operative to varying degrees today.

A-S-P Associates v. City of Raleigh, 298 N.C. 207, 216, 258 S.E.2d 444, 450 (1979) (citation omitted).

> [S]tructures with special historic, cultural, or architectural significance enhance the quality of life for all. Not only do these buildings and their workmanship represent the lessons of the past and embody precious features of our heritage, they serve as examples of quality for today. Historic conservation is but one aspect of the much larger problem, basically an environmental one, of enhancing—or perhaps developing for the first time—the quality of life for people.

Penn Central Transp. Co. v. New York City, 438 U.S. 104, 108, 57 L. Ed. 2d 631, 638-39 (1978) (citations and quotation marks omitted). DOR conceded in a 5 November 2004 internal communication that preservation of historic sites open to the public has been determined to be a "charitable" activity. Therefore, plaintiff falls within the third type of charitable organization and DOR's arguments on this point are without merit.

[2] In support of its argument that plaintiff operates for a profit, DOR points to income and expense reports obtained through discovery. However, DOR focuses only on the figures related to three categories of plaintiff's entire operations: (1) rooms, (2) food and beverage, and (3) conference services. In these three categories—directly associ-

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archeology, engineering, and culture. The National Register is administered by the National Park Service, which is part of the U.S. Department of the Interior." http://www.nps.gov/history/nr/about.htm.

ated with plaintiff's conference and lodging activities—"income" exceeded "expenses." DOR's focus on only three categories of income and expenses is self-serving. In addition to engaging in conference and lodging activities, plaintiff operates the Lee Institute, raises funds for its efforts, and expends significant amounts of money to maintain and preserve the property. An examination of all the categories, including the Lee Institute, donations, and preservation, indicates that plaintiff's overall "expenses" exceeded its overall "income." Therefore, DOR's argument on this point is without merit.

[3] Finally, DOR argues that plaintiff is not entitled to a refund because it does not use the taxed property for charitable purposes. For the eighteen months from July 2004 through December 2005, plaintiff paid a total of $239,069.03 in sales and use taxes to DOR. Plaintiff seeks to recover only $14,731.83. During the same period, plaintiff expended over $2 million towards preserving the property.

The $14,731.83 plaintiff seeks to recover was sales and use taxes it paid with respect to products and services used to preserve the mansion and operate the Lee Institute, such as office supplies, maintenance and upkeep of the mansion, and equipment rentals and supplies for the Lee Institute. Plaintiff does not seek to recover refunds on items and services provided to overnight guests such as maid service, toiletries, and breakfast. Because plaintiff seeks to recover only the sales and use taxes it paid on items that it used in carrying out its charitable work—preserving Duke Mansion and operating the Lee Institute, DOR's argument is without merit.

We note also that DOR's contention that plaintiff operates a "luxury hotel" is without merit. Although plaintiff's room rates are $169-249 per night, and the Duke Mansion has earned the AAA four-diamond award, the property is marketed as a bed and breakfast, with twenty unique rooms. The room rates are necessary to support plaintiff's charitable work and in keeping with the site's status as an historic landmark. The award evidences plaintiff's efforts in restoring the property and making overnight guests comfortable throughout their stay.

Plaintiff was entitled to judgment as a matter of law because we find there is no genuine issue of material fact as to whether (1) plaintiff is a charitable organization; (2) plaintiff does not operate for a profit; and (3) plaintiff used the purchases for "carrying on the work" of its charitable programs. Therefore, the trial court's granting of summary judgment in plaintiff's favor was without error.

Affirmed.

Judges HUNTER and BRYANT concur.

STATE OF NORTH CAROLINA v. JESSE LEE HENSLEY

No. COA07-770

(Filed 20 May 2008)

Alcoholic Beverages— possession of malt beverage by person less than twenty-one years of age—motion to dismiss—sufficiency of evidence

The trial court erred by denying defendant's motion to dismiss the charge of possession of a malt beverage by a person less than twenty-one years of age under N.C.G.S. § 18B-302(b)(1), and the judgment is reversed, because: (1) while the State presented substantial evidence that defendant possessed the beer bottles and wine discovered in his vehicle, the State presented no evidence that there was even any liquid remaining in the beer bottles, nor any residue of a liquid, and not even the type of beer indicated by the label, which could give rise to an inference that the type of beverage in the bottle fits the legal definition of a "malt beverage;" (2) the deputy testified that he threw away the beer bottles rather than preserve the bottles as evidence; (3) the State presented no evidence that the wine discovered in defendant's vehicle came under the purview of the definition of "malt beverage" as defined in N.C.G.S. § 18B-101(9), and defendant was not charged with possession of unfortified wine; (4) although the facts admittedly demonstrated that defendant had consumed some type of alcoholic beverage, consumption and possession are two different matters; and (5) defendant was not tried for consumption of a malt beverage.

Appeal by defendant from judgment entered 30 January 2007 by Judge J. Marlene Hyatt in Yancey County Superior Court. Heard in the Court of Appeals 12 December 2007.

Attorney General Roy Cooper, by Assistant Attorney General Robert D. Croom, for the State.

Kathleen A. Widelski, for defendant-appellant.

CALABRIA, Judge.

Jesse Lee Hensley ("defendant") appeals from a judgment entered upon a jury verdict finding him guilty of possession of a malt beverage by a person less than twenty-one years of age. We reverse.

The State presented the following pertinent evidence: On 7 January 2006, Yancey County Deputy Sheriff Nathan Ball ("Deputy Ball") was on routine patrol at approximately 1:30 a.m on Westside Road. A 1999 Oldsmobile ("the Oldsmobile" or "the vehicle") pulled out in front of his vehicle and after traveling approximately two hundred yards, the Oldsmobile turned right onto Abby Road, a private road. Since Deputy Ball knew approximately four of the residents on Abby Road and was concerned that defendant did not reside on the private road, Deputy Ball checked defendant's license plate and discovered the vehicle was registered to defendant.

After waiting approximately five minutes, Deputy Ball drove onto Abby Road. When he was nearly at the end of the private road, he observed the Oldsmobile, traveling between five and ten miles per hour, pass in front of him and turn. It appeared that defendant was trying to evade him, so Deputy Ball decided to follow defendant. The lights from Deputy Ball's patrol car illuminated the Oldsmobile. With the aid of the lights, Deputy Ball could see the driver of the Oldsmobile and identified the driver as the defendant. After the Oldsmobile passed Deputy Ball's patrol car, Deputy Ball turned his patrol car around and continued following the defendant. When Deputy Ball turned on Westside Road, he observed defendant traveling at a high rate of speed inside Wheeler's Trailer Park ("Wheeler's").

Deputy Ball turned into Wheeler's and discovered the Oldsmobile parked beside a vacant manufactured home. When Deputy Ball looked inside the vehicle, defendant was not in the Oldsmobile, but he discovered open beer bottles and "some type of wine." Another vehicle was located near the Oldsmobile that was occupied by several individuals. One of the occupants was David Stansberry ("Mr. Stansberry"). After speaking with the occupants, Deputy Ball walked to Mr. Stansberry's home.

Deputy Ball knocked on the Stansberrys' door and Heather Stansberry ("Heather"), defendant's cousin, answered. At that time, Heather lived with her parents. Deputy Ball asked Heather if he could enter the residence and Heather refused because she did not have her parents' consent. Deputy Ball then called for additional officers to assist him at the Stansberry residence. After the additional officers arrived, Heather and her parents allowed the officers to enter their residence.

Upon entering the residence, Deputy Ball discovered defendant lying on the couch in the living room. Defendant appeared to be asleep. Defendant stood up when Deputy Ball spoke to him and Deputy Ball noticed defendant's red glassy eyes and detected an odor of alcohol on him. Defendant told Deputy Ball that he was twenty years old. Based on his observations of defendant, Deputy Ball formed an opinion that defendant was appreciably impaired from alcohol, and placed defendant under arrest for driving while impaired. Deputy Ball also issued defendant a citation for possession or consumption of a malt beverage by a person less than twenty-one years of age pursuant to N.C. Gen. Stat. § 18B-302 (2005). After defendant was arrested, a chemical analysis of a sample of his breath using an Intoxilyzer 5000 showed that he had an alcohol concentration of .11.

On 18 May 2006, defendant pled not guilty to both offenses in Yancey County District Court and was found guilty as charged. Defendant appealed to Superior Court. At trial, defendant presented the following evidence: Defendant testified, *inter alia*, there were five sets of Oldsmobile keys and that the vehicle was a "community car" for his family. On the day he was arrested, he admitted that he drank a little bit of wine earlier in the day, then fell asleep on the Stansberrys' couch at approximately 10:45 p.m. He awoke around 1:00 a.m. when Deputy Ball appeared in the living room of the Stansberrys' residence. He claimed he did not operate the Oldsmobile on Westside Road or Abby Road that evening.

On 30 January 2007, in Yancey County Superior Court, the jury found defendant not guilty of driving while impaired, but returned a verdict finding defendant guilty of possession of a malt beverage while being less than twenty-one years of age. Judge J. Marlene Hyatt ("Judge Hyatt") sentenced defendant to a term of forty-five days in the North Carolina Department of Correction, suspended defendant's sentence and placed defendant on supervised probation for a period of twelve months. Defendant appeals.

On appeal, defendant argues the trial court erred in (I) denying defendant's motion to dismiss; (II) instructing the jury regarding the charge of possession of a malt beverage by a person less than twenty-one years of age; (III) failing to grant defendant's motion to suppress; and (IV) admitting a portion of Deputy Ball's testimony in violation of the hearsay rule under the North Carolina Rules of Evidence.

I. Motion to Dismiss

We first address defendant's contention that the trial court erred in denying his motion to dismiss the charge for possession of a malt beverage by a person less than twenty-one years of age. Our standard of review on a motion to dismiss for insufficiency of the evidence is "whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002) (quotation omitted). "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). All evidence must "be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal[.]" *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980). If the evidence "is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator, the motion to dismiss must be allowed." *State v. Malloy*, 309 N.C. 176, 179, 305 S.E.2d 718, 720 (1983).

Pursuant to N.C. Gen. Stat. § 18B-302(b)(1), it is unlawful for "[a] person less than 21 years old to purchase, to attempt to purchase, or to possess malt beverages or unfortified wine[.]" Therefore, for the State to survive a motion to dismiss regarding the charge for possession of a malt beverage by a person less than twenty-one years of age, the State must prove the following elements: (1) that defendant either purchased or possessed a malt beverage and (2) that defendant was under the age of twenty-one at the time of possession. Although the citation issued to defendant apparently included a charge of consumption of a malt beverage by a person less than twenty-one years of age pursuant to N.C. Gen. Stat. § 18B-302(b)(3), the State did not pursue this issue at trial. Only the charge of possession was submitted to the jury. In addition, the citation stated that defendant was

charged only with possession of a malt beverage. Neither wine nor unfortified wine were included in the citation.

In the instant case, Deputy Ball testified regarding defendant's age as follows:

> Q: [W]ere you able to determine [defendant's] date of birth?
>
> A: Yes, sir.
>
> Q: What was his date of birth?
>
> A: His date of birth is 2-26 of 1985.
>
> Q: So on January 7th of 2006 he would have been twenty years old?
>
> A: Yes, sir, twenty years of age.

Therefore, there is no dispute the evidence revealed that on the date of the incident, defendant was under the age of twenty-one. There also is no dispute that there is no evidence regarding defendant's purchase of a malt beverage. As such, the State must prove defendant possessed a malt beverage.

The State must present evidence that defendant had either actual or constructive possession of a malt beverage. *See State v. Weldon*, 314 N.C. 401, 403, 333 S.E.2d 701, 702 (1985). "Actual possession requires that a party have physical or personal custody of the item." *State v. Alston*, 131 N.C. App. 514, 519, 508 S.E.2d 315, 318 (1998) (citation omitted). However, "in a prosecution for possession of contraband materials, the prosecution is not required to prove actual physical possession of the materials. Proof of constructive possession is sufficient and that possession need not always be exclusive." *State v. Perry*, 316 N.C. 87, 96, 340 S.E.2d 450, 456 (1986) (citations omitted). Under a theory of constructive possession, an accused "has possession of the contraband material within the meaning of the law when he has both the power and intent to control its disposition or use." *State v. Brown*, 310 N.C. 563, 569, 313 S.E.2d 585, 589 (1984) (citation and quotation omitted).

In the case *sub judice*, Deputy Ball discovered open beer bottles and "some type of wine" in the Oldsmobile he witnessed defendant driving. In addition, Deputy Ball testified that when he observed defendant driving the vehicle, defendant was the only person inside the vehicle. Defendant testified that the vehicle he drove on the night of the incident was his vehicle. Thus, we conclude the

State presented substantial evidence to prove defendant possessed both the beer bottles and the wine found in his vehicle. However, while the State presented substantial evidence that defendant possessed the beer bottles and wine discovered in his vehicle, we now determine whether the State presented substantial evidence to prove whether the bottles or the wine defendant possessed contained a malt beverage or could be considered a malt beverage.

On the date of the incident, under N.C. Gen. Stat. § 18B-101 (9), a "malt beverage" was defined as "beer, lager, malt liquor, ale, porter, and any other brewed or fermented beverage containing at least one-half of one percent (0.5%), and not more than fifteen percent (15%), alcohol by volume." N.C. Gen. Stat. § 18B-101(9) (2006).[1]

At trial, Deputy Ball testified for the State as to the type of open container he found in defendant's vehicle:

> Q: What type of open containers do you recall seeing inside the vehicle?
>
> A: There were beer bottles and some type of wine.

The State presented no evidence that there was even any liquid remaining in the beer bottles, nor any residue of a liquid, and not even the type of beer indicated by the label, which could give rise to an inference that the type of beverage in the bottle fits the legal definition of a "malt beverage." Furthermore, Deputy Ball testified that he threw away the beer bottles rather than preserve the bottles as evidence. In addition, the State presented no evidence that the wine discovered in defendant's vehicle came under the purview of the definition of "malt beverage" as defined in N.C. Gen. Stat. § 18B-101(9), and defendant was not charged with possession of unfortified wine.

Although the State presented substantial evidence that defendant possessed the beer bottles and wine discovered in his vehicle, the State must also present substantial evidence from which the jury could find that the beverages defendant possessed, or constructively possessed, were in fact "malt beverages." The evidence which supports the State's case, aside from the mere existence of "beer bottles," was Deputy Ball's observations, defendant's admission, and his blood

1. N.C. Gen. Stat. § 18B-101(9) subsequently was amended in 2006. *See* Act of 27 August 2006, ch. 264, sec. 95, 2006 N.C. Sess. Laws 1324. The North Carolina General Assembly inserted "except unfortified or fortified wine as defined by this Chapter," in the definition of a "malt beverage." However, since the date of the incident occurred on 7 January 2006, this addition to the definition of "malt beverage" is not applicable to this case.

alcohol concentration. Deputy Ball noticed defendant had "red, glassy eyes," and he detected an odor of alcohol. In addition, defendant admitted to Deputy Ball that he drank a half bottle of red wine earlier in the evening, and defendant's blood alcohol concentration level was .11. However, none of these facts demonstrate one of the three necessary elements of the charge against defendant, that defendant "had in his possession a malt beverage," since wine does not meet the definition of a "malt beverage." These facts admittedly demonstrate that defendant had consumed some type of alcoholic beverage, but consumption and possession are two different matters.

Although N.C. Gen. Stat. Chapter 18B, Article 1 does not define the word "consume" or "consumption" in relation to alcoholic beverages, "it is presumed that the Legislature intended the words of the statute to be given the meaning which they had in ordinary speech at the time the statute was enacted." *Transportation Service v. County of Robeson*, 283 N.C. 494, 500, 196 S.E.2d 770, 774 (1973). "Consume" is defined as "to eat or drink . . . ." Merriam-Webster's Collegiate Dictionary 268 (11th ed. 2003). Certainly, the common meaning of "consumption" as it relates to a beverage in the context of N.C. Gen. Stat. § 18B-302 is to drink the beverage. However, defendant was not tried for consumption of a malt beverage; he was tried only for possession of a malt beverage.

We conclude the State did not meet its burden of proving substantial evidence existed for all three elements of the offense charged. *Scott*, 356 N.C. at 595, 573 S.E.2d at 868. Accordingly, the trial court erred by not granting defendant's motion to dismiss. We therefore reverse the judgment. In light of our holding, we need not address defendant's remaining assignments of error.

Reversed.

Judges HUNTER and STROUD concur.

HINSON v. JARVIS

[190 N.C. App. 607 (2008)]

ROBIN HINSON, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF BILLY DOUGLAS HINSON, JR. AND AS GUARDIAN AD LITEM FOR MINORS, TRAVIS WAYNE HINSON AND TRISTIN CRAIG HINSON, PLAINTIFF v. RANDY JARVIS AND MANSFIELD JARVIS, CO-EXECUTORS OF THE ESTATE OF JOSEPH MANSFIELD JARVIS AND LINNIE PAULINE JARVIS, DEFENDANTS

No. COA07-1142

(Filed 20 May 2008)

1. Motor Vehicles— automobile accident—absence of negligence by driver's wife

The trial court did not err by granting defendant wife's motion for summary judgment on the theory of negligence arising out of an automobile accident even though plaintiffs allege defendant breached her duty of care to plaintiffs by knowingly riding in a vehicle driven by her husband with knowledge that he had suffered from seizures because: (1) plaintiffs did not make any allegations or present any evidence that defendant was acting in a negligent fashion such that she could be a proximate cause of the accident; (2) assuming that decedent husband suffered a seizure moments before the accident, there was no evidence that defendant in any way brought on that seizure; (3) even if the husband did not suffer a seizure but caused the accident as a result of ordinary negligence, plaintiffs presented no evidence that defendant in any way contributed to that negligence by interfering with his ability to drive; and (4) defendant is not liable strictly by virtue of her marriage to the driver as no married person shall be liable for damages accruing from any tort committed by his or her spouse. N.C.G.S. § 52-12.

2. Motor Vehicles— driving automobile without driver's license—aiding and abetting—insufficient evidence

In an action to recover for a death and injuries suffered by the occupants of a vehicle struck by an automobile driven by defendant's husband in which defendant was a passenger, the trial court did not err by granting summary judgment for defendant on the issue of defendant's negligence on the theory that she aided and abetted her husband in operating the automobile because she knew that he was driving after his license had expired in violation of N.C.G.S. § 20-7 since (1) defendant did not "incite" her husband to drive, and only the husband was in violation of the statute; and (2) this was not a case where defendant was aiding her husband's negligence by interfering with his abil-

ity to drive so that the exact cause of the accident could not be known, and liability under the Restatement of Torts § 876 will not be expanded to a third person whose conduct did not fall below an ordinary standard of care or to a case not involving an issue as to which person was the cause of the alleged harm.

3. Motor Vehicles— joint enterprise—riding to dinner together—insufficient evidence of control by passenger

Defendant automobile passenger and her driver-husband were not engaged in a joint enterprise at the time of a collision so that the negligence of the driver would be imputed to the passenger, even though they were riding in the automobile together to go to dinner, where the automobile was owned solely by the husband; the passenger was not responsible for the automobile's maintenance, did not own a vehicle, and never drove the automobile or any other vehicle; and there was no evidence that the passenger had any control over the automobile.

Appeal by plaintiff from an order entered 24 January 2006 by Judge Michael E. Helms in Wilkes County Superior Court. Heard in the Court of Appeals 5 March 2008.

Law Offices of Timothy D. Welborn, P.A., by Timothy D. Welborn and John R. Smerznak, Jr., for plaintiff-appellant.

Bennett & Guthrie, P.L.L.C., by Rodney A. Guthrie and Roberta B. King; Joines & Greene, P.L.L.C., by Timothy B. Joines, for defendant-appellee Linnie Pauline Jarvis.

HUNTER, Judge.

Robin Hinson filed a complaint as administratrix of the estate of Billy Douglas Hinson, Jr., and as guardian ad litem for minors Wayne Hinson and Tristin Craig Hinson ("plaintiffs") against Linnie Pauline Jarvis ("defendant") for negligence, gross negligence, negligent entrustment, and negligence pursuant to the Family Purpose Doctrine.[1] Plaintiffs now appeal the trial court's grant of summary judgment in favor of defendant. After careful consideration, we affirm the ruling of the trial court.

1. Plaintiffs also filed a claim against Randy Jarvis and Mansfield Jarvis as co-executors of the estate of Joseph Mansfield Jarvis ("Mr. Jarvis"), for negligence, gross negligence, and negligent infliction of emotional distress. A consent judgment was entered on 11 June 2007 settling all issues to be tried between those parties.

This cause of action arose on 31 March 2003 when plaintiffs, who were in a vehicle together waiting at a stoplight in Wilkesboro, North Carolina, were struck head-on by a vehicle defendant's husband, Mr. Jarvis, was operating. Defendant, riding with Mr. Jarvis at the time of the collision, testified that Mr. Jarvis may have had a seizure moments before the impact. Billy Hinson was killed in the collision, and Robin and Tristin Hinson were seriously injured. Mr. Jarvis also died as a result of the accident.

It is undisputed that Mr. Jarvis had suffered seizures in the past and that his driver's license had not been renewed upon its last expiration date. Defendant testified that she was not comfortable with her husband driving and had admonished him not to do so. In spite of her concerns, she would still travel with her husband while he drove from time to time, including on the day in which the accident occurred. Mr. Jarvis's vehicle, the one involved in the accident, was owned exclusively by Mr. Jarvis. The remainder of the relevant facts and allegations are included in the discussion section of this opinion.

Plaintiffs present the following issue for this Court's review: Whether the trial court erred in granting summary judgment in favor of defendant on all negligence claims brought against her. "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) (quoting *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003)); N.C. Gen. Stat. § 1A-1, Rule 56(c) (2007).

I.

Plaintiffs argue that the trial court erred in granting summary judgment in favor of defendant on their various claims of negligence. We address each claim in turn.

A.

[1] Plaintiffs' first argument is that the trial court erred in granting summary judgment on the theory of negligence. We disagree.

" 'Actionable negligence in the law of torts is a breach of some duty imposed by law or a want of due care—commensurate care under the circumstances—which proximately results in injury to another.' " *Bowen v. Mewborn*, 218 N.C. 423, 427, 11 S.E.2d 372, 374-75 (1940) (citation omitted). With this well-settled rule in mind, we review plaintiffs' alleged causes of action.

Plaintiffs allege that defendant, by knowingly riding in a vehicle with her husband with knowledge that he had suffered from seizures, breached her duty of due care to plaintiffs. Plaintiffs, however, have not made any allegations or presented any evidence that defendant was acting in a negligent fashion such that she could be a proximate cause of the accident. In support of this argument, plaintiffs only cite cases pertaining to a situation in which a third party provides alcohol to an individual before that individual operates a motor vehicle. *See*, *e.g.*, *Smith v. Winn-Dixie Charlotte, Inc.*, 142 N.C. App. 255, 542 S.E.2d 288 (2001); *Estate of Mullis v. Monroe Oil Co.*, 349 N.C. 196, 505 S.E.2d 131 (1998). Assuming that Mr. Jarvis suffered a seizure moments before the accident, there is no evidence that defendant in any way brought on that seizure. Moreover, even if Mr. Jarvis did not suffer a seizure but caused the accident as a result of ordinary negligence, plaintiffs have presented no evidence that defendant in any way contributed to that negligence by interfering with his ability to drive. Accordingly, we find the cases cited by plaintiffs in which a third party provides alcohol to a driver not applicable to the case at bar. As to any negligence committed on behalf of defendant's husband, she is not liable strictly by virtue of their marriage as "[n]o married person shall be liable for damages accruing from any tort committed by his or her spouse[.]" N.C. Gen. Stat. § 52-12 (2007). Plaintiffs' arguments to the contrary are therefore rejected.

B.

[2] Plaintiffs next argue that the trial court erred in granting summary judgment on the issue of whether defendant was negligent on the theory that she aided and abetted Mr. Jarvis in operating the vehicle. We disagree.

In plaintiffs' complaint, they alleged that defendant was negligent for aiding and abetting Mr. Jarvis in violating N.C. Gen. Stat. §§ 20-7, 20-28, and 20-35 (2007). Section 20-7 requires those driving on the road to be licensed, and section 20-35 sets out the punishments and defenses available for such a violation. Section 20-28, on the other hand, makes it a misdemeanor to drive with a revoked license.

Defendant counters that none of these sections relate to plaintiffs' current argument that defendant aided and abetted defendant in driving negligently. Thus, defendant argues, plaintiffs are asserting this argument to this Court for the first time contrary to the mandates of N.C.R. App. P. 10(b)(1). Although defendant is technically correct, a violation of N.C. Gen. Stat. § 20-7 has been held to be negligent *per*

se so long as the negligence was the proximate cause, or a proximate cause, of the injury; thus, plaintiffs have properly presented this issue for review. *Hoke v. Greyhound Corp.*, 226 N.C. 692, 698, 40 S.E.2d 345, 349 (1946).

In an effort to establish "aiding and abetting" in the context of a tort cause of action, plaintiffs rely on section 876 of the Restatement of Torts. Section 876, titled "Persons Acting in Concert," contains the following language:

> For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he
>
> (a) does a tortious act in concert with the other or pursuant to a common design with him, or
>
> (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or
>
> (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

Restatement (Second) of Torts § 876 (1979).

The Restatement of Torts, however, is not the law of North Carolina unless a section has specifically been adopted. *Cassell v. Collins*, 344 N.C. 160, 163, 472 S.E.2d 770, 772 (1996), *reversed on other grounds by Nelson v. Freeland*, 349 N.C. 615, 507 S.E.2d 882 (1998). This Court has stated that section 876 of the Restatement of Torts is adopted "as it is applied to the negligence of joint tortfeasors." *Stetser v. TAP Pharm. Prods., Inc.*, 165 N.C. App. 1, 20, 598 S.E.2d 570, 583 (2004) (citing *Boykin v. Bennett*, 253 N.C. 725, 118 S.E.2d 12 (1961) (holding all defendants liable for death of passenger as a result of negligence in racing automobiles upon a public highway after utilizing law from Connecticut which had cited section 876)); *McMillan v. Mahoney*, 99 N.C. App. 448, 393 S.E.2d 298 (1990) (applying section 876 where child was injured by a negligent act of one defendant but it was impossible to determine which defendant inflicted the injury).

This Court has cited the section three times but has never explicitly adopted it. Our Supreme Court has cited Connecticut law, which quoted an older but substantially similar version of section 876, but

has also not expressly adopted Restatement (Second) of Torts § 876. Upon review of those cases which have utilized section 876, we find them readily distinguishable from the facts of the instant case. We address the relevant cases in turn.[2]

In *Boykin*, two individuals were racing on a public roadway in separate vehicles in violation of the racing statute, N.C. Gen. Stat. § 20-141.3(a) and (b). *Boykin*, 253 N.C. at 731, 118 S.E.2d at 14. As a result of the race, plaintiff, who was a passenger in one of the vehicles, was killed after that car flipped approximately five times and threw him from the vehicle. *Id.* at 726, 118 S.E.2d at 13. The plaintiff's estate thereafter brought negligence claims against the drivers of both vehicles. As to the issue of liability of the driver of the vehicle in which the plaintiff was not a passenger, the Court stated that

> " 'a person is liable if he * * * (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself.' Restatement, 4 Torts, § 876. 'If the encouragement or assistance is a substantial factor in causing the resulting tort, the one giving it is himself a tort-feasor and is responsible for the consequences of the other's act.' *Id.*, comment on clause (b)."

Id. at 731, 118 S.E.2d at 16 (quoting *Carney v. De Wees*, 70 A.2d 142, 145-46 (Conn. 1949)).

In finding that the defendant was liable, the Court held that both were in violation of a negligence *per se* statute, thus satisfying the knowledge element. *Id.* at 732, 118 S.E.2d at 17. The Court also found substantial encouragement on the ground that defendant and the other driver were "inciting each other" to drive recklessly. *Id.* In the instant case, we have no such substantial encouragement to breach a duty of care owed by Mr. Jarvis to plaintiffs; if anything, defendant was only complicit in her husband's breach of ordinary care and did not "incite" him to drive. Moreover, unlike in *Boykin*, only Mr. Jarvis, and not defendant, was in violation of a statute that results in negligence *per se*. We therefore find *Boykin* distinguishable from the instant case.

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2. In addition to the cases discussed in this section, plaintiffs also rely on *Blow v. Shaughnessy*, 88 N.C. App. 484, 364 S.E.2d 444 (1988). That case, however, involved the imposition of liability on a defendant that encouraged a third party to breach his fiduciary responsibility—a securities law violation—owed to the plaintiff. *Id.* at 489, 364 S.E.2d at 447. This case, however, does not involve any fiduciary relationship between Mr. Jarvis and plaintiffs. We therefore find *Blow* distinguishable from the instant case.

In *McMillan v. Mahoney*, 99 N.C. App. at 451, 393 S.E.2d at 300, the issue was whether the plaintiff had stated a cause of action where two minor defendants were firing an air rifle and plaintiff was struck by one of the pellets but unable to establish which minor defendant fired the pellet that caused the injury. In that case, citing section 876, the Court held that the minor defendants could be held liable as they were acting in concert with one another. *Id.* at 453, 393 S.E.2d. at 301. In this case, there are no factual issues as to whether Mr. Jarvis or defendant caused the accident. This is not a case where defendant was aiding her husband's negligence by interfering with his ability to drive so that the exact cause of the accident could not be known.

Because both of the above-mentioned cases are readily distinguishable from the case at bar, we decline to extend liability under section 876 of the Restatement of Torts to a third person whose conduct did not fall below an ordinary standard of care or involve an issue as to which person was the cause of the harm alleged. Plaintiffs' assignment or error as to this issue is therefore rejected.

C.

[3] Plaintiffs next argue that the trial court erred in granting defendant's motion for summary judgment on the issue of joint enterprise. We disagree.

In order to establish joint enterprise, " ' "[t]he circumstances must be such as to show that the occupant and the driver together had such control and direction over the automobile as to be practically in the joint or common possession of it." ' " *James v. R. R.*, 233 N.C. 591, 598, 65 S.E.2d 214, 219 (1951) (citations omitted). Here, the undisputed facts establish that defendant did not own the vehicle. Although the complaint alleged joint ownership, both parties agree that this is not in fact the case. Further evidence of defendant's lack of control over the vehicle include that she was not responsible for its maintenance, did not own a vehicle, and never drove the vehicle or any other vehicle. These additional facts make it even less likely that defendant exercised any control over the vehicle, much less enough to establish a joint enterprise.

Plaintiffs attempt to combat these undisputed facts by arguing that defendant and Mr. Jarvis were riding in the car together to go to a dinner. Our Supreme Court, however, has held that " '[a] common enterprise in riding is not enough; the circumstances must be such as to show that plaintiff and the driver had such control [to

amount to] joint possession of it[.]' " *Id.* (citation omitted). Plaintiffs have failed to present evidence that defendant had any control over the vehicle in question. Plaintiffs' arguments to the contrary are therefore rejected.

II.

In summation, the trial court did not err in granting summary judgment in favor of defendant as plaintiffs have presented no issues of material fact. The ruling of the trial court is therefore affirmed.

Affirmed.

Judges ELMORE and STROUD concur.

AMANDA CAMERON, ANGELA EDWARDS JONES, HEIRS, AND REPRESENTATIVES OF HEIRS, OF THE ESTATE OF HAROLD EDWARDS, PLAINTIFFS v. CHARLOTTE M. BISSETTE, MELODY B. ALLEGOOD AND Z. ROYCE BISSETTE, JR., AS CO-TRUSTEES OF THE Z. ROYSTER BISSETTE FAMILY TRUST, AND CHARLOTTE M. BISSETTE, Z. ROYCE BISSETTE, JR., MELODY B. ALLEGOOD, MELISSA B. (JOYNER) BATTS, KAREN B. REEVES (REAVES), AND CHRISTOPHER JASON BISSETTE, ALL JOINTLY AND/OR SEVERALLY AS HEIRS AND/OR BENEFICIARIES OF THE ESTATE OF Z. ROYSTER BISSETTE, DECEASED, DEFENDANTS

No. COA07-408

(Filed 20 May 2008)

1. Civil Procedure— summary judgment—findings of fact and conclusions of law not required

A trial court is not required to make findings of fact and conclusions of law in determining a motion for summary judgment, and if some are made, they are disregarded on appeal.

2. Wills— holographic will—description of property—insufficient to constitute devise

A provision in a holographic will devising "this land" to testator's son for life and then to the son's children was legally ineffective to devise any interest in Wilson County property owned by testator at the time of his death to his son and the son's children where there was no evidence that the Wilson County property was owned by testator at the time he executed the will seven years before his death, and there was no evidence of the sur-

rounding circumstances as of the date the will was executed that might tie the reference to "this land" to any specific property.

Appeal by plaintiffs from order entered 11 December 2006 by Judge W. Russell Duke, Jr. in Wilson County Superior Court. Heard in the Court of Appeals 30 October 2007.

Nathaniel Currie for plaintiffs-appellants.

Narron & Holdford, P.A., by I. Joe Ivey, for defendants-appellees.

GEER, Judge.

Plaintiffs—the heirs and representatives of heirs of the Estate of Harold Edwards—appeal from the trial court's order granting summary judgment to defendants, who are the trustees, heirs, and beneficiaries of the Estate of Z. Royce Bissette. Frank Edwards, Harold's adoptive father, died testate on 1 March 1958, leaving a holographic will stating in its entirety:

March the 28 1951

this is my Will to say this Land is will [sic] to Harold Edwards His Life Time [sic], and then to his children, and it remand [sic] in the Harold Edwards Family

/s/ Frank Edwards

This appeal hinges on the meaning of the phrase "this Land." Because plaintiffs have presented no evidence that might identify to what property Frank Edwards was referring at the time he wrote his will, the trial court properly entered summary judgment in defendants' favor.

Facts

On 2 April 1958, Frank Edwards' will was probated as his "last will and testament" by the Clerk of the Superior Court for Wilson County. At the time of Frank's death, he owned two parcels of property in Wilson County ("the Wilson County property"). Pinkie Edwards, Frank's wife and Harold Edwards' adoptive mother, died intestate sometime in 1974, leaving Harold as her only heir.

On 5 March 1987, a deed was recorded in Wilson County, conveying the Wilson County property from Harold Edwards to Royce

Bissette. Harold died intestate on 1 September 2000. Royce Bissette died testate on 18 December 2001, leaving the Wilson County property to defendants.

On 9 February 2006, plaintiffs initiated this action, seeking a declaration that they, as Harold's children, are the legal owners of the Wilson County property as a result of Frank's holographic will. Defendants moved to dismiss plaintiffs' action pursuant to Rule 12(b)(6), (7), and 12(c) of the Rules of Civil Procedure. Defendants also moved for summary judgment, asserting that they were entitled to judgment as a matter of law (1) under the statute of limitations, the Rule in Shelley's case, and the Rule Against Perpetuities, and (2) because the will was void for indefiniteness and ambiguity. The trial court entered an order on 11 December 2006 granting summary judgment to defendants based on its determination that "the language contained in the March 28, 1951 holographic Will did not identify the 'land' with definitiveness [sic] and certainty for the purpose of locating and distinguishing it from other real property." Plaintiffs timely appealed to this Court.

Discussion

[1] As an initial matter, we address plaintiffs' contention that the trial court was required by Rule 52(a) to make findings of fact in support of its summary judgment order. As we pointed out to the contrary, in *Weaver v. O'Neal*, 151 N.C. App. 556, 558, 566 S.E.2d 146, 147 (2002) (quoting *White v. Town of Emerald Isle*, 82 N.C. App. 392, 398, 346 S.E.2d 176, 179, *disc. review denied*, 318 N.C. 511, 349 S.E.2d 874 (1986)), " '[a] trial judge is not required to make finding[s] of fact and conclusions of law in determining a motion for summary judgment, and if he does make some, they are disregarded on appeal.' " Rule 52(a)(2) does not apply to a decision on a summary judgment motion " 'because, if findings of fact are necessary to resolve an issue, summary judgment is improper.' " *Summey Outdoor Adver., Inc. v. County of Henderson*, 96 N.C. App. 533, 537, 386 S.E.2d 439, 442 (1989) (quoting *White*, 82 N.C. App. at 398, 346 S.E.2d at 179), *disc. review denied*, 326 N.C. 486, 392 S.E.2d 101 (1990).

[2] Plaintiffs next argue that existing issues of material fact should have precluded the trial court from granting summary judgment. "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); N.C.R. Civ. P. 56(c). An appellate court reviews de novo a trial court's order granting summary judgment. *Robins v. Town of Hillsborough*, 361 N.C. 193, 196, 639 S.E.2d 421, 423 (2007).

The trial court ruled that Frank Edwards' holographic will was legally ineffective to devise any interest in the Wilson County property to Harold Edwards. The facts underlying this legal determination are not in dispute. The parties simply disagree as to the legal effect of Frank Edwards' holographic will and the legal effect of Harold Edwards' conveyance to Royce Bissette. The lawsuit thus presented a proper case for resolution on a motion for summary judgment. *See King v. Cranford*, *Whitaker & Dickens*, 96 N.C. App. 245, 247, 385 S.E.2d 357, 359 (1989) (directing entry of summary judgment for defendants when parties agreed on set of stipulated facts for purposes of the summary judgment motion so there was no genuine issue as to any material fact, and defendants' motion raised only question whether, on stipulated facts, defendants were entitled to judgment as a matter of law), *disc. review denied*, 326 N.C. 364, 389 S.E.2d 813 (1990).

Plaintiffs, however, assert that the following "unresolved genuine issues of material fact" exist, making summary judgment improper:

1. Whether Frank Edwards' holographic Will was sufficient to transfer title to the subject property to Harold Edwards,

2. Whether Harold Edwards had right, title and interest to convey the property in fee simple, and

[3]. Whether the general warranty deed recorded on 5 March 1987 in Book 1320, Page 947 of the Wilson County Registry conveyed anything more than a life estate in the subject property from Harold Edwards as Grantor to Z. Royce Bissette as Grantee.

These issues do not, however, point to disputes over the facts, but rather raise questions regarding the legal import of the undisputed facts presented by the parties. Indeed, plaintiffs do not, in their brief, point to any question that requires an evidentiary hearing for resolution.

Instead, plaintiffs challenge the trial court's determination that Frank's holographic will was legally ineffective to convey any interest

in real property because the language in the will "did not identify the 'land' with definitiveness [sic] and certainty for the purpose of locating and distinguishing it from other real property." Plaintiffs argue that under the rules relating to the construction of testamentary instruments, Frank's will was sufficiently definite and certain in its identification of the devised property to allow the trial court to effectuate his intent. We disagree.

Preliminarily, we note that "[i]t is generally agreed that devises in wills are to be interpreted more liberally than conveyances in deeds in order, if possible, to give effect to the testator's intent." *Stephenson v. Rowe*, 315 N.C. 330, 335, 338 S.E.2d 301, 304 (1986). Courts have a duty " 'to render a will operative and to give effect to [a] testator's intent if reasonable interpretation can be given which is not in contravention of some established rule of law.' " *Colombo v. Stevenson*, 150 N.C. App. 163, 165, 563 S.E.2d 591, 593 (2002) (quoting *N.C. Nat'l Bank v. Apple*, 95 N.C. App. 606, 608, 383 S.E.2d 438, 440 (1989)), *aff'd per curiam*, 357 N.C. 157, 579 S.E.2d 269 (2003).

If the plain language of the will is ambiguous, "[e]xtrinsic evidence may be considered . . . to identify the person or thing mentioned therein." *Hammer v. Hammer*, 179 N.C. App. 408, 410, 633 S.E.2d 878, 881 (2006). As the Supreme Court has explained the pertinent principles:

> The general rule in North Carolina is that a latent ambiguity presents a question of identity and that extrinsic evidence may be admitted to help identify the person or the thing to which the will refers. This extrinsic evidence is admissible to identify a person or thing mentioned therein. This evidence is not admissible to alter or affect the construction of the will. Surrounding circumstances as well as the declarations of the testator are relevant to the inquiry. Surrounding circumstances do not refer to the intent of the testator, *rather these circumstances mean the facts of which the testator had knowledge when she made her will.*

Britt v. Upchurch, 327 N.C. 454, 458, 396 S.E.2d 318, 320 (1990) (emphasis added) (internal quotation marks and citations omitted). *See also Stephenson*, 315 N.C. at 339, 338 S.E.2d at 306-07 ("Courts generally permit evidence of circumstances outside the will to save a devise when there are both objective references in the devise, such as 'homestead tract,' 'homeplace,' 'the house where we live,' etc., and competent evidence of circumstances tending to show that these references can be fitted to a particular piece of property . . . .").

In this case, although the parties dispute whether the reference in Frank's will to "this Land" is a latent or patent ambiguity, we need not resolve that issue because plaintiffs have failed to submit any evidence that raises an issue of fact even if that phrase is a latent ambiguity. In arguing that the language "this Land" referred to the Wilson County property, plaintiffs rely exclusively on their evidence that Frank Edwards owned the Wilson County property at the time of his death—seven years after he signed his will. As *Britt* stressed, however, the pertinent time period for extrinsic evidence is the date that the testator executed the will and not the time of his death. 327 N.C. at 458, 396 S.E.2d at 320. *See also Hammer*, 179 N.C. App. at 410, 633 S.E.2d at 881 ("When the court must give effect to a will provision whose language is ambiguous or doubtful, it must consider the will 'in the light of the conditions and circumstances existing *at the time the will was made*.' " (quoting *Wachovia Bank & Trust Co. v. Wolfe*, 243 N.C. 469, 473, 91 S.E.2d 246, 250 (1956))).

Plaintiffs presented no evidence relating to surrounding circumstances as of 28 March 1951, when Frank executed his will, that might tie the reference to "this Land" to any specific property, including the Wilson County property. *Compare Britt*, 327 N.C. at 462-63, 396 S.E.2d at 322 (holding that extrinsic evidence of how testator and his family used adjoining lots at time of execution of will was sufficient to identify both lots as the property described in will as " 'my residence at 2615 Cooleemee Street,' " and trial court properly granted plaintiffs summary judgment); *Stephenson*, 315 N.C. at 340, 338 S.E.2d at 307 (holding that extrinsic evidence that testator purchased and began installing fencing to encompass 30-acre portion of farm was admissible to clarify the ambiguous reference in will to 30-acre tract " 'immediately surrounding the homeplace' ").

Without such evidence, it is impossible to determine from the will, standing alone, what property Frank Edwards intended to devise to Harold Edwards. Plaintiffs have thus failed to present evidence that the provision in Frank's will devising "this Land" refers to the Wilson County property. Yet, the will is the sole basis for plaintiffs' claim that they own the Wilson County property. Accordingly, no issue of fact exists on this record that, if resolved in plaintiffs' favor, would permit the conclusion that plaintiffs are the proper owners of the Wilson County property. The trial court, therefore, properly entered summary judgment in favor of defendants.

Affirmed.

Judges WYNN and STEELMAN concur.

STATE OF NORTH CAROLINA v. BOBBY DONNELL HAIRSTON, JR.

No. COA07-1119

(Filed 20 May 2008)

1. Constitutional Law— effective assistance of counsel—eliciting identification of defendant

Defendant did not receive ineffective assistance of counsel in an assault with a deadly weapon with intent to kill inflicting serious injury and robbery with a firearm case based on his trial counsel eliciting from the victim an identification of defendant because: (1) when unfavorable information is inadvertently elicited, a trial counsel's performance will not fall below the boundaries of acceptable professional conduct where counsel was attempting to elicit favorable information; (2) defense counsel was attempting to elicit a favorable non-identification and had ample reason to pursue such course when the State did not have the victim make an in-court identification and the victim's testimony on direct examination showed it was not unreasonable for defense counsel to conclude the victim would likely be unable to identify defendant; (3) there was overwhelming evidence of defendant's guilt even excluding this identification including defendant's own admission that he had robbed and shot the victim, and there was no allegation the initial confessions were made under duress or were otherwise obtained improperly even though defendant later recanted his initial statements to police; and (4) it cannot be said that there was a probability that the result would have been different absent this admission.

2. Evidence— hearsay—truth of matter asserted—failure to show prejudicial error

The trial court did not err in an assault with a deadly weapon with intent to kill inflicting serious injury and robbery with a firearm case by sustaining the State's objection to a question posed by defendant on the ground that the answer would contain inadmissible hearsay because: (1) in essence defendant

argues that the testimony was not elicited for its truth, but had it been admitted, the jury could have used the statement for the truth of the matter asserted to make it less likely that defendant participated in the robbery; and (2) even if the trial court erred by granting the State's objection, defendant was unable to show that he was prejudiced by such error as required by N.C.G.S. § 15A-1443(a).

Appeal by defendant from judgments entered 8 June 2007 by Judge Charles H. Henry in Onslow County Superior Court. Heard in the Court of Appeals 5 March 2008.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Marc X. Sneed, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Barbara S. Blackman, for defendant-appellant.

HUNTER, Judge.

Bobby Donnell Hairston, Jr. ("defendant") appeals from judgments entered on 8 June 2007 pursuant to jury verdicts finding him guilty of assault with a deadly weapon with intent to kill inflicting serious injury, robbery with a dangerous weapon, first degree kidnapping, three counts of financial credit card theft, and two counts of second degree kidnapping. Judgments were arrested on the three counts of financial credit card theft, the one count of first degree kidnapping, and both counts of second degree kidnapping. Defendant was sentenced to between 116 months' imprisonment and 149 months' imprisonment for assault with a deadly weapon with intent to kill inflicting serious injury and to between eighty-one months' imprisonment and 115 months' imprisonment for robbery with a firearm. After careful consideration, we find that defendant's trial was free from error.

The State presented evidence tending to show that Gene Moore ("Moore"), the proprietor of Private Pleasures and other businesses adjoining that property, walked from Private Pleasures along a back hallway that connected to his other businesses on 21 May 2006 at approximately 3:00 a.m. While walking, Moore was confronted by two men that informed him that " 'this is a hold up' " and demanded that Moore hand over whatever money he possessed. The two men told Moore not to move. Moore began to back up and was shot in the stomach.

Thereafter, the men put a gun to Moore's head and demanded money from him and the keys to his safe. The men informed Moore that if he did not comply, they would kill him. Diana Moody, Moore's employee, approached the scene, removed money from Moore's shirt pocket, and gave the money to the men. The two men also took Moore's wallet and a moneybag.

Detective Joseph Frandsen of the Onslow County Sheriff's Office was assigned to investigate the robbery. Ferondo Moore, Moore's son, told Detective Frandsen that according to Moore's credit card statement, the credit cards stolen from his father had been used in Havelock, North Carolina. Upon contacting the Havelock Police Department, Detective Frandsen spoke with Detective Mike Stuart. Detective Stuart was thereafter able to identify Demario Brown ("Brown") as a suspect in the Moore robbery. Detective Stuart then issued a search warrant against Brown's home, where he found stolen items reported from another robbery, Moore's credit cards, and several items that had been purchased on Moore's cards after they were stolen.

During the course of executing the search warrant, defendant pulled up to Brown's home. Detective Stuart requested to pat down defendant. Defendant asked to retrieve some shoes for the children that had been in his car. Detective Stuart allowed defendant to do so and upon returning to the car, defendant reached for a handgun. Detective Stuart then handcuffed defendant. Defendant told the officers he had another gun in his back pocket. The police recovered this gun off defendant's person, a silver .22-caliber handgun, in addition to a stun gun.

When questioned about the robbery, defendant confessed to both shooting Moore and to robbing him. Later, however, defendant sent Detective Frandsen a note denying his participation in the robbery and shooting of Moore. Defendant explained in the note that the only reason he admitted to the robbery and shooting was to gain "street credit for doing . . . the shooting[.]"

Kendy Hairston, defendant's wife, testified that defendant was with her the entire time in which the State alleged that the crimes occurred. Specifically, Mrs. Hairston testified that she and defendant watched a movie on the evening of 20 May 2006 and went to bed around 1:00 or 2:00 a.m. on the morning of 21 May 2006. She also stated that she and defendant went to church later that same morning.

Defendant presents two issues for this Court's review: (1) whether he received ineffective assistance of counsel; and (2) whether the trial court erred in sustaining the State's objection to a question posed by defendant's counsel on the ground that the answer would elicit inadmissible hearsay.

I.

[1] Defendant first argues that he received ineffective assistance of counsel because his trial counsel elicited an identification of defendant by Moore. We disagree.

In order to assert an ineffective assistance of counsel claim, defendant must: (1) show that his counsel's performance "fell below an objective standard of reasonableness[;]" and (2) establish that "the error committed was so serious that a reasonable probability exists that the trial result would have been different" but for the error. *State v. Gainey*, 355 N.C. 73, 112, 558 S.E.2d 463, 488 (2002).

In this case, the State did not elicit an identification of defendant from Moore while Moore was testifying. On cross-examination, however, the following exchange took place between defendant's counsel and Moore:

> Q. Did you get a good look at their faces?
>
> A. It was real dark that night in the hallway, real dark. Couldn't hardly see nothing back there. I was looking and showed [*sic*] the guy, one was darker than the other one.
>
> Q. Do you recognize [defendant]?
>
> A. Yeah. I remember seeing him.
>
> Q. Okay. You think you saw him that night?
>
> A. Yeah. There was two head of them [*sic*]. Another one, the other guy was a little bit lighter than him, best of my remember [*sic*]. The other guy was a little lighter than him.
>
> Q. But you are not real sure about that, are you?
>
> A. Yeah. I know one was lighter.

"Our Supreme Court has stated, 'this court engages in a presumption that trial counsel's representation is within the boundaries of acceptable professional conduct' when reviewing ineffective

assistance of counsel claims." *State v. Medina*, 174 N.C. App. 723, 729, 622 S.E.2d 176, 179 (2005) (quoting *State v. Roache*, 358 N.C. 243, 280, 595 S.E.2d 381, 406 (2004)). It is not the role of the appellate court " 'to second-guess counsel's tactical decisions.' " *Id.* at 729, 622 S.E.2d at 179-80 (citation omitted).

When unfavorable information is inadvertently elicited, a trial counsel's performance will not fall below the boundaries of acceptable professional conduct where counsel was attempting to elicit favorable information. *State v. Pretty*, 134 N.C. App. 379, 390, 517 S.E.2d 677, 685 (1999) (Greene, J., concurring) (concluding that where evidence presented supports the inquiry, there will be no finding of ineffective assistance of counsel). Here, defendant's counsel was attempting to elicit a favorable non-identification by Moore. Defense counsel had ample reason to pursue such a course: During the State's direct examination of Moore, Moore had testified that he had not previously known either man that he encountered in the rear of building, and only provided a description of the men that had robbed and assaulted him—that one man was of darker complexion than the other and that both were roughly the same height. The State did not have Moore make an in-court identification of defendant. Thereafter, defendant's counsel made a tactical choice to question Moore about his ability to identify defendant as the perpetrator of the crimes. Given Moore's testimony on direct examination, it was not unreasonable for defense counsel to conclude that Moore would likely be unable to identify defendant and to pursue the line of questioning quoted above. Accordingly, we hold that defendant's counsel's performance did not fall below an objective standard of reasonableness.

Moreover, even were we to find deficient performance, there is overwhelming evidence of defendant's guilt, even minus the *quasi* in-court identification. Testimony presented at trial consisted of a witness to the robbery, who noted that one of the men who robbed the store had a silver .22-caliber handgun that looked identical to the one taken from defendant when his car was searched. Additionally, the jury heard testimony that defendant and Brown had robbed another adult entertainment store down the street from Moore's businesses using a similar method. Finally, defendant admitted during his police interrogation that he had robbed and shot Moore and robbed the other adult entertainment store down the street. Although defendant later recanted his initial statements to the police, he made no allegations that his initial confessions were made under duress or were oth-

erwise obtained improperly. Instead, defendant stated that the confessions were made in an effort to gain "street credit."

Given the evidence of defendant's guilt, defendant has made scant argument as to prejudice in his brief to this Court and we cannot say that there was a probability that the result of defendant's trial would have been different. Accordingly, defendant's assignment of error as to this issue is overruled.

II.

[2] Defendant's last argument is that the trial court committed reversible error in sustaining the State's objection to a question posed by defendant on the grounds that the answer would contain inadmissible hearsay. We disagree.

Detective Frandsen testified that Shannon Hicks, an acquaintance of Brown's, also used Moore's stolen credit cards. On cross-examination, defense counsel asked Detective Frandsen if, during his interview with Hicks, she had indicated that she knew defendant. Detective Frandsen answered in the negative. The State objected and the trial court sustained the objection, instructing the jury to disregard the response of Detective Frandsen and to not consider the statement for any purpose.

"Hearsay is defined as 'a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.' " *Hall v. Coplon*, 85 N.C. App. 505, 510, 355 S.E.2d 195, 198 (1987) (quoting N.C. Gen. Stat. § 8C-1, Rule 801(c)). Defendant contends that the statement was not offered for the truth of the matter asserted, but instead was offered as a historical fact—that is, whether Hicks knew defendant or not. Defendant, however, goes on to argue that the trial court's ruling requires reversal because, according to defendant, such evidence would have aided defendant's arguments concerning his alibi defense. According to defendant, had the testimony been admitted, the jury could have used the information as "proof" that Brown and another person, not defendant, committed the robbery. In essence, defendant argues that the testimony was not elicited for its truth, but had it been admitted, the jury could have used the statement for the truth of the matter asserted, that Hicks, who had used the stolen credit cards, did not know defendant—thus making it less likely that defendant participated in the robbery of Moore. Accordingly, the trial court did not err in sustaining the State's objection as the testimony was offered for the truth of the matter asserted.

Alternatively, even were the trial court to have erred in granting the State's objection, defendant has been unable to show that he was prejudiced by such error as is required by N.C. Gen. Stat. § 15A-1443(a) (2007). The overwhelming evidence discussed in section I of this opinion, specifically defendant's admission of guilt, defeats any of defendant's claims for a new trial on errors relating to the admission of evidence. Defendant's assignment of error as to this issue is therefore rejected.

III.

In summary, we conclude that defendant received adequate representation under the Sixth Amendment and in the event that there was trial counsel error, defendant cannot establish prejudice. Additionally, we find no error in the trial court's ruling on the State's objection to testimony. Even if the trial court did err in that ruling, in light of the overwhelming evidence of defendant's guilt, he is unable to establish prejudice.

No error.

Judges ELMORE and STROUD concur.

LARRY D. HANNAH, PLAINTIFF v. NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, DEFENDANT

No. COA07-151

(Filed 20 May 2008)

1. Appeal and Error— preservation of issues—failure to cite authority—standard of review not stated—issue not considered

Questions concerning insurance coverage were not addressed where plaintiff's counsel did not cite authority in support of his contentions and did not even cite the applicable standard of review. While the Court could hear the issues in its discretion, the questions raised have not been previously addressed by the North Carolina appellate courts and it would not be appropriate to do so in the absence of proper briefing.

2. Estoppel— insurance coverage—extension of coverage—waiver and estoppel not available

The principles of waiver and estoppel did not apply in an action to determine insurance coverage after a fire where parents sold their house to an adult child and moved out, the insurance policy was continued, and the son sought to recover for damage to his property after the fire. Waiver and estoppel are not available to obtain protection against risks not included within the policy.

3. Appeal and Error— Rules violations—no interference with ability to review—no sanctions

Multiple violations of the Rules of Appellate Procedure (such as not double spacing and not including the standard of review) that did not affect the Court's ability to review the appeal and sanctions were not imposed in those instances.

Appeal by plaintiff from judgment entered 22 September 2006 by Judge Beverly T. Beal in Cleveland County Superior Court. Heard in the Court of Appeals 20 September 2007.

Cerwin Law Firm, P.C., by Todd R. Cerwin, for plaintiff-appellant.

Baucom, Claytor, Benton, Morgan & Wood, P.A., by Rex C. Morgan, for defendant-appellee.

GEER, Judge.

Plaintiff Larry D. Hannah appeals from a declaratory judgment, entered following a bench trial, holding that his personal property, destroyed in a fire, was not covered under the homeowner's insurance policy issued by defendant Nationwide Mutual Fire Insurance Company. On appeal, Hannah has presented no authority to support his contention that the express terms of the policy provide coverage of his personal property, and we, therefore, do not consider that argument. He argues, alternatively, that Nationwide is required to provide coverage based on the doctrines of waiver and estoppel. Because waiver and estoppel cannot operate to extend coverage to risks not already covered by a policy, we affirm the trial court's entry of judgment in favor of Nationwide.

Following the bench trial, the trial court entered findings of fact and conclusions of law. Hannah has not assigned error to any of the

trial court's findings of fact and, therefore, those findings are binding on appeal. *Johnson v. Herbie's Place*, 157 N.C. App. 168, 180, 579 S.E.2d 110, 118, *disc. review denied*, 357 N.C. 460, 585 S.E.2d 760 (2003). *See also Okwara v. Dillard Dep't Stores, Inc.*, 136 N.C. App. 587, 591, 525 S.E.2d 481, 484 (2000) ("[E]ach contested finding of fact must be separately assigned as error, and the failure to do so results in a waiver of the right to challenge the sufficiency of the evidence to support the finding."). Because of Hannah's failure to challenge the findings of fact, "[o]ur review . . . is limited to the question of whether the trial court's findings of fact, which are presumed to be supported by competent evidence, support its conclusions of law and judgment." *Id.* at 591-92, 525 S.E.2d at 484.

Facts

The trial court made the following findings of fact. On 19 March 2003, Hannah and his wife entered into a contract with Hannah's mother and stepfather—Mary M. Sessoms and John V. Sessoms—to purchase a house and lot located at 814 Fourth Street, Kings Mountain, North Carolina. Mr. and Mrs. Sessoms moved out of the house within a week of the contract and since that time have continuously resided elsewhere.

Under the 19 March 2003 contract, Hannah was required to make the mortgage payments on the property, with John and Mary Sessoms agreeing to deed the property to Hannah once the mortgage was paid in full. The contract also required Hannah to keep the improvements on the land insured for the benefit of Mr. and Mrs. Sessoms against loss by fire and to pay the premiums for the insurance.

Prior to 19 March 2003, Mr. and Mrs. Sessoms had insured the 814 Fourth Street property through Nationwide. Hannah agreed with Mr. Sessoms that they would continue the Nationwide policy and would make the premium payments necessary to keep the Nationwide policy in effect. In June 2003, Hannah's wife made the premium payment to Nationwide and requested that future premium notices be mailed to "John Sessoms, c/o Larry Hannah" at 814 Fourth Street. She repeated this request in November 2003. No one, however, notified Nationwide or its agent that John and Mary Sessoms had moved from the property or that the Hannahs had personal property at the 814 Fourth Street address.

On 14 October 2004, a fire destroyed the house at 814 Fourth Street and most of the personal property owned by Hannah. That same date, Nationwide's Claims Department sent a letter acknowl-

edging the claim for fire damage and requesting information. The letter identified the "insured" under the Nationwide policy as "John V. Sessoms, c/o Larry Hannah." In response to the letter and a verbal direction of a Nationwide adjuster, Hannah sent Nationwide a 29-page inventory of personal property lost in the fire that he claimed was valued for replacement cost purposes at $55,283.50.

Subsequently, an adjuster with Nationwide gave Hannah a check for $2,000.00 for additional living expenses that was made out to "John Sessoms, c/o Larry Hannah." In addition, on approximately 6 December 2004, Nationwide issued two checks in connection with the loss. One check in the amount of $14,471.28 was made payable to John V. Sessoms and Wachovia Mortgage Corporation for the mortgage debt on the property. The second check, in the amount of $89,385.89, was made payable to John V. Sessoms.

In a letter dated 8 December 2004, addressed to "John V. Sessoms, c/o Larry Hannah," Nationwide denied Hannah's claim for personal property loss under Coverage C of the Nationwide policy. Nationwide stated that since the Hannahs were not residents of the Sessoms household where the Sessoms resided, they did not qualify as "insureds" under the policy.

Coverage A of the policy provided coverage for "[t]he dwelling on the residence premises shown in the Declarations, including structures attached to the dwelling[.]" Coverage C of the policy provided coverage for "personal property owned or used by an insured while it is anywhere in the world." At the insured's request, the policy would also cover personal property owned by "[o]thers while the property is on the part of the residence premises occupied by an insured."

"Insured" was defined to "mean[] you and residents of your household who are . . . [y]our relatives." The words "you" and "your" "refer[red] to the 'named insured' shown in the Decarations and the spouse if a resident of the same household." The declarations page of the Nationwide policy at issue identifies the named insured under the policy as:

> JOHN V. SESSOMS
> C/O LARRY HANNAH
> 814 FOURTH STREET
> KINGS MOUNTAIN NC 28086-2115

The policy defined "Insured location" to mean "[t]he residence premises." Further, "Residence premises" means, under the policy:

a) The one family dwelling, other structures, and grounds; or

b) That part of any other building;

where you reside and which is shown as the residence premises in the Declarations.

The declarations page identified the "residence premises" as 814 Fourth Street, Kings Mountain.

On the date of the fire, Mr. and Mrs. Sessoms lived at 906 Lavender Road, Grover, North Carolina. They did not reside at 814 Fourth Street. The trial court found that Hannah and his family were not residents of the household where John and Mary Sessoms resided at the time of the loss. Finally, neither John nor Mary Sessoms had requested that Nationwide provide coverage for the personal property of Hannah or his family prior to the fire.

Based on these findings of fact, the trial court concluded that the policy did not provide coverage for Hannah's personal property lost or damaged in the 14 October 2004 fire. The court also concluded that "[t]he payment by Nationwide of additional living expenses to [Hannah] and/or the payments under Coverage A of the Nationwide policy for damages to the premises do not constitute a waiver or estoppel of Nationwide's denial of Plaintiff's claim for damages to personal property under the policy." The court, therefore, entered a declaratory judgment in favor of Nationwide, "find[ing] that there is no coverage for any claims made by [Hannah] under the Nationwide policy, and further find[ing] that Nationwide has no obligation to make any payments to [Hannah] for any claims under the Policy in connection with the fire of October 14, 2004." Hannah timely appealed this judgment to this Court.

Discussion

[1] Hannah's first three assignments of error challenge the trial court's conclusion that his personal property was not covered under any of the provisions of the insurance policy. Hannah's entire argument for these three assignments of error consists of the following two paragraphs:

> In this case the Plaintiff, Larry Hannah, is a named insured identified in the Declarations. As such, his personal property is covered while it is anywhere in the world, including the residence premises. Also covered would be the property of anyone else

> located at 814 Fourth Street, Kings Mountain, NC, as Larry Hannah occupied that premises.
>
> Larry Hannah is also an "insured" as a "relative" of the spouse of John Sessoms (his spouse also being an insured), being the natural son of the spouse of John Sessoms, living in the "insured location". As such, he is thus identified as an "Insured".

Hannah's counsel cited no authority of any kind in support of his contentions—he did not even cite the applicable standard of review.

Under Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure, "[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." (Emphasis added.) *See also James River Equip., Inc. v. Mecklenburg Utils., Inc.*, 179 N.C. App. 414, 420, 634 S.E.2d 557, 561 (2006) ("[P]laintiff has cited no authority in support of its argument, and thus has abandoned this assignment of error."), *appeal dismissed and disc. review denied*, 361 N.C. 355, 644 S.E.2d 226, 227 (2007). Hannah has, therefore, abandoned these assignments of error.

We could exercise our discretion under Rule 2 to suspend the requirements of Rule 28, but choose not to do so in this case. Hannah's contentions raise questions not previously addressed by the North Carolina appellate courts regarding the proper construction of language frequently included in property insurance policies. We do not believe that it would be appropriate to address those questions in the absence of proper briefing by the parties.

[2] In his next argument, Hannah asserts, with citation of authority, that "[i]n the event that Larry Hannah is not determined to be an 'insured' identified in the Declarations, then [Nationwide] has waived the condition of John Sessoms' residency at the insured location or is otherwise estopped to deny that Plaintiff Hannah's personal property is still covered by the policy . . . ." In other words, Hannah seeks to extend coverage under the policy by reliance on the doctrines of waiver and estoppel.

As this Court has explained, however, " '[w]hile waiver and estoppel have been held applicable to nearly every area in which an insurer may deny liability, the courts of most jurisdictions agree that these concepts are not available to broaden the coverage of a policy so as to protect the insured against risks not included therein or expressly excluded therefrom.' " *Currie v. Occidental Life Ins. Co. of N.C.*, 17 N.C. App. 458, 459-60, 194 S.E.2d 642, 643 (1973) (quoting Annot., 1

A.L.R.3d 1139, § 2 (1965)). *See also Pearce v. Am. Defender Life Ins. Co.*, 316 N.C. 461, 466, 343 S.E.2d 174, 177 (1986) (noting "the well-settled rule that the doctrines of waiver and estoppel have been applied in order to obviate the forfeiture provisions in insurance contracts, but that they are not available to bring within the coverage of a policy risks not covered by its terms, or risks expressly excluded therefrom" (internal quotation marks omitted)); *Brendle v. Shenandoah Life Ins. Co.*, 76 N.C. App. 271, 276, 332 S.E.2d 515, 518 (1985) (holding that waiver and estoppel "cannot be used to create coverage which is nonexistent or expressly excluded from a policy").

By seeking to obtain coverage for personal property not otherwise covered by the policy, Hannah is seeking to use the doctrines of waiver and estoppel to obtain protection against risks not included within the policy. As a result, the principles of waiver and estoppel do not apply.

[3] Finally, we must note Hannah's counsel's numerous violations of the North Carolina Rules of Appellate Procedure. In addition to failing to cite any authority in connection with one of his primary arguments, counsel also failed to include the standard of review and single-spaced the text in his brief in violation of Rules 26(g)(1) and 28(b)(6).[1] Failure to comply with non-jurisdictional appellate rule requirements such as these "normally should not lead to dismissal of the appeal." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 198-99, 657 S.E.2d 361, 365 (2008).

As a result of counsel's failure to cite any authority at all in violation of Rule 28, we have not considered the merits of three of the assignments of error because that violation of the rules impaired our ability to review the merits of the appeal. Although counsel's other errors are inexcusable—the requirement of double-spacing and inclusion of the standard of review are well-known—those errors do not affect our ability to review this appeal, and we, therefore, choose not to impose any further sanctions.

Affirm.

Judges BRYANT and STEELMAN concur.

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1. Plaintiff's brief also does not contain an index and is not paginated with the result that the Table of Cases and Authorities, contrary to Rule 26(g)(2), does not reference the pages in the brief at which each authority appears. Further, the brief also fails to reference the pages of the record at which the assignments of error appear as required by Rule 28(b)(6).

FRIENDS OF MT. VERNON SPRINGS, INC. v. TOWN OF SILER CITY

[190 N.C. App. 633 (2008)]

FRIENDS OF MT. VERNON SPRINGS, INC., ALAN A. ROSENBLOOM, ELIZABETH A. DIXON, VONNELL PALMER, AND MISTY BATTEN, PETITIONERS v. TOWN OF SILER CITY, CHARLES L. TURNER, IN HIS CAPACITY AS MAYOR, AND TONY SILER, JAMES LARRY CHEEK, PATRICIA PERRY, JOHN F. GRIMES, III, SAM P. ADAMS, JR., HELEN BUCKNER, AND GUY D. SMITH, IN THEIR CAPACITY AS MEMBERS OF THE TOWN BOARD OF COMMISSIONERS, RESPONDENTS, AND ISP MINERALS, INC., RESPONDENT-INTERVENOR

No. COA07-1484

(Filed 20 May 2008)

1. Zoning— petition to superior court—withdrawal of company behind project—consideration of board's action—not moot

The superior court did not err by granting a motion for summary judgment concerning a board of adjustment zoning decision after the company which had sought the rezoning to operate a quarry had withdrawn from the project. The petitioners in superior court sought a declaration that the board's action was improper and void; the validity of the board's actions remained in question after the company's withdrawal.

2. Zoning— whole record review by superior court—properly applied

The superior court properly applied whole record review in reviewing a board of adjustment zoning decision where it examined the quantum rather than the quality or credibility of the evidence.

3. Zoning— spot zoning—large tract

A tract of 1,076 acres was not "a relatively small tract" and its rezoning did not constitute spot zoning.

4. Zoning— de novo review by superior court—properly applied

The superior court correctly applied the de novo standard of review when considering a board of adjustment decision. The conclusion that the board did not act arbitrarily or capriciously is supported by the findings, which are supported by competent evidence.

Appeal by petitioners from order entered 27 June 2007 by Judge Kenneth C. Titus in Chatham County Superior Court. Heard in the Court of Appeals 1 May 2008.

John D. Runkle, for petitoner-appellants.

The Brough Law Firm, by William C. Morgan, Jr., for respondent-appellees.

No brief filed for respondent-intervenor.

TYSON, Judge.

Friends of Mt. Vernon Springs, Inc., Alan A. Rosenbloom, Elizabeth A. Dixon, Vonnell Palmer, and Misty Batten (collectively, "petitioners") appeal from order entered, which: (1) denied petitioners' motion for summary judgment; (2) granted the Town of Siler City's ("the Town") and the Town of Siler City Board of Commissioners's ("the Board") (collectively, "respondents") motion for summary judgment; and (3) affirmed the decision of the Board. We affirm.

I. Background

On 30 March 2006, ISP Minerals, Inc. ("ISP") submitted a "Conditional Use Rezoning and Permit Application" to the Town and sought: (1) to have approximately 1,076 acres rezoned from Agriculture-Residential to Heavy Industrial Conditional Use and (2) a conditional use permit to construct and operate a quarry and granule processing facility ("the facility"). On 3 July 2006, the Board approved ISP's application to rezone the property and granted ISP's conditional use permit.

On 1 August 2006, petitioners filed a Petition for Writ of Certiorari and Declaratory Judgment and petitioned the superior court to find and rule that the Board's approval of ISP's application to rezone the property and the grant of ISP's conditional use permit was improper and void. In addition to the action at bar, three other petitions were also filed, which challenged the Board's actions. On 22 September 2006, ISP filed a motion to intervene in each of the actions in which it had not been named as a party.

On 13 March, 16 April, and 14 May 2007, the superior court held hearings on all cases simultaneously. On 27 June 2007, the superior court filed its order, which: (1) allowed respondents' motions for summary judgment; (2) denied petitioners' motions for summary judgment; and (3) affirmed the Board's decision to rezone the property and to issue a conditional use permit to ISP. Petitioners appeal.

II. Issues

Petitioners argue the superior court erred when it: (1) ruled on the parties' motions for summary judgment and (2) affirmed the Board's decision to rezone the property and to issue a conditional use permit.

III. Motions for Summary Judgment

[1] Petitioners argue the superior court erred when it granted respondents' motion for summary judgment after ISP notified the superior court that it had withdrawn from the project. We disagree.

On 14 May 2007, ISP's counsel told the superior court, "ISP Minerals, as the sole applicant for the conditional use permit and rezoning[,] is no longer pursuing the permit for which that would have been useful and therefore we have no objection to . . . however the Court chooses to dispose of this matter with respect to [respondents' 11 May 2007] motion [to dismiss]." Petitioners argue, "[t]he withdrawal by ISP . . . at the last moment biased the outcome of the hearing in that the [superior] [c]ourt could determine in a Solomon-like ruling that the issuance of the permit was reasonable, knowing that the projected [sic] would not occur regardless of what [sic] the [superior] [c]ourt ruled." We disagree.

Mootness arises where the original question in controversy is no longer at issue. *In re Denial of Request by Humana Hospital Corp.*, 78 N.C. App. 637, 640, 338 S.E.2d 139, 141 (1986).

> Whenever, during the course of litigation it develops that the relief sought has been granted or that questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law.

In re Peoples, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978), *cert. denied*, 442 U.S. 929, 61 L. Ed. 2d 297 (1979).

ISP's statement to the superior court that it was no longer pursuing the permit did not dispose of "the original question in controversy . . . ." *Humana Hospital*, 78 N.C. App. at 640, 338 S.E.2d at 141. The relief sought by petitioners was a declaration that the Board's rezoning and grant of a conditional use permit were improper and void. The sole question in controversy raised by petitioners' petition was the validity of the Board's rezoning and issuance of the condi-

tional use permit. ISP's withdrawal did not render moot petitioners' petition, which sought a declaration that the Board's rezoning and grant of a conditional use permit were improper and void. The validity of the Board's actions, the only question in controversy, remained at issue after ISP's withdrawal. ISP's withdrawal was not a "develop[ment] that [caused] the relief sought [to be] granted [n]or th[e] question[] originally in controversy between the parties [to be] no longer at issue . . . ." *Id.* The superior court did not err when it ruled on the parties' motions for summary judgment. This assignment of error is overruled.

IV. Superior Court's Review of the Board's Actions

[2] Petitioners argue the superior court erred when it affirmed the Board's decision to rezone the property and to issue a conditional use permit. We disagree.

A. Standard of Review

When the superior court reviews the decision of a town council or administrative body, it should:

> (1) review the record for errors of law, (2) ensure that procedures specified by law in both statute and ordinance are followed, (3) ensure that appropriate due process rights of the petitioner are protected, including the right to offer evidence, cross-examine witnesses, and inspect documents; (4) ensure that the decision is supported by competent, material, and substantial evidence in the whole record; and (5) ensure that the decision is not arbitrary and capricious.
>
> The task of this Court in reviewing a superior court order is (1) to determine whether the [superior] court exercised the proper scope of review, and (2) to review whether the [superior] court correctly applied this scope of review.

Humane Soc'y of Moore Cty., Inc. v. Town of Southern Pines, 161 N.C. App. 625, 628-29, 589 S.E.2d 162, 165 (2003) (internal citations and quotations omitted).

B. Analysis

"When a party alleges an error of law in the Council's decision, the reviewing court examines the record *de novo*, considering the matter anew. However, when the party alleges that the decision is arbitrary and capricious or unsupported by substantial competent evidence, the court reviews the whole record." *Id.* at 629, 589 S.E.2d

at 165 (citations omitted). On appeal to the superior court, petitioners argued the Board's actions were "arbitrary and capricious, contrary to law and in a manner that was an abuse of discretion, and made with disregard for the due process and equal protection rights of the [p]etitioners." The superior court did not err when it "utiliz[ed] both the 'de novo' and 'whole record' tests . . . ." in its review of the Board's actions. *Id.* We now turn to whether the superior court correctly applied "both the 'de novo' and 'whole record' tests . . . ." *Id.*

The superior court's order, filed 27 June 2007, stated:

> [T]he court has reviewed the decision of the . . . Board . . . utilizing both the "de novo" and "whole record" tests and concludes as follows with regards to the granting of the conditional use permit: (1) The decision of the . . . Board . . . to grant the conditional use permit to ISP . . . was based on and supported by competent, material, and substantial evidence in the whole record; (2) the Board . . . did not act arbitrarily nor capriciously in issuing the conditional use permit; (3) the Board . . . conducted the public hearings on this matter in a manner that did not violate [p]etitioners' rights to due process; (4) all procedures provided for in the Town['s] . . . Unified Development Ordinance and all other applicable law were followed; and, (5) the Board . . . did not commit any errors of law in its consideration of this matter.
>
> As for the rezoning component of this matter, the [c]ourt has reviewed the pleadings, cross-motions for summary judgment, briefs, the Record of Proceedings and arguments of counsel and has determined that the . . . Board . . . : (1) acted appropriately in making the legislative decision to rezone the . . . property from AR (Agricultural-Residential) to HI-CU (Heavy Industrial-Conditional Use); (2) the Board['s] . . . decision does not constitute "spot zoning;" (3) [p]etitioners' rights to due process were afforded them; and (4) that the rezoning decision was consistent with the Town['s] . . . Land Development Plan; and (5) the rezoning decision was not arbitrary and capricious.

In stating its factual conclusions, the superior court neither reweighed the evidence nor substituted its judgment for the Board's. The superior court properly reviewed the *quantum* and not the quality or credibility of the evidence and found it to be sufficient to affirm the Board's decisions. The superior court properly applied its whole record review when it examined all the evidence to determine if substantial evidence supported the Board's findings and conclusions. *Id.*

[3] Our Supreme Court has stated:

> A zoning ordinance, or amendment, which singles out and reclassifies a relatively small tract owned by a single person and surrounded by a much larger area uniformly zoned, . . . so as to relieve the small tract from restrictions to which the rest of the area is subjected, is called "spot zoning."

Blades v. City of Raleigh, 280 N.C. 531, 549, 187 S.E.2d 35, 45 (1972). "[I]n any spot zoning case . . . two questions must be addressed by the finder of fact: (1) did the zoning activity . . . constitute spot zoning as our courts have defined that term; and (2) if so, did the zoning authority make a clear showing of a reasonable basis for the zoning." *Chrismon v. Guilford County*, 322 N.C. 611, 627, 370 S.E.2d 579, 589 (1988).

Here, the tract in question is approximately 1,076 acres. This tract is not "a relatively small tract" as contemplated in *Blades* and the zoning activity did not "constitute spot zoning as our courts have defined that term[.]" 280 N.C. at 549, 187 S.E.2d at 45; *Chrismon*, 322 N.C. at 627, 370 S.E.2d at 589. The superior court did not err when it concluded "the Board['s] . . . decision d[id] not constitute 'spot zoning[.]' "

[4] In reaching its remaining legal conclusions, the superior court considered the matter anew and held the evidence and findings of fact supported the Board's conclusions of law. There is ample support in the record for the conclusion that the rezoning of the tract was not arbitrary or discriminatory, may reasonably be deemed related to the public welfare and is not inconsistent with the purpose for which the Town is authorized to enact zoning regulations. The superior court's conclusion that the Board did not act arbitrarily or capriciously, is supported by the superior court's findings of fact, which, in turn, are supported by competent evidence in the record. *Zopfi v. City of Wilmington*, 273 N.C. 430, 438, 160 S.E.2d 325, 333 (1968). The superior court correctly applied the *de novo* standard of review. *Humane Soc'y of Moore Cty.*, 161 N.C. App. at 629, 589 S.E.2d at 165. This assignment of error is overruled.

V. Conclusion

ISP's withdrawal did not grant the relief sought by petitioners nor dispose of the original question in controversy: the validity of the Board's actions. *Humana Hospital*, 78 N.C. App. at 640, 338 S.E.2d at

141. The superior court did not err when it ruled on the parties' motions for summary judgment, notwithstanding ISP's withdrawal.

The superior court exercised the proper scopes of review and correctly applied those scopes of review. *Humane Soc'y of Moore Cty.*, 161 N.C. App. at 629, 589 S.E.2d at 165. The superior court's order is affirmed.

Affirmed.

Judges McCULLOUGH and STROUD concur.

STATE OF NORTH CAROLINA v. DEBORAH DUNLAP HATLEY

No. COA07-1091

(Filed 20 May 2008)

Motor Vehicles— intoxilyzer test—witness—identification at police station front desk

The trial court erred by denying defendant's motion to suppress the results of an intoxilyzer test where the uncontradicted evidence was that the witness who had been called by defendant timely arrived, identified and described the person she was there to see to the front desk officer, told the front desk officer that the person was there for "DUI," the arresting officer was aware that a witness had been called and was en route, and the witness was kept waiting at the front desk until after the test. There is no authority for the proposition that a potential witness must state unequivocally and specifically that he or she has been called to view the intoxilyzer test.

Appeal by Defendant from order entered 3 May 2007 by Judge Christopher M. Collier in Cabarrus County Superior Court. Heard in the Court of Appeals 5 March 2008.

Attorney General Roy Cooper, by Assistant Attorney General Tamara S. Zmuda, for the State.

Hartsell & Williams, P.A., by Christy E. Wilhelm, for Defendant.

STEPHENS, Judge.

Defendant pled guilty to driving while impaired in violation of N.C. Gen. Stat. § 20-138.1 after the trial court denied her motion to suppress the results of an intoxilyzer test. Defendant appeals the denial of her motion. Because she specifically notified the State and the trial court of her intention to appeal, Defendant preserved the issue for appellate review notwithstanding her guilty plea. N.C. Gen. Stat. § 15A-979(b) (2005); *State v. McBride*, 120 N.C. App. 623, 463 S.E.2d 403 (1995), *aff'd per curiam*, 344 N.C. 623, 476 S.E.2d 106 (1996).

We first observe that Defendant did not assign error to any of the findings of fact made in the trial court's order denying her motion to suppress. Therefore, our review of the order "is limited to the question of whether the trial court's findings of fact, which are presumed to be supported by competent evidence, support its conclusions of law and judgment." *State v. Pickard*, 178 N.C. App. 330, 334, 631 S.E.2d 203, 206 (citations omitted), *appeal dismissed and disc. review denied*, 361 N.C. 177, 640 S.E.2d 59 (2006). "This Court must not disturb the trial court's conclusions if they are supported by the court's factual findings." *State v. McArn*, 159 N.C. App. 209, 211-12, 582 S.E.2d 371, 373 (2003) (citing *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)). "However, the trial court's conclusions of law are reviewed *de novo* and must be legally correct." *State v. Hernandez*, 170 N.C. App. 299, 304, 612 S.E.2d 420, 423 (2005) (citing *State v. Fernandez*, 346 N.C. 1, 11, 484 S.E.2d 350, 357 (1997)).

The facts of this case are not in dispute and were recounted by the trial court in its findings of fact:

1. On [the evening of] March 6 Officer Rebekah Efird with the Concord Police Department was on routine patrol . . . .
2. [Defendant] was operating a vehicle which was lawfully stopped by the officer after which [Defendant] was arrested for driving while impaired.
3. [Defendant] was transported to the Cabarrus County Sheriff's Office for the purpose of administering an intoxilyzer test.
4. At 3:01 a.m. [Defendant] was advised of her rights pursuant to [N.C. Gen. Stat. § 20-16.2(a)].
5. [Defendant] indicated she wanted to call a witness and was successful in reaching her daughter at approximately 3:04 a.m.

6. [Defendant] informed the officer that her daughter was on her way and was coming from Rowan County.

7. [Defendant] had been previously advised the test could be delayed no more than thirty minutes.

8. It was the arresting officer's habit and normal procedure to inform the front desk duty officer that a witness was expected, however, the officer could not specifically remember if she had done so in this case and the officer believed to be on duty that evening is now deceased.

9. During the waiting period [Defendant] was allowed to call her daughter to ascertain her whereabouts, but [Defendant] was unable to reach her.

10. The test was delayed thirty-four minutes before [Defendant] was asked to submit so as to give [Defendant's] daughter time to arrive.

11. [Defendant] submitted to the test as requested as there was no indication from the front desk that a witness had arrived.

12. The test concluded at 3:37 a.m. with a result of .11.

13. [Defendant] was then taken immediately to the magistrate at which time the officer and [Defendant] encountered [Defendant's] daughter and another female during which time [Defendant] and her daughter were allowed to speak briefly.

14. The arresting officer then directed [Defendant's] daughter and the other female to the magistrate's office and indicated that [Defendant] would most likely be released into their custody as she had been polite and cooperative.

15. [Defendant] was released into the custody of her daughter on a written promise to appear at 4:00 a.m.

16. Amy Hatley, daughter of [Defendant], received the call from her mother requesting her to witness the test at approximately 3:05 a.m. and immediately left her residence and arrived at the Cabarrus County Sheriff's Office approximately fifteen minutes later[.]

17. Upon arriving at the Sheriff's office Ms. Hatley informed the front desk duty officer she was "there for Debra [sic] Hatley."

18. There is no evidence [Defendant] or the arresting officer was aware of the arrival of the prospective witness.

19. Amy Hatley waited approximately fifteen minutes after her arrival at which time she saw her mother and the arresting officer and then was directed to the magistrate's office.

20. At no time did Amy Hatley tell the front desk officer she had been summonsed to witness an intoxilyzer test.

21. [Defendant] offered no evidence she requested another test once she realized her daughter was available to witness such a test.

22. [Defendant] was released very shortly after the administration of the intoxilyzer test to the custody of her daughter who then had an opportunity to observe her and assess her sobriety.

At the conclusion of the suppression hearing, the trial court stated that "[b]ecause [Amy Hatley] did not tell the officer she was there to be a witness," the motion was denied. The trial court concluded that Defendant's statutory rights were not violated and denied her motion to suppress.

Section 20-16.2(a) of the General Statutes states, in pertinent part:

> Any law enforcement officer who has reasonable grounds to believe that the person charged has committed [an] implied-consent offense [such as driving while impaired] may obtain a chemical analysis of the person.
>
> Before any type of chemical analysis is administered the person charged shall be taken before a chemical analyst authorized to administer a test of a person's breath or a law enforcement officer who is authorized to administer chemical analysis of the breath, who shall inform the person orally and also give the person a notice in writing that:
>
> . . . .
>
> (6) You may call an attorney for advice and select a witness to view the testing procedures remaining after the witness arrives, but the testing may not be delayed for these purposes longer than 30 minutes from the time you are notified of these rights. You must take the test at the end of 30 minutes even if you have not contacted an attorney or your witness has not arrived.

N.C. Gen. Stat. § 20-16.2(a) (2005). A witness who has been selected to observe the testing procedures must make reasonable efforts to

gain access to the defendant. *State v. Ferguson*, 90 N.C. App. 513, 369 S.E.2d 378, *appeal dismissed and disc. review denied*, 323 N.C. 367, 373 S.E.2d 551 (1988). Although a defendant may waive the statutorily prescribed right to select a witness, the denial of the right requires suppression of the intoxilyzer results. *State v. Myers*, 118 N.C. App. 452, 455 S.E.2d 492, *disc. review denied*, 340 N.C. 362, 458 S.E.2d 195 (1995); *State v. Gilbert*, 85 N.C. App. 594, 355 S.E.2d 261 (1987); *State v. Shadding*, 17 N.C. App. 279, 194 S.E.2d 55, *cert. denied*, 283 N.C. 108, 194 S.E.2d 636 (1973).

In this case, the trial court's findings of fact establish: (1) Defendant was advised of her right to select a witness to view the testing procedures; (2) Defendant did not waive her right; (3) Defendant notified Officer Efird that she had selected and contacted a witness who was on her way to the Sheriff's office to observe the testing procedures; and (4) the witness arrived at the Sheriff's office to observe the testing procedures well within the statutorily allotted thirty minutes. The findings also establish that Amy Hatley did not tell the front desk officer specifically that she was there to witness an intoxilyzer test. Echoing the trial court's pronouncement, the State argues that "since the witness never indicated to anyone that she was at the Sheriff's Department to witness the Intoxilyzer test[,]" Defendant was not deprived of her statutory right. In support of this position, the State principally relies on our unpublished decision in *State v. Lyle*, No. COA02-1140, 2003 WL 21180780 (May 20, 2003).

In *Lyle*, a Highway Patrolman arrested the defendant for driving while impaired and transported the defendant to a law enforcement center. The Trooper brought the defendant to a "test room" to administer an intoxilyzer test and advised the defendant of his right to have a witness present. *Id.* at *2. The defendant unsuccessfully attempted to call his wife to witness the test. Unbeknown to defendant, his wife was in a waiting area outside a dispatcher's office at the law enforcement center. The wife told the dispatcher that "she was there to see the defendant[,]" but the wife was not escorted to the test room. *Id.* at *1. We held that since neither the Trooper nor the defendant knew the wife was present at the law enforcement center, and since the dispatcher did not know the wife was there to witness an intoxilyzer test, the defendant's statutory rights were not violated.

In the present case, by contrast, Officer Efird knew not only that Defendant had contacted a witness but also that the witness was on her way to the Sheriff's office to observe the test. Officer Efird testified that she could not recall whether she alerted the front desk offi-

cer of the witness's impending arrival, but the State contends that she was under no duty to take any positive action to ensure the witness was admitted to the intoxilyzer room. Assuming without deciding that Officer Efird was not, at a minimum, required to alert the front desk officer that a witness was coming to view the administration of the intoxilyzer test, we conclude that Amy Hatley timely arrived and made reasonable efforts to gain access to Defendant, and that, therefore, Defendant's statutory right to have a witness observe the testing procedures was violated.

The front desk officer on duty the night Defendant was brought to the Sheriff's office did not testify at the suppression hearing. Amy Hatley testified, however, as follows:

> A. I walked up to the [front desk officer's] window and I told him that I was there for Debbie Hatley.
>
> Q. And what were you directed to do?
>
> A. He asked me what she was there for and I told him a DUI. He asked me what she looked like. I said she was tall and blond. And he said you can step over there and he pointed across the hall. And we just waited. . . .

From this testimony, the trial court found that "Ms. Hatley informed the front desk duty officer she was 'there for Debra Hatley.' " We find no authority for the proposition that a potential witness to an intoxilyzer test must state unequivocally and specifically that he or she has been called to view the test before the witness is permitted to observe the test. Uncontradicted evidence shows that the witness timely arrived; identified and described to the front desk officer the person she was there to see; and told the front desk officer that the person was there for "a DUI." Under the facts of this case, particularly Officer Efird's knowledge that a witness had been contacted and Officer Efird's understanding that the witness was en route to the Sheriff's office to observe the test, the trial court erred in denying Defendant's motion to suppress.

The trial court's order denying Defendant's motion to suppress is reversed. Accordingly, the judgment entered upon Defendant's guilty plea is also reversed.

REVERSED.

Judges McGEE and TYSON concur.

TIMOTHY J. HASH, PLAINTIFF v. THE ESTATE OF PAIGE WALTON HENLEY, BY AND THROUGH ITS CO-ADMINISTRATORS, RODNEY W. HENLEY AND JEWEL R. HENLEY, NEAL S. GORDON, JR. AND GORDON & SONS FINE GRADING INC., DEFENDANTS

No. COA07-845

(Filed 20 May 2008)

Evidence— judicial admission—prior testimony repudiated allegations and affidavit—summary judgment

The trial court did not err in an action arising out of an automobile accident by granting summary judgment in favor of defendants when defendants' motion alleged that plaintiff passenger previously had provided sworn testimony that decedent driver Henley was not negligent in the operation of her motor vehicle that resulted in plaintiff's injuries, and in response plaintiff filed an affidavit alleging facts that directly contradicted his prior testimony, because: (1) plaintiff's prior testimony unequivocally and unambiguously repudiated the allegations in his complaint and affidavit; and (2) plaintiff's statements constitute judicial admissions by which he is bound.

Appeal by plaintiff from an order entered 13 February 2007 by Judge W. Erwin Spainhour in Davie County Superior Court. Heard in the Court of Appeals 16 January 2008.

Wells Jenkins Lucas & Jenkins PLLC, by Ellis B. Drew, III and R. Michael Wells, Jr., for plaintiff-appellant.

Bennett & Guthrie, P.L.L.C., by Rodney A. Guthrie and Jason P. Burton, for defendant-appellee, The Estate of Paige Walton Henley, by and through its Co-Administrators, Rodney W. Henley and Jewel R. Henley.

JACKSON, Judge.

Timothy J. Hash ("plaintiff") appeals the trial court's order granting summary judgment in favor of the Estate of Paige Walton Henley, by and through its co-administrators, Rodney W. Henley and Jewel R. Henley ("defendants"). For the reasons stated below, we affirm.

On or about 22 November 2002, plaintiff was riding as a passenger in a car driven by defendants' decedent, Paige Walton Henley ("Henley"). As they proceeded northbound on Highway 801 near Mocksville in Davie County, a two-lane road, defendant Neal S.

Gordon ("Gordon") tailgated them for a mile or two, flashing his high-beam headlights at them. Gordon eventually passed them, then slowed down significantly in front of them.

Henley became irritated and attempted to pass Gordon. Gordon sped up, staying alongside Henley to prevent her from passing his truck. Although plaintiff asked Henley to slow down and pull in behind Gordon, she did not. She eventually gained a little distance on Gordon and asked plaintiff if there was enough room for her to pull in front of Gordon.

At this point, one of the vehicles crossed into the other lane, causing the vehicles to collide. Henley's car spun partly in front of Gordon, then into some trees on the side of the road, then back into Gordon's truck. As a result of the accident, Henley died and plaintiff received multiple injuries.

Gordon eventually was found guilty of misdemeanor death by motor vehicle on 17 July 2003. Plaintiff testified for the State at Gordon's trial. On 25 November 2003, defendants filed a civil suit against Gordon. Plaintiff was deposed in that suit on 9 June 2004; however, he did not testify at trial. The jury returned a verdict finding no negligence on Gordon's part in that case.

Plaintiff filed the instant suit on 29 July 2005. Plaintiff settled with defendants Gordon and Gordon & Sons Fine Grading, and they were released. The settlement specifically reserved "any and all claims."

On 19 January 2007, defendants filed a motion for summary judgment. The motion was heard on 5 February 2007. Summary judgment was granted in defendants' favor by order filed 13 February 2007. Plaintiff appeals.

Plaintiff argues that there are genuine issues of material fact such that the trial court's granting of summary judgment was in error. We disagree.

We review an order allowing summary judgment *de novo*. *See Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2005).

The 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).

In the case *sub judice*, defendants' motion for summary judgment alleged that plaintiff previously had provided sworn testimony that Henley was not negligent in the operation of her motor vehicle that resulted in plaintiff's injuries. In response, plaintiff filed an affidavit in which he alleged facts that directly contradict his prior testimony.

At issue in the present appeal is whether plaintiff's prior testimony constitutes evidential admissions by which he is not bound, or judicial admissions by which he is bound. In *Cogdill v. Scates*, 26 N.C. App. 382, 216 S.E.2d 428 (1975), *aff'd*, 290 N.C. 31, 224 S.E.2d 604 (1976), the plaintiff had alleged in her complaint that her injuries were the result of her husband's negligent driving. At trial, however, she testified that her husband acted reasonably. This Court held that the plaintiff was "conclusively bound by her unequivocal testimony" that her husband was not negligent. *Id.* at 385-86, 216 S.E.2d at 430. *Cogdill* did not address whether the plaintiff's testimony constituted a judicial admission. *Id.* at 385, 216 S.E.2d at 430.

In *Woods v. Smith*, 297 N.C. 363, 255 S.E.2d 174 (1979), the North Carolina Supreme Court discussed the difference between evidential and judicial admissions. The Court concluded, "when a party gives adverse testimony in a deposition or at trial, that testimony should not, in most instances, be conclusively binding on him to the extent that his opponent may obtain either summary judgment or a directed verdict." *Id.* at 374, 255 S.E.2d at 181. However, *Woods* recognized an exception "when a party gives unequivocal, adverse testimony under factual circumstances such as were present in *Cogdill*, [in which case] his statements should be treated as binding judicial admissions rather than as evidential admissions." *Id.*

This Court previously has affirmed summary judgment when the plaintiff's deposition testimony unequivocally and unambiguously

repudiated the allegations in the complaint. In *Body v. Varner*, 107 N.C. App. 219, 224, 419 S.E.2d 208, 211 (1992), the Court recognized the general rule as stated in *Woods*, but noted that *Cogdill* applied to the extent that a party's deposition testimony unequivocally repudiates the allegations raised in the party's complaint. *Id.* at 223-24, 419 S.E.2d at 211.

Therefore, the central issue we must decide in the instant case is whether plaintiff's prior testimony unequivocally and unambiguously repudiates the allegations in his complaint and affidavit. We hold that it does.

On 17 July 2003, plaintiff testified against Gordon at the criminal trial resulting from the underlying accident in this case. When asked about road markings present at the time Henley began to pass Gordon, plaintiff responded, "We had the separated lines. The passing marks." On cross-examination, he reiterated that "[s]he pulled out in a passing zone. There was a passing zone there." He stated that Gordon "wasn't letting us over." Plaintiff further testified that as soon as he turned his head to see if there was enough room for Henley to move into the lane in front of Gordon, "[Gordon] smacked us." "He hit us. He hit us in the right rear wheel." Plaintiff continued that Henley's car was "clearly in the southbound lane." He further testified that, to his knowledge, Henley had had nothing to drink and that he did not smell alcohol on her breath. Plaintiff testified unequivocally that Gordon caused the accident.

On 9 June 2004, plaintiff provided deposition testimony in connection with defendants' civil suit against Gordon and Gordon & Sons Fine Grading. In his deposition, plaintiff stated that he could not recall a time when Henley had ever been visibly intoxicated to the point that she lost some control of her motor skills. He further stated that at the time of the accident, she did not appear to be under the influence of alcohol or drugs of any sort. When asked to describe Henley as a driver, plaintiff stated that she was a "very good driver." He testified that Henley was driving the speed limit just prior to the accident. As in the criminal trial, plaintiff testified that Henley began to pass Gordon in a passing zone and that it was Gordon who then crossed the center line and hit them. As in the criminal trial, plaintiff testified unequivocally that Gordon caused the accident.

In addition, plaintiff testified that Gordon's maneuvers "kind of irritated" Henley. In contrast to defense counsel's characterization of

Henley "slamm[ing her car] into third" gear, plaintiff said, "She put it in third gear; yes." Similarly, instead of "whip[ping] around [Gordon,]" plaintiff said Henley "proceeded to go around him." In contrast to this testimony, in his 5 February 2007 affidavit, plaintiff alleged that Henley, "in a fit of road rage," began her pass "on a double yellow line, or at least during part of the time was on a double yellow line." This is in direct contradiction to his prior sworn statements.

Pursuant to *Woods* and *Cogdill*, we hold that plaintiff's earlier testimony was unequivocal and unambiguous that it was Gordon's negligence, and not Henley's, that caused his injuries. Therefore, his statements constitute judicial admissions by which he is bound. Thus, the trial court's granting of summary judgment against him was proper.

Affirmed.

Judges HUNTER and BRYANT concur.

STATE OF NORTH CAROLINA v. SCOTTIE BRENT WEBBER

No. COA07-934

(Filed 20 May 2008)

Appeal and Error— notice of appeal not timely—motion for appropriate relief withdrawn and not ruled upon

An appeal from a conviction for trafficking in cocaine and other charges was dismissed where defendant did not give notice of appeal within fourteen days of conviction, instead filing and later withdrawing a motion for appropriate relief alleging juror misconduct. There was no ruling on the motion because it was withdrawn, and defendant's notice of appeal was given more than one year after the fourteen day appeal period had ended.

Judge HUNTER dissenting.

Appeal by defendant from judgments entered 30 January 2006 by Judge Beverly T. Beal in Cleveland County Superior Court. Heard in the Court of Appeals 20 February 2008.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Dana B. French, for the State.

Glenn Gerding, for defendant-appellant.

JACKSON, Judge.

Scottie Brent Webber ("defendant") appeals the denial of his motions to dismiss charges against him and the imposition of probation on one of his convictions. For the following reasons we dismiss.

On 26 and 30 January 2006, a jury found defendant guilty of possession of cocaine with intent to sell or deliver; trafficking in cocaine by possession; intentionally maintaining a vehicle for the keeping or selling of controlled substances; failure to stop for blue light and siren; driving while license has been revoked; felony operating a motor vehicle to elude arrest; and resisting, delaying, or obstructing an officer. Defendant was sentenced to a term of confinement in the Department of Correction for thirty-five to forty-two months on the charge of trafficking in cocaine by possession, followed by a term of eight to ten months for the charge of possession of cocaine with intent to sell or deliver. The charges of intentionally maintaining a vehicle for the keeping or selling of controlled substances, failure to stop for blue light and siren, and driving while license has been revoked were consolidated into a single sentence of 120 days, suspended for a term of thirty-six months of supervised probation, to be served at the expiration of defendant's second active sentence. The charges of felony operating a motor vehicle to elude arrest and resisting, delaying, or obstructing an officer were consolidated into a single term of nine to eleven months confinement, suspended for a term of sixty months of supervised probation, also to be served at the expiration of defendant's second active term.

On 8 February 2006, defendant filed a Motion for Appropriate Relief ("MAR") alleging juror misconduct. Over a year later, on 19 February 2007, defendant's MAR was called for a hearing. At the hearing, defendant withdrew his MAR, having been unable to substantiate any juror misconduct, and orally entered notice of appeal.

We are without jurisdiction in this matter, and, therefore, unable to address the merits of defendant's appeal. It is well-established that the issue of a court's jurisdiction over a matter may be raised at any time, even for the first time on appeal or by a court *sua sponte*. *Reece v. Forga*, 138 N.C. App. 703, 704, 531 S.E.2d 881, 882 ("A party may not

waive jurisdiction, and 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." (citations omitted)), *disc. rev. denied*, 352 N.C. 676, 545 S.E.2d 428 (2000).

Rule 4 of the North Carolina Rules of Appellate Procedure governs how and when appeals may be taken in criminal cases. Pursuant to Rule 4,

> Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a criminal action may take appeal by (1) giving oral notice of appeal at trial, or (2) filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within 14 days after entry of the judgment or order or within 14 days after a *ruling* on a motion for appropriate relief made during the 14-day period following entry of the judgment or order.

N.C. R. App. P. 4(a) (2007) (emphasis added).

A review of the transcript of defendant's criminal trial reveals that defendant did not give oral notice of appeal within fourteen days of conviction. The record similarly contains no written notice of appeal filed with the clerk of superior court within fourteen days of defendant's convictions. Although defendant summarily states in the 'Organization of the Court' portion of the record on appeal that he filed an MAR within fourteen days of his convictions, the record contains no other documentation establishing this fact. Our review is based "solely upon the record on appeal, the verbatim transcript of proceedings, if one is designated, . . . 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 appellant's duty and responsibility to see that the record is in proper form and complete." *State v. Alston*, 307 N.C. 321, 341, 298 S.E.2d 631, 644 (1983) (citations omitted).

Further, the record reveals that there was no *ruling* on defendant's MAR as defendant withdrew his MAR before the judge could begin to consider it. Defendant's oral notice of appeal after withdrawal of his MAR was given on 19 February 2007, more than one year after the fourteen day appeal period had ended.

"[W]hen a defendant has not properly given notice of appeal, this Court is without jurisdiction to hear the appeal." *State v. McCoy*, 171 N.C. App. 636, 638, 615 S.E.2d 319, 320, *appeal dismissed*, 360 N.C. 73, 622 S.E.2d 626 (2005) (citing *State v. McMillian*, 101 N.C. App.

425, 427, 399 S.E.2d 410, 411, *disc. rev. denied*, 328 N.C. 335, 402 S.E.2d 842 (1991)). Unless jurisdictional prerequisites are met, an appeal must be dismissed. *Giannitrapani v. Duke University*, 30 N.C. App. 667, 670, 228 S.E.2d 46, 48 (1976). This Court recently reaffirmed the principle that "without proper notice of appeal, the appellate court acquires no jurisdiction and neither the court nor the parties may waive the jurisdictional requirements even for good cause shown under Rule 2 of the Rules of Appellate Procedure." *In re Me.B.*, *M.J.*, *Mo.B.*, 181 N.C. App. 597, 600, 640 S.E.2d 407, 409 (2007) (citations, alterations, and quotation marks omitted); *see also In re Hudson*, 165 N.C. App. 894, 898, 600 S.E.2d 25, 28 (noting that "[w]hen the record does not include a notice of appeal, the appellate courts are without jurisdiction." (citations omitted)), *appeal dismissed*, *disc. rev. denied*, *and cert. denied*, 359 N.C. 189, 607 S.E.2d 271 (2004).

Dismissed.

Judge BRYANT concurs.

Judge HUNTER dissents in a separate opinion.

HUNTER, Judge, dissenting.

As the majority notes, at the hearing on defendant's motion for appropriate relief, he both withdrew that motion and orally entered notice of appeal. Had defendant requested that the court deny the motion for appropriate relief rather than withdrawing it, defendant would not have lost his right to appeal the other issues in this case. As the majority notes, Rule 4(a) of the North Carolina Rules of Appellate Procedure requires " 'filing notice of appeal . . . within 14 days after entry of the judgment or order or within 14 days after a ruling on a motion for appropriate relief made during the 14-day period following entry of the judgment or order.' " (Emphasis added.) Because the record reflects no notice of appeal filed within fourteen days of the judgment, defendant by withdrawing the motion for appropriate relief lost any right to appeal. As such, it is clear to me that the withdrawal of the motion was an inadvertent error. In light of this, I would grant *certiorari* and hear this appeal not only because I believe it would prevent injustice to defendant, who has lost his right to appeal because of this error, *see* N.C.R. App. P. 21(a)(1), but also in the interests of judicial economy: If we dismiss this appeal, defendant

will almost certainly petition this Court for a writ of *certiorari*; given the issues of injustice that petition will present, this Court will likely grant the petition, and we will then have to hear this appeal on its merits instead of disposing of it with finality at this time.

For these reasons, I would not dismiss this appeal but hear it on its merits. After having reviewed the merits of this case, I would find no error in the judgment of the court as to the portion of defendant's trial through the jury verdict, but would remand for resentencing as conceded by the State.

STATE OF NORTH CAROLINA v. ROBERT J. SATANEK

No. COA07-890

(Filed 20 May 2008)

1. Appeal and Error; Probation and Parole— appealability— failure to appeal probation extension orders

Defendant did not waive his right to appeal the revocation of his probation and activation of his suspended sentence even though he did not appeal from the probation extension orders, because he had no right to appeal those orders since the probation was neither activated nor modified to special probation.

2. Probation and Parole— subject matter jurisdiction—original period expired

The trial court lacked subject matter jurisdiction to revoke defendant's probation on 26 February 2004, and the judgment is vacated, because: (1) the original probationary period expired on 1 February 2004; and (2) the State did not file a written motion before the expiration of the period of probation indicating its intent to conduct a revocation hearing and did not make a reasonable effort to notify defendant and to conduct an earlier hearing. N.C.G.S. § 15A-1344(f).

Appeal by defendant from judgment entered 30 April 2007 by Judge W. Russell Duke, Jr. in Onslow County Superior Court. Heard in the Court of Appeals 20 February 2008.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Floyd M. Lewis, for the State.

Richard Croutharmel for defendant-appellant.

HUNTER, Judge.

Robert J. Satanek ("defendant") appeals from a revocation of his probation and activation of his suspended sentence. After careful review, we vacate the trial court's judgment.

I.

Defendant pled guilty to indecent liberties with a child and indecent exposure in the Superior Court of Onslow County, North Carolina, on 1 February 2001. Judge Charles H. Henry sentenced defendant to sixteen to twenty months' active confinement. Judge Henry then suspended that active sentence and placed defendant on thirty-six months' supervised probation, ending on 1 February 2004. On 1 March 2001, Judge Carl L. Tilghman found defendant in willful violation of his probation. Judge Tilghman modified defendant's monetary conditions of probation and transferred defendant's probation to Indiana without extending the probation period. A violation report was issued on 2 July 2002, and defendant was returned to North Carolina after signing a waiver of extradition.

On 24 September 2002, Judge Charles H. Henry found defendant in willful violation of his probation pursuant to the violation report dated 2 July 2002. Judge Henry modified the original judgment by ordering defendant to serve ninety days' active confinement, report to his probation officers upon release, pay attorney's fees, and reapply for transfer of his probation to Indiana.

On 26 February 2004, Judge Donald W. Stephens signed an "Order on Violation of Probation or on Motion to Modify," which modified the monetary conditions of defendant's probation and extended defendant's term of probation twenty-four months, from 7 February 2004 until 7 February 2006 ("first extension").

On 9 January 2006, defendant signed a statement agreeing to an extension of his probation another twenty-four months in order to continue his sex offender treatment ("second extension"). On 16 January 2006, Judge Stephens signed an "Order on Violation of Probation or on Motion to Modify," which extended defendant's term

of probation an additional twenty-four months, from 7 February 2006 until 6 February 2008. On 28 March 2007, defendant's probation officer filed a violation report charging that defendant had willfully violated the sex offender special conditions of his probation. At a probation violation hearing on 30 April 2007, Judge Russell Duke found that defendant willfully and without valid excuse violated each of the conditions of his probation as set forth in the violation report dated 28 March 2007. Judge Duke entered a judgment which revoked defendant's probation and activated his suspended sentence. Defendant appeals from this judgment.

II.

[1] Before considering defendant's appeal, we must briefly address the State's argument that defendant may not bring an appeal at this time. The State argues that the proper recourse for defendant was either to appeal as a matter of right within fourteen days of the entry of judgment or to petition this Court for review by writ of certiorari if the right to prosecute the appeal has been lost by failure to take timely action. See N.C. Gen. Stat. § 15A-1444 (2007); N.C.R. App. P. 4(a)(2); N.C.R. App. P. 21(a)(1). The State further argues that defendant has twice failed to comply with the North Carolina Rules of Appellate Procedure by not appealing his probation extension orders and thus has waived his right to appeal both extension orders. In addition, the State believes that defendant's attempt to appeal constitutes an impermissible collateral attack.

The State relies heavily on three cases to reach the conclusion that defendant is precluded from challenging the validity of the probation extension orders while appealing the revocation of his probation: *State v. Holmes*, 361 N.C. 410, 646 S.E.2d 353 (2007); *State v. Rush*, 158 N.C. App. 738, 582 S.E.2d 37 (2003); and *State v. Noles*, 12 N.C. App. 676, 184 S.E.2d 409 (1971). In each case, the appellate court held that, because the defendant's sentence was activated, the defendant had a right to appeal. However, the State fails to recognize that in the present case defendant was precluded from appealing his probation because it was neither activated nor modified to "special probation." Unlike the defendants in the three cases cited by the State, all of whom waived their right to appeal, defendant in this case did not waive his right to appeal because he had no right to appeal the extension orders. *See State v. Edgerson*, 164 N.C. App. 712, 714, 596 S.E.2d 351, 352-53 (2004) (citing N.C. Gen. Stat. §§ 15A-1347 (2003) and 15A-1344(e) (2003)).

III.

[2] Defendant's sole argument on appeal is that the trial court lacked subject matter jurisdiction to revoke his probation. A trial court asserts the "conclusion of law" that it has subject matter jurisdiction when it enters a judgment against a defendant in a criminal case. An appellate court reviews conclusions of law *de novo*. *State v. Taylor*, 155 N.C. App. 251, 260, 574 S.E.2d 58, 65 (2002). Further, an appellate court necessarily conducts a statutory analysis when analyzing whether a trial court has subject matter jurisdiction in a probation revocation hearing, and thus conducts a *de novo* review. *See State v. Bryant*, 361 N.C. 100, 637 S.E.2d 532 (2006).

A trial court must have subject matter jurisdiction over a case in order to act in that case. *State v. Reinhardt*, 183 N.C. App. 291, 292, 644 S.E.2d 26, 27 (2007) (citing *In re N.R.M.*, 165 N.C. App. 294, 297, 598 S.E.2d 147, 149 (2004)). In addition, a defendant may properly raise this issue at any time, even for the first time on appeal. *Id.* (citing *State v. Bossee*, 145 N.C. 579, 59 S.E. 879 (1907)).

The judgment that originally placed defendant on probation was entered on 1 February 2001, and the original probationary period expired on 1 February 2004. According to N.C. Gen. Stat. § 15A-1344(d), a trial court can only extend probation "prior to the expiration or termination of the probation period[.]" There is no provision in the statute that allows for the extension of probation after the original term has expired. However, under N.C. Gen. Stat. § 15A-1344(f) (2007):

> The court may revoke probation after the expiration of the period of probation if:
>
> (1) Before the expiration of the period of probation the State has filed a written motion with the clerk indicating its intent to conduct a revocation hearing; and
>
> (2) The court finds that the State has made reasonable effort to notify the probationer and to conduct the hearing earlier.

The State neither filed the required written motion nor did it make a reasonable effort to notify the probationer. Therefore, because defendant's period of probation had expired, the trial court lacked jurisdiction on 26 February 2004 to extend the probationary period in the first extension, and thus, the trial court lacked jurisdiction to revoke defendant's probation in the second extension.

Finally, " '[w]hen the record shows a lack of jurisdiction in the lower court, the appropriate action on the part of the appellate court is to arrest judgment or vacate any order entered without authority.' " *State v. Crawford*, 167 N.C. App. 777, 779, 606 S.E.2d 375, 377 (2005) (citation omitted).

IV.

Since, the trial court lacked subject matter jurisdiction the judgment revoking defendant's probation must be vacated.

Vacated.

Judges BRYANT and JACKSON concur.

ORIX FINANCIAL SERVICES, INC., FORMERLY KNOWN AS ORIX CREDIT ALLIANCE, INC., PLAINTIFF v. RASPBERRY LOGGING, INC., STEPHANIE MCCRANEY, N/K/A STEPHANIE KNOCKETT, DEFENDANTS

No. COA07-1051

(Filed 20 May 2008)

1. Judgments— foreign judgment—enforcement—absence of personal jurisdiction—failure to assign error to conclusion

The trial court did not err by denying plaintiff's motion to enforce a foreign judgment against the individual defendant on the ground that the New York court rendering the judgment against her did not have personal jurisdiction over her where plaintiff did not assign error to the trial court's conclusion that the New York court did not have personal jurisdiction over defendant and thus waived the right to challenge this conclusion.

2. Appeal and Error— preservation of issues—parol evidence—failure to contest personal jurisdiction determination

Although plaintiff contends the trial court erred in a breach of contract case by considering parol evidence at the time the pertinent guaranty agreement was executed, this argument is dismissed because: (1) plaintiff did not contest the trial court's conclusion that the New York court rendering judgment against defendant did not have personal jurisdiction over her; and (2) without personal jurisdiction over defendant, the New York judg-

ment will not be enforced and thus the actual terms of the contract are irrelevant.

3. Appeal and Error— preservation of issues—minimum contacts—failure to contest personal jurisdiction determination

Although plaintiff contends the trial court erred by concluding that defendant individual did not consent to jurisdiction in New York nor did she have minimum contacts with New York, this argument is dismissed because plaintiff did not contest the trial court's conclusion that the New York court rendering judgment against defendant did not have personal jurisdiction over her.

Appeal by plaintiff from order entered 9 April 2007 by Judge John E. Nobles in Superior Court, Craven County. Heard in the Court of Appeals 21 February 2008.

Smith Debnam Narron Wyche Saintsing & Myers, L.L.P. by Adam M. Gottsegen, for plaintiff-appellant.

Chesnutt, Clemmons & Peacock, P.A. by Gary H. Clemmons, for defendant-appellee.

STROUD, Judge.

Plaintiff filed a "Motion to Enforce Foreign Judgment" in North Carolina based upon a judgment rendered in the United States District Court for the Southern District of New York. The trial court denied plaintiff's motion and dismissed the case with prejudice. Plaintiff appeals. The issues before this Court are whether the trial court erred in (1) denying plaintiff's motion to enforce the foreign judgment, (2) considering parol evidence, and (3) concluding that defendant Stephanie Knockett did not consent to jurisdiction in New York nor did she have minimum contacts with New York. For the following reasons, we affirm.

I. Background

The trial court made extensive findings of fact, only three of which were assigned as error by plaintiff, on the basis that these three findings of fact, numbers 6, 29, and 32, were based upon parol evidence which should not have been considered. Based upon its findings of fact the trial court concluded as law, *inter alia*, that "Knockett has successfully rebutted the presumption that the

North Carolina Courts should grant full faith and credit to the New York Judgment. The United States District Court for the Southern District of New York did not have *in personam* jurisdiction over Knockett."

Based upon its findings of fact and conclusions of law, the trial court denied plaintiff's "Motion for Enforcement of the Foreign Judgment" and dismissed the action with prejudice. Plaintiff appeals. The issues before this Court are whether the trial court erred in (1) denying plaintiff's motion to enforce the foreign judgment, (2) considering parol evidence, and (3) concluding that defendant Knockett did not consent to jurisdiction in New York nor did she have minimum contacts with New York.

II. Motion to Enforce Judgment

[1] Plaintiff first contends "the trial court erred in denying plaintiff's motion to enforce its foreign judgment when defendant Knockett signed a guaranty agreement with a conspicuous consent to jurisdiction or forum selection clause." For the following reasons, we disagree.

"The judgment debtor may file a motion for relief from, or notice of defense to, the foreign judgment on . . . any . . . ground for which relief from a judgment of this State would be allowed." N.C. Gen. Stat. § 1C-1705(a) (2005).

> If a motion for enforcement is filed, a hearing will be held and the trial court will determine if the foreign judgment is entitled to full faith and credit. The burden of proof on the issue of full faith and credit is on the judgment creditor, and the hearing will be conducted in accordance with the Rules of Civil Procedure. The introduction into evidence of a copy of the foreign judgment, authenticated pursuant to Rule 44 of the Rules of Civil Procedure, establishes a presumption that the judgment is entitled to full faith and credit. This presumption can be rebutted by the judgment debtor upon a showing that the rendering court did not have subject matter jurisdiction, *did not have jurisdiction over the parties*, that the judgment was obtained by fraud or collusion, that the defendant did not have notice of the proceedings, or that the claim on which the judgment is based is contrary to the public policies of North Carolina.

Lust v. Fountain of Life, Inc., 110 N.C. App. 298, 300-01, 429 S.E.2d 435, 437 (1993) (internal citations and internal quotation marks omit-

ted) (emphasis added); *see Southern Athletic/Bike v. House of Sports, Inc.*, 53 N.C. App. 804, 805, 281 S.E.2d 698, 699 (1981) (concluding that a judgment that lacks personal jurisdiction over the defendant is void); *cert. denied*, 304 N.C. 729, 288 S.E.2d 381 (1982).

"The appellant must assign error to each conclusion it believes is not supported by the evidence. N.C.R. App. P. 10. Failure to do so constitutes an acceptance of the conclusion and a waiver of the right to challenge said conclusion as unsupported by the facts." *Fran's Pecans, Inc. v. Greene*, 134 N.C. App. 110, 112, 516 S.E.2d 647, 649 (1999).

The trial court concluded as law that "Knockett has successfully rebutted the presumption that the North Carolina Courts should grant full faith and credit to the New York Judgment. The United States District Court for the Southern District of New York did not have *in personam* jurisdiction over Knockett." As plaintiff did not assign error to this conclusion of law, plaintiff has waived the right to challenge this conclusion. *See id.* Therefore, we conclude that the trial court did not err in denying plaintiff's motion to enforce the foreign judgment because the New York court rendering the judgment against Knockett did not have personal jurisdiction over her. *See Lust* at 300-01, 429 S.E.2d at 437; *see also Southern/Athletic Bike* at 805, 281 S.E.2d at 699.

III. Parol Evidence

[2] Plaintiff next contends "the trial court erred by considering defendant Knockett's parol evidence at the time the guaranty agreement was executed." Plaintiff specifically contends that "[f]indings of fact numbers 6, 29, and 32 . . . contain the admission of oral evidence that contradicts the terms of the agreement."

However, we need not consider whether the trial court erred in considering evidence that may have contradicted the terms of the contract as the trial court found that the New York court rendering judgment against defendant Knockett did not have personal jurisdiction over her and plaintiff did not contest this conclusion, *see Fran's Pecans, Inc.* at 112, 516 S.E.2d at 649; without personal jurisdiction over defendant Knockett the New York judgment will not be enforced, and thus the actual terms of the contract are irrelevant. *See Lust* at 300-01, 429 S.E.2d at 437; *see also Southern/Athletic Bike* at 805, 281 S.E.2d at 699.

IV. Consent and Minimum Contacts

[3] Plaintiff also argues that "the trial court erred by concluding that defendant Knockett did not consent to jurisdiction in the State of New York and that defendant Knockett did not have to defend an action there on the basis of minimum contacts[.]" This argument is based upon plaintiff's third assignment of error, to conclusion of law number 18. Plaintiff assigned error to this conclusion of law on the "grounds that it is not supported by competent evidence of record[.]" However, again, we will not review the trial court's conclusion on issues of consent and minimum contacts, as plaintiff did not assign error to the trial court's conclusion that the New York court rendering judgment against defendant Knockett did not have personal jurisdiction over her.

V. Conclusion

As the trial court determined that the New York judgment was not enforceable against defendant Knockett because of a lack of personal jurisdiction over her, and plaintiff failed to challenge this conclusion of law, we affirm the trial court's decision to deny plaintiff's motion to enforce the foreign judgment.

AFFIRMED.

Judges TYSON and GEER concur.

STATE OF NORTH CA ROLINA v. ARIAS C. RODRIGO

No. COA07-938

(Filed 20 May 2008)

Bail and Pretrial Release— motion to set aside bond forfeiture—incarceration in county jail—deportation

The trial court erred by granting a surety's motions to set aside a bond forfeiture based on the surety's evidence including computer printouts of inmate records from the Mecklenburg County Sheriff's Office indicating that defendant was in its custody on 16 July 2006 and released on 17 July 2006, another printout titled "Charge Display" with defendant's name and inmate

number with the notation "federal prisoner," and the surety's argument that defendant was unable to appear at the August court dates since he had been deported, because: (1) relief from a forfeiture, before a forfeiture becomes a final judgment, is exclusive and limited to the reasons provided in N.C.G.S. § 15A-544.5; (2) the documents indicated defendant was released from the Mecklenburg County Sheriff's Office on 17 July 2006, and defendant's court dates were scheduled in August 2006; (3) the printouts did not support a finding under N.C.G.S. § 15A-544.5(b)(6) that defendant was incarcerated in a unit of the North Carolina Department of Correction and is serving a sentence or in a unit of the Federal Bureau of Prisons located within the borders of the State at the time of the failure to appear since a county jail is not a unit of the Department of Correction; and (4) deportation is not listed as one of the six exclusive grounds that allows the court to set aside a bond forfeiture.

Appeal by the Mecklenburg County Board of Education from orders entered 14 March 2007 by Judge Philip F. Howerton, Jr. in Mecklenburg County District Court. Heard in the Court of Appeals 3 March 2008.

James, McElroy & Diehl, P.A., by Jon P. Carroll, for the Mecklenburg County Board of Education.

No brief filed for Sherman F. Crowder, surety-appellee.

CALABRIA, Judge.

The Mecklenburg County Board of Education ("BOE") appeals from orders granting surety Sherman F. Crowder's ("the surety") motions to set aside a bond forfeiture. We reverse and remand.

On 14 May 2006, Arias C. Rodrigo ("defendant") was charged with driving while impaired in violation of N.C. Gen. Stat. § 20-138.1 and his release was authorized upon the execution of a bond in the amount of $1,000. The following day, defendant was charged with driving while impaired in violation of N.C. Gen. Stat. § 20-138.1 and with driving without being licensed as a driver in violation of N.C. Gen. Stat. § 20-7(a). Defendant was also charged with consuming alcohol while operating a motor vehicle in violation of N.C. Gen. Stat. § 20-138.7, reckless driving in violation of N.C. Gen. Stat. § 20-140(b), and hit and run/failure to stop in violation of N.C. Gen.

Stat. § 20-166(c) (collectively referred to as "the 15 May 2006 charges"). Defendant's release was authorized upon the execution of bonds in different amounts. Specifically, a $4,000 bond for the 15 May 2006 driving while impaired charge, $1,000 each for the driving without being a licensed driver charge and consuming alcohol charge, and $2,000 each for the reckless driving and hit and run charges. Defendant was released on an appearance bond on 18 May 2006.

Defendant's court date for the 15 May 2006 charges was scheduled for 7 August 2006 in Mecklenburg County District Court. When defendant failed to appear in court on that date, orders for his arrest and bond forfeiture notices were issued and mailed to the surety on 8 August 2006 for each of the 15 May 2006 charges. The bond forfeiture notices stated that the forfeitures would become final judgments on 5 January 2007.

Defendant's court date for the 14 May 2006 driving while impaired charge was 28 August 2006. When defendant failed to appear in court on that date, an order for his arrest and a bond forfeiture notice were issued on 29 August 2006. The notice was mailed to the surety on 30 August 2006. The bond forfeiture notice stated that the forfeiture would become a final judgment on 27 January 2007.

On 29 December 2006, the surety moved to set aside the forfeitures relating to the 14 May 2006 driving while impaired charge and each of the 15 May 2006 charges. The basis for the motion was that "defendant was incarcerated in a unit of the Department of Correction and is serving a sentence or in a unit of the Federal Bureau of Prisons located within the borders of the state at the time of the failure to appear." The BOE objected to the motions on 3 January 2007 and a hearing date was scheduled for 14 February 2007 then continued until 14 March 2007. On 14 March 2007, Mecklenburg County District Court Judge Philip F. Howerton, Jr. entered orders granting the surety's motions to set aside the bond forfeitures. From these orders, the BOE appeals.

I. Standard of Review

The standard of review on appeal where a trial court sits without a jury 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. *Keel v. Private Bus., Inc.*, 163 N.C. App. 703, 707, 594 S.E.2d 796, 799 (2004) (citation omitted).

II. Motion to Set Aside Bond Forfeitures

The BOE argues the surety's evidence does not support a finding that defendant was incarcerated in a unit of the Department of Correction at the time of his failure to appear on both the 7 August 2006 and the 28 August 2006 court dates. We agree.

The reasons to set aside a bond forfeiture are governed by statute. *State v. Robertson*, 166 N.C. App. 669, 670, 603 S.E.2d 400, 401 (2004). If a defendant is released upon execution of a bail bond and fails to appear in court as required, "the court shall enter a forfeiture for the amount of that bail bond in favor of the State against the defendant and against each surety on the bail bond." N.C. Gen. Stat. § 15A-544.3(a) (2005). Relief from a forfeiture, before the forfeiture becomes a final judgment, is exclusive and limited to the reasons provided in N.C. Gen. Stat. § 15A-544.5. N.C. Gen. Stat. § 15A-544.5(a) (2005); *Robertson*, 166 N.C. App. at 670, 603 S.E.2d at 401. Those reasons are:

> (1) The defendant's failure to appear has been set aside by the court and any order for arrest issued for that failure to appear has been recalled, as evidenced by a copy of an official court record, including an electronic record.
>
> (2) All charges for which the defendant was bonded to appear have been finally disposed by the court other than by the State's taking dismissal with leave, as evidenced by a copy of an official court record, including an electronic record.
>
> (3) The defendant has been surrendered by a surety on the bail bond as provided by G.S. 15A-540, as evidenced by the sheriff's receipt provided for in that section.
>
> (4) The defendant has been served with an Order for Arrest for the Failure to Appear on the criminal charge in the case in question as evidenced by a copy of an official court record, including an electronic record.
>
> (5) The defendant died before or within the period between the forfeiture and the final judgment as demonstrated by the presentation of a death certificate.
>
> (6) The defendant was incarcerated in a unit of the North Carolina Department of Correction and is serving a sentence or in a unit of the Federal Bureau of Prisons located within the borders of the State at the time of the failure to appear as evi-

denced by a copy of an official court record or a copy of a document from the Department of Correction or Federal Bureau of Prisons, including an electronic record.

N.C. Gen. Stat. § 15A-544.5(b) (2005).[1]

Here, the surety presented computer printouts of inmate records from the Mecklenburg County Sheriff's Office indicating that defendant was in the custody of the Mecklenburg County Sheriff on 16 July 2006 and released on 17 July 2006. The surety also attached another printout titled "Charge Display" with the defendant's name and inmate number and the notation "federal prisoner." At the hearing, the surety argued that defendant had been deported and for that reason was unable to appear at the 7 August and 28 August 2006 court dates.

III. Conclusion

We conclude that the trial court's findings were not supported by competent evidence. The documents presented by the surety indicate defendant was released from the Mecklenburg County Sheriff's Office on 17 July 2006. Defendant's court dates were scheduled in August of 2006. The surety presented no additional evidence other than the printouts. The printouts do not support a finding that the defendant was "incarcerated in a unit of the North Carolina Department of Correction and is serving a sentence or in a unit of the Federal Bureau of Prisons located within the borders of the State at the time of the failure to appear. . . ." A county jail is not a unit of the Department of Correction. *See Robertson*, 166 N.C. App. at 671, 603 S.E.2d at 402. Furthermore, deportation is not listed as one of the six exclusive grounds that allows the court to set aside a bond forfeiture. *Id.* at 670-71, 603 S.E.2d at 401 ("The exclusive avenue for relief from forfeiture of an appearance bond . . . is provided in G.S. § 15A-544.5."). Therefore, the trial court erred in granting the surety's motions to set aside the bond forfeitures.

Reversed and remanded.

Chief Judge MARTIN and Judge GEER concur.

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1. The General Assembly amended N.C. Gen. Stat. § 15A-544.5(b) in 2007 to add a seventh reason. *See* N.C. Gen. Stat. § 15A-544.5(b)(7) (2007) (amended by N.C. Sess. Laws 2007-105, eff. Oct. 1, 2007). This reason is not relevant to this appeal since the motions to set aside the bond forfeitures were filed and ruled on before the effective date of the amendment.

J. KAMAU CHRISTOPHER A/K/A JOSEPH KAMAU CHRISTOPHER BEY, PLAINTIFF v. NORTH CAROLINA STATE UNIVERSITY, DEFENDANT

No. COA07-1516

(Filed 20 May 2008)

Workers' Compensation— exclusive remedy—employment conceded

The Workers' Compensation Act is the exclusive remedy for a resident advisor in a university residence hall who allegedly developed asthma from mold and mildew in the building. The determinative factor is whether an employee-employer relationship exists and plaintiff conceded numerous times that he was an employee of defendant university.

Appeal by plaintiff from decision and order entered 10 August 2007 by Commissioner Christopher Scott for the North Carolina Industrial Commission. Heard in the Court of Appeals 1 May 2008.

Joseph Kamau Christopher Bey, pro se, for plaintiff-appellant.

Attorney General Roy Cooper, by Assistant Attorney General Dahr Joseph Tanoury, for the defendant-appellee.

TYSON, Judge.

J. Kamau Christopher ("plaintiff") appeals from the Full Commission of the North Carolina Industrial Commission's ("the Commission") order dismissing his tort claim action against North Carolina State University ("defendant"). We affirm.

I. Background

Plaintiff was enrolled as a student at North Carolina State University from August 1999 to May 2004. In July 2002, plaintiff enlisted in the U.S. Naval Reserve and attained the status of serving as an Active Duty member in the Nuclear Propulsion Officer Candidate Program. Plaintiff's initial enlistment physical revealed he was "fit for full service." In August 2002, plaintiff was hired as a Resident Advisor for Wood Residence Hall ("Wood Hall") for the 2002-2003 term. Plaintiff was subsequently rehired as Resident Advisor for the following 2003-2004 term.

On 18 September 2003, plaintiff resigned from his position due to "mold and mildew growing in visible areas in the living space of resi-

dents [sic] and a lack of responsiveness from the University Administration[.]" In November 2003, plaintiff was diagnosed with a permanent asthmatic and respiratory condition. Despite these medical conditions, plaintiff was granted a waiver by the Navy Recruiting Command. After graduation, plaintiff was transferred to the Naval Air Station in Pensacola, Florida. Upon plaintiff's arrival, a commissioning physical was conducted, plaintiff's medical waiver was revoked, and further analysis of plaintiff's medical condition and fitness to serve was ordered.

Such analysis revealed plaintiff's respiratory condition had further progressed. On 5 May 2005, the Navy Medical Command Physical Evaluation Board issued an order finding plaintiff had acquired a medical condition, asthma, which was a physically disqualifying factor. Plaintiff was released from his military obligation with an honorable discharge, which terminated his commitment five years early.

On 30 December 2005, plaintiff filed an affidavit under the Tort Claims Act alleging he was damaged in the amount of $150,000.00 from "exposure to substandard and unhealthy indoor environment" while he was employed as a Resident Advisor in Wood Hall. On 9 March 2006, defendant filed a motion to dismiss and answer. Defendant asserted plaintiff alleged he was injured while employed with defendant and therefore his exclusive remedy was to assert a claim under the North Carolina Workers' Compensation Act. On 20 July 2006, defendant filed a motion for summary judgment.

Plaintiff filed a response to defendant's motion for summary judgment and asserted plaintiff's injury "did not arise out of and in the course of employment, nor is the injury compensable under the North Carolina Workers' Compensation Act, and thus the Plaintiff . . . can only seek compensation for damages under the Tort Claims Act as filed." On 9 February 2007, Deputy Commissioner Wanda Taylor filed an order dismissing plaintiff's tort claim with prejudice and entered the following conclusions:

> 7. Defendant has met its burden of proof by forecasting sufficient, competent evidence to show that Plaintiff was an employee of Defendant at the time he was allegedly exposed to a "harmful" indoor environment, which in turn allegedly caused him to sustain a respiratory illness.
>
> 8. Plaintiff has failed to forecast sufficient, competent evidence to rebut Defendant's evidence, and has failed to show that

> Plaintiff was not an employee of Defendant at the time of the alleged exposure.
>
> 9. Plaintiff has failed to forecast sufficient, competent evidence to show that the Industrial Commission has subject-matter jurisdiction to hear Plaintiff's claim under the Tort Claims Act. Plaintiff has further failed to show there is a genuine issue as to a material fact.

On 10 August 2007, the Full Commission affirmed the Deputy Commissioner's order and dismissed plaintiff's tort claim with prejudice. Plaintiff appeals.

II. Issues

Plaintiff argues the Industrial Commission erred by: (1) failing to make findings of fact concerning all crucial issues, including the alleged injury; (2) hearing defendant's motion for summary judgment and finding no genuine issues of material fact exist; and (3) dismissing plaintiff's tort claim based upon the assertion that a claim under the North Carolina Workers' Compensation Act was plaintiff's exclusive remedy.

III. Standard of Review

> [W]hen reviewing Industrial Commission decisions, appellate courts must examine whether any competent evidence supports the Commission's findings of fact and whether those findings . . . support the Commission's conclusions of law. The Commission's findings of fact are conclusive on appeal when supported by such competent evidence, even though there is evidence that would support findings to the contrary.

McRae v. Toastmaster, Inc., 358 N.C. 488, 496, 597 S.E.2d 695, 700 (2004) (internal quotations omitted). However, our Supreme Court has repeatedly held "that jurisdictional facts found by the Industrial Commission, even when supported by competent evidence, are not binding upon the courts on appeal, and that the reviewing court has the duty to make its own independent findings." *Lemmerman v. Williams Oil Co.*, 318 N.C. 577, 580, 350 S.E.2d 83, 86 (1986) (citations omitted).

IV. Subject Matter Jurisdiction

The dispositive issue before us is whether the North Carolina Workers' Compensation Act provides plaintiff his exclusive remedy

for his alleged injury and divests the Industrial Commission of subject matter jurisdiction to adjudicate plaintiff's tort claim.

The determinative factor that subjects the parties to the provisions of the North Carolina Workers' Compensation Act is whether an employee-employer relationship exists. *Cox v. Transportation Co.*, 259 N.C. 38, 42, 129 S.E.2d 589, 592 (1963); *see also Askew v. Tire Co.*, 264 N.C. 168, 170, 141 S.E.2d 280, 282 (1965) ("The question whether the employer-employee relationship exists is clearly jurisdictional.").

Here, plaintiff conceded numerous times in his pleadings and before the Industrial Commission that he was an employee of defendant while he attended classes during the 2002-2003 school term and briefly for the 2003-2004 term. Plaintiff specifically states in his Response to Defendant's Motion for Summary Judgment, "Plaintiff admits and acknowledges that his relationship with the Defendant included a employer-employee arrangement, as defined by the Statutes, and thus he was employed with the Defendant during a period in which the alleged injury manifested itself[] . . . ."

It is well settled in this jurisdiction that the North Carolina Workers' Compensation Act is the exclusive remedy when an employee is injured by accident arising out of and in the course and scope of employment. *Wood v. Guilford Cty.*, 355 N.C. 161, 164, 558 S.E.2d 490, 493 (2002) (citing N.C. Gen. Stat. § 97-10.1). Because the North Carolina Workers' Compensation Act is plaintiff's exclusive remedy for the alleged injury that occurred during his employment, the Industrial Commission properly dismissed plaintiff's tort claim with prejudice. This assignment of error is overruled. In light of our holding, it is unnecessary to address plaintiff's remaining assignments of error.

V. Conclusion

The North Carolina Workers' Compensation Act provides plaintiff's exclusive remedy for his alleged injury that arose out of and in the course and scope of employment. The Industrial Commission's order dismissing plaintiff's tort claim with prejudice is affirmed.

Affirmed.

Judges McCULLOUGH and STROUD concur.

STATE OF NORTH CAROLINA v. MARCO ANTONIO LAZARO

No. COA07-937

(Filed 20 May 2008)

Bail and Pretrial Release— forfeiture of appearance bond—motion to set aside—printouts of jail records—evidence not sufficient

The trial court erred by setting aside a forfeiture of an appearance bond where the surety presented only printouts of records from the sheriff's office that did not support the finding that defendant was incarcerated in a unit of the North Carolina Department of Correction or is in a unit of the Federal Bureau of Prisons within North Carolina. A county jail is not a unit of the Department of Correction and deportation is not listed as one of the six exclusive grounds that allow the court to set aside a bond forfeiture. N.C.G.S. § 15A-544.5(b).

Appeal by the Mecklenburg County Board of Education from order entered 14 March 2007 by Judge Philip F. Howerton, Jr. in Mecklenburg County District Court. Heard in the Court of Appeals 3 March 2008.

James, McElroy & Diehl, P.A., by Jon P. Carroll, for the Mecklenburg County Board of Education.

No brief filed for Sherman F. Crowder, surety-appellee.

CALABRIA, Judge.

The Mecklenburg County Board of Education ("BOE") appeals from an order granting surety Sherman F. Crowder's ("the surety") motion to set aside a bond forfeiture. We reverse and remand.

On 25 October 2002, Marco Antonio Lazaro ("defendant") was charged with driving while impaired in violation of N.C. Gen. Stat. § 20-138.1 and his release was authorized upon the execution of a bond in the amount of $1,500. The appearance bond was executed by a third-party bondsman. Defendant's court date was set for 4 December 2002 in Mecklenburg County District Court. When defendant failed to appear in court on that date, an order for his arrest and a bond forfeiture notice were issued on 16 December 2002. Defendant was arrested on 9 January 2003 and a new bond

was set in the amount of $3,000. Defendant was later released on a second appearance bond.

On 3 March 2003, defendant failed to appear in court. The district court issued an order for arrest on 5 March 2003. Defendant was arrested on 6 May 2006 and his bond was set at $6,000.

On 11 May 2006, defendant was released on an appearance bond executed by the surety. Defendant's new court date was scheduled for 7 November 2006. Defendant again failed to appear in court and the Mecklenburg County Clerk of Court issued an order for arrest and a bond forfeiture notice on 8 November 2006 and the notice was mailed to the surety on the same day. The bond forfeiture notice stated the bond would become a final judgment on 7 April 2007.

On 29 December 2006, the surety moved to set aside the $6,000 forfeiture notice on the basis that "defendant was incarcerated in a unit of the Department of Correction and is serving a sentence or in a unit of the Federal Bureau of Prisons located within the borders of the state at the time of the failure to appear." The BOE objected to the motion on 3 January 2007 and a hearing date was scheduled for 14 February 2007 then continued until 14 March 2007. On 14 March 2007, Mecklenburg County District Court Judge Philip F. Howerton, Jr. entered an order granting the surety's motion to set aside the bond forfeiture. From this order, the BOE appeals.

I. Standard of Review

The standard of review on appeal where a trial court sits without a jury 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. *Keel v. Private Bus., Inc.*, 163 N.C. App. 703, 707, 594 S.E.2d 796, 799 (2004) (citation omitted).

II. Motion to Set Aside Bond Forfeiture

The BOE argues the surety's evidence does not support a finding that defendant was incarcerated in a unit of the Department of Correction or in a unit of the Federal Bureau of Prisons located within the borders of North Carolina at the time of his failure to appear on 7 November 2006. We agree.

The reasons to set aside a bond forfeiture are governed by statute. *State v. Robertson*, 166 N.C. App. 669, 670, 603 S.E.2d 400, 401 (2004). If a defendant is released upon execution of a bail bond and fails to appear in court as required, "the court shall enter a

forfeiture for the amount of that bail bond in favor of the State against the defendant and against each surety on the bail bond." N.C. Gen. Stat. § 15A-544.3(a) (2005). Relief from a forfeiture, before the forfeiture becomes a final judgment, is exclusive and limited to the reasons provided in N.C. Gen. Stat. § 15A-544.5. N.C. Gen. Stat. § 15A-544.5(a) (2005); *Robertson*, 166 N.C. App. at 670, 603 S.E.2d at 401. Those reasons are:

> (1) The defendant's failure to appear has been set aside by the court and any order for arrest issued for that failure to appear has been recalled, as evidenced by a copy of an official court record, including an electronic record.
>
> (2) All charges for which the defendant was bonded to appear have been finally disposed by the court other than by the State's taking dismissal with leave, as evidenced by a copy of an official court record, including an electronic record.
>
> (3) The defendant has been surrendered by a surety on the bail bond as provided by G.S. 15A-540, as evidenced by the sheriff's receipt provided for in that section.
>
> (4) The defendant has been served with an Order for Arrest for the Failure to Appear on the criminal charge in the case in question as evidenced by a copy of an official court record, including an electronic record.
>
> (5) The defendant died before or within the period between the forfeiture and the final judgment as demonstrated by the presentation of a death certificate.
>
> (6) The defendant was incarcerated in a unit of the North Carolina Department of Correction and is serving a sentence or in a unit of the Federal Bureau of Prisons located within the borders of the State at the time of the failure to appear as evidenced by a copy of an official court record or a copy of a document from the Department of Correction or Federal Bureau of Prisons, including an electronic record.

N.C. Gen. Stat. § 15A-544.5(b) (2005).[1]

1. The General Assembly amended N.C. Gen. Stat. § 15A-544.5(b) in 2007 to add a seventh reason. *See* N.C. Gen. Stat. § 15A-544.5(b)(7) (2007) (amended by N.C. Sess. Laws 2007-105, eff. Oct. 1, 2007). This reason is not relevant to this appeal since the motion to set aside the bond forfeiture was filed and ruled on before the effective date of the amendment.

Here, the surety presented computer printouts of inmate records from the Mecklenburg County Sheriff's Office indicating that defendant was in the custody of the Mecklenburg County Sheriff on 28 September 2006 and released on 2 November 2006. The surety also attached another printout titled "Charge Display" and a document titled "Sentence Display" with the defendant's name and inmate number and the notation "ICE" and "ICEP." "ICE" is an acronym for Immigration and Customs Enforcement. At the hearing, the surety argued that defendant had been deported and for that reason was unable to appear at the 7 November 2006 court hearing.

III. Conclusion

We conclude that the trial court's findings were not supported by competent evidence. The documents presented by the surety indicate defendant was released from the Mecklenburg County Sheriff's Office on 2 November 2006. Defendant's court date was scheduled for 7 November 2006. The surety presented no additional evidence other than the printouts. The printouts do not support a finding that the defendant was "incarcerated in a unit of the North Carolina Department of Correction and is serving a sentence or in a unit of the Federal Bureau of Prisons located within the borders of the State at the time of the failure to appear. . . ." A county jail is not a unit of the Department of Correction. *See Robertson*, 166 N.C. App. at 671, 603 S.E.2d at 402. Furthermore, deportation is not listed as one of the six exclusive grounds that allowed the court to set aside a bond forfeiture. *Id.* at 670-71, 603 S.E.2d at 401 ("The exclusive avenue for relief from forfeiture of an appearance bond . . . is provided in G.S. § 15A-544.5."). Therefore, the trial court erred in granting the surety's motion to set aside the bond forfeiture.

Reversed and remanded.

Chief Judge MARTIN and Judge GEER concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 20 MAY 2008)

BANK ONE, N.A. v. FRIEDMAN No. 07-1068	Iredell (02CV0602)	Affirmed
BENZ v. AMERICAN AIRLINES/AMR CORP. No. 07-1343	Indus. Comm. (I.C. No. 011668)	Affirmed
FOSTER v. UNIFI, INC. No. 07-1016	Mecklenburg (06CVS19007)	Affirmed
IN RE APPEAL OF OLIVER No. 07-796	Prop. Tax Comm. (05PTC301)	Affirmed
KING v. LINGERFELT No. 07-1193	Catawba (05CVS420)	Affirmed
KMART CORP. v. GUASTELLO No. 07-777	Wake (01CVS12138)	Affirmed
LAPIDUS v. SIEMENS POWER TRANSMISSION No. 07-784	Indus. Comm. (I.C. NO. 162240) (I.C. NO. 836986)	Remand
LAPIDUS v. SIEMENS POWER TRANSMISSION No. 07-836	Indus. Comm. (I.C. No. 162240) (I.C. No. 836986)	Affirm
MAP SUPPLY INC. v. INTEGRATED INVENTORY SOLUTIONS, LLC No. 07-733	Davidson (06CVS1168)	Affirmed
MARKLEY v. MARKLEY No. 07-1210	Wake (06CVD16987)	Dismissed
MONGER v. DURHAM HOUSING AUTH. No. 07-1187	Indus. Comm. (I.C. No. 366828)	Affirmed
MOSTELLER MANSION, LLC v. MACTEC ENG'G & CONSULTING OF GA, INC. No. 07-664	Buncombe (05CVS3046)	Affirmed
STATE v. BAILEY No. 07-1150	Mecklenburg (05CRS240202) (06CRS25220)	No error
STATE v. BRILL No. 07-1143	Alamance (06CRS52268) (07CRS2887)	Affirmed

STATE v. BROOKS No. 07-940	Alamance (05CRS53425-26)	Affirmed
STATE v. COOK No. 07-1096	Cumberland (03CRS70914) (03CRS70932-36) (03CRS70938)	No error
STATE v. COWAN No. 07-1521	Iredell (05CRS60613) (06CRS100) (06CRS54509) (06CRS55670-73)	No error
STATE v. CRAIG No. 07-1147	Mecklenburg (05CRS220631) (05CRS220634) (06CRS70365)	Remanded
STATE v. EVANS No. 07-1222	Forsyth (04CRS65000) (05CRS40548)	No error
STATE v. HAWKINS No. 07-1098	Guilford (05CRS76301) (05CRS78012-14)	No error
STATE v. LOMAX No. 07-1183	Iredell (06CRS56006) (06CRS56009)	Affirmed
STATE v. MANN No. 06-1693	Guilford (05CRS24646) (05CRS84003-04)	No error; sentence vacated and remanded
STATE v. MATTHEWS No. 07-1237	Guilford (07CRS77244) (07CRS24182)	No error
STATE v. McDOUGALD No. 07-993	Harnett (01CRS920) (01CRS4612)	No error
STATE v. McRAE No. 07-1271	Robeson (06CRS50921)	No error
STATE v. MELVIN No. 07-1284	Sampson (05CRS52198) (05CRS51927)	No error
STATE v. METCALF No. 07-1228	Davidson (01CRS55736-37) (99CRS10290) (00CRS2113) (00CRS11490) (00CRS53700) (01CRS55733)	Affirmed

STATE v. PARKER No. 07-854	Beaufort (05CRS54402)	No error
STATE v. SHINE No. 07-1148	Cabarrus (06CRS53192)	No error
STATE v. SMITH No. 07-1297	Cleveland (05CRS58215)	No error
STATE v. STEWART No. 07-1199	Forsyth (05CRS59072)	No error
STATE v. TWEED No. 07-740	Randolph (05CRS90)	Reversed
STATE v. VISINGGARD No. 07-259	Gaston (05CRS18412) (05CRS50251) (05CRS50253-54)	No error
STATE v. WHEELER No. 07-1306	Pitt (04CRS11216)	Vacated
STATE v. WILLIAMS No. 07-923	Forsyth (06CRS61596)	No error
THURMAN v. N.C. DIV. OF MOTOR VEHICLES No. 07-668	Scotland (04CVS1020)	No error

JUDICIAL STANDARDS COMMISSION

STATE OF NORTH CAROLINA

FORMAL ADVISORY OPINION: 2009-02

June 11, 2009

QUESTION:

Is a newly installed judge required to disqualify from criminal cases prosecuted by the District Attorney's office where the judge was formerly employed?

Initially this inquiry addressed a very specific circumstance regarding a judge who was employed as an Assistant District Attorney (ADA) immediately prior to the judge's election to the District Court Bench. Employment responsibilities during the final 18 to 24 months of employment as an ADA were essentially limited to prosecuting criminal cases in superior court. In the normal course of work, ADA's prosecuting in district court rarely, if ever, shared information about matters with ADA's prosecuting in superior court, unless a matter was appealed following a conviction in district court.

COMMISSION CONCLUSION:

The Judicial Standards Commission determined it to be appropriate for a judge who was formerly employed as an assistant district attorney to preside over criminal district court cases prosecuted by the District Attorney's office, provided the judge disqualifies from hearing any matter wherein the judge 1) was involved in the matter's investigation or prosecution, 2) has personal knowledge of disputed evidentiary facts, or 3) when the judge believes he/she cannot be impartial.

The Commission advises the best practice is for judges to follow a "Six Month Rule" whereby newly installed judges, for a minimum of 6 months after taking judicial office, refrain from presiding over any adjudicatory proceeding wherein an attorney associated with the judge's prior employer provides legal representation to a party in the proceeding. Specific circumstances may necessitate a deviation for the "Six Month Rule". However, judges should always disqualify in the three instances delineated above unless all counsel and pro se parties waive the potential disqualification pursuant to the remittal of disqualification procedures set out in Canon 3D of the Code of Judicial Conduct.

DISCUSSION:

Canon 3C(1) of the North Carolina Code of Judicial Conduct provides that, upon motion, judges should disqualify in proceedings in which their impartiality "may reasonably be questioned". Subparagraph (b) provides for disqualification of the judge when "[t]he judge served as lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter". However, the Commission considered relationships between attorneys working in the district attorney's office to be distinguishable from those between attorneys working together in a private law firm. Factors such as the division of duties between attorneys prosecuting in district and superior court, prosecuting attorneys being assigned to a particular county in a multi-county district, and the sheer volume of cases prosecuted in district criminal court impact the reasonableness standard by which a judge's impartiality must be considered.

References:
North Carolina Code of Judicial Conduct
Canon 3C(1)(b)
Canon 3D

IN RE A.S.

[190 N.C. App. 679 (2008)]

IN THE MATTER OF: A.S.

No. COA07-1242

(Filed 3 June 2008)

1. Appeal and Error— notice of appeal not signed by party—petition for certiorari allowed

A guardian ad litem's motion to dismiss an appeal from a neglected child adjudication was granted where the notice of appeal was not signed by the respondent-mother. However, the mother's writ of certiorari was granted given the serious consequences of the adjudication order, the lack of any evidence that respondent contributed to the error, which appeared to be due to counsel's mistake, and the need to resolve an ambiguity in the court's disposition.

2. Child Abuse and Neglect— subject matter jurisdiction—filing of petition

The trial court had subject matter jurisdiction to consider a neglected child petition where the petition did not contain a "filed" stamp and a magistrate had made a handwritten notation that he had filed it. The record indicates that the petition was in fact filed with the clerk's office; even if the petition was filed after issuance of the nonsecure custody order, the district court would not be deprived of jurisdiction. Moreover, the district court later entered an order for continued non-secure custody which specifically found subject matter jurisdiction because a petition was filed.

3. Child Abuse and Neglect— nonsecure custody order—entered by magistrate—trial court jurisdiction

Even assuming that the magistrate lacked authority to enter a nonsecure custody order for an allegedly neglected child, no authority was cited suggesting that this stripped the trial court of subject matter jurisdiction. The trial court later entered a nonsecure custody order pending further hearings.

4. Child Abuse and Neglect— delay in holding hearing—not prejudicial

There was no prejudice from the trial court's failure to hold a hearing for continued juvenile nonsecure custody within seven days of the original order where respondent did not make any argument as to how she was prejudiced by the two-day delay.

While respondent argued that the court simply continued the hearing, the court specifically determined that custody should be continued in DSS based on findings of fact.

5. Child Abuse and Neglect— appointment of guardian ad litem—no record of formal appointment

There was no error in a child neglect proceeding where there was no record of a formal appointment of a guardian ad litem for the child. The record reveals that a GAL volunteer served all of the children in the family, she appeared at the hearing with an attorney advocate, and she submitted a report relating to this child that reflected an investigation which complied with her duties.

6. Child Abuse and Neglect— statement of standard of proof—sufficiency

The trial court's adjudication of child neglect was sufficient where it stated the standard of proof with the language "from the foregoing, the court concludes through clear, cogent and convincing evidence . . . ."

7. Child Abuse and Neglect— evidence concerning siblings—no objection

A child neglect adjudication was supported by sufficient evidence where DSS offered into evidence, without objection, reports from DSS and the guardian ad litem that provided support for the court's findings regarding the other children in the family. Without an objection, the issue was not preserved for appellate review. Although DSS requested that the trial court take judicial notice of the facts of the other children's cases, it is not clear whether the court ever specifically ruled on that request.

8. Child Abuse and Neglect— newborn still in hospital—older sibling abused—evidence of neglect of newborn—sufficiency

The facts relating to a sibling were sufficient to support a conclusion that a newborn who had not yet left the hospital was neglected.

9. Child Abuse and Neglect— dispositional order—ambiguous—remanded

The trial court's dispositional order for a child adjudicated neglected was vacated and remanded where the appellate court

could not determine what was found or what the court intended to order.

Judge TYSON concurring in part and dissenting in part.

Appeal by respondent from order entered 24 August 2007 by Judge J. Stanley Carmical in Robeson County District Court. Heard in the Court of Appeals 28 January 2008.

No brief filed on behalf of petitioner-appellee.

Annick Lenoir-Peek for respondent-appellant.

North Carolina Guardian ad Litem Program, by Pamela Newell Williams, for guardian ad litem.

GEER, Judge.

Respondent mother appeals from the district court's adjudication and dispositional order adjudicating her minor child as neglected. We affirm the trial court's adjudication of neglect, but we cannot determine from the order the precise disposition of the trial court; which facts it found in support of the disposition; or its reasoning in making that disposition. We must, therefore, vacate the disposition portion of the order and remand for further findings of fact and conclusions of law and clarification of the decretal portion of the order.

Facts

Respondent presently has four minor children: "Teresa," "David," "Isaac," and "Adam."[1] This appeal relates only to Adam. On 22 December 2006, DSS received information that Teresa had sustained second degree burns on her feet. Respondent claimed to the social worker that she had boiled water for a medicinal bath and left the pot of water on the bottom step of the bathtub. She then took Teresa out of the bathtub and put her to bed. According to respondent, shortly thereafter, she heard Teresa crying in the bathroom, and when she went into the room, she found Teresa "hopping up and down" in the pot of boiling water.

When, however, Teresa was examined at the UNC Hospital's Burn Center, the hospital staff informed DSS that her burn patterns were not consistent with an accidental burning. The doctors believed instead that her unusual burn patterns were consistent with an inten-

1. The pseudonyms "Teresa," "David," "Isaac," and "Adam" will be used throughout the opinion to protect the children's privacy and for ease of reading.

tional immersion burning, and the absence of any splash marks indicated that Teresa's burns were not the result of an accident.

Respondent was arrested on 11 June 2007 and charged with felony child abuse based on Teresa's burns. Teresa, Isaac, and David were removed from her home. Teresa was subsequently adjudicated abused, and Isaac and David were adjudicated neglected.

On 16 June 2007, respondent gave birth to Adam. On 18 June 2007, before Adam was taken home from the hospital, DSS completed a petition alleging that Adam was neglected. DSS alleged that because of the burns Teresa had received, it could not ensure the safety of the child without court intervention and, as a result, Adam lived in an environment injurious to his welfare.

Because all of the district court judges were away at a summer conference, DSS presented its petition and its request for nonsecure custody to a magistrate. The magistrate ultimately wrote at the top of the petition: "filed by mag Sam Hunt 6-18-07 2:05 pm." Also on 18 June 2007, the magistrate entered an order for nonsecure custody, placing Adam in DSS' custody.

On 27 June 2007, a district court judge conducted a hearing under N.C. Gen. Stat. § 7B-506 (2007) to determine the need for continued nonsecure custody of the child. In an order entered 24 July 2007, the court found that remaining in the home would be contrary to the best interest of the child; that efforts to prevent the need for placement were precluded by immediate threat of harm to the child; and that there was a reasonable factual basis to believe that the allegations in the petition were true. The court, therefore, ordered that Adam remain in the nonsecure custody of DSS.

The court conducted the initial adjudication hearing on 25 July 2007. In its order, entered 24 August 2007, the court found that Teresa suffered burns on her feet that appeared, according to the UNC Hospital's Burn Center, to be intentional immersion burns. The court further found that the Burn Center social worker indicated that the unusual burn pattern did not seem consistent with the mother's account of how Teresa burned her feet. The court then found that "the mother's explanation is not consistent with the injury" and that "because of the burns [Teresa] received to her feet on 12-22-06, [DSS] cannot ensure the safety of the children without court intervention." Based on the court's findings of fact, the court adjudicated Adam neglected as defined by N.C. Gen. Stat. § 7B-101(15) (2007).

Respondent filed a notice of appeal from the court's order on 27 August 2007. Subsequently, on 3 December 2007, the guardian ad litem ("GAL") served respondent with a motion to dismiss the appeal on the ground that respondent had not signed the notice of appeal as required by Rule 3A of the Rules of Appellate Procedure; the motion was filed in this Court on 19 December 2007. On 18 December 2007, respondent filed a petition for writ of certiorari seeking review despite the defective notice of appeal.

I

[1] As a preliminary matter, we address the GAL's motion to dismiss and respondent's petition for writ of certiorari. The GAL contends that respondent's appeal must be dismissed because respondent failed to sign the notice of appeal as required by Rule 3A, which states: "If the appellant is represented by counsel, both the trial counsel and appellant must sign the notice of appeal[.]" N.C.R. App. P. 3A(a).

This Court recently held: "Rule 3A is . . . jurisdictional, and if not complied with, the appeal must be dismissed." *In re L.B.*, 187 N.C. App. 326, 331, 653 S.E.2d 240, 244 (2007). Because the notice of appeal contained in the record on appeal is not signed by respondent mother, we must grant the GAL's motion to dismiss this appeal.

Nevertheless, N.C.R. App. P. 21(a)(1) provides that a "writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action . . . ." We believe that this is an appropriate case in which to exercise our discretion and allow respondent's petition for writ of certiorari. Although the order at issue involves only an initial adjudication of neglect, the disposition could be read as ordering DSS to cease reunification efforts with respondent—effectively, a termination of respondent's parental rights less than three months after the birth of Adam. The error depriving this Court of jurisdiction appears to be due to trial counsel's mistake regarding the requirements of the Rules of Appellate Procedure. Given the serious consequences of the adjudication order, the lack of any evidence that respondent contributed to the error, and the need to resolve the ambiguity in the order's disposition, as discussed below, we believe that review pursuant to a writ of certiorari is appropriate.

II

[2] Respondent first argues that the trial court lacked subject matter jurisdiction because the petition was not properly filed. Respondent points to the provision of the Juvenile Code stating that "[a]n action is commenced by the filing of a petition in the clerk's office when that office is open or by the issuance of a juvenile petition by a magistrate when the clerk's office is closed, which issuance shall constitute filing." N.C. Gen. Stat. § 7B-405 (2007). The authority to issue the juvenile petition may be delegated to a magistrate by a district court judge in emergency situations when a petition is required to obtain a nonsecure custody order. N.C. Gen. Stat. § 7B-404(b) (2007). In such situations, the statute requires that the petition be delivered to the clerk's office for processing as soon as the office reopens for business. *Id.*

Respondent contends that because the clerk's office was open and because "[n]o 'filed' stamp is evident on either the juvenile petition or the Non-Secure Custody Order granted by the Magistrate," the petition necessarily was not filed in compliance with § 7B-405. As respondent notes, however, the magistrate handwrote on the petition: "filed by mag Sam Hunt 6-18-07 2:05 pm." Although respondent argues that this notation indicates that the petition was "issued" by a magistrate even though the clerk's office was open, we disagree.

The record indicates that the petition was in fact filed with the clerk's office on 18 June 2007 as suggested by the magistrate's notation. The summons issued the same day to respondent is signed by a deputy clerk stating that a petition had been filed and a nonsecure custody order entered. *See* N.C. Gen. Stat. § 7B-406(a) (2007) ("Immediately after a petition has been filed alleging that a juvenile is abused, neglected, or dependent, the clerk shall issue a summons to the parent . . . . A copy of the petition shall be attached to each summons."). Even if the petition was filed after the issuance of the nonsecure custody order, that fact would not deprive the district court of jurisdiction. *See In re L.B.*, 181 N.C. App. 174, 187, 639 S.E.2d 23, 29 (2007) (holding that even though nonsecure custody order and summons were issued before juvenile petition was signed and verified, court gained subject matter jurisdiction upon subsequent signing and verification of petition). Further, on 24 July 2007, the district court entered an Order on Need for Continued Non-Secure Custody that specifically found that the court had jurisdiction over the subject matter of the proceedings because "[a] Petition was filed and an Order for Non-Secure Custody was entered, as the record shows."

The lack of an official "filed" stamp on the petition does not require a conclusion—contrary to the other material in the record—that the petition was not filed with the clerk's office and only, according to respondent, "at some point . . . made its' [sic] way to a juvenile file." We, therefore, hold that the district court had subject matter jurisdiction over the petition under N.C. Gen. Stat. § 7B-405.

III

[3] Respondent next argues that the magistrate lacked the authority to issue the 18 June 2007 nonsecure custody order because that authority was not properly delegated to him by the chief district court judge. N.C. Gen. Stat. § 7B-502 (2007) states:

> Any district court judge shall have the authority to issue nonsecure custody orders pursuant to G.S. 7B-503. The chief district court judge may delegate the court's authority to persons other than district court judges by administrative order which shall be filed in the office of the clerk of superior court. The administrative order shall specify which persons shall be contacted for approval of a nonsecure custody order pursuant to G.S. 7B-503.

Respondent points out that the administrative order issued in this case on 11 June 2007 authorized the director of DSS to issue nonsecure custody orders rather than the magistrate.

Even assuming, without deciding, that the magistrate lacked authority to enter a nonsecure custody order, respondent has cited no authority suggesting that such a lack of authority stripped the trial court of subject matter jurisdiction over the petition. At most, respondent's argument might support a conclusion that the initial award of custody to DSS on 11 June 2007 was invalid. Nevertheless, the trial court revisited the issue of custody in a hearing on 24 June 2007 and entered an order stating that "pending further hearings, the juvenile shall remain or be placed in the non-secure custody of the Robeson County Department of Social Services." Thus, a proper order of custody existed prior to the district court's entering its adjudication and dispositional order.

IV

[4] Respondent next argues that the trial court violated N.C. Gen. Stat. § 7B-506(a) by failing to hold a hearing for continued nonsecure custody within seven calendar days after entry of the initial nonsecure custody order. The statute specifically states: "No juvenile shall

be held under a nonsecure custody order for more than seven calendar days without a hearing on the merits or a hearing to determine the need for continued custody." *Id.* Here, the record indicates that the initial nonsecure custody order was entered on 18 June 2007 and was set to expire on 25 June 2007. The court did not, however, conduct a hearing on the need for continued nonsecure custody until 27 June 2007.

While respondent asserts that this violation is a "serious error," she does not make any argument as to how she was prejudiced by the two-day delay. It is established, however, that "a trial court's violation of statutory time limits in a juvenile case is not reversible error *per se*. Rather, we have held that the complaining party must appropriately articulate the prejudice arising from the delay in order to justify reversal." *In re S.N.H.*, 177 N.C. App. 82, 86, 627 S.E.2d 510, 513 (2006) (internal citations omitted).

Respondent also argues that on 27 June 2007, the court simply "continued the non-secure custody hearing to July 25, 2007 since the parties had not been served." While the order states that "this matter is continued upon the request and or consent of all parties," the order also made specific findings that remaining in the home would be contrary to the best interests of the child, that efforts to prevent the need for the child's placement were precluded by an immediate threat of harm to the child, that there was a reasonable factual basis to believe that the allegations in the petition were true, and that DSS had made reasonable efforts to prevent or eliminate the need for the child's placement. Based on those findings, the court then ordered that the child be placed in the custody of DSS and that although a plan to return the children to the parents should be addressed, "it would not be appropriate to return the juvenile to the home and remaining in the home would be contrary to the best interest of the juvenile." Thus, the court specifically determined, based on findings of fact, that custody should be continued in DSS. This assignment of error is, therefore, overruled.

V

[5] Respondent further contends that the trial court erred by failing to appoint a GAL for Adam. When, as here, a juvenile is alleged to be neglected, N.C. Gen. Stat. § 7B-601(a) (2007) provides that "the court shall appoint a guardian ad litem to represent the juvenile."

In this case, the record on appeal contains no order formally appointing a GAL for Adam. The order arising out of the nonsecure

custody hearing held on 27 June 2007 stated that the "GAL Staff," without a specifically designated individual, served as GAL on behalf of Adam and that Diane Surgeon appeared as attorney advocate. Nevertheless, the record reveals that as of at least 23 July 2007, Hope Robinson, a GAL volunteer, was serving as the GAL for all four children, including Adam. She submitted a "Guardian Ad Litem Court Report" for Adam's adjudication and disposition hearing held on 25 July 2007 that specifically addressed Adam's current placement, his medical condition, and respondent's attendance at Adam's medical appointments, as well as the GAL's recommendations for all four children that DSS retain custody, that the plan of reunification change to guardianship, and that the children remain in their current placements. The court's adjudication and disposition order asserts that Ms. Robinson appeared at the hearing as Adam's GAL, with Ms. Surgeon present as the GAL's attorney advocate, and that Ms. Robinson submitted a report to the court relating to Adam.

We find this case materially indistinguishable from *In re A.D.L.*, 169 N.C. App. 701, 612 S.E.2d 639, *disc. review denied*, 359 N.C. 852, 619 S.E.2d 402 (2005). In *A.D.L.*, as in this case, the record on appeal did not include an appointment of a GAL. This Court observed, however, that "except for the initial hearing following the entry of the non-secure order to assume custody of the juveniles in August of 2001, the guardian ad litem was noted as present at each and every hearing prior to and including the TPR hearing where she represented the interest of the children. In addition, the guardian ad litem was named in the TPR petition." *Id.* at 707, 612 S.E.2d at 643. Based on those facts, this Court held: "It is clear that the guardian ad litem followed her statutory duties under N.C. Gen. Stat. § 7B-601(a) to represent the juveniles in all actions under Chapter 7B. Since the guardian ad litem carried out her respective duties, failure of the record to disclose guardian ad litem appointment papers does not necessitate reversal of the district court's decision." *Id.*

Here, Ms. Robinson prepared a report that reflected an investigation that complied with her duties as set forth in § 7B-601(a).[2] That

2. "The duties of the guardian ad litem program shall be to make an investigation to determine the facts, the needs of the juvenile, and the available resources within the family and community to meet those needs; to facilitate, when appropriate, the settlement of disputed issues; to offer evidence and examine witnesses at adjudication; to explore options with the court at the dispositional hearing; to conduct follow-up investigations to insure that the orders of the court are being properly executed; to report to the court when the needs of the juvenile are not being met; and to protect and promote the best interests of the juvenile until formally relieved of the responsibility by the court." N.C. Gen. Stat. § 7B-601(a).

report was submitted to the court in connection with the initial adjudication hearing, and Ms. Robinson attended that hearing as Adam's GAL, although—like the *A.D.L.* GAL—she did not attend the first hearing after DSS was granted nonsecure custody. Thus, as in *A.D.L.*, "[s]ince the guardian ad litem carried out her respective duties, failure of the record to disclose guardian ad litem appointment papers does not necessitate reversal of the district court's decision." 169 N.C. App. at 707, 612 S.E.2d at 643. We, therefore, overrule this assignment of error.

VI

[6] With respect to the merits of the trial court's adjudication of neglect, respondent first argues that the order was inadequate because the court failed to affirmatively state that the allegations in the petition had been proven by clear and convincing evidence as required by the Juvenile Code. Pursuant to N.C. Gen. Stat. § 7B-807 (2007), the court is required to recite the standard of proof the court relied on in its determination of neglect.

Although the "[f]ailure by the trial court to state the standard of proof applied is reversible error[,] . . . there is no requirement as to where or how such a recital of the standard should be included." *In re O.W.*, 164 N.C. App. 699, 702, 596 S.E.2d 851, 853 (2004) (internal citation omitted) (holding that court sufficiently satisfied the requirement of statement of standard of proof by stating the court "CONCLUDES THROUGH CLEAR, COGENT AND CONVINCING EVIDENCE"). Here, the court's order contains the following language: "FROM THE FOREGOING, THE COURT CONCLUDES THROUGH CLEAR, COGENT AND CONVINCING EVIDENCE: . . . ." We find this language sufficient to meet the requirement of N.C. Gen. Stat. § 7B-807.

[7] Respondent also contends the trial court's neglect adjudication was not supported by sufficient evidence because DSS did not present evidence at the adjudication hearing related to the allegations of the petition, but rather asked the trial court to take judicial notice of facts in the other children's cases. Respondent overlooks the fact that DSS offered into evidence, without objection from either parent, reports submitted by DSS and Ms. Robinson, the GAL. These reports provide evidentiary support for the court's findings of fact regarding Teresa and the other children in the adjudication portion of the order. Since there was no objection by respondent to the admission of these reports or any request that the use of the reports be limited in any way, the reports constitute substantive evidence sufficient to support

the trial court's findings of fact. *See Raynor v. Odom*, 124 N.C. App. 724, 730, 478 S.E.2d 655, 658 (1996) (holding that finding of fact was supported by competent evidence when based on affidavit, report, evaluation, and plan admitted without objection).

In addition, although DSS requested that the trial court take judicial notice of the facts of the other children's cases, it is unclear from the transcript whether the court ever specifically ruled on that request as opposed to simply acknowledging that the request had been made. In any event, neither parent objected to DSS' request or ever made any suggestion to the court that he or she had concerns about the evidentiary approach urged by DSS. Without an objection, respondent did not preserve for appellate review any argument regarding the trial court's consideration of the facts relating to the other children. N.C.R. App. P. 10(b)(1) ("In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.").

[8] Respondent did, however, argue at trial, as she argues on appeal, that the facts relating to Teresa are insufficient to support a conclusion that Adam is a neglected child. "A proper review of a trial court's finding of neglect entails a determination of (1) whether the findings of fact are supported by 'clear and convincing evidence,' and (2) whether the legal conclusions are supported by the findings of fact." *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000) (internal citation omitted).

> A neglected juvenile is defined as one
>
> who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or who has been placed for care or adoption in violation of law. *In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile . . . lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home.*

N.C. Gen. Stat. § 7B-101(15) (emphasis added). In considering the identically-worded statutory predecessor to § 7B-101, this Court held

that while this language regarding abuse or neglect of other children "does not mandate" a conclusion of neglect, the trial judge has "discretion in determining the weight to be given such evidence." *In re Nicholson*, 114 N.C. App. 91, 94, 440 S.E.2d 852, 854 (1994).

When, as is the case with Adam, the juvenile being adjudicated has never resided in the parent's home, "the decision of the trial court must of necessity be predictive in nature, as the trial court must assess whether there is a substantial risk of future abuse or neglect of a child based on the historical facts of the case." *In re McLean*, 135 N.C. App. 387, 396, 521 S.E.2d 121, 127 (1999). Since the statutory definition of a neglected child includes living with a person who has abused or neglected other children and since this Court has held that the weight to be given that factor is a question for the trial court, the trial court, in this case, was permitted, although not required, to conclude that Adam was neglected based on evidence that respondent had abused Teresa by intentionally burning her. *See, e.g.*, *In re P.M.*, 169 N.C. App. 423, 427, 610 S.E.2d 403, 406 (2005) (affirming adjudication of neglect of one child based on prior adjudication of neglect with respect to other children and ongoing unwillingness to accept responsibility); *In re E.N.S.*, 164 N.C. App. 146, 150, 595 S.E.2d 167, 170 (affirming conclusion of neglect "based primarily on events that took place before [the child's] birth, in particular, the circumstances regarding respondent's oldest child being adjudicated neglected and dependent" and subsequent failure to demonstrate stability), *disc. review denied*, 359 N.C. 189, 606 S.E.2d 903 (2004).

The dissenting opinion relies upon *In re A.K.*, 178 N.C. App. 727, 637 S.E.2d 227 (2006). In *A.K.*, however, the trial court based its adjudication of neglect on its finding that "A.K. was at 'substantial risk of neglect' because of father's failure to acknowledge the cause of C.A.K.'s injuries." *Id.* at 731, 637 S.E.2d at 229. This Court pointed out, however, that the only evidentiary support for this finding was an order entered nine months earlier. The Court carefully limited its holding in reversing the adjudication of neglect: "Consequently, where the trial court did not accept any formal evidence in addition to its consideration of the prior court orders concerning C.A.K., and the only order concerning C.A.K. that contained findings by the clear and convincing standard of proof was from a hearing occurring many months earlier, the trial court could not, *on this record*, conclude that 'the minor child would be at substantial risk of neglect if placed in the custody of the . . . parents at this time.' " *Id.* at 732, 637 S.E.2d at 230 (emphasis added).

Thus, in *A.K.*, the neglect adjudication was not based on prior abuse of another child, but rather on a lack of acknowledgment by the father—a circumstance that could have changed over the nine-month period prior to the second child's adjudication. Here, however, the trial court based its adjudication that Adam was neglected on the prior abuse of Teresa six months earlier. If a court finds prior abuse, the existence of that abuse is established and, of course, is not a fact that could alter over time. Indeed, respondent was arrested on 11 June 2007 and charged with felony child abuse, mere days before Adam's birth and less than three months before the adjudication order. While it may be that respondent's response to the allegations of abuse may change, her response was not the basis for the adjudication and any such change in respondent's perspective would only be relevant in subsequent proceedings regarding any continued efforts at reunification. We, therefore, affirm the adjudication that Adam is a neglected child.

VII

[9] Respondent's final argument on appeal concerns the court's dispositional order. Respondent argues that (1) the trial court improperly delegated its fact-finding function by broadly incorporating by reference the DSS and GAL reports, and (2) the court failed to make the findings required by N.C. Gen. Stat. § 7B-507 (2007) to cease reunification efforts. Based upon our review of the trial court's disposition order, we cannot decipher either what the trial court actually found or what the trial court intended to order. We, therefore, must vacate the disposition portion of the order and remand for further findings of fact and conclusions of law.

In the disposition portion of its order, the trial court incorporated by reference each of the DSS and GAL exhibits, including the DSS court report, a family reunification assessment, a family assessment of strengths and needs, and the GAL court report. The court then found:

> That the statements set forth in the Court Report of social worker, Sheila Smith[,] are true and the statements set forth in the Court Report of guardian ad litem, Hope Robinson[,] are true and that it is in the best interest of the named juvenile that the recommendations of the Robeson County Department of Social Services adopted [sic] by the Court, legal and physical custody of the named juvenile remain with the Department *and change [sic] the plan from reunification to guardianship with a court*

> *approved caretaker*. Visits are going well, continue visits as long as supervised. Return to Court on August 8, 2007 for a First Review Hearing.
>
> The Court finds that it is contrary to the welfare of the juvenile named and it is not possible for the juveniles to be returned home immediately or within the next six months in full legal custody of their parents and that it is not in the best interest of the juvenile to return home because of the parents[']' inability to provide for the care and supervision of the juvenile and the parents[']' failure to make reasonable progress in correcting those conditions that led to the removal of the juvenile from their custody.

(Emphasis added.)

Following these findings, the order then recited that the court concluded based on the findings:

> The Court finds as a fact that it would be contrary to the welfare of the named juvenile for their [sic] to be a continuation in or return to the juvenile's own home and that if [sic] such action would be contrary to the juvenile's best interest; that the Robeson County Department of Social Services has made reasonable efforts to prevent or eliminate the need for placement for the juvenile *as set forth in the court report of the Department of Social Services should [sic] continue to make reasonable efforts to prevent or eliminate the need for placement of the juvenile*, and the juvenile's placement and care are the responsibility of the Robeson County Department of Social Services and that agency is to provide and arrange for the foster care or other placement, including relative placement if appropriate, deemed to be in the best interest of the juvenile.

(Emphasis added.) Following this paragraph, the order then stated that based on the foregoing findings of fact/stipulation and agreement of the parties

> that the above named juvenile is hereby adjudicated neglected as defined by N.C.G.S. 7B-101(15) and the Court finds and concludes as matters of law that the parents are not presently able to provide adequately for the care and supervision of the named juveniles [sic] and that it is in the best interest of the named juvenile that [his] care, custody and control remain with the Robeson County Department of Social Services and that the Robeson County Department of Social Services should have authority to

> make any lawful placement, including relative placement if deemed appropriate.

In the decretal portion of the order, the court reiterated its neglect adjudication and its determination that legal custody should be awarded to DSS with DSS having authority to make any lawful placement, including relative placement. The order also granted DSS authority to arrange and sign for any health care treatment or evaluation in the interest of the child and ordered respondent to attend parenting classes, complete a psychological test, and "participate [sic] and follow all recommendations." Finally, the court stated "[t]hat this Court orders and adopts the recommendations listed in the findings of fact."

Thus, in the findings of fact, the court appeared to adopt the DSS and GAL recommendation that the plan change from reunification to guardianship. On the other hand, in the conclusion of law section of the order, the court appears to require DSS to continue with reunification efforts. Finally, in the decretal portion the court makes no reference to the plan or whether reunification efforts should cease. The order does place requirements on respondent that would appear to be unnecessary if reunification efforts were to cease.[3] The concluding provision adopting "the recommendations listed in the findings of fact," however, may refer to the recommended change of plan from reunification to guardianship.

Thus, we must remand for clarification of what the trial court intended. On remand, the trial court should specify not only what it is ordering, but also the specific facts and reasoning upon which that order is based. As this Court has explained:

> In juvenile proceedings, it is permissible for trial courts to consider all written reports and materials submitted in connection with those proceedings. Despite this authority, the trial court may not delegate its fact finding duty. Consequently, the trial court should not broadly incorporate these written reports from outside sources as its findings of fact.

In re J.S., 165 N.C. App. 509, 511, 598 S.E.2d 658, 660 (2004) (internal citations omitted). In this case, the trial court did not err when, while summarizing the evidence considered by the court, it incorporated

3. We also note that while the decretal portion of the order directs respondent to attend parenting classes and complete a psychological test, some documentation in the record indicates that respondent has completed both of those requirements.

the DSS and GAL reports by reference rather than specifically describing the content of those reports.

The court was, however, required to make its own findings of fact based on those reports and any testimonial evidence presented. The trial court's bare finding that "the statements set forth" in the reports "are true" does not tell this Court upon which assertions in those reports the trial court was relying. *Compare L.B.*, 181 N.C. at 193, 639 S.E.2d at 33 ("We hold that the trial court properly incorporated DSS and guardian *ad litem* reports and properly made findings of fact, included in the permanency planning order, based on these reports. Moreover, these findings are sufficient to support the trial court's ultimate determination, and there is no evidence that [the trial court] relied on information from the reports that he then failed to include as a finding of fact in his order.").

While the trial court's order did include findings reciting in conclusory fashion that Adam could not be returned to his parents within the next six months "in full legal custody" because of the parents' inability "to provide for the care and supervision of the juvenile and the parents['] failure to make reasonable progress in correcting those conditions that led to the removal of the juvenile from their custody," there is no finding of fact identifying the conditions on which both parents had failed to progress. The language appears to be boilerplate that, without further clarification, does not necessarily apply to the specific circumstances of this case.[4] Accordingly, on remand, the trial court must clarify its disposition; must specify which statements in the reports it is finding as a fact; and must make findings of fact specifically relating to Adam that support its disposition. *See J.S.*, 165 N.C. App. at 513, 598 S.E.2d at 661 ("Since the trial court's findings are not sufficiently specific to allow this Court to review its decision and determine whether the judgment was correct, and since the findings also fail to comply with the statutory requirements, we remand this matter to the district court to make appropriate findings of fact.").

Affirmed in part; vacated and remanded in part.

Judge JACKSON concurs.

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

4. Although the order indicates the parents had failed to make progress, we note that, at the time of the hearing, only just over a month had elapsed since DSS filed its petition with respect to Adam and since respondent had been arrested for felony child abuse.

TYSON, Judge concurring in part and dissenting in part.

The majority's opinion grants the GAL's motion to dismiss respondent's appeal based upon respondent's failure to sign the notice of appeal as required by Rule 3A of the North Carolina Rules of Appellate Procedure. The majority's opinion then holds that this is an appropriate case to grant respondent's petition for writ of *certiorari* pursuant to Rule 21. I concur to grant respondent's petition for writ of *certiorari* and reach the merits of respondent's appeal.

The majority's opinion further holds the trial court properly concluded that A.S., a newborn infant, was a neglected juvenile based upon evidence of a single instance of prior abuse to A.S.'s sibling. I disagree and vote to reverse the trial court's adjudication order. I respectfully dissent.

I. Standard of Review

"At the adjudication stage, the party petitioning for the termination must show by clear, cogent, and convincing evidence that grounds authorizing the termination of parental rights exist." *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 614 (1997) (citation omitted). The standard for appellate review is whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence and whether those findings of fact support its conclusions of law. *In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000), *disc. rev. denied*, 353 N.C. 374, 547 S.E.2d 9 (2001). "Clear, cogent, and convincing describes an evidentiary standard stricter than a preponderance of the evidence, but less stringent than proof beyond a reasonable doubt." *N.C. State Bar v. Sheffield*, 73 N.C. App. 349, 354, 326 S.E.2d 320, 323 (citation omitted), *cert. denied*, 314 N.C. 117, 332 S.E.2d 482 (1985). We review the trial court's conclusions of law *de novo*. *Starco, Inc. v. AMG Bonding and Ins. Services*, 124 N.C. App. 332, 336, 477 S.E.2d 211, 215 (1996).

II. Analysis

Respondent argues the trial court's findings of fact are insufficient to support the trial court's conclusion of law that A.S. was a neglected juvenile. I agree.

A neglected juvenile is statutorily defined as:

> [a] juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided nec-

> essary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or who has been placed for care or adoption in violation of law. In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home where another juvenile has died as a result of suspected abuse or neglect or lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home.

N.C. Gen. Stat. § 7B-101(15) (2007). To adjudicate a juvenile as neglected, the court must find some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment as a consequence of the parent's failure to provide proper care, supervision, or discipline. *In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901-02 (1993). When the juvenile being adjudicated was taken into custody immediately upon birth and has never resided in the parent's home, "the decision of the trial court must of necessity be predictive in nature, as the trial court must assess whether there is a *substantial risk of future abuse or neglect* of a child based on the historical facts of the case." *In re McLean*, 135 N.C. App. 387, 396, 521 S.E.2d 121, 127 (1999) (emphasis supplied).

This Court has repeatedly held "the fact of prior abuse, standing alone, is not sufficient to support an adjudication of neglect." *In re N.G.*, 186 N.C. App. 1, 9, 650 S.E.2d 45, 51 (2007) (citing *In re A.K.*, 178 N.C. App. 727, 731, 637 S.E.2d 227, 229 (2006)), *aff'd*, 362 N.C. 229, 657 S.E.2d 355 (2008). In *In re A.K.*, contrary to the majority's assertion, the trial court adjudicated the juvenile to be neglected based upon prior abuse of an older sibling *and* the parents denial of said abuse. *See In re A.K.*, 178 N.C. App. at 728-29, 637 S.E.2d at 228 ("In its order concluding A.K. was a neglected juvenile, the trial court relied upon the prior adjudication of C.A.K. as a neglected juvenile and the review orders concerning C.A.K." which included the trial court's finding that "the parents of C.A.K. denied that either of them intentionally harmed C.A.K." and its conclusion that "it appears that at least some of the physical injuries sustained by [C.A.K.] are a result of inappropriate force applied to the child's body by her caretaker(s) or while in their care.").

This Court reversed the trial court's adjudication of neglect because:

> the trial court did not accept any formal evidence in addition to its consideration of the prior court orders concerning [an older

> sibling previously removed from the home], and the only order concerning [the older sibling previously removed from the home] that contained findings by the clear and convincing standard of proof was from a hearing occurring many months earlier[.]

Id. at 732, 637 S.E.2d at 230. This Court concluded that because no evidence was introduced that related to the parents' progress or whether one or both of the parents continued to deny the true cause of the older sibling's injuries, in addition to the time that had elapsed from the date of the last hearing, "the trial court could not . . . conclude that 'the minor child would be at substantial risk of neglect if placed in the custody of the . . . parents at this time.' " *Id.*

The facts of *In re A.K.* are analogous to the facts at bar. In the adjudication portion of its order, the trial court entered fourteen findings of fact all regarding the particulars of a prior incident in which respondent allegedly burned the feet of A.S.'s two-year-old sibling seven months prior to the hearing. The trial court found respondent had denied any wrongdoing and insisted the child's burns were accidental on two occasions, 22 December 2006 and 4 January 2007. No other instances of abuse or neglect were reported or appeared in the evidence before the trial court. The trial court found that "*based on the information gathered the mother's explanation is not consistent with the injury[]*" and that without the court's intervention, the safety of the infant could not be ensured. (Emphasis supplied).

The trial court's findings of fact regarding a single prior incident of abuse involving another sibling seven months earlier, standing alone, do not support the trial court's conclusion of law that A.S. is a neglected juvenile as defined in N.C. Gen. Stat. § 7B-101(15). *In re N.G.*, 186 N.C. App. at 9, 650 S.E.2d at 51. Further, the record is completely devoid of any evidence that respondent mother has continued to deny responsibility with regards to the prior incident involving A.S.'s sibling. *In re A.K.*, 178 N.C. App. at 731, 637 S.E.2d at 229. Based upon *In re N.G.* and *In re A.K.*, the trial court's adjudication order must be reversed. 186 N.C. App. at 9, 650 S.E.2d at 51; 178 N.C. App. at 731, 637 S.E.2d at 229.

The majority's opinion cites *In re P.M.* and *In re E.N.S.* in support of its holding that the trial court was permitted to conclude A.S. was neglected based upon evidence of prior abuse. *In re P.M.*, 169 N.C. App. 423, 610 S.E.2d 403 (2005); *In re E.N.S.*, 164 N.C. App. 146, 595 S.E.2d 167, *disc. rev. denied*, 359 N.C. 189, 606 S.E.2d 903 (2004). However, both cases are distinguishable from the case at bar.

In both *In re P.M.* and *In re E.N.S.*, this Court emphasized the respondent's inability and/or refusal to comply with court orders and affirmed the trial court's adjudication of neglect based upon several other factors which indicated there was a substantial risk of future neglect if the juvenile was returned to the parents. *In re P.M.*, 169 N.C. App. at 427, 610 S.E.2d at 406; *In re E.N.S.*, 164 N.C. App. at 150, 595 S.E.2d at 170. Here, the trial court's order is totally devoid of any findings regarding respondent's compliance with DSS's case plan or other factors which would tend to indicate a substantial risk of future neglect if A.S. was returned to respondent.

III. Conclusion

The trial court erred by relying on a single instance of prior abuse to another sibling to adjudicate A.S. as neglected. *In re N.G.*, 186 N.C. App. at 9, 650 S.E.2d at 51. Further, no evidence presented to the trial court tended to show respondent has failed to comply with any DSS case plan or continued to deny responsibility with regards to the prior incident involving A.S.'s older sibling. *In re A.K.*, 178 N.C. App. at 731-32, 637 S.E.2d at 229-30.

The trial court's adjudication of A.S. as a neglected juvenile is not supported by "clear, cogent, and convincing evidence" and must be reversed. *In re Young*, 346 N.C. at 247, 485 S.E.2d at 614. Because I vote to reverse the adjudication order, remand is unnecessary. The majority's opinion correctly notes the order is fatally defective and lacked the required findings of fact to support its conclusions of law and decretal. I respectfully dissent.

STATE OF NORTH CAROLINA v. SHELTON LAMAR SAPP

No. COA07-1135

(Filed 3 June 2008)

1. Rape— two first-degree rapes—switched positions—sufficiency of evidence

The trial court did not err by submitting two first-degree rape charges to the jury even though defendant contends he did not "finish" having sex with the victim on the couch but merely switched positions by moving to the floor because: (1) each act of forcible vaginal intercourse constitutes a separate rape; (2) although the victim did not specifically articulate that defendant

withdrew, her testimony that he did not "finish" on the couch but that the two "had sex, again" on the floor was substantial evidence from which the jury could infer that the defendant withdrew before re-penetrating the victim on the floor; (3) defendant acknowledged that he was not sure how many times he raped the victim; and (4) when viewed in the light most favorable to the State, defendant's testimony and the testimony of the victim constitute substantial evidence of two rapes including one on the couch and one on the floor.

2. Rape— first-degree rape—acting in concert—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the first-degree rape charge resulting from the acts of a coparticipant in the bathroom with the victim on the theory of acting in concert where the evidence at trial showed that: (1) a coparticipant and defendant invaded the victims' residence with the intent to commit robbery with a dangerous weapon; (2) defendant's rapes of the female victim in front of her boyfriend was for the admitted purpose of coercing the boyfriend to give up his money and drugs, and, as such, they were part of the robbery; (3) once defendant had engaged in this conduct in front of the coparticipant, it was foreseeable that the coparticipant would become aroused and want to have sex with the victim; and (4) having set in motion the rape of the victim as an integral part of the robbery, defendant cannot now complain that the coparticipant's rape of the victim was not a natural and probable consequence of the home invasion and robbery.

3. Kidnapping— second-degree kidnapping—young children—sufficiency of evidence—restraint—confinement

The trial court did not err by denying defendant's motion to dismiss the three second-degree kidnapping charges involving the young children even though defendant contends the children were neither restrained nor confined where the evidence at trial showed that: (1) defendant, wielding a shotgun, acted in concert with a coparticipant to isolate the grandmother, the female victim's 12-year-old brother, and three young children in a single bedroom while terrorizing the remaining occupants of the apartment in the course of a robbery; (2) defendant controlled the behavior of the persons in the bedroom by forcing both women to remove their clothes and refusing to allow the grandmother to use the bathroom when she asked to do so, telling her to "pee on

the floor;" and (3) the intruders terrorized those in the bedroom, responding to the 12-year-old brother by hurling racial slurs and telling him to "shut up."

4. Kidnapping— second-degree—instruction—restraint

The trial court did not err by instructing on a theory of restraint for second-degree kidnapping because: (1) there was substantial evidence from which the jury could infer that the defendant exercised impermissible control over the inhabitants of the bedroom sufficient to withstand a motion to dismiss the second-degree kidnapping charges related to the young children; and (2) the instruction on restraint was supported by substantial evidence that defendant, wielding a shotgun, terrorized the occupants of the apartment and exercised control over the persons in the bedroom by use of threats.

5. Sentencing— felony structured sentencing—prior conviction in Virginia substantially similar to N.C. crime

The trial court did not err by concluding the State met its burden of proving that defendant's prior conviction in Virginia was substantially similar to a Class A1 or Class 1 misdemeanor in North Carolina for felony structured sentencing purposes because: (1) the State introduced the petition, indictment, and judgment from the Commonwealth of Virginia against defendant for inflicting bodily injury on an employee of a juvenile detention center, and after discussing with counsel for the State and defendant whether the offense was similar to the North Carolina crimes of assault inflicting serious injury or assault on a government official, the court concluded that the offense was at least a Class 1 misdemeanor, revised the Sentencing Worksheet to reflect one point instead of two, and found defendant to be a Prior Record Level II offender; (2) although the Virginia statute does not contain the precise wording found in N.C.G.S. § 14-33(c), the requirement set forth in N.C.G.S. § 15A-1340.14(e) is not that the statutory wording precisely match, but rather that the offense be "substantially similar;" (3) the Virginia statute makes it a crime for persons confined in a correctional facility to knowingly and willfully inflict bodily injury upon an employee of that facility, and due to the nature of a correctional facility, an assault on one of its employees would necessarily be in the discharge of the employee's duties; and (4) any questions as to whether this was the case were resolved by the defendant's own testimony that the assault occurred as the employee at-

tempted to break up a fight between prisoners and prevent them from further fighting.

6. Homicide— first-degree murder—short-form indictment—constitutionality

Our Supreme Court has on numerous occasions upheld the constitutionality of the use of a short-form indictment for the charge of first-degree murder.

Appeal by defendant from judgment entered 28 July 2006 by Judge Albert Diaz in Mecklenburg County Superior Court. Heard in the Court of Appeals 6 March 2008.

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

Russell J. Hollers, III, for the defendant-appellant.

STEELMAN, Judge.

Defendant's acts of withdrawal and moving a female victim from the couch to the floor established that there was a separate penetration supporting a second rape charge. When defendant raped one of the victims twice during the course of a home invasion and robbery, a third rape by his co-defendant was a natural or probable consequence of the robbery and the trial court properly submitted the third rape to the jury under an acting in concert theory. Evidence that young children were confined to a bedroom while defendants terrorized the family during the course of a robbery was sufficient to withstand defendant's motion to dismiss second-degree kidnapping charges on the elements of confinement and restraint and to warrant a jury instruction on both theories. The trial court properly found that defendant's conviction in Virginia was for a crime substantially similar to a North Carolina Class A1 misdemeanor.

I. Factual and Procedural Background

In the early morning hours of 18 August 2002, two men entered a residence in Charlotte in search of money and drugs belonging to Damien Bell (hereinafter "Bell"). The apartment belonged to Bell's girlfriend, L.B., whose 48-year-old mother and 12-year-old brother were staying with the couple and L.B.'s three young children (ages 6, 3, and 5 months). The intruders, Shelton L. Sapp (defendant) and Tracy Hicks (hereinafter "Hicks"), armed with a shotgun and a knife respectively, entered through a bedroom window, where they found

L.B.'s mother and 12-year-old brother asleep. They forced these two persons through the hall into the second bedroom, where Bell, L.B., and the younger children slept.

The intruders used duct tape to bind Bell and demanded cash and illegal drugs that they suspected were located in the residence. As the intruders searched for the cash and drugs, they forcibly separated Bell and L.B. from the rest of the family. L.B.'s mother, her 12-year-old brother, and the three young children remained in the bedroom throughout the incidents hereinafter described, while the intruders verbally and physically terrorized Bell and L.B.

Both intruders forced L.B. to engage in sexual intercourse: first, defendant in the living room, and later, Hicks in the apartment's lone bathroom. Defendant testified that he had sex with L.B. in order to induce Bell to reveal the location of the money and drugs. Hicks did not testify. Defendant took L.B. into the living room, where he twice penetrated her vaginally: first on the couch then again on the floor, while Bell and Hicks watched. Defendant then sent L.B. to the bathroom with instructions to "wash really good." After she bathed, and was in the process of drying herself, Hicks came into the bathroom and had intercourse with her.

Eventually, Bell told the men where to find the money and drugs. Defendant retrieved the money and drugs from their hiding place in a bedroom closet, then made a phone call. Before leaving, defendant killed Bell with a single shot to the head.

On 13 January 2003, defendant was indicted for murder, first degree burglary, first degree rape (3 counts), first degree kidnapping (2 counts), and second degree kidnapping (5 counts). Defendant was tried capitally on the murder charge. The offenses were consolidated for trial before a jury at the 26 June 2006 criminal term of Mecklenburg County Superior Court. Defendant's motion to dismiss the charges at the close of the State's evidence was denied. Defendant then testified and admitted to raping L.B. and shooting Bell. Defendant testified that he only raped L.B. once and did not plan any crime other than the robbery. On cross-examination, the State questioned defendant concerning his statement to police investigators that "My only plan was to go in, boom, boom." Defendant's motion to dismiss all charges at the close of all evidence was denied.

On 21 July 2006, the jury returned a verdict of guilty on all charges. On 28 July 2006, the jury recommended life imprisonment rather than death on the murder charge. The trial court accordingly

sentenced defendant to life imprisonment for the murder charge, and consecutive active sentences totaling a minimum of 1,369 months and a maximum of 1,764 months imprisonment for the other offenses. Defendant appeals.

II. Denial of Defendant's Motions to Dismiss

In his first three arguments, defendant contends that the trial court erred in denying his motions to dismiss two of the rape charges and three of the second degree kidnapping charges.

A. Standard of Review

> When considering a criminal defendant's motion to dismiss, the trial court must view all of the evidence presented in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence. The trial court correctly denies a motion to dismiss if there is substantial evidence of every element of the offense charged, or any lesser offense, and of defendant being the perpetrator of the crime.

State v. Murray, 154 N.C. App. 631, 634, 572 S.E.2d 845, 847 (2002) (internal quotations and citations omitted).

"Whether the evidence presented is substantial is a question of law for the court." *Id.* at 734, 572 S.E.2d at 847 (citation omitted). "Evidence is substantial if it is relevant and adequate to convince a reasonable mind to accept a conclusion." *Id.* (quoting *State v. Robinson*, 355 N.C. 320, 336, 561 S.E.2d 245, 255 (2002), *cert. denied*, 537 U.S. 1006, 154 L. Ed. 2d 404 (2002)). This Court reviews such questions of law *de novo*.

B. The Rape Charges

1. The Living Room Rapes

[1] In his first argument, defendant contends that he committed only one rape on L.B. because he did not "finish" having sex with her on the couch, but merely switched positions by moving to the floor. We disagree.

Defendant relies on *State v. Small*, 31 N.C. App. 556, 559, 230 S.E.2d 425, 427 (1976), for the premise that an act "of rape is terminated by a single act or fact." This reliance is misplaced. In *State v. Key*, this Court upheld separate convictions for rape where defendant did not move the victim from one location to another but forced her to change positions before re-entering her. *State v. Key*, 180 N.C. App.

286, 289, 636 S.E.2d 816, 820 (2006) (affirming two rape convictions where defendant penetrated victim vaginally from the front, withdrew, turned her on her side, and re-penetrated the victim vaginally from the rear), *disc. review denied*, 361 N.C. 433, 649 S.E.2d 399 (2007). "Each act of forcible vaginal intercourse constitutes a separate rape. Generally rape is not a continuous offense, but each act of intercourse constitutes a distinct and separate offense." *Key*, 180 N.C. App. at 288, 636 S.E.2d at 819 (2006) (quoting *State v. Owen*, 133 N.C. App. 543, 551-52, 516 S.E.2d 159, 165 (1999)).

Viewed in the light most favorable to the State, the evidence showed that the defendant and Hicks broke into the victim's home in the middle of the night and terrorized her and her family. After beating her boyfriend in an attempt to find money and drugs, defendant, armed with a shotgun, took L.B. to the living room with the stated purpose of having sex. L.B. testified that defendant penetrated her twice, first on the couch in the living room, then on the floor after Hicks dragged Bell, with his mouth taped and hands bound, into the room to watch.

The victim's testimony included the following:

Q. What happened to you on that couch, [Ms. B.]?

A. Well, I had sex with the tall guy—the tall guy with the shotgun.

Q. When you say sex, what do you mean?

A. Intercourse.

Q. Okay. And, you mean he put his penis in your vagina?

A. Yes, sir.

Q. [Ms. B.], did you give that man permission or did you want to have sexual intercourse with him there on your couch?

A. No, sir.

Q. Why did you do it?

A. I was afraid.

. . .

Q. And, did the man, the tall man with the shotgun, did he finish having sexual intercourse with you, there on the couch?

A. No, sir.

. . .

> Q. . . . What happened . . . once the shorter man brought [Bell] into the living room where you and the tall man with the shotgun were?
>
> A. Well, we got on the floor; me and the tall guy got on the floor. He got on top of me and we had sex, again.
>
> . . .
>
> Q. . . . did you give that man permission for—did you want to have sexual intercourse with him at that time?
>
> A. No, sir.

Although L.B. did not specifically articulate that the defendant withdrew, her testimony that he did not "finish" on the couch but that the two "had sex, again" on the floor was substantial evidence from which the jury could infer that the defendant withdrew before re-penetrating the victim on the floor. *Robinson*, 355 N.C. at 336, 561 S.E.2d at 255-56.

Defendant acknowledged that he was not sure how many times he raped the victim. On direct examination, defendant testified:

> Q. Did you have sex with her, in the living room?
>
> A. Yeah. I did.
>
> Q. Why did you do it?
>
> A. **I don't know how many times.** I done thought about this right here, man.

(emphasis added). Defendant testified that his motive in "having sex" with the victim was to apply pressure to Bell to reveal where the money and drugs were hidden.

When viewed in the light most favorable to the State, defendant's testimony and the testimony of the victim constitute substantial evidence of two rapes: one on the couch and one on the floor. The act of withdrawal and moving with the victim to the floor was sufficient to sustain the second charge. *Key*, 180 N.C. App. at 289, 636 S.E.2d at 820. Thus, the trial court did not err in denying defendant's motion to dismiss at the close of all the evidence or in submitting both rape charges to the jury.

This argument is without merit.

B. Rape in the Bathroom

[2] In his second argument, defendant contends that the court erred in denying his motion to dismiss the rape charge resulting from the acts of Hicks in the bathroom because the evidence did not support a rape conviction on an acting in concert theory. We disagree.

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

State v. Westbrook, 279 N.C. 18, 41-42, 181 S.E.2d 572, 586 (1971) (quoted with approval in *State v. Barnes*, 345 N.C. 184, 233, 481 S.E.2d 44, 71 (1997); *State v. Erlewine*, 328 N.C. 626, 637, 403 S.E.2d 280, 286 (1991)), *sentence vacated on other grounds*, 408 U.S. 939, 33 L. Ed. 2d 761 (1972). "A natural consequence is thus one which is within the normal range of outcomes that may be expected to occur if nothing unusual has intervened." *State v. Bellamy*, 172 N.C. App. 649, 669, 617 S.E.2d 81, 95 (2005) (quoting *Roy v. United States*, 652 A.2d 1098, 1105 (D.C. 1995)), *disc. review denied*, *appeal dismissed*, 360 N.C. 290, 628 S.E.2d 384 (2006).

Defendant argues that, under *Bellamy*, the bathroom rape was not a natural or probable consequence of the robbery. He contends that, as the man with the gun, he was "in charge of the situation" and it was unforeseeable that Hicks "would defy him by raping [L.B.]." He further contends that once that he told L.B. to go wash herself that the actions of Hicks were no longer a natural or probable consequence of the robbery and that he cannot be convicted under an acting in concert theory.

In *Bellamy*, two men planned a robbery of a restaurant where one of the men was employed. Bellamy entered the office area of the restaurant shortly after closing. He confronted the night manager with a gun as she prepared the night deposit. After securing the money, Bellamy instructed the manager to disrobe. He demanded that she spread her labia, then used the barrel of the gun to further separate her labia. The assault followed the robbery. There was no evidence of any plan for a sexual assault, nor was there evidence that the sexual assault was related in any way to the robbery. The State argued that, as a party to the robbery, Bellamy's co-defendant was "liable as a principal under the theory of acting in concert for

Bellamy's sexual assault on C.B." The issue before this Court was whether "a sexual assault is a natural or probable consequence of a robbery with a dangerous weapon of a fast food restaurant[.]" *Bellamy*, 172 N.C. App. at 668, 617 S.E.2d at 94.

In reaching its conclusion that this unusual sexual assault was not a natural or probable consequence of the completed robbery, this Court stated:

> Our Supreme Court has expressly rejected the concept that for a defendant to be convicted of a crime under an acting in concert theory, he must possess the *mens rea* to commit that particular crime. *Barnes*, 345 N.C. 184, 481 S.E.2d 44 (overruling *State v. Blankenship*, 337 N.C. 543, 447 S.E.2d 727 (1994) and *State v. Straing*, 342 N.C. 623, 466 S.E.2d 278 (1996)). Based upon the holding in *Barnes*, it would not be appropriate to adopt a standard based upon the defendant's subjective state of mind or intent. Rather, the appropriate standard for evaluating whether a crime was a reasonable or probable consequence of a defendant's joint purpose should be an objective one.
>
> We decline to adopt a *per se* rule that any sexual assault committed during the course of a robbery is a natural or probable consequence of a planned crime. Rather, this determination must be made on a case by case basis, upon the specific facts and circumstances presented. *See State v. Trackwell*, 458 N.W.2d 181, 183-84 (Neb. 1990).

Bellamy, 172 N.C. App. at 668-69, 617 S.E.2d at 95. The Court held that this "bizarre sexual offense" was not a natural and probable consequence of the robbery. *Id.* at 670-71, 617 S.E.2d at 96.

Citing to the case of *People v. Nguyen*, 21 Cal. App. 4th 518, 532-33, 26 Cal. Rptr. 2d 323, 332 (Cal. App. 3 Dist. 1993), this Court analyzed the foreseeability of a sexual assault occurring in the context of a commercial setting, as opposed to a residential setting. *Bellamy*, 172 N.C. App. at 669-70, 617 S.E.2d at 95-96. We held that it was less likely that a sexual assault in the course of a robbery of a business would be a natural and probable consequence than in the context of a residential robbery. *Id.* at 670, 617 S.E.2d at 96.

Viewed in the light most favorable to the State, the evidence at trial showed that Hicks and defendant invaded the victims' residence with the intent to commit robbery with a dangerous weapon. Defendant's rapes of L.B. in front of Bell were for the admitted pur-

pose of coercing Bell to give up his money and drugs, and, as such, they were part of the robbery. Once defendant had engaged in this conduct in front of Hicks it was clearly foreseeable that Hicks would become aroused and want to have sex with L.B. Having set in motion the rape of L.B. as an integral part of the robbery, defendant cannot now complain that Hicks' rape of L.B. was not a natural and probable consequence of the home invasion and robbery.

Unlike in *Bellamy*, where the sexual assault took place after the robbery was completed, the rape by Hicks was conducted during the course of the robbery. As noted in *Nguyen*, "[d]uring hostage-type robberies in isolated locations, sexual abuse of victims is all too common. . . . rapes in the course of a residential robbery occur with depressing frequency." *Nguyen*, 21 Cal. App. 4th at 532-33, 26 Cal. Rptr. 2d at 332 (internal quotations and citations omitted).

Taken in the light most favorable to the State, the evidence in this case supports the trial court's submission of the bathroom rape by Hicks to the jury under an acting in concert theory. We hold that, on these facts, Hicks' rape of L.B. was a natural and probable consequence of the intended robbery of Bell and the court did not err in submitting this rape charge to the jury.

This argument is without merit.

C. Second Degree Kidnapping: The Children

[3] In his third argument, defendant contends that the court erred in denying his motion to dismiss the three second degree kidnapping charges involving L.B.'s young children, stating that, because the children were "neither restrained nor confined," the evidence was insufficient to submit these charges to the jury. We disagree.

Since 1975, the crime of kidnapping has been governed by statute. N.C.G.S. § 14-39 (2007) (defining kidnapping of a juvenile as the confinement, restraint or removal of the child, without the consent of the parent, for the purpose of, among other things, facilitating the commission of a felony).

In *State v. Shue*, this Court observed that:

> "If the victim is shown to be under sixteen, the state has the burden of showing that he or she was unlawfully confined, restrained, or removed from one place to another without the consent of a parent or legal guardian." *State v. Hunter*, 299 N.C. 29, 40, 261 S.E.2d 189, 196 (1980).

> "Confinement" in the context of the offense "connotes some form of imprisonment within a given area, such as a room, a house or a vehicle." *State v. Fulcher*, 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978). Whereas " 'restrain,' while broad enough to include a restriction upon freedom of movement by confinement, connotes also such a restriction, by force, threat or fraud, without confinement." *Id.*

State v. Shue, 163 N.C. App. 58, 63, 592 S.E.2d 233, 237 (2004). Moreover, we believe that "The terms 'restrain,' 'confine' or 'remove' are related in that they all encompass an act which asserts control over the victim." *State v. Dominie*, 134 N.C. App. 445, 451, 518 S.E.2d 32, 35 (1999) (J. Walker, concurring).

Viewed in the light most favorable to the State, the evidence at trial showed that defendant, wielding a shotgun, acted in concert with Hicks to isolate L.B.'s mother, L.B.'s 12-year-old brother, and L.B.'s three young children in a single bedroom while terrorizing the remaining occupants of the apartment in the course of a robbery. There was evidence that defendant controlled the behavior of the persons in the bedroom by forcing both women to remove their clothes and refusing to allow L.B.'s mother to use the bathroom when she asked to do so, telling her to "pee on the floor." There was also evidence that the intruders terrorized those in the bedroom, responding to L.B.'s 12-year-old brother by hurling racial slurs and telling him to "shut up." We thus hold that there was substantial evidence from which the factfinder could infer that the defendant exercised impermissible restraint over the young children and confined them within the meaning of the statute. *Fulcher*, 294 N.C. at 523, 243 S.E.2d at 351; *Shue*, 163 N.C. App. at 63, 592 S.E.2d at 237.

This argument is without merit.

II. Jury Instructions on Second Degree Kidnapping Charges

[4] In his fourth argument, defendant alleges prejudicial error in that the jury was instructed on a theory of restraint without sufficient evidence to support that theory. We disagree.

The judge instructed the jury as to each child:

> First, that the defendant, either acting alone or together with another, unlawfully confined [the child] within a given area or restrained him, that is restricted his freedom of movement.

> Second, that [the child] had not reached his 16th birthday and his parent or guardian did not consent to this confinement or restraint. Consent obtained or induced by fraud or fear is not consent.
>
> Third, that the defendant, either acting alone or together with another, confined or restrained [the child] for the purpose of committing the offenses of robbery with a dangerous weapon [sic].
>
> And fourth, that this confinement or restraint was a separate, complete act, independent of and apart from the commission of the offense of robbery with a dangerous weapon.

Defendant challenges only the element of restraint in each paragraph, contending that: (1) *Fulcher* defined restraint as a constriction on one's freedom of movement by force, threat or fraud without confinement; (2) there was no evidence that defendant kept the children in the bedroom by force, threat or fraud; (3) the trial court should have refrained from charging the jury on the restraint theory; and (4) its failure to do so was prejudicial error because it prevented the jury from considering "whether staying with your grandmother in your bedroom, standing alone, constitutes kidnapping."

The language in *Fulcher* includes confinement within the meaning of restraint. *Fulcher*, 294 N.C. at 523, 243 S.E.2d at 351 ("The term 'restrain,' while broad enough to include a restriction upon freedom of movement by confinement, connotes also such a restriction, by force, threat or fraud, without a confinement."). We have already determined that there was substantial evidence from which the jury could infer that the defendant exercised impermissible control over the inhabitants of the bedroom, sufficient to withstand a motion to dismiss the second-degree kidnapping charges related to L.B.'s young children. We hold that the instruction on restraint was supported by substantial evidence that defendant, wielding a shotgun, terrorized the occupants of the apartment and exercised control over the persons in the bedroom by use of threats.

This argument is without merit.

III. Felony Sentencing Level

[5] In his fifth argument, defendant contends that the State failed to meet its burden of proving that defendant's prior conviction in Virginia was substantially similar to a Class A1 or Class 1 misdemeanor in North Carolina. We disagree.

At trial, the State introduced the petition, indictment, and judgment from the Commonwealth of Virginia against defendant for inflicting bodily injury on an employee of a juvenile detention center. After discussing with counsel for the State and defendant whether the offense was similar to the North Carolina crimes of assault inflicting serious injury or assault on a government official, the court concluded that the offense was "at least a Class 1 misdemeanor[,]" revised the Sentencing Worksheet to reflect one point instead of two, and found the defendant to be a Prior Record Level II offender. Defendant contends that, because the Virginia indictment did not allege that the victim was discharging or attempting to discharge any official duty, the State failed to prove that the assault was anything more than a simple assault, a Class 2 misdemeanor, and consequently he should have been found to be a Level I offender with no prior sentencing points.

N.C. Gen. Stat. § 15A-1340.14(e) governs the classification of prior convictions from other jurisdictions. The relevant portion of the statute reads:

> If the State proves by the preponderance of the evidence that an offense classified as a misdemeanor in the other jurisdiction is substantially similar to an offense classified as a Class A1 or Class 1 misdemeanor in North Carolina, the conviction is treated as a Class A1 or Class 1 misdemeanor for assigning prior record level points.

N.C. Gen. Stat. § 15A-1340.14(e) (2007).

The Virginia juvenile court petition charged that defendant:

> did on or about 11/29/99, unlawfully and feloniously, while confined in a secure facility as defined in VA. Code Section 16.1-228, knowingly and willfully inflict bodily injury on [D.R.], an employee thereof, in violation of Section 18.2-55 of the 1950 Code of Virginia as amended.

Section 18.2-55 of the Code of Virginia, "Bodily injuries caused by prisoners, state juvenile probationers and state and local adult probationers or adult parolees[,]" states that:

> A. It shall be unlawful for a person confined in a state, local or regional correctional facility as defined in § 53.1-1; in a secure facility or detention home as defined in § 16.1-228 or in any facility designed for the secure detention of juveniles; or while in the

custody of an employee thereof to knowingly and willfully inflict bodily injury on:

1. An employee thereof, . . .

Va. Code Ann. § 18.2-55 (2008).

Pursuant to defendant's guilty plea in Virginia, the court sentenced him to ten years imprisonment, with eight years and three months suspended.

During trial of the instant case, defendant testified that:

A. . . . I was in a juvenile correctional center . . . for like a couple of weeks and I caught an assault on an officer; in an assault on that officer.

[DEFENSE COUNSEL]. How did that happen?

A. One night, another inmate was in a block that we was in [sic] and it was only one officer working the unit [sic]. He came in to break the fight up and he tried to prevent both of us from fighting. In the process, he got assaulted. He got hit in the face. He pressed charges on me.

. . .

Q. . . . what happened as a result of that?

A. I got tried as an adult.

. . .

[DISTRICT ATTORNEY]. . . . [T]he guard was a Mr. [D.R.]; wasn't it?

A. Yeah.

. . .

Q. . . . And the charge you were convicted of was called inflicting bodily injury; wasn't it?

A. I can't remember the exact charge; but some where around that [sic].

. . .

Q. . . . Inflict bodily injury, do you know if that's a felony?

A. I think so.

N.C. Gen. Stat. § 14-33(c) classifies the following conduct by a defendant as a Class A1 misdemeanor:

> . . . if, in the course of the assault, assault and battery, or affray, he or she:
>
> . . .
>
> (4) Assaults an officer or employee of the State or any political subdivision of the State, when the officer or employee is discharging or attempting to discharge his official duties[.]

N.C. Gen. Stat. § 14-33(c) (2007). The Virginia statute does not contain the precise wording found in N.C. Gen. Stat. § 14-33(c). However, the requirement set forth in N.C. Gen. Stat. § 15A-1340.14(e) is not that the statutory wording precisely match, but rather that the offense be "substantially similar." The Virginia statute makes it a crime for persons confined in a correctional facility to knowingly and willfully inflict bodily injury upon an employee of that facility. Due to the nature of a correctional facility, an assault on one of its employees would necessarily be in the discharge of the employee's duties. Any questions as to whether this was the case were resolved by the defendant's own testimony that the assault occurred as the employee attempted to break up a fight between prisoners and prevent them from further fighting. The trial court properly found defendant to be a Level II offender for felony structured sentencing purposes.

This argument is without merit.

IV. Short Form Indictment

[6] In his final argument, defendant challenges the constitutionality of the short form murder indictment, contending that the trial court lacked subject matter jurisdiction to enter a judgment on first-degree murder because the short form indictment alleged only second degree murder. We disagree.

Defendant acknowledges that our Supreme Court has on numerous occasions upheld the constitutionality of the use of the short-form murder indictment, *e.g. State v. Hunt*, 357 N.C. 257, 582 S.E.2d 593, *cert. denied*, 539 U.S. 985, 156 L. Ed. 2d 702 (2003) (rejecting the argument that the United States Supreme Court's decision in *Ring v. Arizona* rendered North Carolina's short-form murder indictment unconstitutional), and seeks only to preserve this issue in the event of further review. *Engle v. Isaac*, 456 U.S. 107, 71 L. Ed. 2d 783 (1982).

This argument is without merit.

V. Conclusion

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

For the reasons stated above, we find no error in the trial or sentencing of defendant.

NO ERROR.

Judges McCULLOUGH and ARROWOOD concur.

STATE OF NORTH CAROLINA v. TELLY T. COX

No. COA07-1171

(Filed 3 June 2008)

1. Trials— sleeping juror—not replaced

The trial court did not abuse its discretion by denying defendant's request to replace a juror who he asserted had been sleeping during the trial. Defendant had raised concerns during jury selection but accepted this juror, and the court conducted an inquiry and determined that the juror was sufficiently alert to perform her duties as a juror.

2. Appeal and Error— preservation of issues—motion to dismiss—not renewed at close of evidence

Defendant waived appellate review of the denial of his motion to dismiss at the close of the State's evidence by not moving to dismiss at the close of his evidence.

3. Constitutional Law; Criminal Law— failure to move to dismiss at close of evidence—no prejudice

Defendant was not prejudiced by his counsel's failure to move to dismiss at the close of all of the evidence where the State produced evidence that defendant acted with another to obtain a gun and went to the victim's residence (with the other person having the gun) with intent to rob the victim, any inferences concerning whether defendant was armed or told one victim to dis-

robe were for the jury to determine, and the State met its burden of presenting substantial evidence of the crimes.

Appeal by defendant from judgment entered 22 September 2006 by Judge Russell J. Lanier, Jr. in Wayne County Superior Court. Heard in the Court of Appeals 6 March 2008.

Attorney General Roy Cooper, by Special Deputy Attorney General A. Danielle Marquis, for the State.

Richard E. Jester, for the defendant-appellant.

STEELMAN, Judge.

The trial court did not abuse its discretion in refusing defendant's request to dismiss a juror during the trial. Defendant may not challenge the sufficiency of the evidence upon appeal when he failed to move for dismissal at the close of all the evidence. Because defendant cannot show prejudice under *Strickland*, his ineffective assistance of counsel claim must fail.

Throughout the evening of 31 December 2003 and the early morning hours of 1 January 2004, Chris Brown (Brown) and his girlfriend, Alonza Bedell (Bedell), were cruising Wayne County, consuming alcohol and illegal drugs at various residences. The couple picked up Telly Cox (defendant) in the early morning hours of 1 January 2004, and the three consumed alcohol and smoked "weed." Brown, Bedell, and defendant paid a visit to the Maynard residence, where Shawn Maynard was entertaining his father and his girlfriend, Nicole Jones. Shawn's two children were also present: 8-year-old daughter Bailey and 13-year-old stepson Chae, who recognized Brown from previous visits to the Maynard residence. On this particular visit, Brown stayed only a short time.

When Brown returned to the car, Bedell, Brown, and defendant drove to a friend's home where Brown and Bedell frequently drank and socialized. Bedell lost track of the two men for approximately 30 minutes. Brown called her on her cellphone and told her to come pick him up at Maynard's residence. When Bedell arrived, the two men ran out of the residence, jumped into her car, and told her to drive away. Both men had guns.

Police responded to a 911 call to Shawn Maynard's home and found the bodies of Shawn Maynard and Nicole Jones in the master bedroom. Jones was only partially dressed. Bailey told police that

"two bad men came in and shot and killed my dad and his girlfriend[.]" The glass door of a gun cabinet in the bedroom where the bodies were found had been removed and guns were missing.

The following day, police interviewed Shawn's children. Chae, age 13, gave them Brown's name and identified Brown from a photo line-up. Brown was arrested that same day in blood-spattered clothing. At the time of his arrest, Brown's head was closely shaven.

Police arrested defendant late on the night of 1 January 2004. At the time of his arrest, defendant wore his hair in cornrows. Defendant gave a detailed statement to investigators, in which he admitted accompanying Brown into the Maynard home but claimed that he only acted at Brown's direction and at gunpoint.

On 7 February 2005, defendant was indicted for murder (2 counts), armed robbery, attempted rape, and first degree kidnapping (2 counts). The cases were consolidated for trial. Although defendant was tried non-capitally on the murder charge, he was represented by two attorneys. The cases were tried at the 11 September 2006 criminal session of Wayne County Superior Court.

Bailey Maynard, then 10 years old and a witness to the murders, testified at trial as to the events of 1 January 2004. Bailey stated that she awoke to find "Nicki" (Jones) and a man with cornrows (defendant) in the bedroom where she had been sleeping. The man with cornrows had a gun, which he was pointing at Nicki, and yelling at her to get up on the bed and to take off her shirt. No one else was in the room, and Bailey could see the bald man (Brown) in the living room. Bailey had never seen the man with cornrows before but the bald man had been to the house before. The man with the cornrows pointed the gun at Bailey and told her to get in the closet. From the closet, Bailey heard the bald man and Nicki yelling, then a gunshot, then Nicki yelling "No[,]" then another gunshot. When Bailey heard the front door close, she left the closet. She tried to wake her father. Then she dialed 911.

At the close of the State's evidence, the trial court dismissed both kidnapping charges. Defendant asserted a duress defense as to the murder and robbery charges. Eight defense witnesses testified to events occurring in the hours prior to and following the time of the murders. As to the robbery charge, the jury was charged on the theories that defendant acted as a principal or in concert with Brown. As to the murders, the jury was charged only as to felony murder, with

the underlying felony being either robbery with a dangerous weapon or attempted rape.

On 22 September 2006, the jury returned a verdict of guilty on the remaining four charges: murder (2 counts), armed robbery, and attempted rape. The trial court sentenced defendant to two consecutive life sentences on the murder charges, and arrested judgment on the robbery and attempted rape charges. Defendant appeals.

[1] In his first argument, defendant contends that the trial court failed to protect his constitutional right to a jury of twelve persons when it denied his request to excuse a juror whom he asserts was sleeping during the trial. We disagree.

In North Carolina, trial by a jury of twelve persons in a criminal case is an unwaivable right of the accused. *State v. Hudson*, 280 N.C. 74, 79, 185 S.E.2d 189, 192 (1971). The question of whether a juror shall be excused and replaced by an alternate is left to the discretion of the trial court, whose actions are reviewed under an abuse of discretion standard. *State v. Nelson*, 298 N.C. 573, 260 S.E.2d 629 (1979); *see also State v. Lovin*, 339 N.C. 695, 715-16, 454 S.E.2d 229, 241 (1995) (quoting *State v. Nelson*, 298 N.C. 573, 593, 260 S.E.2d 629, 644 (1979) for the premise that "decisions relating to the competency and service of jurors are not reviewable on appeal absent a showing of abuse of discretion, or some imputed legal error."). In *Lovin*, our Supreme Court found no abuse of discretion in the court's refusal to replace a juror despite testimony from two law enforcement officials that the juror had appeared confused, required directions to the courtroom on multiple occasions, slept a good part of the time, and failed to review a photo exhibit that was published to the jury. *Lovin*, 339 N.C. at 715-16, 454 S.E.2d at 240-41.

Following closing arguments, defense counsel raised concerns to the trial court that two jurors, juror 5 and juror 8, had been sleeping during parts of the trial. Because defendant brings forward only his challenge to juror 8, we limit our review to that juror. Defense counsel argued to the trial court that, during closing arguments, he had closely observed juror 8, whom he believed had fallen asleep and been inattentive. Outside of the presence of the jury, the trial court heard from both the State and defendant. Juror 8 was then brought into the court room and the trial court conducted the following inquiry:

> THE COURT: —the reason that I've asked you to come in is that it has been brought to my attention that at some point dur-

ing the trial you appeared to have dozed off, to somebody. Did you doze off?

JUROR NUMBER 8: If I did, it was, yeah, for a second. I mean, it's . . .

THE COURT: Well, the question is: Did you hear enough of the trial to be able to perform your duty as a juror? Because, you know, if you did doze off and miss something, you know, it may be unfair to one side or the other if you happened to have missed something at that particular time.

JUROR NUMBER 8: I don't remember doing it. I know I jerk. I have bad hands, and I sit here and pull on them and I jerk. But I—I don't remember a time after when we were selected in the jury—and it was really hot in here. I don't remember a time after that. I won't tell, you know . . .

THE COURT: The question that I really have: Do you—do you feel like—that you have a command of the testimony sufficient to perform your duty as a juror?

JUROR NUMBER 8: I feel like I have, you know, heard everything.

THE COURT: Okay. Well, I mean, you know—

JUROR NUMBER 8: Pin me down. I mean, give me a person I might have done that—

THE COURT: I can't because I don't know, because, you know, it's entirely possible for people to listen with their eyes closed, you know, and frequently people do that. I just want to make certain that—you know, that the decision-makers, which is the jurors [sic], heard the facts.

JUROR NUMBER 8: (Affirmative nod.) Well, I think I did. But, it's okay.

The trial court concluded:

> [T]he Court has inquired of jurors number 5 and 8 whether they were sufficiently alert to fully participate in the accumulation of the knowledge disclosed by the facts that were testified to in open court to perform their duties as a juror. Each has assured the Court that they have done so. Therefore, I'm going to deny the defense motion to replace the jurors.

Defendant challenges the denial only as to juror 8.

A review of the record reveals that defense counsel first raised concerns regarding juror 8 during jury selection. Nonetheless, defense counsel neither challenged her for cause nor moved to strike her. Instead, defense accepted her as a juror. Defendant now argues before this Court that the trial court abused its discretion in allowing juror 8 to deliberate when it was sufficiently aware of the issue to closely monitor her during the trial. Characterizing the juror's responses as "equivocal at best[,]" he contends that these facts are distinguishable from *Lovin* because defense counsel personally observed the sleeping juror. We find these arguments unpersuasive. We hold that *Lovin* controls these facts, and, as in *Lovin*, we can find no abuse of discretion in the court's inquiry and determination that juror 8 was sufficiently alert to perform her duties as a juror. This argument is without merit.

[2] In his second argument, defendant contends that, because the State failed to prove beyond a reasonable doubt that he participated in a "joint enterprise" with Brown, his motion to dismiss at the close of the State's evidence should have been granted. We disagree.

Rule 10(b)(3) of the North Carolina Rules of Appellate Procedure state, in relevant part:

> [I]f a defendant fails to move to dismiss the action or for judgment as in case of nonsuit at the close of all the evidence, he may not challenge on appeal the sufficiency of the evidence to prove the crime charged.

N.C. R. App. P. 10(b)(3) (2007). The record shows that defendant moved to dismiss all of the charges at the close of the State's evidence. However, following his presentation of evidence, defendant failed to move to dismiss the charges or to renew his challenge to the sufficiency of the evidence. Consequently, he has waived his right to appellate review of the denial of his motion to dismiss the action at the close of the State's evidence. N.C. R. App. P. 10(b)(3). This argument is dismissed.

In his third argument, defendant contends that his two attorneys rendered ineffective assistance of counsel by failing to move for dismissal of all charges at the close of all the evidence. We disagree.

[3] In a three-part argument, defendant contends that the attorney's failure to make a routine motion to dismiss at the close of all the evidence violated his right to have the sufficiency of the evidence weighed before submission of the charge to the jury. He further con-

tends that his attorney's failure to preserve these arguments constituted ineffective counsel and that the deficient performance prejudiced his appeal by waiving his right to appellate review.

A criminal defendant's Sixth Amendment right to counsel 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, 664 (1984). To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient and that the deficiency prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (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, 80 L. Ed. at 698. In the matter *sub judice*, defendant fails to show a reasonable probability that counsel's failure to move for dismissal of the charges would have resulted in a different outcome.

In weighing the sufficiency of the evidence, the trial court considers all evidence admitted at trial, whether competent or incompetent:

> . . . in the light most favorable to the State, giving the State the benefit of every reasonable inference that might be drawn therefrom. Any contradictions or discrepancies in the evidence are for resolution by the jury. *State v. Witherspoon*, 293 N.C. 321, 237 S.E.2d 822 (1977). The trial judge must decide whether there is substantial evidence of each element of the offense charged. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980).

State v. Brown, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984). The role of the trial judge is merely to establish that substantial evidence exists of each element of the offense. *Id.* The jury resolves any conflicts in the evidence. *Id.*

Before discussing each of defendant's arguments, we first note that defendant argues the evidence in the light most favorable to his version of the events of 1 January 2004. This is not the appropriate standard of review, *Brown*, 310 N.C. at 566, 313 S.E.2d at 587, and we decline to so view the evidence.

In the first part of his argument, defendant contends that the State's evidence was that "[o]nly Chris Brown was armed when the men arrived [at the Maynard residence]." Two witnesses for the State testified that, before visiting the Maynard residence, defendant accompanied Brown to another drug house, where the two men spent 30-60 minutes in a back room with Brown's drug dealer, and emerged with Brown toting a shotgun. During the time that the two men were in the back room, defendant watched as Brown loaded the gun. This evidence raises a reasonable inference that the two men acted together to obtain a gun, then went to the Maynard residence with the intent to rob Maynard of his firearms. We conclude that this testimony is substantial evidence supporting the trial court's charge on armed robbery.

In the second part of his argument, defendant contends that his version of events and the evidence of duress are not rebutted by evidence, only by conjecture and speculative testimony by a child who was in a closet during the alleged crimes. As discussed *supra*, Bailey testified that defendant had a gun and ordered Jones at gunpoint to take off her shirt. Although he does not directly challenge Bailey's competency as a witness, defendant contends that Bailey's failure to testify to any breaking into the gun cabinet establishes that the breaking "could only have occurred while she was in the closet" and he thus could not have ordered Jones to take off her shirt at gunpoint. He argues that, as Brown was the only armed man and "Bailey did not hear two voices commanding Nicole to remove her clothes[,]" defendant cannot be guilty of the crimes charged.

In his statement to police, defendant gave this version of events at the Maynard residence leading up to the murders:

> Chris came back to the bedroom with the white lady, Shawn's friend, and Shawn. He was pointing the shotgun at them. When they got into the bedroom, Chris told the white female to take her clothes off. I think he was going to rape her. She took her shirt off. I'm not sure if she had a blouse or a pullover on. She took it off and was naked from the waist up. He, Chris, told her, the lady, to take her pants off. She started to take her pants off. Shawn was telling Chris to, quote, chill out, end quote. This is nonsense, end quote. Shawn started to walk toward the door, headed to the bathroom in the hallway near the master bedroom. Shawn was still hollering at Chris, and that is when Chris shot him.

Defendant's version of these events was directly contradicted by Bailey's testimony that he pointed a gun at Jones and yelled at her to take off her shirt and get up on the bed. Bailey's testimony is substantial evidence that defendant was armed and threatening both Jones and Bailey with a gun. Any inferences concerning whether defendant was armed or told Jones to disrobe were for the jury to determine. *Brown*, 310 N.C. at 566, 313 S.E.2d at 587.

In the remainder of his argument, defendant challenges the sufficiency of the evidence to show that he committed any crime. Assuming *arguendo* that defendant had preserved this argument, it is without merit. When viewed in the light most favorable to the State, the evidence showed that both Brown and defendant participated in the robbery and attempted rape of Jones. Bailey testified that defendant pointed a gun at Jones and yelled at her to take off her shirt and get up on the bed. Jones' body was only partially clothed; she had no shirt or bra on and her pants were unsnapped and unzipped. This physical evidence, coupled with defendant's statement to police, supported the State's theory that the murders occurred when Maynard tried to stop the intruders from raping Jones, which occurred in the course of the armed robbery.

With respect to the robbery, defendant's thumbprint was found on the gun cabinet where the stolen guns were locked, and the stolen firearms, shotgun shells, and crossbow were found in a car outside defendant's home. Defendant admitted to investigators that he broke into the cabinet and removed the guns. The State introduced evidence that defendant was armed with a gun, which he used to control and threaten the female victim and the child during the course of the robbery. This evidence was more than sufficient to meet the State's burden of presenting substantial evidence of each element of the robbery and that defendant was the perpetrator or acted in concert with Brown.

It is well-established that proof of the elements of the underlying felony suffices to establish the necessary intent for felony murder. *See*, *e.g.*, *State v. Moore*, 284 N.C. 485, 494, 202 S.E.2d 169, 175 (1974) (" 'A murder which is committed in the perpetration or attempted perpetration of robbery, rape, arson, [etc.], is murder in the first degree, irrespective of premeditation or deliberation or malice.' ") (quoting 4 N.C. Index 2d, Homicide, Sec. 4, 1947 Ed.). Because the State met its burden of producing evidence that the murders occurred in the course of the robbery or an attempted rape, the felony murder charge was properly submitted to the jury.

We hold that the defendant was not prejudiced by counsel's failure to move to dismiss the charges at the close of all the evidence. This argument is without merit.

Defendant's brief fails to address the remaining assignments of error. Pursuant to N.C. R. App. P. 28(b)(6) (2007), these are deemed abandoned.

NO ERROR.

Judges McCULLOUGH and ARROWOOD concur.

STATE OF NORTH CAROLINA v. JUAN DOE A/K/A FRANCISCO VAZQUEZ MARTINEZ

No. COA07-1560

(Filed 3 June 2008)

1. Search and Seizure— motion to suppress—drugs—consent—knowing and intelligent waiver

The trial court did not err in a prosecution for various cocaine offenses by denying defendant's motion to suppress evidence pertaining to the search of his bedroom, even though defendant contends he did not knowingly and intelligently waive his right to be free of unreasonable searches or his right to self-incrimination, because: (1) *Miranda* warnings are not required to be given by officers before obtaining the consent of the owner to a search of his premises; (2) even if defendant's consent was held to be a statement while he was in custody, our Supreme Court has held that physical evidence obtained as a result of statements by a defendant made prior to receiving the necessary *Miranda* warnings need not be excluded; (3) the only requirement for a valid consent search is the voluntary consent given by a party who had reasonably apparent authority to grant or withhold such consent; and (4) the totality of circumstances revealed that there was competent evidence in the record supporting the trial court's findings of fact and those findings supported the trial court's conclusion when defendant signed a consent form that was written in Spanish, his native language; the consent form was read to him; defendant indicated no lack of understanding; he did

not object at any time to the consent that he gave by signing the consent form; he was cooperative in providing the consent and he provided information relating to the location of his room within the trailer on the form further indicating his consent.

2. Drugs— trafficking in cocaine by possession—trafficking in cocaine by transportation—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charges of trafficking in cocaine by possession and by transportation even though defendant contends the State failed to present sufficient evidence tending to show he possessed or transported the cocaine recovered from the vehicle because sufficient evidence was presented that: (1) defendant was in constructive possession of the cocaine recovered from the vehicle when a witness testified that defendant obtained the nine ounces of cocaine recovered from the vehicle from a third party, the cocaine was located in defendant's jacket or under the passenger seat where he was sitting prior to police intervention, and defendant presented the cocaine to the confidential informant; and other testimony tended to show nine ounces of cocaine were recovered from the floorboard in the back seat, more toward the passenger side of the floorboard where defendant was located; and (2) a witness testified that he and defendant often delivered cocaine together because he was the one that knew of the informant; and that he and defendant had driven to their residence after work on 2 March 2006, arranged the drug purchase with one of the confidential informants, and later drove to the parking lot where the purchase was to occur with the cocaine located inside the vehicle.

3. Drugs— maintaining dwelling for keeping or selling controlled substances—motion to dismiss—sufficiency of evidence

The trial court erred by denying defendant's motion to dismiss the charge of maintaining a dwelling for the keeping or selling of controlled substances based on insufficient evidence that defendant kept his bedroom for the purpose of keeping or selling cocaine, and this conviction is reversed and the case is remanded for resentencing, because: (1) factors to be considered in determining whether a particular place is used to keep or sell controlled substances include a large amount of cash being found in the place, a defendant admitting to selling controlled substances,

and the place containing numerous amounts of drug paraphernalia; and (2) none of the aforementioned factors are present in the instant case when officers recovered six and a half grams of cocaine from a boot located inside defendant's closet, no other evidence or paraphernalia tending to indicate the sale of cocaine recovered from a vehicle came from defendant's bedroom, defendant admitted he was a habitual cocaine user and that he had purchased the cocaine found in his bedroom at a bar the previous week for $200.00, and defendant asserted the cocaine recovered from the boot was solely for his personal use and denied any intent or plans to sell the cocaine recovered from the boot in the bedroom.

4. Drugs— possession with intent to sell and deliver cocaine—instruction—trafficking in the same cocaine by possession

The trial court did not commit plain error by instructing the jury on the charge of possession with intent to sell and deliver cocaine, even though defendant contends the trial court was required to instruct the jury that it could not properly find defendant guilty of possession with the intent to sell or deliver cocaine based upon the same evidence it used to find defendant guilty of trafficking in cocaine by possession, because: (1) contrary to defendant's contentions, the Court of Appeals has upheld convictions for both possession with intent to sell and distribute cocaine and trafficking in the same cocaine by possession; and (2) the language and history of the statutes indicates that the legislature intended that these offenses be punished separately, even where the offenses are based upon the same conduct.

Appeal by defendant from judgments entered 2 May 2007 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 15 May 2008.

Attorney General Roy Cooper, by Assistant Attorney General Robert K. Smith, for the State.

Anne Bleyman, for defendant-appellant.

TYSON, Judge.

Juan Doe a/k/a Francisco Vazquez Martinez ("defendant") appeals judgments entered after a jury found him to be guilty of: (1) trafficking in cocaine by possession and transportation pursuant to N.C.

Gen. Stat. § 90-95(h)(3); (2) conspiracy to traffic in cocaine by possession pursuant to N.C. Gen. Stat. § 90-95(i); (3) possession with the intent to sell or deliver cocaine pursuant to N.C. Gen. Stat. § 90-95(a); and (4) maintaining a dwelling for the keeping or selling of controlled substances pursuant to N.C. Gen. Stat. § 90-108(a)(7). We find no error in part, reverse in part, and remand for resentencing.

I. Background

On 2 March 2006, Raleigh Police Detective A.H. Pennica ("Detective Pennica") obtained information from confidential informants that a drug purchase had been arranged with an individual known as "Goyo." "Goyo" was later identified as Alfredo Lara ("Lara"). The drug purchase was scheduled to occur at approximately 9:00 p.m in the parking lot of the building on 2800 Trawick Road. Lara was to deliver a quarter kilo of cocaine, which equals approximately nine ounces. The informants told Detective Pennica that Lara and a second person would deliver the drugs.

Detective Pennica drove to the location and parked directly across the street to observe the transaction. Detective Pennica required one informant to stay behind with him to contact the second informant via telephone. The second informant was instructed to approach Lara's vehicle and to signal to the first informant when he had observed the cocaine. After Detective Pennica received the signal, drug enforcement officers stationed next to the parking lot were ordered to "takedown" the vehicle. Three subjects, Lara, defendant, and the second informant occupied the vehicle.

Raleigh Police Sergeant Mike Glendy ("Sergeant Glendy") removed defendant from the front passenger seat, handcuffed and searched his person. Sergeant Glendy found three small bags of cocaine located inside defendant's front right pocket. Meanwhile, officers searched the vehicle and recovered a small brown paper bag containing nine ounces of cocaine "on the floorboard of the back seat near the center console."

After officers had recovered the drugs and secured the scene, defendant and Lara were transported to their residence. Upon arrival, defendant signed a form consenting to a search of his bedroom. Officers discovered six and a half grams of cocaine located inside a cowboy boot inside of defendant's closet.

After a three day trial, a jury found defendant to be guilty of: (1) trafficking in cocaine by possession; (2) trafficking in cocaine by

transportation; (3) conspiracy to traffic in cocaine by possession; (4) possession with the intent to sell or deliver cocaine; and (5) maintaining a dwelling for the keeping or selling of controlled substances. All five convictions were consolidated into two separate judgments. Defendant was sentenced to a minimum term of seventy and a maximum term of eighty-four months imprisonment for his trafficking and conspiracy convictions. The trial court also sentenced defendant to a consecutive six to eight month term of imprisonment for his possession with the intent to sell or deliver a controlled substance and maintaining a dwelling for the keeping or selling of controlled substances convictions. This sentence was suspended and defendant was to be placed on supervised probation for twenty-four months following the completion of his consolidated sentence. Defendant appeals.

II. Issues

Defendant argues the trial court erred by: (1) denying his motion to suppress evidence and testimony related to the search of his bedroom; (2) denying his motions to dismiss the trafficking cocaine by possession and transportation convictions; and (3) denying his motions to dismiss the maintaining a dwelling for the keeping or selling of controlled substances conviction. Defendant also argues the trial court committed plain error by improperly instructing the jury on the charge of possession with intent to sell and deliver cocaine.

III. Motion to Suppress

[1] Defendant argues he did not knowingly and intelligently waive his right to be free of unreasonable searches or his right to self-incrimination and asserts the trial court erred by denying his motion to suppress evidence and testimony pertaining to the search of his bedroom. We disagree.

A. Standard of Review

This Court has stated:

> The trial court's findings of fact regarding a motion to suppress are conclusive and binding on appeal if supported by competent evidence. This Court determines if the trial court's findings of fact support its conclusions of law. Our review of a trial court's conclusions of law on a motion to suppress is *de novo*.

State v. Edwards, 185 N.C. App. 701, 702, 649 S.E.2d 646, 648 (internal citations and quotations omitted), *disc. rev. denied*, 362 N.C. 89, 656 S.E.2d 281 (2007).

B. Analysis

1. Miranda Warnings

Defendant challenged the validity of his consent to search his bedroom during the motion to suppress hearing. Defendant argued both at trial and in his brief that he should have been advised of his *Miranda* rights prior to the officer's consent request. We disagree.

Our Supreme Court has repeatedly held that *Miranda* warnings are not required to be given by officers before obtaining the consent of the owner to a search of his premises. *State v. Hardy*, 339 N.C. 207, 226, 451 S.E.2d 600, 611 (1994); *State v. Powell*, 297 N.C. 419, 427, 255 S.E.2d 154, 159 (1979); *State v. Vestal*, 278 N.C. 561, 579, 180 S.E.2d 755, 767 (1971). Even if defendant's consent was held to be a statement while he was in custody, "our Supreme Court has held that physical evidence obtained as a result of statements by a defendant made prior to receiving the necessary *Miranda* warnings need not be excluded." *State v. Houston*, 169 N.C. App. 367, 371-72, 610 S.E.2d 777, 781 (citing *State v. May*, 334 N.C. 609, 612, 434 S.E.2d 180, 182 (1993)), *disc. rev. denied*, 359 N.C. 639, 617 S.E.2d 281 (2005). Defendant's argument is overruled.

2. Voluntary Consent

Defendant alternatively argues that the consent form he signed was "merely perfunctory" and the State failed to meet its burden to show his consent was given freely without coercion, duress, or fraud. We disagree.

"The only requirement for a valid consent search is the voluntary consent given by a party who had reasonably apparent authority to grant or withhold such consent." *Id.* at 371, 610 S.E.2d at 780 (citing N.C. Gen. Stat. §§ 15A-221, -222 (2003)). This Court reviews the totality of the circumstances to determine whether consent was voluntarily given. *Id.* at 371, 610 S.E.2d at 781 (citation omitted).

At the conclusion of defendant's motion to suppress hearing, the trial court rendered the following findings of fact and conclusion of law:

> Here, the Defendant signed a consent form that was written in Spanish, his native language. The consent form was read to him. The Defendant indicated no lack of understanding. The Defendant did not object at any time to the consent that he gave by

> signing the consent form. The Defendant was cooperative in providing the consent and the Defendant provided information relating to the location of his room within the trailer on the form further indicating his consent. So I therefore conclude that the consent in this case was voluntarily given.

Competent evidence in the record supports the trial court's findings of fact and these findings support the trial court's conclusion that defendant voluntarily consented to the search, conducted in his bedroom. *See id.* (holding the defendant voluntarily consented to a search of his bedroom based upon evidence that defendant: (1) did not contest the fact that he had voluntarily given verbal consent to the search; (2) did not appear to be nervous or scared and was "cooperative" with the officers; (3) led officers to his bedroom; and (4) was present for the search and did not indicate at any time that he wished to revoke his consent). The trial court properly denied defendant's motion to suppress evidence obtained from the search of defendant's bedroom. This assignment of error is overruled.

IV. Motions to Dismiss

A. Standard of Review

> The standard for ruling on a motion to dismiss is whether there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense. Substantial evidence is relevant evidence which a reasonable mind might accept as adequate to support a conclusion. In ruling on a motion to dismiss, the trial court must consider all of the evidence in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence. Any contradictions or discrepancies arising from the evidence are properly left for the jury to resolve and do not warrant dismissal.

State v. Wood, 174 N.C. App. 790, 795, 622 S.E.2d 120, 123 (2005) (internal citations and quotations omitted).

B. Trafficking Cocaine Charges

[2] Defendant argues the trial court erred by denying his motion to dismiss the charges of trafficking in cocaine by possession and transportation because the State failed to present sufficient evidence tending to show defendant had possessed or transported the cocaine recovered from the vehicle. We disagree.

1. Possession

Trafficking in cocaine by possession pursuant to N.C. Gen. Stat. § 90-95(h)(3) requires the State to prove that the substance was knowingly possessed. *State v. Baldwin*, 161 N.C. App. 382, 391, 588 S.E.2d 497, 504 (2003). "Possession can be actual or constructive. When the defendant does not have actual possession, but has the power and intent to control the use or disposition of the substance, he is said to have constructive possession." *Id.* at 391, 588 S.E.2d at 504-05 (internal citations omitted). "However, unless the [defendant] has exclusive possession of the place where the narcotics are found, the State must show other incriminating circumstances before constructive possession may be inferred." *State v. Davis*, 325 N.C. 693, 697, 386 S.E.2d 187, 190 (1989) (citation omitted).

Here, defendant did not have exclusive possession over the vehicle in which the cocaine was located; therefore other incriminating circumstances must have been present before defendant could be found to have constructive possession. *Id.* At trial, Lara testified that: (1) defendant obtained the nine ounces of cocaine recovered from the vehicle from a third-party; (2) the cocaine was located in defendant's jacket or under the passenger seat where he was sitting prior to police intervention; and (3) defendant presented the cocaine to the confidential informant. Other testimony tended to show nine ounces of cocaine was recovered from "the floorboard in the back seat, more toward the passenger side of the floorboard." Viewed in the light most favorable to the State, sufficient evidence was presented for the jury to infer defendant was in constructive possession of the cocaine recovered from the vehicle. *Wood*, 174 N.C. App. at 795, 622 S.E.2d at 123. The trial court properly submitted the charge of trafficking in cocaine by possession to the jury. This assignment of error is overruled.

2. Transportation

Transportation is defined as "any real carrying about or movement from one place to another." *State v. Outlaw*, 96 N.C. App. 192, 197, 385 S.E.2d 165, 168 (1989) (citation and quotation omitted), *disc. rev. denied*, 326 N.C. 266, 389 S.E.2d 118 (1990)). Lara testified that he and defendant often delivered cocaine together because "[he] was the one that knew of the informant." Lara also testified that he and defendant had driven to their residence after work on 2 March 2006, arranged the drug purchase with one of the confidential informants, and later drove to the parking lot where the purchase was to occur

with the cocaine located inside the vehicle. Viewed in the light most favorable to the State, sufficient evidence was presented to submit the charge of trafficking in cocaine by transportation to the jury. *Wood*, 174 N.C. App. at 795, 622 S.E.2d at 123. This assignment of error is overruled.

C. Maintaining a Dwelling Charge

[3] Defendant argues the trial court erred by denying his motion to dismiss the charge of maintaining a dwelling for the keeping or selling of controlled substances because the State failed to present sufficient evidence tending to show defendant kept his bedroom for the purpose of keeping or selling cocaine. We agree.

N.C. Gen. Stat. § 90-108(a)(7) (2005) prohibits the maintaining of a dwelling only when it is used for "keeping or selling" a controlled substances, such as cocaine. *State v. Mitchell*, 336 N.C. 22, 32, 442 S.E.2d 24, 29 (1994). "The determination of whether . . . a [dwelling], is used for keeping or selling controlled substances will depend on the totality of the circumstances." *Id.* at 34, 442 S.E.2d at 30.

"Factors to be considered in determining whether a particular place is used to 'keep or sell' controlled substances include: a large amount of cash being found in the place; a defendant admitting to selling controlled substances; and the place containing numerous amounts of drug paraphernalia." *State v. Frazier*, 142 N.C. App. 361, 366, 542 S.E.2d 682, 686 (2001) (citations omitted).

Here, none of the aforementioned factors are present. Officers recovered six and a half grams of cocaine from a boot located inside defendant's closet. No other evidence or paraphernalia tending to indicate the sale of cocaine recovered from the vehicle came from defendant's bedroom. Defendant admitted he was a habitual cocaine user and that he had purchased the cocaine found in his bedroom at a bar the previous week for $200.00. Defendant asserted the cocaine recovered from the boot was solely for his personal use and denied any intent or plans to sell the cocaine recovered from the boot in the bedroom. The State presented no evidence to the contrary.

Viewed in the light most favorable to the State, insufficient evidence was presented tending to show defendant maintained a dwelling for the keeping or selling of controlled substances. *Wood*, 174 N.C. App. at 795, 622 S.E.2d at 123. The trial court should have granted defendant's motion to dismiss this charge. We reverse defendant's

conviction for maintaining a dwelling for the keeping or selling of controlled substances and remand this case for resentencing.

V. Jury Instructions

[4] Defendant asserts the trial court committed plain error by improperly instructing the jury on the charge of possession with intent to sell and deliver cocaine and argues the alleged error resulted in an ambiguous jury verdict. We disagree.

A. Standard of Review

Plain error review applies only to challenges of jury instructions and to evidentiary matters. *State v. Wiley*, 355 N.C. 592, 615, 565 S.E.2d 22, 39-40 (2002), *cert. denied*, 537 U.S. 1117, 154 L. Ed. 2d 795 (2003). Under plain error review, "the appellate court must be convinced that absent the error the jury probably would have reached a different verdict." *State v. Hartman*, 90 N.C. App. 379, 383, 368 S.E.2d 396, 399 (1988) (citing *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986)).

B. Analysis

Defendant argues the trial court was required to instruct the jury that it could not properly find defendant guilty of possession with the intent to sell or deliver cocaine based upon the same evidence it used to find defendant guilty of trafficking in cocaine by possession.

Contrary to defendant's contentions, this Court has upheld convictions for both "possession with intent to sell and distribute cocaine and trafficking in the same cocaine by possession." *State v. Boyd*, 154 N.C. App. 302, 311, 572 S.E.2d 192, 198 (2002) (citing *State v. Pipkins*, 337 N.C. 431, 435, 446 S.E.2d 360, 363 (1994). In *Boyd*, this Court stated "an examination of the subject, language and history of the statutes indicates that the legislature intended that these offenses be punished separately, even where the offenses are based upon the same conduct." 154 N.C. App. at 310-11, 572 S.E.2d at 198 (quoting *Pipkins*, 337 N.C. at 434, 446 S.E.2d at 362)). The cases defendant relies upon relating to the principles of "jury unanimity" are inapposite to the case at bar. This assignment of error is overruled.

VI. Conclusion

Miranda warnings are not required prior to obtaining the owner's consent to search his premises. *Hardy*, 339 N.C. at 226, 451 S.E.2d at 611. The trial court's findings of fact support its conclusion that

defendant voluntarily consented to the search conducted in his bedroom. The trial court properly denied defendant's motion to suppress.

Viewed in the light most favorable to the State, sufficient evidence was presented to submit to the jury the charges of trafficking in cocaine by possession and trafficking in cocaine by transportation. Where none of the factors articulated in *Frazier* was presented, there is insufficient evidence tending to show defendant maintained his bedroom for the keeping or selling of controlled substances. 142 N.C. at 336, 542 S.E.2d at 686. The trial court should have granted defendant's motion to dismiss this charge. Defendant's conviction for maintaining a dwelling for the keeping or selling of controlled substances is reversed and this case is remanded for resentencing.

The trial court was not required to instruct the jury that it could not properly find defendant guilty of possession with the intent to sell or deliver cocaine based upon the same evidence it used to find defendant guilty of trafficking in cocaine by possession. *Boyd*, 154 N.C. App. at 311, 572 S.E.2d at 198. Defendant received a fair trial, free from prejudicial errors he assigned and argued except for the denial of his motion to dismiss the maintaining a dwelling charge.

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

Judges McCULLOUGH and STROUD concur.

ELSIE J. KELLY, Sister of BETTY JEAN JEFFREYS, Deceased Employee, Plaintiff v. DUKE UNIVERSITY, Employer, (Self-Insured), Defendant

No. COA07-874

(Filed 3 June 2008)

1. Workers' Compensation— occupational disease—statute of limitations—date of injury—date of disability

The Industrial Commission did not err by concluding that plaintiff's claim for workers' compensation death benefits was not barred by the statute of limitations set forth in N.C.G.S. § 97-38 because: (1) "date of injury" and "date of disability" are terms of art under N.C. Gen. Stat. § 97-2l with different meanings; (2) in an occupational disease case, the six-year statute of limitation provided by N.C.G.S. § 97-38 begins to run from the date of

the employee's disability, which is the 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; whereas N.C.G.S. § 97-2(6) provides that the term injury shall mean only injury by accident arising out of and in the course of the employment, and shall not include a disease in any form; (3) the fact that this is an occupational disease case as opposed to an injury by accident case reveals the date relevant for purposes of the statute of limitations is the date of disability rather than the date of injury; and (4) the statute of limitations began to run on 1 April 1999, the date the Commission found that decedent became incapable of earning the wages that she was receiving at the time of the injury, and the fact that decedent began experiencing symptoms of her occupational disease on 1 April 1997, the stipulated date of injury, is irrelevant, as decedent maintained her original earning capacity until 1 April 1999.

2. Workers' Compensation— cause of death—compensable occupational disease—weight of expert testimony

The Industrial Commission did not err in a workers' compensation case by its finding of fact that the cause of decedent's death was her compensable occupational diabetic disease because: (1) the decision concerning what weight to give expert evidence is a duty for the Commission and not the Court of Appeals; (2) although plaintiff's medical expert indicated that it was possible that decedent died of complications from her upper respiratory infection, the expert testified that it was more likely than not that decedent's diabetes caused her death; and (3) this opinion was based not only on the temporal sequence of events, but also on statistical information and the expert's knowledge of the history of decedent's condition.

3. Workers' Compensation— total disability compensation—separate award for loss of vision

The Industrial Commission erred in a workers' compensation case by awarding decedent's estate a separate award of 240 weeks for loss of vision under N.C.G.S. § 97-31 when decedent had already been awarded total disability compensation under N.C.G.S. § 97-29, and the Commission's award of compensation in the amount of $473.20 per week for 240 weeks is reversed, because: (1) our Supreme Court has held that the "in lieu of" clause of N.C.G.S. § 97-31 was intended to prevent double recovery without making the schedule provided by § 97-31 an exclusive

remedy; (2) where an employee can show both a disability under N.C.G.S. §§ 97-29 or 97-30 and a specific physical impairment under N.C.G.S. § 97-31, he may not collect benefits pursuant to both schemes, but rather is entitled to select the statutory compensation scheme which provides the more favorable remedy; and (3) as a general rule, stacking of benefits covering the same injury for the same time period is prohibited.

4. Costs— attorney fees—workers' compensation appeal

The Court of Appeals exercised its discretion in a workers' compensation case and granted plaintiff's request for an award of attorney fees under N.C.G.S. § 97-88 which provides that the Commission or a reviewing court may award costs to an injured employee if the insurer has appealed and, on appeal, the Commission or reviewing court orders the insurer to make, or continue to make, payments to the employee. This case is remanded to the Commission to determine the amount of reasonable attorney fees incurred by plaintiff on this appeal.

Appeal by defendant from an Opinion and Award filed 27 April 2007 by the North Carolina Industrial Commission. Heard in the Court of Appeals 16 January 2008.

Lennon & Camak, P.L.L.C., by George W. Lennon and Michael W. Bertics, for plaintiff appellee.

Cranfill, Sumner & Hartzog, L.L.P., by Jonathan C. Anders and Meredith L. Taylor, for defendant appellant.

McCULLOUGH, Judge.

Defendant appeals an Opinion and Award of the North Carolina Industrial Commission ("the Commission"), finding that Betty J. Jeffreys ("decedent") died as a proximate result of a compensable occupational disease and awarding decedent's sole surviving sibling, Elsie J. Kelley ("plaintiff"), death benefits pursuant to N.C. Gen. Stat. § 97-38 (2007).

The evidence before the Commission tended to show that decedent began working as a medical secretary in the Anesthesia Department at Duke University Medical Center ("defendant") on 13 March 1996.

As part of decedent's job responsibilities, decedent provided secretarial and administrative support to an exceptionally demanding

doctor. This doctor criticized decedent in the presence of others and was generally abusive towards her. The extreme stress of decedent's work environment exacerbated her pre-existing diabetic condition and caused her overall health to deteriorate. With the aggravation of her diabetic condition, in April 1997, decedent began to experience a loss of most of the vision in her right eye. In January 1998, decedent lost most of the vision in her left eye. Despite her vision problems, decedent continued to work for defendant until 1 April 1999, when she was placed on disability retirement.

On 8 April 1999, decedent filed a Form 18, claiming that while employed by defendant, decedent sustained an injury by accident or occupational disease on 11 April 1997 as a result of mental stress induced by her work environment.

On 28 December 2000, following a hearing of the matter, Deputy Commissioner Jones of the North Carolina Industrial Commission ("Deputy Commissioner Jones") filed an Opinion and Award concluding that decedent had contracted a compensable occupational disease in which her stressful work environment aggravated and accelerated her pre-existing diabetic condition, anxiety, depression, and carpal tunnel syndrome. Deputy Commissioner Jones concluded that decedent's diabetes resulted in decedent's loss of vision in both eyes and awarded decedent total disability compensation benefits pursuant to N.C. Gen. Stat. § 97-29 (2007) beginning on 1 April 1999.

On 2 February 2001, Dr. Scott V. Joy began treating decedent's various conditions, including her insulin-dependent diabetes. Decedent routinely documented her glucose levels in logbooks, which Dr. Joy reviewed during their appointments. These glucose levels began increasing significantly in 2003, and Dr. Joy considered treating decedent with a continuous glucose monitor.

On 7 January 2004, decedent called Dr. Scott's triage nurse, stating that she had been sick for three weeks with chest congestion and a cough. Based on this phone call, Dr. Joy diagnosed decedent with an upper respiratory infection and prescribed her an antibiotic. On 10 January 2004, decedent died. Decedent did not leave behind any dependents and was survived only by plaintiff, her sister.

Although no one performed an autopsy on decedent to determine the cause of decedent's death, Dr. Joy stated that it was a common practice to complete a death certificate without performing an autopsy. Dr. Joy opined that although it was possible that decedent died due to complications from her respiratory infection, the most

likely cause of decedent's death was a cardiovascular event secondary to complications of diabetes. Defendant did not offer any medical evidence to rebut Dr. Joy's opinion.

The Commission found that decedent's death was proximately caused by complications from her compensable diabetic condition and awarded plaintiff death benefits pursuant to N.C. Gen. Stat. § 97-38 and funeral expenses pursuant to N.C. Gen. Stat. § 97-40 (2007). In addition, the Commission concluded that pursuant to N.C. Gen. Stat. § 97-31 (2007), plaintiff's estate had a vested right to payment of 240 weeks of compensation for decedent's industrial blindness.

On appeal, defendant contends that the Commission erred by: (1) failing to conclude that plaintiff's claim for death benefits was barred by the statute of limitations set forth in N.C. Gen. Stat. § 97-38; (2) making findings of fact that are not supported by competent evidence; and (3) allowing plaintiff to recover damages under both N.C. Gen. Stat. § 97-29 (2007) and N.C. Gen. Stat. § 97-31. In addition, plaintiff seeks an award of attorney's fees under N.C. Gen. Stat. § 97-88 (2007).

I. Statute of Limitations

[1] Defendant first contends that the Commission erred by failing to conclude that plaintiff's claim was barred by the statute of limitations set forth in N.C. Gen. Stat. § 97-38. Specifically, defendant contends that because the parties stipulated throughout the proceedings that decedent's injury occurred on 11 April 1997, the statute of limitations began to run as of that date and the Commission was without authority to determine that decedent was not disabled until 1 April 1999. Because we find that "date of injury" and "date of disability" are terms of art under N.C. Gen. Stat. § 97-2 (2007), we disagree.

Death benefits under the Workers' Compensation Act are governed by N.C. Gen. Stat. § 97-38, which provides, in pertinent part:

> If death results proximately from a compensable injury **or occupational disease** and [occurs] **within six years** thereafter, or within two years of the final determination of disability, whichever is later . . . the employer shall pay . . . compensation[.]

Id.

We have held that in an occupational disease case, the six-year statute of limitation provided by § 97-38 begins to run from the date

of the employee's "disability," as defined by N.C. Gen. Stat. § 97-2(9), which is the " '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.' " *Joyner v. J.P. Stevens and Co.*, 71 N.C. App. 625, 626, 322 S.E.2d 636, 637 (1984) (citation omitted), *disc. review denied*, 313 N.C. 330, 327 S.E.2d 891 (1985). "Injury," on the other hand, is defined by N.C. Gen. Stat. § 97-2(6), which provides that the term " '[i]njury . . .' shall mean **only injury by accident** arising out of and in the course of the employment, **and shall not include a disease in any form**[.]" Thus, it is clear that under § 97-2, "injury" and "disability" do not have the same meanings.

Because the case before us is an occupational disease case as opposed to an injury by accident case, we find that the date relevant for purposes of the statute of limitations is the "date of disability" rather than the "date of injury." Here, the statute of limitations began to run on the date of disability, 1 April 1999, which the Commission found to be the date that decedent became incapable of earning the wages that she was receiving at the time of the injury. The fact that decedent began experiencing symptoms of her occupational disease on 1 April 1997, the stipulated date of injury, is irrelevant to our analysis, as decedent maintained her original earning capacity until 1 April 1999. As such, the Commission properly concluded plaintiff's claim was not barred by the statute of limitations set forth in N.C. Gen. Stat. § 97-38. Accordingly, this assignment of error is overruled.

II. Cause of Decedent's Death

[2] Next, defendant contends that the Commission's finding of fact as to the cause of decedent's death is not supported by competent evidence of record. Defendant argues that Dr. Joy's opinion was insufficient, as it was based solely on statistical data and no autopsy was performed to determine the actual cause of decedent's death. We disagree.

In reviewing a decision by the Commission, this Court's role "is limited to determining whether there is any competent evidence to support the findings of fact, and whether the findings of fact justify the conclusions of law." *Cross v. Blue Cross/Blue Shield*, 104 N.C. App. 284, 285-86, 409 S.E.2d 103, 104 (1991). The Commission's findings of fact are conclusive upon appeal if supported by competent evidence, even if there is evidence to support a contrary finding. *Morrison v. Burlington Industries*, 304 N.C. 1, 6, 282 S.E.2d 458, 463 (1981). On appeal, this Court may not reweigh the evidence or assess

credibility. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999). Findings of fact may be set aside on appeal only "when there is a complete lack of competent evidence to support them[.]" *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 914 (2000).

The plaintiff in a workers' compensation case bears the burden of initially proving "each and every element of compensability," including a causal relationship between the injury and his employment. *Whitfield v. Laboratory Corp. of Am.*, 158 N.C. App. 341, 350, 581 S.E.2d 778, 784 (2003). Plaintiff must prove causation by a "greater weight" of the evidence or a "preponderance" of the evidence. *Phillips v. U.S. Air, Inc.*, 120 N.C. App. 538, 541-42, 463 S.E.2d 259, 261 (1995), *aff'd*, 343 N.C. 302, 469 S.E.2d 552 (1996).

In cases involving complicated medical questions, only an expert can give competent opinion testimony as to the issue of causation. *Click v. Freight Carriers*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980). Where, as here, medical opinion testimony is required, "medical certainty is not required, [but] an expert's 'speculation' is insufficient to establish causation." *Holley v. ACTS, Inc.*, 357 N.C. 228, 234, 581 S.E.2d 750, 754 (2003). An expert witness's passing use of the word "speculate," however, does not necessarily establish that the witness engaged in speculation. *Id.* Further, the degree of the doctor's certainty goes to the weight of his testimony. *Martin v. Martin Bros. Grading*, 158 N.C. App. 503, 507-08, 581 S.E.2d 85, 88, *cert. denied*, 357 N.C. 579, 589 S.E.2d 127 (2003). The decision concerning what weight to give expert evidence is a duty for the Commission and not this Court. *See Adams*, 349 N.C. at 681, 509 S.E.2d at 414.

In the instant case, the only medical deposition testimony offered into evidence was the testimony of Dr. Joy taken on 29 June 2005. Dr. Joy's deposition transcript on direct examination reads in pertinent part:

> Q. (By Mr. Lennon) Do you have an opinion satisfactory to yourself and to a reasonable degree of certainty as an expert in internal medicine, and certified diabetes educator, and as her treating physician, regarding whether **more likely than not, Betty Jean's death resulted proximally from her compensable diabetic condition**?
>
> A. Yes, I believe it's complications of diabetes.
>
> * * * *

> Q. All right. In your opinion is it likely that the upper respiratory infection caused her death?
>
> A. I think there's no evidence to suggest that, and she was treated appropriately for upper respiratory infection.

(Emphasis added.) Dr. Joy's deposition transcript on cross-examination reads in pertinent part:

> Q. Okay. It's pretty much speculation [that decedent died from a cardiovascular event related to diabetes], isn't it?
>
> A. I think based on the data and knowing the complications that Betty Jean had, **cardiovascular events** [related to diabetes] **are the number one**, but she did have an upper respiratory infection that may have led to some problems.

(Emphasis added.)

Thus, although Dr. Joy indicated that it was possible that decedent died of complications from her upper respiratory infection, Dr. Joy testified that it was "more likely than not" that decedent's diabetes caused her death. *See Whitfield*, 158 N.C. App. at 351, 581 S.E.2d at 785 ("We acknowledge that the 'mere possibility of causation,' as opposed to the 'probability' of causation, is insufficient to support a finding of compensability.") (citation omitted). This opinion was based not only on the temporal sequence of events, but also on statistical information and Dr. Joy's knowledge of the history of decedent's condition. We therefore conclude that there is competent evidence in the record to support the Commission's finding that decedent's death was proximately caused by her compensable occupational disease. This assignment of error is overruled.

III. Compensation under N.C. Gen. Stat. § 97-31

[3] Finally, defendant contends that the Commission erred in awarding decedent's estate a separate award of 240 weeks for loss of vision under N.C. Gen. Stat. § 97-31 because decedent had already been awarded total disability compensation under § 97-29. We agree.

N.C. Gen. Stat. § 97-31 provides:

> In cases included by the following schedule the compensation in each case shall be paid for disability during the healing period and in addition the disability shall be deemed to continue

for the period specified, and **shall be in lieu of all other compensation**, including disfigurement, to wit:

* * * *

(17) The loss of both hands, or both arms, or both feet, or both legs, or both eyes, or any two thereof, shall constitute total and permanent disability, to be compensated according to the provisions of G.S. 97-29. The employee shall have a vested right in a minimum amount of compensation for the total number of weeks of benefits provided under this section for each member involved. When an employee dies from any cause other than the injury for which he is entitled to compensation, payment of the minimum amount of compensation shall be payable as provided in G.S. 97-37.

(Emphasis added.)

Our Supreme Court has held that the "in lieu of" clause of § 97-31 was intended to "prevent[] double recovery without making the schedule [provided by § 97-31] an exclusive remedy." *Whitley v. Columbia Lumber Mfg. Co.*, 318 N.C. 89, 98, 348 S.E.2d 336, 341 (1986). Thus, "[w]here an employee can show *both* a disability pursuant to G.S. §§ 97-29 or 97-30 and a specific physical impairment pursuant to G.S. § 97-31, he may not collect benefits pursuant to both schemes, but rather is entitled to select the statutory compensation scheme which provides the more favorable remedy." *Collins v. Speedway Motor Sports Corp.*, 165 N.C. App. 113, 119, 598 S.E.2d 185, 190 (2004). As a general rule, "stacking of benefits covering the same injury for the same time period is prohibited[.]" *Gupton v. Builders Transport*, 320 N.C. 38, 43, 357 S.E.2d 674, 678 (1987).

Plaintiff argues that decedent never made an election to receive benefits under § 97-29. We disagree.[1] Here, the Commission found as a fact that decedent suffered from a loss of vision in both eyes and that she was compensated for that impairment by an award of

1. As an aside, however, we note that even though decedent elected an award of benefits under § 97-29, if decedent had died prior to receiving a full 240 weeks of such payments, plaintiff would then be entitled to recover the more generous vested benefits available pursuant to § 97-31, less the amount she had already received. *See Gupton*, 320 N.C. at 43, 357 S.E.2d at 678 ("[B]ecause the prevention of double recovery, not exclusivity of remedy, is patently the intent of the 'in lieu of all other compensation' clause in N.C.G.S. § 97-31, a plaintiff entitled to select a remedy under either N.C.G.S. § 97-31 or N.C.G.S. § 97-30 may receive benefits under the provisions offering the more generous benefits, *less* the amount he or she has already received.").

total disability compensation pursuant N.C. Gen. Stat. § 97-29, in the amount of $709.77 per week, beginning 1 April 1999. She continued to receive these payments until the date of her death in 2004. Because it is well settled that the "in lieu of" clause of § 97-31 is a bar to double recovery, decedent is not entitled to recover once under § 97-29 and then again under § 97-31. Therefore, the Commission erred in concluding that decedent's estate had a vested right in an additional 240 weeks of compensation pursuant to § 97-31. Accordingly, we reverse the Commission's award of compensation in the amount of $473.20 per week for 240 weeks.

IV. Attorney's Fees

[4] Now, we turn to plaintiff's request for an award of attorney's fees pursuant to N.C. Gen. Stat. § 97-88. Section 97-88 provides that the Commission or a reviewing court may award costs to an injured employee if the insurer has appealed and, on appeal, the Commission or reviewing court orders the insurer to make, or continue to make, payments to the employee. *Flores v. Stacy Penny Masonry Co.*, 134 N.C. App. 452, 459, 518 S.E.2d 200, 205 (1999). We conclude that the requirements of § 97-88 are satisfied, and we exercise our discretion to grant plaintiff's request. We remand to the Commission to determine the amount of reasonable attorney's fees incurred by plaintiff on this appeal.

Accordingly, the Opinion and Award of the Commission is affirmed in part and reversed in part.

Affirmed in part; reversed in part.

Judges ELMORE and ARROWOOD concur.

PATRICK COWELL AND WIFE, TERRI COWELL, PLAINTIFFS v. GASTON COUNTY, FIRST GASTON BANK OF NORTH CAROLINA, COUNTRYWIDE HOME LOANS, INC., DEFENDANTS

No. COA07-1434

(Filed 3 June 2008)

Immunity— governmental—building inspectors—waiver—liability insurance—ambiguous coverage exclusion

Defendant county waived governmental immunity by its purchase of liability insurance in an action by plaintiff homeowners to recover for damages allegedly caused by negligence of the county's building inspectors which allowed plaintiffs' general contractor to build a house unfit and unsafe for habitation where an ambiguous endorsement in the county's policy that excluded coverage for certain professional services, including inspection activities, was interpreted to apply only to the acts of professional engineers, architects or surveyors and not to building inspectors.

Appeal by defendant Gaston County from an order entered 9 August 2007 by Judge J. Gentry Caudill in Gaston County Superior Court. Heard in the Court of Appeals 30 April 2008.

Gray, Layton, Kersh, Solomon, Sigmon, Furr & Smith, P.A., by William E. Moore, Jr. and Arcangela M. Mazzariello, for plaintiffs-appellees.

Harack, Talley, Pharr & Lowndes, P.A., by D. Christopher Osborn and Phillip E. Lewis, for Gaston County, defendant-appellant.

JACKSON, Judge.

Plaintiffs initiated the instant suit on 9 August 2006, claiming that defendant, through the negligent actions of its building inspectors, caused damage to their property, specifically a house they were building. Plaintiffs contend that defendant was responsible for inspecting for code violations and safe construction of their house, and due to defendant's negligence, plaintiffs' general contractor was allowed to build a house unfit and unsafe for habitation. Plaintiffs made additional claims against defendant and other parties, which were dismissed upon motion pursuant to Rule 12(b)(6) by order filed

13 March 2007. Defendant moved for summary judgment in its favor on the remaining negligence claims on 24 May 2007, arguing that it held no insurance policies covering plaintiffs' claims, and it was therefore immune from suit due to the doctrine of governmental (or sovereign) immunity. Defendant's motion for summary judgment was denied by order filed 9 August 2007. From this order denying summary judgment, defendant appeals.

In defendant's sole assignment of error, it contends that the trial court erred in denying its motion for summary judgment because it was immune from liability for plaintiffs' claims based upon the doctrine of governmental immunity. We disagree.

> Summary judgment is properly granted only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. On appeal, our standard of review is (1) whether there is a genuine issue of material fact and (2) whether the movant is entitled to judgment as a matter of law. The evidence presented is viewed in the light most favorable to the non-movant.
>
> The court is not authorized by Rule 56 to decide an issue of fact. It is authorized to determine whether a genuine issue of fact exists. The purpose of summary judgment is to eliminate formal trials where only questions of law are involved by permitting penetration of an unfounded claim or defense in advance of trial and allowing summary disposition for either party when a fatal weakness in the claim or defense is exposed. Under the doctrine of governmental immunity, a county is immune from suit for the negligence of its employees in the exercise of governmental functions absent waiver of immunity. When a county purchases liability insurance, however, it waives governmental immunity to the extent it is covered by that insurance.

McCoy v. Coker, 174 N.C. App. 311, 313, 620 S.E.2d 691, 693 (2005) (citations and quotations omitted).

In the instant case, the only issue on appeal is whether plaintiffs' complaint should have been dismissed because defendant was immune from suit based upon governmental immunity. The dispositive issue in this matter is whether defendant had waived its immunity through the purchase of liability insurance. Defendant purchased two

insurance policies from the Zurich North America arm of Zurich Financial Services Group (Zurich). One policy was issued by Northern Insurance Company of New York (Northern policy), and another policy was issued by Maryland Casualty Insurance Company (Maryland policy). Both policies covered a term from 1 July 2001 to 1 July 2002. According to plaintiffs' complaint, construction of their house began in mid-June of 2001, and was "completed" around the end of 2001 or the beginning of 2002. Defendant was responsible for inspecting the work done in building plaintiffs' house during this time period. If either of the policies provided coverage against the alleged negligent acts of defendant's building inspector, then defendant has waived its governmental immunity and its motion for summary judgment was properly denied. It is defendant's burden to show that no genuine issue of material fact exists that the policies do not cover its actions in the instant case. *Marlowe v. Piner*, 119 N.C. App. 125, 127-28, 458 S.E.2d 220, 222 (1995).

We first address the Maryland policy, which is entitled "Public Officials Liability Coverage." This policy includes an "exclusions" section, which reads in relevant part:

> This Policy does not apply to any "claim" made against an insured:
>
> . . . .
>
> 3. for damage to or destruction of any property, including diminution of value or loss of use.
>
> . . . .
>
> 16. Based upon or arising out of the performance or failure to perform any professional, supervisory, inspection or engineering services including architects, engineers, surveyors, healthcare providers, accountants, lawyers or any other professional service by an insured or by anyone else for whom the insured may be responsible.

Based upon the clear language of this policy, plaintiffs' claims were excluded from coverage for defendant's actions as a building inspector. Even assuming *arguendo* that building inspection does not constitute a "professional service", as argued by defendant's Assistant County Manager, William Beasley (Beasley), exclusion 3 clearly exempts from liability coverage the type of harm plaintiffs claim. The Maryland policy did not cover plaintiffs' claims, and summary judgment in favor of defendant would have been proper as to this policy.

The Northern policy requires a more intricate analysis, and our use of the rules of contract interpretation.

> It is well established that contracts for insurance are to be interpreted under the same rules of law as are applicable to other written contracts. One of the most fundamental principles of contract interpretation is that ambiguities are to be construed against the party who prepared the writing. Therefore, in an insurance contract all ambiguous terms and provisions are construed against the insurer.

Chavis v. Southern Life Ins. Co., 318 N.C. 259, 262, 347 S.E.2d 425, 427 (1986) (internal citations omitted). "[A] contract of insurance should be given that construction which a reasonable person in the position of the insured would have understood it to mean and, if the language used in the policy is reasonably susceptible of different constructions, it must be given the construction most favorable to the insured, since the company prepared the policy and chose the language." *Grant v. Emmco Ins. Co.*, 295 N.C. 39, 43, 243 S.E.2d 894, 897 (1978) (citation omitted).

> When an insurance company, in drafting its policy of insurance, uses a "slippery" word to mark out and designate those who are insured by the policy, it is not the function of the court to sprinkle sand upon the ice by strict construction of the term. All who may, by any reasonable construction of the word, be included within the coverage afforded by the policy should be given its protection. If, in the application of this principle of construction, the limits of coverage slide across the slippery area and the company falls into a coverage somewhat more extensive than it contemplated, the fault lies in its own selection of the words by which it chose to be bound.

Id.

> [T]he intention of the parties as gathered from the language used in the policy is the polar star that must guide the courts in the interpretation of such instruments. "The heart of a contract is the intention of the parties which is to be ascertained from the expressions used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time." Therefore, in the interpretation of language contained in an insurance policy, the court may take into consideration the character of the business of the insured and the usual hazards involved therein in ascertaining the intent of the parties.

McDowell Motor Co. v. New York Underwriters Ins. Co., 233 N.C. 251, 253-54, 63 S.E.2d 538, 540-41 (1951) (internal citations omitted).

The relevant portion of the Northern policy is the section entitled "Commercial General Liability Coverage." In its brief, defendant argues that the Northern policy does not cover the work of its building inspectors, and thus plaintiffs' suit must fail because governmental immunity applies. Defendant argues that a particular provision in that policy specifically exempts the work of its building inspectors from liability coverage. Defendant bases the entire argument in its brief on one provision in the Commercial General Liability Coverage section of the Northern Policy. Specifically, an endorsement which reads as follows:

> THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.
>
> EXCLUSION—ENGINEERS, ARCHITECTS OR SURVEYORS PROFESSIONAL LIABILITY
>
> This endorsement modifies insurance provided under the following:
>
> COMMERCIAL GENERAL LIABILITY COVERAGE PART
>
> The following exclusion is added to paragraph 2, Exclusions of COVERAGE A—BODILY INJURY AND PROPERTY DAMAGE LIABILITY (Section I—Coverages) and paragraph 2, Exclusions of COVERAGE B—PERSONAL AND ADVERTISING INJURY LIABILITY (Section I—Coverages):
>
> This insurance does not apply to "bodily injury", "property damage", "personal injury" or "advertising injury" arising out of the rendering of or failure to render any professional services by you or any engineer, architect or surveyor who is either employed by you or performing work on your behalf in such capacity.
>
> Professional services include:
>
> 1. The preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; and
>
> 2. Supervisory, inspection, architectural or engineering activities.

Defendant argues that because the term "inspection" is included in the professional services portion of this exclusionary endorse-

ment, its inspectors were excluded from liability coverage under the Northern policy. Defendant further argues that the word "you" in the phrase "professional services by you or any engineer, architect or surveyor who is either employed by you or performing work on your behalf in such capacity" broadens the scope of this exclusionary provision beyond the professional services rendered by engineers, architects or surveyors expressly denoted in the exception. We note that because defendant bases its entire argument on its assertion that the above endorsement explicitly excluded its building inspectors from liability coverage, and does not argue that any other portion of the Northern policy might also exclude coverage for its inspectors, we limit our review of the policy to this issue. N.C. R. App. P., Rule 28(b)(6).

Initially, we note that the endorsement is captioned "Exclusion—Engineers, Architects or Surveyors Professional Liability". By its very specific and limiting language, this caption alerts the insured that the following language pertains to the acts of three named professions. In the body of the endorsement, Zurich states that it will not cover liability for certain damages, including personal injury and property damage, "arising out of the rendering of or failure to render any professional services by you or any engineer, architect or surveyor who is either employed by you or performing work on your behalf in such capacity." Even viewing this language in the light most *favorable* to defendant's argument (which is contrary to our legal duty on appeal), this language is ambiguous. Defendant argues that the language "arising out of the rendering of or failure to render *any professional services by you* or . . ." (Emphasis added), provides a blanket exclusion in the Northern Policy for any professional service conducted by Gaston County itself, at least for the named "professional services" in the endorsement, which include "inspection". However, both the caption of the endorsement, and its effective language could be interpreted by a reasonable insured to mean the exclusion applied only to professional engineers, architects or surveyors, whether permanent employees of Gaston County, or otherwise retained by Gaston County. We note that all of the listed "professional services", including "inspection", are services performed by engineers, architects and surveyors.

Defendant's interpretation of the endorsement would leave Zurich with broad discretion in deciding what professional services could be denied coverage, and leave the insured unable to discern the limits of its coverage. Using this interpretation, it is unclear how the

contracting parties could have had any meaningful meeting of the minds as to what services were and were not excluded. *See Creech v. Melnik*, 347 N.C. 520, 527, 495 S.E.2d 907, 911-12 (1998). We hold that the word "you" in this context constitutes a "slippery" word as contemplated in *Grant*, must be construed against Zurich, and thus allow coverage for defendant's building inspectors' acts. *Grant*, 295 N.C. at 43, 243 S.E.2d at 897.

Further, Zurich has demonstrated that it is capable of drafting exclusionary provisions, without ambiguity, broadly limiting liability coverage for professional work done by or on behalf of defendant. In the Maryland policy, Section I(B.)(16.) states that the policy does not cover any claim: "Based upon or arising out of the performance or failure to perform any professional, supervisory, inspection or engineering services including architects, engineers, surveyors, healthcare providers, accountants, lawyers or any other professional service by an insured or by anyone else for whom the insured may be responsible." This provision unambiguously excludes all forms of professional services from liability coverage under the Maryland policy.

Beasley, an Assistant County Manager for Gaston County, was made available by defendant for deposition on 14 January 2005. In his deposition, Beasley, representing defendant, agreed that the contested endorsement should *not* apply to building inspectors working for defendant, further stating that he did not consider building inspection to be a "professional service". Beasley's deposition testimony provides some insight into "the construction which a reasonable person in the position of the insured would have understood [the provision] to mean". *Grant*, 295 N.C. at 43, 243 S.E.2d at 897. "[I]f the language used in the policy is reasonably susceptible of different constructions, it must be given the construction most favorable to the insured, since the company prepared the policy and chose the language." *Id.* Having offered Beasley as not only a reasonable person, but one of its employees most qualified to interpret the contested insurance policies, defendant may not now argue the opposite. This testimony raises at least a question of material fact concerning defendant's reasonable understanding of the coverage it was purchasing. *Id.* Beasley's testimony further provides some evidence as to defendant's intent and understanding of the coverage it was purchasing. *McDowell*, 233 N.C. at 253-54, 63 S.E.2d at 540-41. In light of the multiple ambiguities in the Northern policy endorsement, and based upon established rules of contract interpretation, these ambiguities

must be construed against Zurich (and therefore against defendant's arguments), and in favor of liability coverage. *Grant*, 295 N.C. at 43, 243 S.E.2d at 897. We hold that the contested endorsement is "reasonably susceptible of different constructions," and defendant's motion for summary judgment based upon the defense of governmental immunity was properly denied as to the Northern policy. *Id.* We note that at trial, plaintiffs' suit may only proceed based upon the coverage provided pursuant to the Northern policy.

Affirmed.

Judges McGEE and ELMORE concur.

STATE OF NORTH CAROLINA v. MICHELLE ANITA COUSAR

No. COA07-850

(Filed 3 June 2008)

1. Constitutional Law— double jeopardy—kidnapping and other crimes—restraint or force against person

There were no double jeopardy implications that arose from convictions for second-degree kidnapping, first-degree burglary, and felonious larceny because restraint or force against a person was not an inherent element of burglary or larceny. Judgment was arrested on a common law robbery charge.

2. Criminal Law— multiple crimes—instructions—intervention of counsel

There was no plain error when the trial court requested both counsel to intervene rather than allow him to misinstruct the jury on a complex charge, the court confused the underlying felony in giving the kidnapping instruction, and the prosecutor intervened. Defendant did not demonstrate how the claimed error so influenced the jury that a different result would otherwise have been reached.

3. Appeal and Error— preservation of issues—no offer of proof

Defendant did not preserve for appellate review the sustaining of the State's objection to a certain question where she

did not make an offer of proof and the answer to the question was not readily apparent from the context.

4. Evidence— prior bad acts—admission to prove motive, knowledge, absence of mistake—limiting instruction

The trial court did not err by allowing evidence of prior bad acts in a prosecution for burglary, larceny, kidnapping and other crimes against a blind woman. The evidence of defendant's prior conduct was admissible under Rule 404(b) of the Rules of Evidence to prove motive, intent, knowledge, and absence of mistake, and it cannot be said that its admission or the limiting instructions were erroneous or influenced the jury such that a different verdict would have been reached otherwise.

5. Sentencing— probationary terms—concurrent—consecutive sentences suspended

There was no error in sentencing defendant where defendant contended that he was given consecutive probationary sentences. The court properly gave defendant consecutive sentences that were suspended with concurrent probationary periods.

6. Constitutional Law— ineffective assistance of counsel—no prejudice

The merits of an ineffective assistance of counsel claim were not reached on appeal where defendant acknowledged that she could not satisfy the prejudice prong of the test.

Appeal by defendant from judgments entered 25 January 2007 by Judge Clifton W. Everett, Jr. in Pitt County Superior Court. Heard in the Court of Appeals 12 December 2007.

Attorney General Roy Cooper, by Assistant Attorney General Charles E. Reece, for the State.

Charns & Charns, by M. Alexander Charns, for the defendant-appellant.

STEELMAN, Judge.

The trial court did not err in its evidentiary rulings, in instructing the jury, or in entering judgment on the jury's second-degree kidnapping verdict where the State proved restraint beyond that inherent in the underlying felony. The court did not err in sentencing defendant to consecutive sentences that were suspended with concurrent probationary periods.

I. Factual and Procedural Background

The evidence at trial tended to show that, shortly before midnight on 9 April 2006, Amanda Rush (hereinafter "Rush") heard knocking at her apartment door. Rush, who is legally blind, at first ignored the knocking, but when it continued, she got out of bed and asked who was at the door. A man's voice responded "Rich" and asked for Rush by name. Believing it might be a co-worker, Rush opened the door and briefly spoke with the man. A second person, who never spoke, entered the apartment during the conversation. Rush realized that she did not know these people, and the man finally said that he had the wrong address. As the strangers left, Rush attempted to close the door. Instead, one of the strangers pushed the door back open, pushed Rush three or more feet into the apartment, pushed her to the floor, and held her down with a hand over her mouth. He asked if she had any money, and removed his hand long enough for her to answer "no." He told her to be quiet. When she cooperated, he released her, and she moved to a recliner a few feet away.

The two intruders took a DVD player, a cellphone, and her wallet. Shortly thereafter, defendant Michelle Cousar used one of the two credit cards in Rush's wallet for purchases at a local grocery store and gas station, obtaining $20 in cash and gasoline in the amounts of $25, $5.32, and $20.01.

When questioned by police, Rush mentioned that defendant was a former co-worker who had previously tricked her out of money in an ATM transaction. Defendant and two male suspects, including defendant's boyfriend, Avery Holly, were subsequently arrested. All three co-defendants admitted to the crime but denied being inside the apartment. Each co-defendant identified the other two as the persons who went inside the apartment and stole Rush's property. In a voluntary statement to police, defendant admitted "I told them where Amanda Rush [lived.] . . . I did attempt to use the credit card."

Defendant was indicted for common law robbery; first-degree burglary, larceny after breaking and entering, and second-degree kidnapping; and financial card theft plus four counts of financial card fraud.

The jury returned guilty verdicts on all charges. The trial court entered four judgments, arresting judgment on the common law robbery charge, and sentenced defendant to: 96-125 months im-

prisonment on the first-degree burglary conviction; 46-65 months imprisonment on the second-degree kidnapping charge, to begin at the expiration of the burglary sentence; 11-14 months (suspended for 36 months with supervised probation) on the larceny charge, and 8-10 months (also suspended) on the financial card charges, to run at the expiration of the larceny sentence. Defendant appeals.

II. Analysis

A. Kidnapping Charge: *Fulcher* Issue

[1] In defendant's first argument, she contends that the trial court erred in failing to arrest judgment on the kidnapping charge because any restraint of Rush was inherent in the crimes of robbery and burglary. We disagree.

Defendant cites but one case, *State v. Ripley*, 360 N.C. 333, 626 S.E.2d 289 (2006), in support of her argument. In that case, a group of robbers entered the lobby of a motel and robbed the front desk clerk at gunpoint. Motel patrons entered the lobby during the robbery. Some of the patrons were ordered at gunpoint, in the course of the robbery, to move from one side of a motel lobby door to the other side of the door. The Supreme Court, relying on the decision of *State v. Irwin*, 304 N.C. 93, 282 S.E.2d 439 (1981), held this to be a "mere technical asportation" that was an inherent part of the armed robbery. *Ripley*, 360 N.C. at 338, 626 S.E.2d at 293-94.

The analysis in *Ripley* is based upon the seminal case of *State v. Fulcher*, 294 N.C. 503, 243 S.E.2d 338 (1978). The key holding in that case was as follows:

> 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.

Id. at 523, 243 S.E.2d at 351.

Thus, the rationale of *Fulcher* and its progeny, including *Ripley*, is that a defendant may not be punished twice for the same conduct, *i.e.* restraint, under principles of double jeopardy.

Defendant argues in her brief that the element of restraint and force supporting the second degree kidnapping was inherent in the charge of common law robbery. We find no fault in defendant's argument in this regard. However, defendant fails to recognize that the trial court arrested judgment on the common law robbery charge. This action eliminated any possibility of the defendant being punished twice for the restraint involved in the common law robbery and second degree kidnapping.

Other than the second degree kidnapping charge, only the charge of common law robbery had as an inherent element of the offense the use of restraint or force against a person. The only force inherent in burglary or in larceny pursuant to a breaking and entering is forcible entry into the property, which was achieved when the intruders forced the door open and not by pushing Ms. Rush to the floor and holding her there. Thus, under the rationale of *Blockburger v. United States*, 284 U.S. 299, 76 L. Ed. 306 (1932), there are no double jeopardy implications that arose from the convictions for second degree kidnapping, first degree burglary, and felonious larceny. *See State v. Gardner*, 315 N.C. 444, 340 S.E.2d 701 (1986) (applying the *Blockburger* test to single prosecution situations).

This argument is without merit.

B. Jury Instructions

[2] In her second argument, defendant contends that she was unfairly prejudiced when the trial court deferred to the prosecutor and, in effect, permitted the prosecutor "to instruct the jury" on the second degree kidnapping charge. We disagree.

The record reflects that the trial court requested both counsel to intervene rather than to allow him to misinstruct the jury during a complex charge. Defendant assented to this request. When the trial court confused the underlying felony in administering the kidnapping instruction, the prosecutor intervened, as requested, to clarify. Because defense counsel raised no objection to the instructions at trial, we review this argument on a "plain error" basis, which requires defendant to show that the claimed error is so fundamental and prejudicial that a different verdict would have otherwise been reached. *State v. Cummings*, 352 N.C. 600, 636, 536 S.E.2d 36, 61 (2000).

A bare "assertion of plain error, without supporting argument or analysis of prejudicial impact, does not meet the spirit or intent of the plain error rule." *Id.* at 636-37, 535 S.E.2d at 61. Although defendant claims "no adversarial fairness[,]" she fails to demonstrate how the claimed error so influenced the jury that a different verdict would otherwise have been reached. *Id.* This argument is without merit.

C. Preservation of Evidentiary Issue

[3] In defendant's third argument, she contends that the trial court erred in sustaining the State's objection to testimony that her boyfriend would have killed her if she had not followed his orders. We disagree.

At trial, defendant raised an affirmative defense of duress. Defendant testified to an abusive relationship with co-defendant Holly, stating that he threatened her life and the lives of her family if she refused to cooperate and participate in the crime. Holly testified that: defendant did "basically whatever I told her to do;" he had frequently used physical means to induce compliance with his wishes; he had previously threatened to kill her; and she was afraid of him. He further testified that she used the credit cards at his direction. Defense counsel asked Holly "what would have happened to Michelle Cousar if she refused to cooperate with you?" The court sustained the State's objection, and defendant did not request a proffer of Holly's response for the record.

"In order for a party to preserve for appellate review the exclusion of evidence, the significance of the excluded evidence must be made to appear in the record and a specific offer of proof is required unless the significance of the evidence is obvious from the record." *State v. Ray*, 125 N.C. App. 721, 726, 482 S.E.2d 755, 758 (1997) (citations omitted). When the defendant assigns as error the exclusion of testimony, but has not made an offer of proof for the record of what the resulting testimony would be, this Court "cannot assess the significance of the evidence sought to be elicited[.]" *Id.*, 482 S.E.2d at 758-59. Holly's answer to the question is not readily apparent from the context within which the question was asked. N.C. Gen. Stat. § 8C-1, Rule 103(a)(2). We will not speculate as to what Holly's answer might have been. *See State v. Barton*, 335 N.C. 741, 749, 441 S.E.2d 306, 310-11 (1994). This argument is without merit.

D. Rule 404(b): Evidence of Prior Bad Acts

[4] In her fourth argument, defendant contends that the trial court erred by allowing evidence of her prior bad acts. We disagree.

Ms. Rush testified to a previous incident in which, after agreeing to loan defendant $60, she allowed defendant to assist her with an automated withdrawal of $120, where defendant instead withdrew approximately $320. Outside the presence of the jury, the State proffered defendant's arrest warrant and plea transcript from that incident, arguing that, under Rule 404(b), the evidence was relevant to the financial card fraud charges to show motive, intent, knowledge, plan, absence of mistake, and identity. Defendant at first objected but then conceded that the evidence was within the ambit of 404(b) as long as a limiting instruction was provided.

When the State offered the warrant and transcript into evidence, defendant made no objection. At defendant's request, the court gave a limiting instruction prior to publication of the items to the jury. Defendant did not object to the introduction of the mug shot from her arrest for the instant charges. Nor did defendant object to the trial court's limiting instructions. We review this argument on a "plain error" basis. *Cummings*, 352 N.C. at 636, 535 S.E.2d at 61.

Defendant now contends that the limiting instruction regarding Ms. Rush's testimony was factually incorrect and damaging to her. In relevant part, the court instructed the jury:

> "[Y]ou just heard Ms. Rush testify and evidence has been received tending to show that at an earlier time the defendant . . . well made an unauthorized transaction with Ms. Rush's credit card without her approval in exceeding what she told her to draw out, and this evidence was received specifically with reference to the four charges of financial transaction card fraud that I have previously told you about that occurred on or about the 10th day of April, 2006[.]

Defendant now claims that this instruction was unduly prejudicial because it erroneously instructed the jury that "Ms. Cousar had previously stolen money from Ms. Rush by trick using the victim's credit card." We note that defendant pled guilty to obtaining property by false pretenses in the earlier case. In the instant case, defendant admitted to attempted use of Rush's card and there was video evidence tending to show that she used the card. The evidence of defendant's prior conduct was admissible under N.C. R. Evid. 404(b) to prove motive, intent, knowledge, and absence of mistake, and we cannot say that its admission or the limiting instructions were erroneous or influenced the jury such that, without them, a different verdict would have been reached.

This argument is without merit.

E. Sentencing Challenge

[5] In her fifth argument, defendant contends that the imposition of consecutive probationary sentences was reversible error. We disagree.

Defendant argues that the trial court imposed two consecutive terms of probation upon defendant, citing to *State v. Canady*, 153 N.C. App. 455, 570 S.E.2d 262 (2002). The State concedes that defendant is correct. Neither defendant nor the State are correct in their analysis. We hold that *Canady* is not controlling in this matter.

The trial court imposed consecutive active sentences for the first degree burglary (case 06 CRS 54052-51) and the second degree kidnapping (case 06 CRS 54052-53) convictions. The trial court then entered judgment on the felonious larceny conviction (case 06 CRS 54052-52). The sentence in the larceny conviction was to run at the expiration of the kidnapping sentence. This sentence was suspended and defendant was placed on probation for 36 months, with the probation to commence upon defendant's release from incarceration on the kidnapping convictions. A fourth judgment was entered upon the convictions for financial card theft and financial card fraud (case 06 CRS 54050-51). This sentence was to run at the expiration of the felonious larceny conviction. The judgment provided that the defendant was placed on probation for 36 months, and the court ordered compliance with the conditions of probation set forth in the felonious larceny judgment.

While the two probationary sentences were ordered to run consecutively, the two probationary judgments are devoid of any language that would suggest that the defendant was to have two consecutive terms of 36 months probation. In the absence of any specific language, the provisions of N.C. Gen. Stat. § 15A-1346 control and the period of probation "[i]f not specified, . . . runs concurrently." N.C. Gen. Stat. § 15A-1346 (2007). Our holding in *Canady* dealt only with consecutive periods of probation, not consecutive sentences that were suspended. This argument is without merit.

F. Remaining Assignments of Error

[6] Finally, defendant preserves an argument that she received ineffective assistance of counsel in that her attorney failed to request recordation of jury selection, opening statements, and closing arguments. Because she acknowledges that she cannot satisfy the "prejudice" prong of the *Strickland* test, we do not reach the merits of this claim. *Strickland v. Washington*, 466 U.S. 668, 80 L. E. 2d 674 (1984)

(requiring defendant to show that counsel's performance was so seriously deficient that her Sixth Amendment rights were compromised and that the alleged deficiency prejudiced the defense to a degree that there is a reasonable probability that but for counsel's errors, the result of the proceedings would have been different); *see also State v. Verrier*, 173 N.C. App. 123, 129-30, 617 S.E.2d 675, 679-80 (2005) (holding that, while "appellate counsel may be at a disadvantage when preparing an appeal for a case in which he did not participate at the trial level, . . . It is outside the realm of this Court's function as the judiciary to modify statutory law.")

The remaining assignments of errors asserted in the record on appeal, but not argued in defendant's brief, are deemed abandoned. N.C. R. App. P. 28(b)(6) (2007).

NO ERROR.

Judges McCULLOUGH and GEER concur.

JAMES HOGAN, JR., Employee, Plaintiff v. TEaRMINAL TRUCKING COMPANY, INC., Employer, AMCOMP ASSURANCE CORP., Carrier, Defendants

No. COA07-1273

(Filed 3 June 2008)

1. Workers' Compensation— termination under company policy regarding accidents—stipulations

An Industrial Commission finding and conclusion that plaintiff was terminated by his employer pursuant to a company policy regarding accidents was adequately supported by the stipulations of the parties and was binding on appeal.

2. Workers' Compensation— ability to return to work—supported by medical evidence—contrary evidence of ongoing pain

The Industrial Commission's findings of fact in a workers' compensation case that plaintiff could return to work were supported by competent medical evidence even though plaintiff contented that his testimony about ongoing pain was sufficient to support a conclusion of total disability.

3. Workers' Compensation— repair of truck—best evidence rule not applicable

In a workers' compensation action involving a truck accident, a manager's testimony about the inspection and repair of the truck was competent even though plaintiff contended that it was not competent under the best evidence rule. The best evidence rule did not apply since the challenged finding did not seek to establish the content of a writing.

4. Workers' Compensation— maximum medical improvement—disability

In a workers' compensation case, the Industrial Commission properly found from the medical evidence that plaintiff had reached maximum medical improvement; properly concluded under this factual scenario (in which plaintiff did not establish a loss of wage-earning capacity) that temporary total disability ended when plaintiff reached maximum medical improvement; had competent evidence in differing medical opinions to support a finding that plaintiff's impairment rating fell between zero and six percent and averaged three percent; and properly determined plaintiff's compensation and defendant's excess payments.

Appeal by plaintiff from opinion and award entered 16 May 2007 by the North Carolina Industrial Commission. Heard in the Court of Appeals 28 April 2008.

Robert M. Talford for plaintiff-appellant.

Cranfill Sumner & Hartzog LLP, by Jaye E. Bingham and Rebecca L. Thomas, for defendants-appellees.

MARTIN, Chief Judge.

Plaintiff appeals an opinion and award of the Industrial Commission concluding that plaintiff is not entitled to compensation for total disability after 12 August 2004 and determining that defendants had overpaid compensation and were entitled to a credit for overpayment.

Plaintiff was employed by defendant-employer Terminal Trucking Company, Inc. as a truck driver on 17 May 2004 when he was traveling on Highway 226 transporting a load from Spruce Pine to Gastonia. As he was descending a grade and going around a curve, he lost control of his truck, which caused the truck to tip over. Following the

accident, plaintiff reported that he had not been hurt. However, the tractor of the truck had to be towed away for repairs, and a salvage company came to the accident site to preserve the freight. A highway patrolman investigated the accident and inspected the truck. He cited plaintiff for exceeding a safe speed and for driving with a tire that had too little tread. Defendant-employer had a written policy providing that a preventable accident causing more than $5,000 in damage to the rig and freight was grounds for termination. After the accident, defendant-employer terminated plaintiff pursuant to the written policy.

Two days after the accident, plaintiff went to the emergency room complaining of head, neck, and back pain. He sought further treatment at the hospital on 24 May 2004. Plaintiff was advised to see an orthopedic surgeon if his symptoms did not improve. On 17 June 2004, plaintiff sought treatment from Dr. Mokris at Miller Orthopedic Clinic for pain in his left cervical region, his left arm and hand, his lower back, and his left leg. Dr. Mokris diagnosed plaintiff with lumbar and cervical strains with possible cervical radiculopathy and sciatica and prescribed a steroid dose pack and other medication. Dr. Mokris referred plaintiff to Dr. Brigham, a spine specialist in the same office.

On 15 July 2004, Dr. Brigham examined plaintiff and ordered a CT scan to rule out an occult fracture. The test revealed only mild degenerative changes, which likely preexisted the accident and would be a normal finding for someone plaintiff's age. On 26 July 2004, a physician's assistant ordered physical therapy. Dr. Brigham next saw plaintiff on 12 August 2004 and found no neurological deficits. Dr. Brigham reassured plaintiff that, although he was still having some pain, it would be fine for him to return to work, and Dr. Brigham assigned plaintiff no permanent partial disability rating. Plaintiff did not accept Dr. Brigham's work release and made no effort to return to work. He continued to complain of neck and back pain and returned to see Dr. Brigham on 18 October 2004. Dr. Brigham's opinion about plaintiff's condition did not change.

On 8 March 2005, plaintiff sought a second opinion from Dr. Shaffer, an orthopedic surgeon. Dr. Shaffer noted plaintiff's complaints of posterior neck pain with no radicular symptoms, occipital headaches, and back pain when lying down too long. He diagnosed plaintiff with cervical sprain/strain with aggravation of preexisting C6-7 degenerative disc disease as well as a lumbosacral sprain/strain.

Dr. Shaffer gave plaintiff a six percent permanent partial impairment rating of the back as a whole.

Defendant-employer gave notice on 7 June 2004 that it would pay compensation for the injury without prejudice. Payments covered the period 18 May 2004 through 18 October 2004. Defendant-employer applied to terminate compensation because plaintiff had been released to return to work without any restrictions and had sustained no permanency as a result of the injury. Payments were terminated effective 18 October 2004.

Plaintiff requested that the claim be assigned for hearing, and the case was heard 16 May 2006. The deputy commissioner determined "[p]laintiff was not entitled to compensation for total disability after August 12, 2004" and found that compensation for the period 13 August 2004 through 18 October 2004 constituted overpayment. Plaintiff appealed to the Full Commission, which affirmed the opinion and award. Plaintiff appealed the Full Commission's opinion and award to this Court.

Plaintiff assigned error to findings of fact and conclusions of law related to five issues. On appeal, we review decisions from the Industrial Commission to determine whether any competent evidence supports the findings of fact and whether the findings of fact support the conclusions of law. *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 700 (2004).

[1] First, plaintiff argues the Commission erred in its findings and conclusions that "[defendant-employer] terminated [plaintiff] pursuant to the written policy" and "defendant-employer terminated the plaintiff for misconduct or fault unrelated to the compensable injury, for which a non-disabled employee would ordinarily have been terminated." Plaintiff argues that the finding is unsupported by the evidence and contends that defendant-employer did not meet its burden to prove that the accident was preventable and the damage to the rig and freight exceeded $5,000. However, the Commission acknowledged the parties' stipulation that "plaintiff was terminated by the defendant-employer on May 17, 2004, pursuant to a company policy regarding chargeable accidents involving $5,000.00 or more damage to company property and/or customer cargo." When a challenged finding of fact is adequately supported by the stipulations of the parties, it is conclusive and binding on this Court. *Hollman v. City of Raleigh Pub. Util. Dep't*, 273 N.C. 240, 245, 159 S.E.2d 874, 877 (1968).

[2] Next, plaintiff argues that the findings of fact related to the severity of plaintiff's injury were unsupported by the evidence. First, the Commission found "Dr. Brigham examined the plaintiff on July 15, 2004, and found no evidence of a serious injury." This finding of fact is supported by Dr. Brigham's testimony during his deposition where, upon being asked "Dr. Brigham, I believe in your note [sic] of July 15 you indicated that your opinion was that Mr. Hogan had not sustained a serious injury. Do you recall making that statement?," he replied, "[y]es" and described the examination he performed on plaintiff and compared his findings about plaintiff's condition with the injuries he had seen in other patients.

Further, the Commission found that after examining plaintiff on 18 October 2004 "Dr. Brigham remained of the opinion that there was no evidence of serious injury and that the plaintiff could work without restrictions." In his notes from the examination, Dr. Brigham stated "I have reassured, again, [plaintiff] that his symptoms should gradually subside, and the studies confirm that he does not have a serious injury. I . . . have again released him without restriction."

Plaintiff argues that his testimony that he experienced ongoing pain was sufficient to support a conclusion of total disability in accordance with *Weatherford v. American National Can Co.*, 168 N.C. App. 377, 607 S.E.2d 348 (2005). In *Weatherford*, this Court noted, "[m]edical evidence that the plaintiff suffers from pain as a result of physical injury, combined with the plaintiff's own testimony that he is in pain has been held to be sufficient to support a conclusion of total disability." *Id.* at 380-81, 607 S.E.2d at 351. Although evidence of the claimant's pain in *Weatherford* was sufficient to support a determination that the claimant was disabled, it is not necessarily sufficient in all cases. As noted in *Weatherford*, plaintiff must "show his incapacity to earn pre-injury wages in one of four ways," by presenting evidence that either plaintiff is "incapable of working in any employment," plaintiff has "been unsuccessful in his effort to obtain employment," it would be futile for plaintiff to seek other employment because of pre-existing conditions, or plaintiff "has obtained other employment at a wage less than he earned prior to the injury." *Id.* at 380, 607 S.E.2d at 351 (citing *Russell v. Lowes*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993)). Plaintiff presented no evidence of any of these scenarios.

Ultimately, the Commission found "[t]he medical evidence of record shows that the plaintiff was capable of returning to work in his regular job as a truck driver as of August 13, 2004." This finding is

supported by Dr. Brigham's notes from 12 August 2004, stating "I have reassured [plaintiff] that even though he is still having pain, it is safe for him to return to work without restriction." Plaintiff contends that his ongoing pain refutes Dr. Brigham's testimony about the severity of his injury; however, "[t]he Commission's findings of fact are conclusive on appeal when supported by . . . competent evidence, 'even though there [is] evidence that would support findings to the contrary.' " *McRae*, 358 N.C. at 496, 597 S.E.2d at 700 (alteration in original) (quoting *Jones v. Myrtle Desk Co.*, 264 N.C. 401, 402, 141 S.E.2d 632, 633 (1965)). All of the Commission's findings of fact concerning the severity of plaintiff's injury are supported by competent evidence; accordingly, plaintiff's assignments of error are overruled.

[3] Plaintiff also challenges the Commission's findings that "the evidence established that the brakes were inspected and underwent no repairs before the truck was placed back into service." Although the terminal manager for defendant-employer testified that a mechanic checked the truck after the accident when they repaired it and that the mechanics did not "do any work to the brakes," plaintiff contends that the manager's testimony is not competent evidence under the "best evidence rule." Defendant cites no authority for this assertion, but we note that North Carolina Evidence Rule 1002 is commonly referred to as the "best evidence rule," and it states "[t]o prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute." N.C. Gen. Stat. § 8C-1, Rule 1002 (2007); *see also State v. York*, 347 N.C. 79, 91, 489 S.E.2d 380, 387 (1997). In this case, since the challenged finding of fact does not seek to establish the content of a writing, but rather whether the truck was physically inspected and repaired, the "best evidence rule" does not apply, and the manager's testimony about the inspection and repair of the truck was competent.

[4] Plaintiff next challenges the Commission's finding of fact that "plaintiff reached maximum medical improvement with respect to his injury on August 12, 2004. After he reached maximum medical improvement, the plaintiff did not require further medical treatment to effect a cure, give him relief or lessen his disability." In his deposition, Dr. Brigham stated that he felt plaintiff had reached maximum medical improvement for his injuries from the accident by 12 August 2004 and "that there [was] no surgical, physical, therapeutic, pharmacological or injection therapy that [would] make his condition better." Plaintiff argues that he needed an MRI for further diagnosis because

Dr. Mokris opined in June 2004 that an MRI might be needed if plaintiff continued to experience "significant upper extremity symptoms." Despite Dr. Mokris' forecast of tests that might be required depending on plaintiff's progress, Dr. Brigham's opinion after examining plaintiff in August 2004 is competent evidence sufficient to support the Commission's finding that further treatment was not required. Furthermore, this finding of fact clearly supports the Commission's conclusion "[n]o further medical treatment would tend to effect a cure, give the plaintiff relief, or lessen his disability from this injury."

> Also related to this finding of fact, the Commission concluded:
>
> Temporary total disability ends when a claimant reaches maximum medical improvement. *Moretz v. Richards and Associates, Inc.*, 316 N.C. 539 (1986); *Franklin v. Broyhill Furniture Industries*, 123 N.C. App. 200 (1996). Consequently, the defendants overpaid compensation to the plaintiff from August 13 until October 18, 2004, and are entitled to a credit for the overpayment.

Plaintiff argues the Commission improperly characterized the law from *Moretz* and *Franklin* and contends that a contrary legal standard applies, as described in *Knight v. Wal-Mart Stores, Inc.*, 149 N.C. App. 1, 562 S.E.2d 434 (2002), *aff'd per curiam*, 357 N.C. 44, 577 S.E.2d 620 (2003). This Court in *Knight* held:

> [A]s established by case law both prior to *Franklin* and since *Franklin*, the concept of MMI does not have any direct bearing upon an employee's right to continue to receive temporary disability benefits (or upon an employee's presumption of ongoing disability) *once the employee has established a loss of wage-earning capacity* pursuant to N.C. Gen. Stat. § 97-29 or § 97-30.

Id. at 16, 562 S.E.2d at 444 (emphasis added). In this case, plaintiff did not establish a loss of wage-earning capacity under any of the *Russell* scenarios, as previously discussed; thus, *Knight* is inapplicable. The Commission properly concluded, according to the factual scenario presented in this case, that temporary total disability ends when a claimant reaches maximum medical improvement, pursuant to *Moretz* and *Franklin*. *Moretz v. Richards & Assocs., Inc.*, 316 N.C. 539, 542, 342 S.E.2d 844, 847 (1986) ("Plaintiff's 'healing period' had stabilized and he had reached his maximum recovery by December 1977, and it is this date that marks the termination of his compensation for temporary total disability and the initiation of compensation for permanent disability."); *Franklin v. Broyhill Furniture Indus.*,

123 N.C. App. 200, 204-05, 472 S.E.2d 382, 385 (1996) ("Temporary total disability is payable only 'during the healing period.' The 'healing period' ends when an employee reaches 'maximum medical improvement.' " (citations omitted)).

Ultimately, plaintiff challenges the Commission's finding of fact that "plaintiff sustained a three-percent (3%) permanent partial disability to his back as a result of the August 12, 2004 injury by accident." Plaintiff argues that the finding is not supported by the evidence because Dr. Shaffer gave plaintiff a six percent permanent partial impairment rating for his entire back. However, Dr. Brigham gave plaintiff a zero percent impairment rating for his back. In light of the differing medical opinions, the Commission had competent evidence to support a finding that plaintiff's impairment rating fell between zero and six percent and averaged three percent. Based on this finding, the Commission properly concluded that "plaintiff would be entitled to compensation at the rate of $493.06 per week for nine weeks for the three-percent (3%) permanent partial disability he sustained to his back, [but] the defendants have previously overpaid compensation to him in excess of that amount." Accordingly, these assignments of error are overruled.

Affirmed.

Judges BRYANT and ARROWOOD concur.

STATE OF NORTH CAROLINA v. JOHN JOSEPH ZINKAND

No. COA07-980

(Filed 3 June 2008)

1. Evidence— prior crimes or bad acts—stale act—cross-examination—credibility

The trial court did not err in a multiple statutory sex offense, double crime against nature, and taking indecent liberties with a child case by overruling defendant's objection to the testimony of several witnesses who testified to an alleged act of sexual misconduct between defendant and his sister occurring in 1979 or 1980 because: (1) defendant called and examined his sister as a direct witness, and the evidence of molestation of his sister was

elicited on cross-examination to test the credibility of defendant's witness; (2) when defendant requested that the trial court give an N.C.G.S. § 8C-1, Rule 404(b) instruction regarding his sister's testimony, the trial court did so; and (3) defendant cannot show prejudice in the trial court's admission of the challenged evidence since it would have no probable impact on the jury's decision in light of the overwhelming evidence of defendant's guilt.

2. Sexual Offenses— sexually violent predator—notice—investigation—written findings or basis for findings required

The trial court erred by ruling that defendant is a sexually violent predator because: (1) the classification of a sexually violent predator under N.C.G.S. § 14-208.20, requires the district attorney to file notice of his intent to seek the classification within the time provided for pretrial motions under N.C.G.S. § 15A-952 or later with the allowance of the trial court for good cause shown, and the study of defendant and whether the defendant is a sexually violent predator shall be conducted by a board of experts selected by the Department of Correction; and (2) there was no indication the State gave notice of its intent to classify defendant as a sexually violent predator, no indication there was an investigation by a board of experts, and no written findings by the trial court as to why defendant was to be classified as a sexually violent predator or a basis for the findings.

Appeal by defendant from judgment entered 17 November 2006 by Judge C. Preston Cornelius in Macon County Superior Court. Heard in the Court of Appeals 14 April 2008.

Attorney General Roy Cooper, by Assistant Attorney General Anne M. Middleton, for the State.

Mark Montgomery for defendant.

BRYANT, Judge.

Defendant John Zinkand appeals from three counts of statutory sex offense, two counts of crime against nature, and one count of taking indecent liberties with a child.

Evidence presented at trial tended to show that Thomas,[1] at the time of trial a boy of fifteen years, and his mother lived with defend-

1. "Thomas" is a pseudonym used to protect the victim's identity.

ant in 2003. Defendant and Thomas's mother married that year. Defendant began molesting Thomas shortly after defendant married Thomas's mother.

Thomas testified that he and defendant engaged in acts of kissing, oral sex, anal sex, and analingus, and these acts would occur in Thomas's home—in the living room or in a bedroom. In exchange for sex, Thomas received Yugioh game cards, money, CD's, and promises to fix-up a car for Thomas to drive. Thomas also testified that he observed defendant engage in oral and vaginal sex with a dog. On multiple occasions, defendant also compelled Thomas to engage in sex with a dog. On 20 March 2006, Thomas disclosed to his mother that defendant was molesting him; that day Thomas's mother contacted the authorities.

Thomas's mother testified that both she and her son were being emotionally and physically abused while they lived with defendant, but at the time, she was unaware of any sexual relations between defendant and her son. Prior to Thomas's disclosure about defendant's sex acts, Thomas's mother enrolled him in therapy due to outbursts of anger.

When asked if she ever observed anything odd during the course of her marriage, Thomas's mother testified that once she caught defendant in their basement having sex with a goat. The family had several pets—at one point several goats and five dogs. She testified that she was repulsed but she still loved defendant and simply didn't know what to do. Later, approximately a month before Thomas revealed defendant's conduct to her, Thomas's mother observed defendant in their living room having sex with a neighbor's dog. Thomas's mother testified that she was just in shock—she didn't know what to do, what to say, or where to go. But, she did not think defendant would harm Thomas.

Thomas's mother testified that the day Thomas confided in her, defendant was not at home and Thomas stayed home from school. Thomas did not go into detail about defendant's acts but related that defendant had molested him. Thomas's mother asked him to describe defendant's anatomy, and Thomas described defendant's anatomy "exactly." At that point, Thomas's mother contacted the authorities.

Detective Judy Bradford of the Macon County Sheriff's Office, Juvenile Investigations Unit interviewed Thomas. Det. Bradford testified that when Thomas became comfortable, he disclosed that he and

defendant were engaging in sexual acts, such as: sodomy, oral sex, and sex with animals. On one occasion, Thomas's mother took him to the hospital due to the abnormal swelling of his penis. Thomas informed Det. Bradford and later testified that his penis was swollen due to defendant's handling, but at the time, he did not tell hospital staff the cause of injury.

Det. Bradford took Thomas to be examined by Dr. Jennifer Brown, a physician and founder of Kid's Place in Macon County, North Carolina, a Child Advocacy Center where children suspected of being abused or neglected can be examined or receive treatment. Dr. Brown testified as an expert in the field of pediatrics. Dr. Brown noted that Thomas's ability to communicate, specifically his sentence structure, was more akin to that of a younger child. During her interview, Dr. Brown questioned Thomas about his relationship with defendant at which point Thomas tended to get "very nervous and kind of embarrassed." Dr. Brown asked Thomas whether defendant "touch[ed] [him] in some way [Thomas] didn't like . . ?" Dr. Brown testified that Thomas's responses included phrases such as, "my d—, he licked it"; "stuck his d— up my butt"; and "he made me do a dog." Dr. Brown testified that "do it" meant having intercourse with the dog. For purposes of corroboration, Dr. Brown testified to Thomas's statements which included an occasion when Thomas's mother walked in on defendant in the basement having sex with a goat.

Dr. Brown testified that Thomas gave an explicit history of sexualized contact but his physical exam, though consistent with that history, yielded nothing specifically abnormal. Dr. Brown also stated that ninety-eight percent of boys who have been sexually abused will have no physical findings whatsoever. "A child who has had multiple assaults over a long period of time tends to have less ability to recall details about a specific assault than the child who has had it one time, because it happened so many times that the details begin to run together . . . ." "[I]t becomes normalized." Dr. Brown testified that Thomas stated the molestation occurred over two and a half years. "When they do disclose, they tend to give only a tiny incident or they tend to wait years, and there's something that pushes them over that makes them willing to finally disclose." "[C]hildren have a very difficult time overriding the inherent authority that an adult has in their lives."

Keith Delancey, a director and counselor at Kid's Reach in Jacksonville, N.C., who had been working with Thomas since September 2005 on another issue and then the issue of sex abuse, also

testified about his interaction with Thomas. Delancey testified that Thomas indicated the abuse occurred over a period of two and a half years and that it happened a lot. Delancey testified that according to Thomas these events would occur when Thomas's mother was asleep or in the shower. Delancey stated Thomas was bribed with CD's, money, and Yugioh cards. Delancey also testified to Thomas's statements that he had been asked to have sexual contact with dogs.

Another juvenile, Kathy[2]—who at the time of trial was a seventeen year old girl, testified that she had known defendant from about the time she was two. Defendant had dated Kathy's mother, and from the time Kathy was three or four, defendant lived with her and her mother. Kathy testified that when she was about five, she would come home from school and only defendant would be at home waiting for her. Kathy testified that defendant would take her into a bedroom, remove her underwear, and rub her "private parts." Defendant would kiss her and lick "[Kathy's] vagina and . . . butt." Kathy testified that this occurred many times, at different times of day, in a bedroom or in the living room.

Kathy testified that defendant attempted to have intercourse with her but was unsuccessful. So, defendant resorted to "acting like he was having sex" with her—instructing her to cross her legs while defendant placed his penis between them. Kathy testified that on one occasion defendant was dog sitting for a relative. Kathy testified that defendant pulled her underwear down and "began to lick [her] privates. And he called the dog over and had the dog lick [Kathy], too." At the time, Kathy was seven. Kathy testified that once when defendant was committing a sex act upon her defendant's mother walked in. Kathy testified that defendant said, "Get out," and his mother left.

Kathy testified that defendant molested her from the time she was five until she was almost eleven. It ended only when Kathy's mother, Kathy, and Kathy's little sister ran away in the middle of the night.

Defendant's mother, Eva Zinkand Sundeck (Sundeck), testified on defendant's behalf. On cross-examination, Sundeck denied observing any sexual impropriety by her son. About the incident to which Kathy testified—in which Sundeck walked in on defendant molesting Kathy—Sundeck testified that, at the time, she was living with defendant, Kathy, and Kathy's mother and she "heard a noise like the [baby's] crib wheels moving. . . . [She] got up to see if the baby was

2. "Kathy" is a pseudonym.

moving the crib, and . . . [defendant] came, said 'Don't worry, I'll pat her on the back.' And that was that. [Sundeck] went back to sleep . . . ." On cross examination, Sundeck acknowledged that Kathy told her she had been raped.

The State also questioned Sundeck regarding a communication she allegedly made to her youngest son's wife informing her that when defendant was fourteen he molested his five year old sister. Though Sundeck did not recall informing her daughter-in-law about the molestation of Sundeck's daughter, Sundeck testified that back in 1979 or 1980 she had taken her five year old daughter to a hospital where it was determined the daughter had contracted gonorrhea. Sundeck's daughter was taken to a rape center, and Sundeck testified that her daughter identified defendant as the person who molested her.

Sundeck's daughter, defendant's sister, Michelle,[3] also testified. On cross-examination, Michelle testified that when she was five and a half she was molested by defendant, but a court found defendant not guilty. Michelle testified that defendant fondled her. Michelle testified that she told her mother about being molested.

A jury found defendant guilty of three counts of statutory sex offense against a victim who was thirteen, fourteen or fifteen years old; taking indecent liberties with a child; and two counts of crime against nature. Defendant was sentenced to several consecutive active terms of imprisonment followed by an additional probationary sentence to begin at the expiration of the active sentences. Based on the State's oral motion made at the time of sentencing, the trial court also found and ordered that defendant be classified as a sexually violent predator. Defendant appealed.

On appeal, defendant questions whether the trial court erred by (I) overruling defendant's objection to allow testimony regarding acts defendant allegedly committed over twenty years earlier and (II) finding that defendant is a sexually violent predator.

I

[1] Defendant first questions whether the trial court erred in overruling his objection to the testimony of several witnesses who testified to an alleged act of sexual misconduct between defendant and his sister, Michelle, occurring in 1979 or 1980. Defendant argues this

3. "Michelle" is also a pseudonym.

testimony was inadmissible because he was acquitted of the charges stemming from the alleged molestation, and even if not, the conduct for which he was accused occurred twenty years ago and was too remote in time to be relevant. Defendant argues the introduction of this evidence was highly prejudicial and amounts to reversible error.

We first note that defendant called and examined his sister as a direct witness. The evidence of molestation of his sister was elicited on cross-examination in a proper attempt to test the credibility of defendant's witness. Moreover, when defendant requested that the trial court give a Rule 404(b) instruction regarding Michelle's testimony, the trial court did so.

Additionally, in light of the overwhelming evidence, as detailed earlier, of defendant's guilt, defendant cannot show prejudice in the trial court's admission of the challenged evidence as it would have no probable impact on the jury's decision. *See State v. Locklear*, 172 N.C. App. 249, 260, 616 S.E.2d 334, 341-42 (2005) (citation omitted) ("we find there would be no probable impact on the jury's decision in light of other overwhelming evidence of defendant's guilt"). As detailed earlier in the opinion, the State presented strong direct evidence of defendant's guilt as to the charges of statutory sex offense against a victim who was thirteen, fourteen or fifteen years old, crimes against nature, and taking indecent liberties with a child. Accordingly, defendant's assignment of error is overruled.

II

[2] Defendant next argues, and the State concedes, the trial court erred by ruling that defendant is a sexually violent predator.

Under North Carolina General Statutes, Article 27A, Sex Offender and Public Protection Registration Programs, section 14-208.6A, lifetime registration requirements for criminal offenders, our General Assembly states its objective to "establish a more stringent set of registration requirements for recidivists, persons who commit aggravated offenses, and for a subclass of highly dangerous sex offenders who are determined by a sentencing court with the assistance of a board of experts to be sexually violent predators." N.C. Gen. Stat. § 14-208.6A (2007). To accomplish that objective, our General Assembly established a registration program for sexually violent predators. *See* N.C. Gen. Stat. § 14-208.6A (2007).

Under North Carolina General Statute section 14-208.20, the classification of a sexually violent predator requires the district attorney

to file notice of his or her intent to seek the classification within the time provided for pretrial motions under G.S. § 15A-952 or later with the allowance of the trial court for good cause shown. N.C. Gen. Stat. § 14-208.20(a) (2007).

> Prior to sentencing a person as a sexually violent predator, the court shall order a presentence investigation in accordance with G.S. 15A-1332(c). However, the study of the defendant and whether the defendant is a sexually violent predator shall be conducted by a board of experts selected by the Department of Correction.

N.C. Gen. Stat. § 14-208.20(b) (2007). After the board of experts has conducted a study and generates a presentence report,

> the court shall hold a sentencing hearing in accordance with G.S. 15A-1334. At the sentencing hearing, the court shall, after taking the presentencing report under advisement, make written findings as to whether the defendant is classified as a sexually violent predator and the basis for the court's findings.

N.C. Gen. Stat. § 14-208.20(c) (2007).

Here, there is no indication the State gave notice of its intent to classify defendant as a sexually violent predator, no indication there was an investigation by a board of experts, and no written findings by the trial court as to why defendant was to be classified as a sexually violent predator or a basis for the findings. Accordingly, the trial court's ruling which classifies defendant as a sexually violent predator is vacated and the matter is remanded to the trial court for the entry of orders in accordance with this opinion.

No error in part; vacated in part; and remanded.

MARTIN, C.J. and ARROWOOD, J. concur.

GRESS v. ROWBOAT CO.

[190 N.C. App. 773 (2008)]

STEPHEN P. GRESS, PLAINTIFF v. THE ROWBOAT COMPANY, INC., AND C&C GRADING, INC., DEFENDANTS

No. COA07-961

(Filed 3 June 2008)

1. Unfair Trade Practices— presumption against employer-employee claims—fictitious employment

The general presumption against unfair and deceptive practice claims between employers and employees did not apply to a fictitious employment between defendant corporations and plaintiff potential purchaser of the corporations' assets where the owner of the corporations and plaintiff intended for a fictitious employer relationship to exist solely as a cover to enable plaintiff to conduct due diligence measures related to the purchase of defendants' assets while maintaining the confidentiality of the pending transaction; and plaintiff was not to be legitimately compensated for his work as a "nominal" employee, but defendants were to receive a credit at closing for all sums paid to plaintiff as fictitious compensation.

2. Unfair Trade Practices— fraudulent asset purchase scheme—fictitious employment relationship

Defendant corporations stated a claim for relief against plaintiff potential purchaser of the corporate assets under the Unfair and Deceptive Trade Practices Act based upon a fraudulent scheme concerning the sale of the assets to plaintiff where defendants alleged that plaintiff induced the owner of defendant corporations to sign an employment agreement by promising that all compensation paid to plaintiff would be reimbursed upon closing of the asset purchase; that plaintiff had no intention of closing on the sale; and that plaintiff used the pending sale to induce one corporation to continue paying him a salary and quarterly profit-sharing bonuses. N.C.G.S. § 75-1.1.

Appeal by defendants from order entered 26 April 2007 by Judge Richard L. Doughton in Iredell County Superior Court. Heard in the Court of Appeals 6 February 2008.

Templeton & Raynor, P.A., by Kenneth R. Raynor, for plaintiff appellee.

Homesley, Jones, Gaines, Dudley, Childers, McLurkin & Donaldson, PLLC, by Mark L. Childers, for defendant appellants.

McCULLOUGH, Judge.

The sole issue before us is whether the trial court properly dismissed defendants' counterclaim asserting that plaintiff engaged in unfair and deceptive trade practices pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. "In our review of the dismissal of this action pursuant to [N.C. Gen. Stat. § 1A-1,] Rule 12(b)(6) [(2007)], we must consider the allegations of plaintiff's complaint as true." *Arroyo v. Scottie's Professional Window Cleaning*, 120 N.C. App. 154, 155, 461 S.E.2d 13, 14 (1995).

The facts as pled by defendants are as follows: The Rowboat Company, Inc. ("Rowboat") and C&C Grading, Inc. ("C&C") (collectively referred to as "defendants") are North Carolina corporations wholly owned by Robert Wilson ("Wilson"), who is the president of both corporations. Rowboat is engaged in the business of building piers, docks, boathouses, boat slips, and other waterfront structures for residential and commercial customers. C&C is engaged in the business of grading real property and constructing upland amenities for resort developments.

In May 2005, Stephen P. Gress ("plaintiff") approached Wilson about the possibility of buying the assets of both Rowboat and C&C. Plaintiff and Wilson entered into a written letter of intent on 30 May 2005, and plaintiff paid Wilson a $10,000 earnest money deposit, refundable only in the event of a material misrepresentation. Plaintiff represented that he would close the asset purchase within sixty to ninety days.

During negotiations, plaintiff and Wilson agreed that plaintiff would be permitted to observe the operations of the businesses and to conduct due diligence measures in and about the business premises prior to the closing of the deal. Further, in the interest of maintaining the continuity of business, the parties agreed to keep plaintiff's pending purchase of defendants' assets confidential. To that end, the parties agreed to introduce plaintiff as an employee of C&C and entered into a fictitious employment agreement, entitled "C&C Grading Co. Inc. Agreement President Opportunities and

Expectations." Neither party intended for this contract to be a true contract of employment; rather, the parties agreed that defendants would "recoup from [p]laintiff at the closing of the purchase and sale of the [defendants'] assets . . . those sums . . . paid to [p]laintiff as a nominal employee[.]"

Thereafter, plaintiff did not purchase defendants' assets as planned within ninety days. In fact, plaintiff had no intention of purchasing defendants' assets, yet plaintiff induced defendants to continually extend the closing deadline so that plaintiff could continue to draw a salary and receive quarterly profit-sharing bonuses. Further, while acting as a "nominal employee," plaintiff knowingly engaged in a series of unauthorized activities that resulted in financial loss and damage to defendants, including among other acts, upgrading the business's computer network, rebuilding and painting a remote office, and negotiating the purchase of another company.

In January of 2006, it became evident to defendants that plaintiff had no intention and no ability to close the purchase of defendants' assets. C&C terminated the "nominal" employment contract and revoked plaintiff's access to defendants' business premises and records.

Plaintiff brought suit against defendants to recover his $10,000 earnest money deposit. Defendants asserted counterclaims against plaintiff for breach of contract and for Unfair and Deceptive Trade Practices ("the UDTPA claim") under N.C. Gen. Stat. § 75-1.1 (2007). Pursuant to Rule 12(b)(6), plaintiff moved to dismiss the UDTPA claim on the ground that defendants had failed to state a claim upon which relief could be granted. The trial court granted this motion, concluding that the relationship between plaintiff and defendants was that of an employee and employer, and defendants' counterclaim was, therefore, outside of the intended scope of N.C. Gen. Stat. § 75-1.1.

On appeal, defendants contend that the trial court erred in dismissing their UDTPA claim. We agree. Treating defendants' allegations as true and construing their claim liberally, as we must at the Rule 12(b)(6) stage, defendants have alleged that plaintiff engaged in a fraudulent scheme arising from the sale of corporate assets, which is sufficient to establish a claim for relief under N.C. Gen. Stat. § 75-1.1.

"An inquiry into the sufficiency of a counterclaim to withstand a motion to dismiss under Rule 12(b)(6) is identical to that regarding

the sufficiency of a complaint to survive the same motion." *Chesapeake Microfilm, Inc. v. Eastern Microfilm Sales & Service*, 91 N.C. App. 539, 542, 372 S.E.2d 901, 902 (1988). In deciding a motion to dismiss pursuant to Rule 12(b)(6), the trial court must determine " '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.' " *Block v. County of Person*, 141 N.C. App. 273, 277, 540 S.E.2d 415, 419 (2000) (quoting *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987)). The court must construe the complaint liberally and "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." *Id.* at 277-78, 540 S.E.2d at 419.

To establish a *prima facie* claim for unfair trade practices, the defendants must show: (1) plaintiff committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, N.C. Gen. Stat. § 75-1.1, and (3) the act proximately caused injury to defendants. *Pleasant Valley Promenade v. Lechmere, Inc.*, 120 N.C. App. 650, 664, 464 S.E.2d 47, 58 (1995). " '[T]he unfair and deceptive acts and practices forbidden by G.S. 75-1.1(a) are those involved in the bargain, sale, barter, exchange or traffic.' " *Cameron v. New Hanover Memorial Hospital*, 58 N.C. App. 414, 444-45, 293 S.E.2d 901, 919 (1982) (quoting *Edmisten, Attorney General v. Penney Co.*, 292 N.C. 311, 316-17, 233 S.E.2d 895, 899 (1977)), *appeal dismissed, cert. denied*, 307 N.C. 127, 297 S.E.2d 399 (1982). The UDTPA is intended to apply " ' "*to dealings between buyers and sellers at all levels of commerce.*" ' " *Sara Lee Corp. v. Carter*, 351 N.C. 27, 32, 519 S.E.2d 308, 311 (citations omitted), *reh'g denied*, 351 N.C. 191, 541 S.E.2d 716 (1999). This Court has held that "it is not necessary for the plaintiff to show fraud, bad faith, deliberate or knowing acts of deception, or actual deception," but "plaintiff must . . . show that the acts complained of possessed the tendency or capacity to mislead, or created the likelihood of deception." *Overstreet v. Brookland, Inc.*, 52 N.C. App. 444, 452-53, 279 S.E.2d 1, 7 (1981).

A. Employee-Employer Relationships

[1] As a general rule, there is a presumption against unfair and deceptive practice claims as between employers and employees. *Dalton v. Camp*, 353 N.C. 647, 658, 548 S.E.2d 704, 711 (2001). Ordinarily, in such a context, the claimant must make a showing of business related conduct that is unlawful or of deceptive acts that affect commerce beyond the employment relationship. *Durling v.*

King, 146 N.C. App. 483, 488-89, 554 S.E.2d 1, 4 (2001). The rationale behind this general rule is that pure employer-employee disputes are not sufficiently "in or affecting commerce" to satisfy the second element of a UDTPA claim. *Id.* at 489, 554 S.E.2d at 5.

Here, however, defendants do not allege the existence of a true employer-employee relationship. *See State ex rel. Employment Security Comm. v. Faulk*, 88 N.C. App. 369, 374, 363 S.E.2d 225, 227-28 ("Whether someone is an 'employee' is a mixed question of law and fact. The question of fact is what the terms, express or implied, of the employment contract are; the question of law is whether those terms show the requisite degree of control."). *Id.* (citation omitted), *disc. review denied*, 321 N.C. 480, 364 S.E.2d 917 (1988). Defendants allege that both Wilson and plaintiff intended for a fictitious employer relationship to exist solely as a cover to enable plaintiff to conduct due diligence measures related to the purchase of defendants' assets, while maintaining the confidentiality of the pending transaction. Plaintiff was not to be legitimately compensated for his work as a "nominal" employee; rather, the parties agreed that defendants were to receive a credit at closing for all sums paid to plaintiff as fictitious compensation. Thus, the facts alleged by defendants do not establish a true employer-employee relationship; rather, they show a fictitious relationship that would not exist but for plaintiff and defendants' buyer-seller relationship. Furthermore, the conduct at issue all arises from an underlying contract to purchase corporate assets which satisfies the "in or affecting commerce" element of a UDTPA claim under N.C. Gen. Stat. § 75-1.1. *See La Notte, Inc. v. New Way Gourmet, Inc.*, 83 N.C. App. 480, 484-86, 350 S.E.2d 889, 891-92 (1986), *cert. denied, appeal dismissed*, 319 N.C. 459, 354 S.E.2d 888 (1987) (holding that evidence of deceptive conduct in connection with the sale of a restaurant is sufficient to establish an unfair and deceptive trade practice in violation of § 75-1.1). Accordingly, we conclude that the general presumption against unfair and deceptive practice claims as between employers and employees does not apply to the facts before us.

B. Fraudulent Scheme

[2] Instead, we find the facts before us demonstrate a fraudulent scheme concerning the sale of corporate assets, which is sufficient to establish a claim for relief pursuant to N.C. Gen. Stat. § 75-1.1. In *Mapp v. Toyota World, Inc.*, 81 N.C. App. 421, 344 S.E.2d 297 (1986), a car dealer induced a customer to sign a purchase agreement for a car by promising her that he would allow rescission of the contract if

she was not satisfied with the car; the car dealer had no intention of keeping such promise. The customer attempted to return the car the next day, and the car dealer refused to rescind the contract and refused to return the customer's money and trade-in vehicle. We reasoned that the plaintiff's evidence "showed not just a breach of promise; it showed a fraudulent scheme, *i.e.*, a contract induced by the defendant's promise to allow rescission of the contract by plaintiff, which promise defendant never intended to keep." *Id.* at 426, 344 S.E.2d at 301. We held that the dealer's misrepresentations to plaintiff were sufficiently "offensive, oppressive and outrageous," to support an award under N.C. Gen. Stat. § 75-1.1.

Here, the facts alleged by defendants are largely analogous to those of *Mapp*. Defendants allege that plaintiff induced Wilson to sign an employment agreement by promising that all compensation paid to plaintiff would be reimbursed upon closing of the asset purchase. Plaintiff's promise to return all compensation paid under the employment contract is much like the car dealer's promise to allow rescission of the purchase agreement in *Mapp*. Thereafter, while plaintiff had no intention of closing on the sale, plaintiff used the pending sale to induce C&C to continue paying him a salary and quarterly profit-sharing bonuses. These facts establish more than just a breach of contract by plaintiff; they show a fraudulent scheme in which plaintiff's misrepresentations were sufficiently deceptive to (1) constitute unfair or deceptive acts (2) in or affecting commerce, which (3) proximately caused injury to defendants. As such, defendants' allegations, treated as true, are sufficient to establish a violation of N.C. Gen. Stat. § 75-1.1.

While defendants may not be able to prove their allegations after the discovery stage, these allegations are sufficient to survive plaintiff's Rule 12(b)(6) motion to dismiss. Accordingly, we reverse the trial court's order dismissing defendants' counterclaim for unfair and deceptive trade practices.

Reversed.

Judges ELMORE and ARROWOOD concur.

IN RE S.F.

[190 N.C. App. 779 (2008)]

IN THE MATTER OF: S.F.

No. COA08-197

(Filed 3 June 2008)

Termination of Parental Rights— subject matter jurisdiction— service on child

A termination of parental rights was vacated for lack of subject matter jurisdiction where no summons was issued to the child or her appointed guardian ad litem. In a proceeding implicating a fundamental right, due process demands that DSS abide by the statutory provisions established by the General Assembly for subject matter jurisdiction. DSS remains free to file a motion or a new petition to terminate respondent-father's parental rights.

Appeal by respondent from order filed 21 November 2007 by Judge Mack Brittain in District Court, Polk County. Heard in the Court of Appeals 5 May 2008.

Feagan Law Firm, PLLC, by Phillip R. Feagan, for Polk County Department of Social Services, petitioner-appellee.

Pamela Newell Williams, for the guardian ad litem-appellee.

Peter Wood, for respondent-appellant.

WYNN, Judge.

"[U]pon the filing of the petition [to terminate parental rights], the court shall cause a summons to be issued" to all those named as respondents, including the juvenile or her court-appointed guardian *ad litem*.[1] Because the record before us contains no evidence that a summons was issued to the juvenile in the instant case, we must vacate the trial court's order for lack of subject matter jurisdiction.

On 20 August 2003, the Polk County Department of Social Services (DSS) filed a juvenile petition alleging the abuse, neglect, and dependency of minor child S.F. The petition was prompted by a report received by DSS that S.F., three years old at that time, had severe bruising on her face, abdomen, ears, legs, buttocks, and down her back; the doctors who examined her "determined that the injuries were non-accidental and consistent with physical child abuse." S.F. indicated that the injuries were inflicted by her mother's live-in

1. N.C. Gen. Stat. § 7B-1106(a) (2005).

boyfriend; both he and S.F.'s mother were arrested and charged with child abuse.

S.F. remained in the nonsecure custody of DSS and foster care until 18 January 2004, when a consent order was entered in which her parents admitted that S.F. was an abused and neglected child. The trial court gave DSS legal custody of the child at that time, and her foster care placement was continued while DSS also pursued reasonable efforts toward reunification. According to the record, Respondent-father initially "worked hard on various components of his Family Services Case Plan," including conducting regular weekly visits with S.F., securing and maintaining regular employment, moving in with his parents to provide a more stable home situation for S.F., paying child support, and complying with substance abuse treatment recommendations. As a consequence of this progress, S.F. left foster care and moved in for a trial placement with Respondent-father and her paternal grandparents on 16 April 2004. Respondent-father and S.F. moved into their own residence, across the street from the paternal grandparents, in May 2004.

However, on 4 October 2004, DSS learned that Respondent-father had been charged with criminal drug and weapon offenses and had also tested positive for several controlled substances. S.F. was then moved back into the home of her paternal grandparents. At a permanency planning hearing on 12 April 2005, the trial court awarded guardianship of the child to her paternal grandparents and directed DSS to cease reunification efforts with Respondent-father. In that order, the trial court noted:

> While it is heartbreaking to see the juvenile lose the close relationship she had just established with the Respondent Father, he has not complied with substance abuse treatment recommendations made in his assessment in November 2004; he continues to test positive to methamphetamine; and he is living with a woman, who, due to previously documented drug use, has had her child placed by the Court with a relative.

According to DSS, the paternal grandmother and Respondent-father were informed that a condition of awarding the guardianship of S.F. to the paternal grandparents was that neither Respondent-father nor his girlfriend be allowed unsupervised visits with S.F. until they could provide evidence that they were no longer using drugs.

Nevertheless, on 7 July 2005, a report was received by DSS that S.F. was staying with Respondent-father and his girlfriend, and that

both adults were using drugs. Respondent-father also continued to test positive for methamphetamine. On 13 September 2005, the trial court held a hearing to consider these changes in circumstances; in an order entered 4 November 2005, the trial court terminated the paternal grandparents' guardianship of S.F. and returned her to DSS custody and foster care. On 10 November 2005, S.F.'s mother relinquished her parental rights to S.F., permanently transferring her legal and physical custody to DSS for the purpose of adoption. The paternal grandparents appealed the termination of their guardianship, and Respondent-father appealed the cessation of reunification efforts by DSS on his behalf.

The trial court conducted a permanency planning hearing on 24 October 2006 and concluded that termination of Respondent-father's parental rights should be pursued, pending the outcome of the appeal filed by Respondent-father and the paternal grandparents. This Court affirmed the trial court's termination of the paternal grandparents' guardianship and the cessation of reunification efforts by DSS with Respondent-father. *In re S.F.*, 181 N.C. App. 149, 639 S.E.2d 454 (Jan. 2, 2007) (No. COA06-297) (unpublished). Following a permanency planning hearing on 10 April 2007, the trial court noted that DSS had been relieved of reunification efforts on 13 March 2006 and ordered that DSS pursue filing a petition for the termination of Respondent-father's parental rights. S.F. has been in foster care with a family in South Carolina since 21 December 2005; the family has previously adopted her half-sister, who also lives in the home.

On 23 May 2007, DSS filed a petition to terminate Respondent-father's parental rights in order to pursue a permanent plan of adoption of S.F. by her current foster family. The record contains a notice of hearing to Respondent-father and his attorney, as well as to the guardian *ad litem* appointed to S.F. and her attorney advocate. An affidavit of service by the DSS attorney likewise indicates that a copy of the summons, notice of hearing, and petition were mailed to and received by Respondent-father. Following a hearing conducted on 21 August 2007 and 11 September 2007, the trial court entered an order on 21 November 2007, terminating Respondent-father's parental rights as to S.F. From that order, Respondent-father appeals, challenging a number of the trial court's findings of fact and conclusions of law.

At the outset, however, we note that DSS failed to issue a summons to the juvenile or to her appointed guardian *ad litem* in this case. Although not raised by the parties, "subject matter jurisdiction

may be raised at any time . . . by the court *ex mero motu*." *In re J.D.S.*, 170 N.C. App. 244, 248, 612 S.E.2d 350, 353, *cert. denied*, 360 N.C. 64, 623 S.E.2d 263 (2005); N.C. R. App. P. 10(a) (2007). Significantly, the "summons, not the complaint, constitutes the exercise of the power of the State to bring the defendant before the court." *Childress v. Forsyth County Hosp. Auth., Inc.*, 70 N.C. App. 281, 285, 319 S.E.2d 329, 332 (1984) (citation omitted), *disc. review denied*, 312 N.C. 796, 325 S.E.2d 484 (1985).

According to statutory law, "upon the filing of the petition [to terminate parental rights], the court *shall cause* a summons to be issued. The summons *shall be directed to . . . [t]he juvenile*." N.C. Gen. Stat. § 7B-1106(a) (2005) (emphasis added). The statute further provides an exception 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." *Id.*; *see also In re J.A.P., I.M.P.*, 189 N.C. App. 683, 685, 659 S.E.2d 14, 16 (2008) ("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."). We have likewise recently held that this requirement is jurisdictional, such 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). Thus, without the proper issuance of a summons, "an order terminating parental rights must be vacated for lack of subject matter jurisdiction." *Id.* at 504, 653 S.E.2d at 429; *see also In re T.R.P.*, 360 N.C. 588, 590, 636 S.E.2d 787, 790 (2006) ("Subject matter jurisdiction is the indispensable foundation upon which valid judicial decisions rest, and in its absence a court has no power to act[.]"). As no such summons was issued in this case, either to S.F. or to her appointed guardian *ad litem*, we must vacate the trial court's order terminating Respondent-father's parental rights to S.F.

Recognizing the need for permanence and stability in S.F.'s life, and the apparent suitability of her current placement in South Carolina, we do not reach this conclusion lightly. Nevertheless, given the number of cases that have recently relied on and discussed *K.A.D.* and this jurisdictional requirement, we write further to outline the reasoning supporting this decision. While the best interest of S.F. and other juveniles in neglect, abuse, and dependency proceedings is our "polar star," *see In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 251 (1984), these cases likewise concern the fundamental right of a parent " 'to make decisions concerning the care, custody, and

control' of his or her child[] under the Due Process Clause of the Fourteenth Amendment to the United States Constitution." *Adams v. Tessener*, 354 N.C. 57, 60, 550 S.E.2d 499, 501 (2001) (quoting *Troxel v. Granville*, 530 U.S. 57, 66, 147 L. Ed. 2d 49, 57 (2000)). In light of the due process concerns related to terminating this fundamental right of Respondent-father, the requirement of a summons must be treated as a jurisdictional prerequisite, as specified by the General Assembly, rather than a mere procedural formality. *See, e.g.*, *T.R.P.*, 360 N.C. at 591, 636 S.E.2d at 791 ("[A] review of the Juvenile Code reveals that . . . verification of the petition in an abuse, neglect, or dependency action as required by N.C.G.S. § 7B-403 is a vital link in the chain of proceedings carefully designed to protect children at risk on one hand while avoiding undue interference with family rights on the other.").

Indeed, we observe that the General Assembly has established by statute two means by which proceedings to terminate an individual's parental rights may be initiated: (1) by filing a petition to initiate a new action concerning the juvenile; or (2) in a pending child abuse, neglect, or dependency proceeding in which the district court is already exercising jurisdiction over the juvenile and parent, by filing a motion to terminate pursuant to N.C. Gen. Stat. § 7B-1102. If the latter means is employed, the General Assembly has provided that the movant "shall prepare a notice" directed to the parents of the juvenile, the guardians, the custodian, the county department of social services charged with the juvenile's placement, the juvenile's guardian *ad litem*, and the juvenile *if twelve years or older* at the time the motion is filed. N.C. Gen. Stat. § 7B-1106.1. Thus, because the court has already acquired subject matter jurisdiction over the juvenile and parents because of the ongoing proceedings, a new summons is not necessary; rather, mere notice of the hearing is sufficient.

By contrast, when a *petition* to terminate is filed, the petition initiates an entirely new action before the court, rather than simply continuing a long process begun with the petition alleging abuse, neglect, or dependency. As such, the General Assembly has required that a summons "shall" be issued and directed to the parents, the guardians, the custodian, the county department of social services charged with the juvenile's placement, the juvenile's guardian *ad litem*, and the juvenile. *Id.* § 7B-1106. Unlike the notice requirement in the case of a motion, there is no age restriction on directing the summons to the juvenile; that is, the statute directs that any juvenile who is the subject of a petition to terminate parental rights must receive a sum-

mons. *Id.*; *see also In re I.D.G.*, 188 N.C. App. 629, 630-31, 655 S.E.2d 858, 859-60 (2008) (noting that in many instances DSS has the option to file a motion to terminate, requiring only a notice of hearing, or a petition to terminate, which requires the issuance of a summons to the juvenile).

In a case such as the one at bar, where the juvenile has been in the custody of DSS for an extended period of time, DSS has the option to use either of these means to begin proceedings to terminate the parental rights of the juvenile's parents. However, as noted by our Supreme Court, "[t]he inherent power of the government to act through its agencies and subdivisions . . . is subject to restraint in order to preserve and maintain a proper balance between the State's interest in protecting children from mistreatment and the right of parents to rear their children without undue government interference." *T.R.P.*, 360 N.C. at 598, 636 S.E.2d at 794. Thus, in a proceeding implicating a fundamental right, due process demands that DSS abide by the statutory provisions established by our General Assembly for a court to acquire subject matter jurisdiction over the matter. As with the requirement to verify the petition, the issuance of a summons to each of the parties named in the statute "is a minimally burdensome limitation on government action[.]" *Id.*, 636 S.E.2d at 795. If, in some instances, the requirement is overly burdensome, then DSS may elect to file a motion rather than a petition, thereby avoiding the necessity of issuing a summons to the juvenile.

In the instant case, because we vacate the trial court's order terminating Respondent-father's parental rights for lack of subject matter jurisdiction, "[t]he legal status of the juvenile and the custodial rights of the parties shall revert to the status they were before the juvenile petition was filed[.]" N.C. Gen. Stat. § 7B-201. We note that DSS is then free to file a motion or a new petition to terminate Respondent-father's parental rights to S.F., with the statutory requirements attendant to whichever means DSS elects to employ.

Vacated.

Judges McCULLOUGH and BRYANT concur.

McGUIRE v. RIEDLE

[190 N.C. App. 785 (2008)]

MICHAEL H. McGUIRE, PLAINTIFF v. DR. ROBERT R. RIEDLE AND GASTON MEMORIAL HOSPITAL, INC., DEFENDANTS

No. COA07-1276

(Filed 3 June 2008)

1. **Medical Malpractice— Rule 9(j)—witness not willing to testify—no good faith exception**

   The trial court did not err by dismissing a medical malpractice claim for failure to comply with Rule 9(j) where it was clear that the potential expert witness was not willing to testify that the applicable standard of care was not met. Rule 9(j) does not contain a good faith exception.

2. **Medical Malpractice— res ipsa loquitur—not sufficiently alleged**

   Plaintiff failed to state a res ipsa loquitur claim, and the trial correctly dismissed his action under Rule 9(j), where the allegations did not demonstrate that proof of the cause of the injury was not available, the instrument involved was in the exclusive control of defendant, or that the injury would not normally occur in the absence of negligence.

3. **Medical Malpractice— motion to amend complaint to substitute expert witness—review of records required before filing**

   The trial court did not err by denying plaintiff's motion to amend a medical malpractice complaint to substitute a new expert witness where the medical care had not been reviewed by a potential expert witness prior to the filling of the complaint. The review must occur before the filing to withstand dismissal.

Appeal by plaintiff from order entered 22 May 2007 by Judge Beverly T. Beal in Gaston County Superior Court. Heard in the Court of Appeals 2 April 2008.

Katherine Freeman, for plaintiff.

Parker Poe Adams & Bernstein LLP, by Harold D. "Chip" Holmes and Scott S. Addison, for defendant Gaston Memorial Hospital, Inc.

Caruthers & Roth, P.A., by Norman F. Klick, Jr. and Robert N. Young, for defendant Robert R. Riedle, M.D.

ELMORE, Judge.

On 8 March 2006, Michael H. McGuire (plaintiff) filed a complaint against Dr. Robert R. Riedle and Gaston Memorial Hospital, Inc. (together, defendants), alleging negligence in leaving a fragment of a screwdriver in plaintiff's knee during reconstructive surgery. In his complaint, plaintiff included a Rule 9(j) certification stating that Dr. Roy A. Majors, the surgeon who removed the fragment from plaintiff's knee, had reviewed the medical care provided plaintiff by defendants, was reasonably expected to qualify as an expert witness, and was willing to testify as to defendants' alleged breach of the standard of care.

On 20 July 2006, plaintiff responded to defendants' discovery requests, stating that Dr. Majors' opinions were unknown. On 13 November 2006, defendants deposed Dr. Majors, who stated that he never reviewed plaintiff's prior care and was never willing to testify as to any alleged breach of the standard of care. Plaintiff, in his own deposition, stated that he did not recall ever speaking to Dr. Majors regarding any alleged breach of the standard of care and that he also did not recall Dr. Majors ever agreeing to serve as an expert witness. Dr. Majors never spoke to plaintiff's attorneys about serving as an expert witness.

Dr. Reidle's attorneys contacted plaintiff's counsel requesting that he dismiss his suit based on his failure to satisfy Rule 9(j). Both defendants' attorneys filed motions to dismiss, including motions to dismiss based on Rule 9(j), and plaintiff filed a motion to amend his complaint. On 22 May 2007, the trial court entered an order dismissing the suit for failure to comply with Rule 9(j). There was no mention of the motion to amend in the trial court's order. Plaintiff now appeals the trial court's 22 May 2007 order, claiming that the trial court erred in granting the motion to dismiss and in failing to grant his motion to amend. After a thorough review of the record and briefs, we affirm the trial court's order of the trial court.

[1] We first address plaintiff's argument that the trial court erred in dismissing his complaint based on his failure to abide by Rule 9(j) of our Rules of Civil Procedure. Rule 9(j) states:

> *Medical malpractice.*—Any complaint alleging medical malpractice by a health care provider as defined in G.S. 90-21.11 in failing to comply with the applicable standard of care under G.S. 90-21.12 **shall be dismissed unless**:

(1) The pleading specifically asserts that the medical care has been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence **and who is willing to testify that the medical care did not comply with the applicable standard of care**;

(2) The pleading specifically asserts that the medical care has been reviewed by a person that the complainant will seek to have qualified as an expert witness by motion under Rule 702(e) of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care, and the motion is filed with the complaint; or

(3) The pleading alleges facts establishing negligence under the existing common-law doctrine of res ipsa loquitur.

N.C. Gen. Stat. § 1A-1, Rule 9(j) (2007) (emphasis added).

Preliminarily, we note that plaintiff presents an incorrect standard of review. Plaintiff contends that because the trial court considered matters outside the pleadings in reaching its decision, defendants' motions to dismiss based on Rule 9(j) violations were converted to a Rule 56 summary judgment motion. Although plaintiff is correct that a motion to dismiss under Rule 12(b)(6) may be converted to a motion for summary judgment in such a situation, *see*, *e.g.*, *North Carolina R. Co. v. Ferguson Builders Supply, Inc.*, 103 N.C. App. 768, 771, 407 S.E.2d 296, 298 (1991) ("Where matters outside the pleadings are received and considered by the court in ruling on a motion to dismiss under Rule 12(b)(6), the motion should be treated as a motion for summary judgment and disposed of in the manner and on the conditions stated in G.S. 1A-1, Rule 56."), this Court has recently stated that "when ruling on [a motion to dismiss pursuant to Rule 9(j)], a court must consider the facts relevant to Rule 9(j) and apply the law to them." *Phillips v. A Triangle Women's Health Clinic*, 155 N.C. App. 372, 376, 573 S.E.2d 600, 603 (2002) (citation omitted). We therefore note that "our review of Rule 9(j) compliance is *de novo*, because such compliance clearly presents a question of law . . . ." *Smith v. Serro*, 185 N.C. App. 524, 527, 648 S.E.2d 566, 568 (2007) (quotations and citation omitted).

In this case, the trial court was unequivocal in stating that it dismissed plaintiff's action under Rule 9(j), concluding that "Plaintiff failed to comply with the requirements of Rule 9(j) in regard to the content of the complaint, and this action should be dismissed."

Plaintiff's argument that this Court's review should inquire as to whether there was any question of material fact, and his contention that we must view the evidence in the light most favorable to him, are therefore incorrect.

Rule 9(j) is clear that a potential expert witness must be "willing to testify that the medical care did not comply with the applicable standard of care." N.C. Gen. Stat. § 1A-1, Rule 9(j)(1) (2007). It is equally clear that Dr. Majors was not willing to do so. Plaintiff's arguments regarding good faith are inapposite: Rule 9(j) contains no good faith exception. *See Oxendine v. TWL, Inc.*, 184 N.C. App. 162, 167, 645 S.E.2d 864, 867 (2007) ("When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required.") (quotations and citations omitted).

Moreover, contrary to plaintiff's claims, Rule 9(j) is not merely facial. As our Supreme Court recently stated,

> Rule 9(j) clearly provides that "any complaint alleging medical malpractice . . . *shall* be dismissed" if it does not comply with the certification mandate . . . indicat[ing] that medical malpractice complaints have a distinct requirement of expert certification with which plaintiffs must comply. Such complaints will receive strict consideration by the trial judge.

Thigpen v. Ngo, 355 N.C. 198, 202, 558 S.E.2d 162, 165 (2002) (citation omitted) (emphasis in original). Plaintiff did not present the trial court with an expert who was "willing to testify that the medical care did not comply with the applicable standard of care." N.C. Gen. Stat. § 1A-1, Rule 9(j)(1) (2007). The trial court therefore correctly dismissed the action.[1]

[2] Moreover, defendants are correct that plaintiff failed to assert a *res ipsa loquitur* claim as required by Rule 9(j)(3). Plaintiff acknowledges in his brief that "the incantation '*res ipsa loquitur*' was not used in the complaint . . . ." However, he argues that the complaint put forth sufficient allegations to infer such a claim. We disagree.

This Court recently stated that *res ipsa loquitur* "is applicable when no proof of the cause of an injury is available, the instrument

1. We decline to address the parties' arguments regarding Dr. Majors' review of the care given. In order to satisfy the Rule 9(j)(1) requirements, plaintiff's expert must have been willing to testify. Because he was not so willing, it is irrelevant whether he in fact reviewed the care that plaintiff received.

involved in the injury is in the exclusive control of defendant, and the injury is of a type that would not normally occur in the absence of negligence." *Howie v. Walsh*, 168 N.C. App. 694, 698, 609 S.E.2d 249, 251 (2005) (quotations and citation omitted). Moreover,

> in order for the doctrine to apply, not only must plaintiff have shown that [the] injury resulted from defendant's [negligent act], but plaintiff must [be] able to show—without the assistance of expert testimony—that the injury was of a type not typically occurring in absence of some negligence by defendant.

Id. at 698, 609 S.E.2d at 252 (quotations and citation omitted) (alterations in original). We note that in plaintiff's complaint, he alleged negligence

> in the performance of the April 11, 2001 arthroscopic-assisted ACL reconstruction left knee [sic] in that:
>
> a. the Defendants failed to note the damage to the screwdriver used to set the Bioscrew;
>
> b. the Defendants failed to note any difficulty with the aforementioned screwdriver in the Operative Report;
>
> c. the Defendants failed to note that a fragment of the screwdriver remained within the radiolucent screw within the femoral tunnel in the operative report;
>
> d. the Defendant, Dr. Robert R. Riedle, failed to notify the Plaintiff of the screwdriver fragment that remained in the Plaintiff's left knee;
>
> e. the Defendant, Dr. Robert R. Riedle, failed to provide proper follow-up care in that there was no evaluation or monitoring of the screwdriver fragment.

These are the *only* allegations of negligence on defendants' part in the entire complaint. These allegations do not demonstrate that "no proof of the cause of [the] injury is available, the instrument involved in the injury [was] in the exclusive control of defendant, [or] the injury is of a type that would not normally occur in the absence of negligence." *Walsh*, 168 N.C. App. at 698, 609 S.E.2d at 251 (quotations and citation omitted). Nor does plaintiff contend in his complaint that the "injury was of a type not typically occurring in absence of some negligence by defendant." *Id.* at 698, 609 S.E.2d at 252.

Accordingly, plaintiff failed to state a *res ipsa loquitur* claim, and the trial court correctly dismissed his action under Rule 9(j).

[3] Plaintiff also claims that the trial court erred in not considering or allowing his motion to amend. "We review a denial of a motion to amend under Rule 15(a) for abuse of discretion." *Pinewood Homes, Inc. v. Harris*, 184 N.C. App. 597, 607, 646 S.E.2d 826, 833 (2007) (citation omitted).[2]

Plaintiff filed his motion pursuant to Rule 15 of our Rules of Civil Procedure, which states, in reference to plaintiff's situation, that "a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." N.C. Gen. Stat. § 1A-1, Rule 15(a) (2007). "[L]eave to amend a pleading may be properly denied under certain circumstances, including but not limited to undue delay, bad faith on the part of the movant, or undue prejudice to the opposing party by virtue of allowance of the amendment." *Zenobile v. McKecuen*, 144 N.C. App. 104, 109, 548 S.E.2d 756, 759 (2001).

Here, plaintiff sought to amend his complaint to substitute a new expert witness, even though the medical care had not been reviewed by a potential expert witness prior to the filing of the complaint. Under Rule 9(j), an expert witness's review of medical care "must occur *before* filing to withstand dismissal." *Ngo*, 355 N.C. at 204, 558 S.E.2d at 166 (emphasis in original). As in *Ngo*,

> [t]here is no evidence in the record that plaintiff alleged the review occurred before the filing of the original complaint. Specifically, there was no affirmative affidavit or date showing that the review took place before the statute of limitations ex-

2. We note plaintiff's argument that the trial court committed reversible error in failing to explicitly rule on the motion to amend. The case on which plaintiff relies, *Zenobile v. McKecuen*, 144 N.C. App. 104, 109, 548 S.E.2d 756, 759 (2001), is distinguishable. In *Zenobile*, this Court held, in part, that "[t]he trial court's decision to rule on [the defendant's] motion to dismiss before ruling on plaintiff's motion for leave to amend constitutes reversible error." *Id.* However, in *Zenobile* the plaintiff filed a motion to amend before the defendant filed his motion to dismiss; the trial court failed to rule on the plaintiff's motion for approximately seven months. Also, unlike the current case, the plaintiff in *Zenobile* filed the motion to amend within the applicable statute of limitations. Finally, as this Court noted in *Zenobile*, "leave to amend a pleading may be properly denied under certain circumstances, including but not limited to undue delay, bad faith on the part of the movant, or undue prejudice to the opposing party by virtue of allowance of the amendment." *Id.* (citation omitted). It appears from the record that the trial court, in granting the motion to dismiss, effectively denied the motion to amend. Accordingly, we address this issue as though the trial court had properly denied plaintiff's motion.

pired. Allowing a plaintiff to file a medical malpractice complaint and to then wait until after the filing to have the allegations reviewed by an expert would pervert the purpose of Rule 9(j).

Id. at 204, 558 S.E.2d at 166-67. Accordingly, we hold that the trial court did not err in its failure to review or grant plaintiff's motion to amend.

Having conducted a thorough review of the briefs and records, we find no error. We therefore affirm the trial court's order.

Affirmed.

Judges HUNTER and STROUD concur.

STEVE SAWYER, PLAINTIFF v. MARKET AMERICA, INC., DEFENDANT

No. COA07-1257

(Filed 3 June 2008)

1. Appeal and Error— appealability—partial summary judgment—certification by trial court

Although plaintiff's appeal from the trial court's grant of partial summary judgment is an appeal from an interlocutory order since it does not dispose of the case but leaves it for further action by the trial court in order to settle and determine the entire controversy, the trial court certified the order for immediate review under N.C.G.S. § 1A-1, Rule 54(b).

2. Employer and Employee— North Carolina Wage and Hour Act—nonresident who neither lives nor works in North Carolina

The trial court did not err by granting partial summary judgment for defendant on the North Carolina Wage and Hour Act claim when plaintiff was an Oregon resident performing work outside the State of North Carolina because: (1) although plaintiff asserted that the choice of law provision effectively removed the scope of the North Carolina Wage and Hour Act from consideration, he failed to articulate any argument or cite any authority that supports this view, and plaintiff's argument has previously

been rejected in other jurisdictions; (2) the North Carolina Wage and Hour Act does not apply to the wage payment claims of a nonresident who neither lives nor works in North Carolina when the plain language of N.C.G.S. § 95-25.1 identifies it as being for the benefit of North Carolina residents; and (3) the U.S. Supreme Court has long held that legislation is presumptively territorial and confined to limits over which the law-making power has jurisdiction, and courts have no extraterritorial jurisdiction.

Appeal by Plaintiff from judgment entered 9 May 2007 by Judge John O. Craig, III, in Guilford County Superior Court. Heard in the Court of Appeals 28 April 2008.

Carruthers & Roth, P.A., by Kenneth R. Keller, and William J. McMahon, IV, for Plaintiff-Appellant.

Womble Carlyle Sandridge & Rice, PLLC, by Pressly M. Millen, for Defendant-Appellee.

ARROWOOD, Judge.

Steve Sawyer, Plaintiff, appeals from an order granting Defendant's motion for partial summary judgment on Plaintiff's claim under the North Carolina Wage & Hour Act. We affirm.

Plaintiff is a resident of the State of Oregon. Defendant, Market America, Inc., is a North Carolina corporation based in Greensboro, North Carolina. On 1 December 2004 the parties met in Greensboro and signed an "Independent Contractor Agreement." Pursuant to this agreement, Plaintiff performed services for Defendant from December 2004 until his contract was terminated on 30 January 2006. Plaintiff's work for Defendant was performed outside North Carolina.

In March 2006 Plaintiff filed suit against Defendant, seeking recovery of certain sums to which Plaintiff claimed entitlement under the terms of the parties' agreement. Plaintiff brought claims for breach of contract and for violation of the North Carolina Wage and Hour Act, N.C. Gen. Stat. § 95-25.1 (2007), *et seq.* In April 2007 Defendant moved for partial summary judgment on Plaintiff's claim under the North Carolina Wage and Hour Act. On 9 May 2007 the trial court granted Defendant's motion and entered summary judgment for Defendant on Plaintiff's North Carolina Wage and Hour Act claim. The court ruled that "the North Carolina Wage & Hour Act does not apply to Plaintiff as an individual who resides and primarily

works outside of the State of North Carolina[.]" From this order Plaintiff appeals.

Standard of Review

[1] Plaintiff's appeal from the trial court's summary judgment order "is interlocutory because the trial court's order 'does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.' An interlocutory order is immediately appealable if the trial court certifies that: (1) the order represents a final judgment as to one or more claims in a multiple claim lawsuit or one or more parties in a multi-party lawsuit, and (2) there is no just reason to delay the appeal. N.C.G.S. § 1A-1, Rule 54(b) [(2007)]." *Hamby v. Profile Prods., L.L.C.*, 361 N.C. 630, 633-34, 652 S.E.2d 231, 233 (2007) (quoting *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950)). In the instant case, the trial court certified its summary judgment order for immediate review, as provided in Rule 54(b).

"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) (quoting *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003); and citing N.C. Gen. Stat. § 1A-1, Rule 56(c)). In the case *sub judice*, neither party contends that there exist genuine issues of material fact. Rather, the dispositive appellate issue is whether, as a matter of law, Defendant was entitled to summary judgment.

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[2] The issue presented on appeal is whether Plaintiff, an Oregon resident performing work outside the State of North Carolina, can bring a claim against Defendant under the North Carolina Wage and Hour Act.

Preliminarily, we address the validity of the North Carolina choice of law provision in the Independent Contractor Agreement. A "choice of law provision[] names a particular state and provides that the substantive laws of that jurisdiction will be used to determine the validity and construction of the contract, regardless of any conflicts between the laws of the named state and the state in which the case is litigated." *Johnston County v. R.N. Rouse & Co.*, 331 N.C. 88, 92, 414 S.E.2d 30, 33 (1992). In the instant case, the Independent Contractor Agreement contains a clause providing in pertinent part

that the "Agreement shall be governed and construed under the laws of the State of North Carolina," and the parties agree that North Carolina law should be utilized to resolve the issues in this case.

"This Court has held that where parties to a contract have agreed that a given jurisdiction's substantive law shall govern the interpretation of the contract, such a contractual provision will be given effect." *Tanglewood Land Co. v. Byrd*, 299 N.C. 260, 262, 656 261 S.E.2d 655, 656 (1980). "We have previously held that 'the parties' choice of law is generally binding on the interpreting court as long as they had a reasonable basis for their choice and the law of the chosen State does not violate a fundamental public policy of the state or otherwise applicable law.' " *Torres v. McClain*, 140 N.C. App. 238, 241, 535 S.E.2d 623, 625 (2000) (quoting *Behr v. Behr*, 46 N.C. App. 694, 696, 266 S.E.2d 393, 395 (1980)).

We conclude that there is no obstacle to the application of North Carolina law to this appeal. Accordingly, we will apply the substantive law of North Carolina to our determination of the territorial ambit of the North Carolina Wage and Hour Act.

Plaintiff first asserts that the choice of law provision effectively removed the scope of the North Carolina Wage and Hour Act from consideration. He argues that Defendant's assertion that the North Carolina Wage and Hour Act does not have extraterritorial effect "ignores the determinative fact that the parties agreed" that their agreement would be governed by North Carolina law.

Plaintiff appears to take the position that our general application of North Carolina law automatically brings him within the scope of the North Carolina Wage and Hour Act and obviates the need to determine whether the statute has any extraterritorial effect. However, Plaintiff fails to articulate any argument, or cite any authority, that supports this view. Moreover, we note that Plaintiff's argument has previously been rejected in other jurisdictions.

For example, in *Highway Equipment Co. v. Caterpillar, Inc.*, 908 F.2d 60 (6th Cir. 1990), an Ohio plaintiff sued an Illinois defendant for breach of contract and violation of the Illinois Franchise Disclosure Act (IFDA). The trial court granted defendant's motion for judgment on the pleadings on the plaintiff's IFDA claim, on the grounds that the IFDA could not be applied extraterritorially to an Ohio plaintiff. On appeal the plaintiff argued that the Illinois choice of law provision in the parties' agreement gave the IFDA extraterritorial application to the Ohio plaintiff. The Court disagreed, noting that plaintiff did "not

present any evidence that the IFDA was intended to apply outside Illinois," and concluding that "the IFDA was enacted for the protection of Illinois residents only." *See also*, *e.g.*, *Gravquick A/S v. Trimble Navigation Int'l*, 323 F.3d 1219, 1222 (9th Cir. Ct. App. 2003) ("The contract's choice of law clause states that the [contract] is to 'be governed by and construed under the laws of the State of California[.]' . . . Honoring that choice of law does not give extraterritorial application to the [California] statute[.]"). We conclude that the choice of law provision in the parties' contract, although it requires us to apply North Carolina law, does not change the limits or requirements of the North Carolina statutes thus applied. This assignment of error is overruled.

Plaintiff also argues that the court erred by granting summary judgment, on the grounds that North Carolina North Carolina Wage and Hour Act is "not limited in application to residents of North Carolina." We disagree and hold that the North Carolina Wage and Hour Act does not apply to the wage payment claims of a nonresident who neither lives nor works in North Carolina.

N.C. Gen. Stat. § 95-25.1 (2007) provides that:

(a) This Article shall be known and may be cited as the "Wage and Hour Act."

(b) The public policy of this State is declared as follows: The wage levels of employees, hours of labor, payment of earned wages, and the well-being of minors are subjects of concern requiring legislation to promote the general welfare of the people of the State without jeopardizing the competitive position of North Carolina business and industry. The General Assembly declares that the general welfare of the State requires the enactment of this law under the police power of the State.

The plain language of the statute identifies it as being for the benefit of North Carolina residents. This Court has noted that the "Wage and Hour Act was enacted to safeguard the hours worked by and the wages paid to 'the people of the State without jeopardizing the competitive position of North Carolina business and industry." *Horack v. S. Real Estate Co. of Charlotte, Inc.*, 150 N.C. App. 305, 309, 563 S.E.2d 47, 52 (2002) (quoting N.C. Gen. Stat. § 95-25.1(b) ([2007])).

Plaintiff directs our attention to the absence of statutory language that explicitly restricts application of the North Carolina Wage

and Hour Act to North Carolina residents. Plaintiff argues that, because the statute does not expressly bar its extraterritorial application, the North Carolina Wage and Hour Act may properly be applied to a resident of the State of Oregon. We disagree, and note the long established common law rule to the contrary.

The U.S. Supreme Court has long held that "[l]egislation is presumptively territorial and confined to limits over which the lawmaking power has jurisdiction." *Sandberg v. McDonald*, 248 U.S. 185, 195, 63 L. Ed. 200, 204 (1918) (citing *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 53 L. Ed. 826 (1909)). "No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived." *Hilton v. Guyot*, 159 U.S. 113, 163, 40 L. Ed. 95, 108 (1895). The North Carolina Supreme Court has also shown a longstanding adherence to this rule:

> The law is unmistakably clear that the Legislature has no power to enact statutes, even though in general words, that can extend in their operation and effect beyond the territory of the sovereignty from which the statute emanates. . . ."Prima facie, every statute is confined in its operation to the persons, property, rights, or contracts, which are within the territorial jurisdiction of the legislature which enacted it. The presumption is always against any intention to attempt giving to the act an extraterritorial operation and effect." . . . No presumption arises, from a failure of the state through its legislative authority to speak on the subject, that the state intends to grant any right, privilege, or authority under its laws to be exercised beyond its jurisdiction.

McCullough v. Scott, 182 N.C. 865, 877-78, 109 S.E. 789, 796 (1921) (quoting *Walbridge v. Robinson*, 22 Idaho 236, 245, 125 P. 812, 815 (1912) (citations omitted).

Thus, although "a state has broad power to establish and enforce standards of conduct within its borders relative to the health of everyone there[,]" *Barsky v. Board of Regents*, 347 U.S. 442, 449, 98 L. Ed. 829, 838 (1954), "[i]t is axiomatic that courts have no extraterritorial jurisdiction." *In re De Ford*, 226 N.C. 189, 192, 37 S.E.2d 516, 518 (1946). Therefore, "general words used in statutes are taken as limited to cases within the jurisdiction of the Legislature passing the statute, and confining its operation to matters affecting persons and property in such jurisdiction." *McCullough*, 182 N.C. at 877, 109 S.E. at 796. In *McCullough*, our Supreme Court noted that its holding was

not only in accord with long-established law, but also constituted good public policy:

> Either the statute applies . . . within the State . . . or its scope is unlimited, and . . . the board may hold examinations anywhere and everywhere it sees fit. And if this board may go outside the state to hold examinations, why not every other examining board of the State do likewise, if the place is left to its discretion? Obviously, this would be subversive of public policy, of the spirit and intent of the law, would defeat the very ends which these protective statutes were enacted to accomplish[.]

Id. 182 N.C. at 878, 109 S.E. at 796-97.

We conclude that the North Carolina Wage and Hour Act does not provide a private cause of action for a nonresident who neither lived nor worked in North Carolina. We further conclude that the trial court did not err and that its order granting partial summary judgment for Defendant on Plaintiff's North Carolina North Carolina Wage and Hour Act claim should be

Affirmed.

Chief Judge MARTIN and Judge BRYANT concur.

STATE OF NORTH CAROLINA v. ERNESTO RAFEL DELROSARIO

No. COA07-953

(Filed 3 June 2008)

1. Criminal Law— actions used in federal sentencing—not a federal conviction—state prosecution not barred

N.C.G.S. § 90-97 did not bar state prosecution where defendant pled guilty in state court to a drug offense, those acts were considered at sentencing for a federal conviction of a related offense, and the state sentencing occurred after the federal sentencing. The acts that were the subject of the state charge were not charged in federal court and defendant was not convicted under federal law for those actions.

2. Criminal Law— continuance denied—transcript of federal sentencing hearing not available

The trial court did not err by denying a continuance where a defendant sought a transcript of a federal sentencing hearing which had considered the acts for which he was being sentenced in state court. There was testimony that the federal indictment had not adopted these offenses, the trial court properly concluded that N.C.G.S. § 90-97 was not a defense to the State prosecution, and defendant had not shown that he was materially prejudiced by the denial of his motion.

Appeal by defendant from judgment entered 16 January 2007 by Judge J.B. Allen, Jr., in Wake County Superior Court. Heard in the Court of Appeals 6 February 2008.

Attorney General Roy Cooper, by Assistant Attorney General Latoya B. Powell, for the State.

Jarvis John Edgerton, IV, for defendant appellant.

McCULLOUGH, Judge.

At the 11 December 2001 Criminal Session of Wake County Superior Court, defendant Ernesto Rafel Delrosario ("defendant") pled guilty to two counts of maintaining a vehicle or dwelling for the keeping or sale of controlled substances, one count of trafficking in cocaine by possession, and one count of trafficking in cocaine by transportation.

The undisputed evidence presented at the plea hearing tended to show the following: Sometime prior to 20 July 2001, a confidential informant working in cooperation with the Raleigh Police Department told Detective Bradley Young that defendant was involved in drug trafficking in the Raleigh area. The Raleigh Police Department, with the assistance of the informant, arranged to purchase approximately nine ounces of cocaine from defendant on 20 July 2001.

On 20 July 2001, law enforcement observed defendant drive his vehicle from his residence at 225 Peartree Lane toward the location for the prearranged cocaine purchase. Law enforcement concluded that defendant was driving without a valid driver's license and stopped the vehicle. During the stop, law enforcement searched defendant and found nine ounces of cocaine on his person. Defendant

waived his rights and consented to a search of his residence. Upon searching his residence, law enforcement found a cocaine grinder and 278.2 grams of cocaine. The trial court accepted defendant's guilty plea pursuant to the plea arrangement, and the matter was continued 60 days for sentencing. Defendant was released.

During the interim between the plea hearing and the sentencing hearing, defendant absconded. On 21 December 2001, defendant committed acts that gave rise to federal drug charges. Specifically, defendant was indicted with charges under 18 U.S.C. § 954(c) and 21 U.S.C. § 841(a)(1) for distributing 55 grams of cocaine. Defendant pled guilty to these federal charges on 24 February 2003. Although the charges arising from the 20 July 2001 offenses were not adopted for prosecution in the federal indictment, the 20 July 2001 offenses were considered for purposes of sentencing. The federal judge found as fact that the 20 July 2001 offenses were part of the same course of conduct as defendant's 21 December 2001 offenses. Using a "real offense" approach to sentencing, on 25 June 2003, the federal judge aggregated the weight of the cocaine from the 21 December offense and the 20 July offense, and increased defendant's offense level from a Level 16 to a Level 22.

At the 16 January 2007 Criminal Session of Wake County Superior Court, defendant was sentenced on the state charges. Defendant moved to dismiss the state charges pursuant to N.C. Gen. Stat. § 90-97 (2007), and alternatively, to continue sentencing, in order to secure a transcript of defendant's federal sentencing hearing. The trial court denied both motions. Defendant received a consolidated term of imprisonment of 70 to 84 months as well as a $100,000 fine.

On appeal, defendant contends that the trial court erred by: (1) denying his motion to dismiss the state drug charges pursuant to N.C. Gen. Stat. § 90-97; and (2) failing to continue the sentencing hearing.

I. Motion to Dismiss

[1] Defendant first contends that because the 20 July 2001 offenses that give rise to the state charges were considered during defendant's federal sentencing, N.C. Gen. Stat. § 90-97 is a bar to the state charges against defendant. We disagree, as we conclude that defendant was not convicted under federal law for the same act that gives rise to the state charges at issue.

N.C. Gen. Stat. § 90-97 provides, in pertinent part:

> If a violation of this Article is a violation of a federal law or the law of another state, **a conviction** or acquittal under federal law or the law of another state **for the same act** is a bar to prosecution in this State.

A. "Prosecution" under § 90-97

First, we address the State's argument that § 90-97 is inapplicable to the case *sub judice* because the state prosecution ended on the date that defendant pled guilty to the state charges, which was prior to defendant's federal conviction. We find that this argument is inconsistent with the definition of "prosecution" that has been adopted by our Supreme Court. In *State v. Harvey*, 281 N.C. 1, 19, 187 S.E.2d 706, 717 (1972), our Supreme Court held that under the Controlled Substance Act, a prosecution "consists of the series of proceedings had in the bringing of an accused person to justice, from the time when the formal accusation is made, by the filing of an affidavit or a bill of indictment or information in the criminal court, until the proceedings are terminated." We are bound by this definition, and accordingly, we conclude that a state prosecution ends not on the date that a defendant pleads guilty to state charges, but rather the prosecution is pending until the date that all state proceedings are terminated. Here, defendant was convicted of federal charges before all state proceedings were terminated. Because defendant's federal conviction occurred before the state prosecution ended, N.C. Gen. Stat. § 90-97 is applicable if the remaining statutory requirements are satisfied.

b. "Conviction" under N.C. Gen. Stat. § 90-97

Having decided that defendant's federal conviction occurred prior to the conclusion of defendant's state prosecution, we now turn to whether the consideration of the 20 July 2001 offenses for federal sentencing purposes constituted a "conviction" for those offenses as that term is used in N.C. Gen. Stat. § 90-97. " 'Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning.' " *State v. Cheek*, 339 N.C. 725, 728, 453 S.E.2d 862, 864 (1995) (quoting *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990)).

We have held that, under the traditional definition, "conviction" refers to the jury's or fact-finder's guilty verdict. *State v. McGee*, 175

N.C. App. 586, 589-90, 623 S.E.2d 782, 785, *disc. review denied*, 360 N.C. 489, 632 S.E.2d 768, *appeal dismissed*, *disc. review denied*, 360 N.C. 542, 634 S.E.2d 891 (2006) (adopting Black's Law Dictionary's definition of the term "conviction": " 'The act or process of judicially finding someone guilty of a crime; the state of having been proved guilty. . . . 2. The judgment (as by jury verdict) that a person is guilty of a crime.' "). *Id.* Likewise, the North Carolina Structured Sentencing Statutes provide, in pertinent part, "a person has been convicted when he has been adjudged guilty or has entered a plea of guilty or no contest." N.C. Gen. Stat. § 15A-1331(b) (2007).

This definition of the term "conviction" is in accord with federal precedent. In *Witte v. United States*, 515 U.S. 389, 132 L. Ed. 2d 351 (1995), the defendant moved to dismiss an indictment charging him with conspiring and attempting to import cocaine in violation of 21 U.S.C. §§ 952(1) and 963 on the ground that the cocaine involved in these offenses had been considered as "relevant conduct" at sentencing for a previous marijuana conviction, and therefore, the later prosecution was barred by the Double Jeopardy Clause of the Fifth Amendment. The United States Supreme Court rejected this argument, reasoning that consideration of uncharged conduct for sentencing purposes is *not* a "conviction" for such conduct, and therefore, is not "punishment" under the Double Jeopardy Clause:

> We agree with the Court of Appeals, however, that petitioner's double jeopardy theory—that consideration of uncharged conduct in arriving at a sentence within the statutorily authorized punishment range constitutes "punishment" for that conduct—is not supported by our precedents, which make clear that a defendant in that situation is punished, for double jeopardy purposes, **only for the offense of which the defendant is convicted.**

Witte, 515 U.S. at 397, 132 L. Ed. 2d at 362.

Thus, under federal law, where uncharged conduct is considered as relevant conduct for sentencing purposes, the defendant is neither "convicted" for such conduct nor is he "punished" for such conduct. *Id.* Here, Robert Hale, defendant's counsel in the federal case, testified that the federal indictment did not adopt for prosecution defendant's conduct on 20 July 2001. Because defendant was not charged in the federal prosecution for his 20 July 2001 acts, he was neither adjudged guilty nor did he plead guilty or no contest for those acts in federal court. Under both the state and federal definition of the term,

defendant was not "convicted" under federal law for the uncharged acts that occurred on 20 July 2001. Accordingly, we conclude that N.C. Gen. Stat. § 97-90 does not bar the state prosecution for the acts that occurred on 20 July 2001 because defendant was not "convicted" for the "same act" under federal law. This assignment of error is overruled.

II. Motion to Continue

[2] Defendant next contends that the trial court committed reversible error by denying his motion to continue, pending delivery of a transcript from the federal sentencing hearing. Defendant argues that the trial court deprived him of his constitutional right to present his defense. We disagree.

In reviewing a trial court's ruling on a motion to continue,

> "[i]t is well-established that a motion to continue is ordinarily addressed to the trial judge's sound discretion and his ruling thereon will not be disturbed except upon a showing of abuse of discretion. However, when a motion to continue is based on a constitutional right, the question presented is a reviewable question of law."

State v. Smith, 155 N.C. App. 500, 505, 573 S.E.2d 618, 622 (2002) (quoting *State v. Poole*, 305 N.C. 308, 318, 289 S.E.2d 335, 341-42 (1982)), *disc. review denied*, 357 N.C. 255, 583 S.E.2d 287 (2003).

"To establish a constitutional violation, a defendant must show that he did not have ample time to . . . investigate, prepare and present his defense." *State v. Tunstall*, 334 N.C. 320, 329, 432 S.E.2d 331, 337 (1993), *cert. denied*, 543 S.E.2d 144, *cert. denied*, 543 S.E.2d 882, *cert. denied*, 544 S.E.2d 242 (2000). In order to demonstrate that the time allowed to prepare a defense was inadequate, defendant must show "how his case would have been better prepared had the continuance been granted or that he was materially prejudiced by the denial of his motion." *State v. Covington*, 317 N.C. 127, 130, 343 S.E.2d 524, 526 (1986). Here, although defendant was unable to obtain a transcript of the federal sentencing hearing, defendant presented Robert Hale's testimony that the federal indictment did not adopt the 20 July 2001 offenses. As previously discussed, based on this testimony, the trial court properly concluded that N.C. Gen. Stat. § 90-97 was not a defense to defendant's state prosecution. Since this defense fails as a matter of law, defendant has not shown that he was materially preju-

diced by the denial of his motion or that he would have been better prepared had he been able to obtain a transcript of the hearing. This assignment of error is overruled.

Based on the foregoing, we affirm.

Affirmed.

Judges ELMORE and ARROWOOD concur.

KAREN SHEHAN, AS ADMINISTRATRIX FOR THE ESTATE OF KENNETH JAMES BISHOP, PLAINTIFF v. GASTON COUNTY, GASTON COUNTY CHIEF OF POLICE BILL FARLEY, IN HIS CAPACITY AS GASTON COUNTY CHIEF OF POLICE, JASON CARY MAY, IN HIS CAPACITY AS AN OFFICER OF THE GASTON COUNTY POLICE DEPARTMENT, AND JOSEPH BRADSHAW, INDIVIDUALLY, DEFENDANTS

No. COA07-1138

(Filed 3 June 2008)

Collateral Estoppel and Res Judicata— wrongful death—proximate cause—third party's Alford plea—collateral estoppel inapplicable

The administratrix of a deceased pedestrian's estate was not collaterally estopped from adjudicating her claim that defendant police officer's negligence in running over the pedestrian's body while responding to a call that the pedestrian was lying in the roadway after he had been assaulted by a third person was a proximate cause of the pedestrian's death, based upon the third person's Alford plea to voluntary manslaughter of the pedestrian, because neither plaintiff administratrix nor any defendant was a party to the criminal proceeding involving the third party; plaintiff had no opportunity to litigate the issue of proximate cause during the criminal proceeding; and plaintiff alleged concurrent negligence by the third party and defendant officer so that the third party's negligence does not preclude defendant officer's negligence.

Appeal by defendants from order entered 30 April 2007 by Judge Beverly T. Beal in Gaston County Superior Court. Heard in the Court of Appeals 20 February 2008.

Campbell & Associates, LLP, by Payton D. Hoover, for plaintiff.

Stott, Hollowell, Palmer & Windham, LLP, by Martha Raymond Thompson and Aaron C. Low, for defendants.

ELMORE, Judge.

Gaston County, Gaston County Chief of Police Bill Farley, and Jason Cary May (collectively, defendants) appeal an order denying their motion for judgment on the pleadings on the issue of collateral estoppel. For the reasons stated below, we affirm the order of the trial court.

Karen Shehan, as administratrix for the Estate of Kenneth James Bishop (plaintiff), sued defendants and Joseph Bradshaw for wrongful death. Bradshaw is not a party to this appeal. Plaintiff's complaint and amended complaints allege the following facts: During the early hours of 9 June 2005, Mr. Bishop was walking on an unpaved right-of-way portion of N.C. 279, near Cherryville in Gaston County. Bradshaw confronted Mr. Bishop and, after arguing with him, struck him on the head with a blunt instrument. Bradshaw left Mr. Bishop, now suffering from a severe head injury, in the northbound lane of N.C. 279. A couple in a passing car discovered Mr. Bishop lying in the road and called 911. The driver "angled his car in the center turn lane of N.C. 279, with his lights on, to aid responding emergency vehicles in locating Mr. Bishop." Defendant May, a Gaston County Police Officer, was traveling northbound on N.C. 279 and responded to the 911 call. At the time, defendant May was acting in his official capacity as a Gaston County police officer and employee of defendant Gaston County Police Department.

When defendant May reached the stretch of N.C. 279 where Mr. Bishop was lying, defendant May ran over Mr. Bishop's body with his patrol car and dragged the body more than ten feet. Plaintiff alleged that she has located a person who is reasonably expected to qualify as an expert witness who will testify that Mr. Bishop was alive when defendant May ran over him. This testimony would be based on a review of defendant Gaston County's "Report of Investigation by the Medical Examiner," "Accident Report," "911 Dispatch Tapes," and "Autopsy Report." In their brief, defendants deny that Mr. Bishop was killed when defendant May ran over him.

On 7 October 2005, Bradshaw entered an *Alford* plea in which he entered a plea of guilty to voluntary manslaughter for his part in the

death of Mr. Bishop. Pursuant to the *Alford* plea, Bradshaw did not admit guilt, but instead acknowledged that it was in his best interest to plead guilty and that he understood that he would be treated as being guilty whether or not he admitted that he was in fact guilty.

Plaintiff alleged in her complaint that "the negligence of Joseph Bradshaw was *concurrent* with the negligence of Defendants Gaston County, the Gaston County Police Department and Gaston County Police Officer Jason May . . . in proximately causing the death of Kenneth Bishop and the injuries to the plaintiff." (Emphasis added). Defendants filed an amended answer on 19 February 2007 in which they asserted as a defense that Bradshaw's actions and omissions "constitute superceding, intervening, insulating actions and omissions, and further rise to the standard of gross negligence, intentional or willful actions and/or criminal acts; all of which bar any purported claims against these answering defendants."

Defendants also asserted a defense and crossclaim in the 19 February 2007 amended answer that states:

> If it be determined that these answering Defendants were in any way negligent or liable to the Plaintiff, and that such negligence was the proximate cause of the Plaintiff's damages, if any, or that these Defendants were otherwise in any way liable to the Plaintiff, all of which has been and is once again denied, then it is alleged that Defendant Bradshaw was negligent as alleged above and otherwise, and these Defendants / [sic] allege that such negligence was primary and active and was the proximate cause of the Plaintiff's damages, if any, and these Defendants' negligence, if any, was secondary and passive and that by reason of the matters herein stated, these Defendants are entitled to be indemnified by Defendant Bradshaw with respect to any judgment, award, cost, expenses, or attorneys fees the Plaintiff or any other party may recover of these Defendants in this action.

The Assistant Clerk of Superior Court in Gaston County entered default against Bradshaw as to the crossclaim on 16 April 2007.

On 20 March 2007, defendants filed a motion for judgment on the pleadings and dismissal of plaintiff's complaint, pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(c), "on the grounds of collateral estoppel, sovereign immunity, public official immunity, and other forms of governmental immunity." On 30 April 2007, the trial court denied defendant's Rule 12(c) motion as to the issue of collateral estoppel. The court

noted that "counsel for the moving defendants orally announced that the other grounds for 12(c) were not being presented at this time, and are therefore not considered or ruled upon at this time . . . ." The court issued the order "after reviewing the pleadings in the Court file, along with 05 CRS 60553, the criminal file referenced in the Amended Answer of the moving defendants, and after hearing arguments of counsel for the moving defendants and for plaintiff."

Defendants now appeal the trial court's 30 April 2007 order denying their motion for judgment on the pleadings. They argue that no genuine issue of material fact exists as to collateral estoppel, and therefore they are entitled to judgment on the pleadings as a matter of law.

We review *de novo* the trial court's denial of a 12(c) motion for judgment on the pleadings. *Carpenter v. Carpenter*, 189 N.C. App. 755, 757, 659 S.E.2d 762, —— (2008) (citations omitted)

> 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. 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 nonmoving party.

Id. at 757, 659 S.E.2d at —— (citations and quotations omitted). "[C]ollateral estoppel precludes the subsequent adjudication of a previously determined issue, even if the subsequent action is based on an entirely different claim." *Gregory v. Penland*, 179 N.C. App. 505, 513, 634 S.E.2d 625, 631 (2006) (quoting *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004)).

> For defendant[s] "to assert a plea of collateral estoppel under North Carolina law as traditionally applied, [defendants] would need to show that [1] the earlier suit resulted in a final judgment on the merits, [2] that the issue in question was identical to an issue actually litigated and necessary to the judgment, and [3] that both [defendants] and [plaintiff] were either parties to the earlier suit or were in privity with parties." *Thomas M. McInnis & Assocs., Inc. v. Hall*, 318 N.C. 421, 429, 349 S.E.2d 552, 557 (1986). The Court in *Hall*, however, went on to abandon the third requirement, commonly called "mutuality," when collateral estoppel is being used "against a party who has previously had a full and fair opportunity to litigate a matter and now seeks to reopen

> the identical issues with a new adversary." *Id.* at 434, 349 S.E.2d at 560 . . . .

Gregory, 179 N.C. App. at 513-14, 634 S.E.2d at 631.

Here, defendants are using collateral estoppel defensively, which eliminates the "privity" or "mutuality" requirement. "Defensive use of collateral estoppel means that a stranger to the judgment, ordinarily the defendant in the second action, relies upon a former judgment as conclusively establishing in his favor an issue which he must prove as an element of his defense." *Mays v. Clanton*, 169 N.C. App. 239, 241, 609 S.E.2d 453, 455 (2005) (citation and quotations omitted). In this case, both defendants and plaintiff are strangers to the original judgment, Bradshaw's voluntary manslaughter conviction based on his *Alford* plea. The only parties to Bradshaw's judgment were Bradshaw and the State. Plaintiff had *no* opportunity to litigate the issue of proximate cause during Bradshaw's plea hearing. Even if Bradshaw had proceeded to trial, plaintiff would not have had a "full and fair opportunity to litigate the matter."

Defendants rely on *Mays* to support their defensive use of collateral estoppel against plaintiff. The plaintiff in *Mays*, Arthur Lee Mays, "engaged in a physical altercation" with a Taylorsville police officer after a Christmas Parade. *Id.* at 240, 609 S.E.2d at 454-55. The officer arrested Mays. In 2001, Mays filed a civil suit against the officer, "the Town of Taylorsville, and the Taylorsville Police Department alleging battery, false imprisonment, negligent hiring, and negligent supervision." *Id.*, 609 S.E.2d at 454. In 2002, Mays was convicted by a jury of "assaulting a public officer with a deadly weapon and simple assault . . . ." *Id.*, 609 S.E.2d at 455. In 2003, the defendants moved for summary judgment on the basis of collateral estoppel, and the trial court granted their motion. *Id.* Mays appealed to this Court, and we affirmed the trial court's order, explaining that "evidence of a prior criminal conviction is admittable in a civil suit to support a defensive use of collateral estoppel." *Id.* at 242, 609 S.E.2d at 456 (citation omitted).

Mays is easily distinguished from the case at hand: Mays had a full and fair opportunity to litigate the elements of his crimes during his criminal jury trial. He was the plaintiff in the civil trial, and his criminal convictions for assaulting a police officer with a deadly weapon and simple assault established certain elements that were also elements in his civil case. Here, plaintiff was not a party to Bradshaw's criminal proceeding and had no ability to intercede and

litigate the issue of causation.[1] Moreover, plaintiff alleged *concurrent negligence* in her complaint. Even if she had received a full and fair opportunity to litigate the issue of whether Bradshaw proximately caused Mr. Bishop's death, she still would not have had a full and fair opportunity to litigate defendants' role in Mr. Bishop's death; Bradshaw's negligence does not preclude defendants' negligence.

Accordingly, defendants could not meet the requirements of collateral estoppel as a matter of law and the trial court properly determined that a judgment on the pleadings was not appropriate. We affirm the order of the trial court.

Affirmed.

Judges McCULLOUGH and ARROWOOD concur.

CIM INSURANCE CORPORATION, GMAC DIRECT INSURANCE CO., GMAC INSURANCE COMPANY ONLINE, INC., HOME STATE COUNTY MUTUAL, INTEGON CASUALTY INSURANCE CO., INTEGON GENERAL INSURANCE CORP., INTEGON INDEMNITY CORP., INTEGON NATIONAL INSURANCE CO., INTEGON PREFERRED INSURANCE CO., INTEGON SPECIALTY INSURANCE CO., MIC GENERAL INSURANCE CORP., MIC PROPERTY AND CASUALTY INS. CORP., MOTORS INSURANCE CORPORATION, NATIONAL ALLIANCE INSURANCE CO., NATIONAL GENERAL ASSURANCE CO., NATIONAL GENERAL INSURANCE CO., NEW SOUTH INSURANCE CO., AND GMAC INSURANCE HOLDINGS, INC., PLAINTIFFS v. CASCADE AUTO GLASS, INC., DEFENDANT

No. COA07-1079

(Filed 3 June 2008)

Contracts— unilateral—acceptance by performance

Summary judgment was properly granted against defendant in a declaratory judgment action and counterclaim arising from a contract dispute concerning payments for repair or replacement of automobile glass under GMAC's glass coverage program. GMAC communicated the prices it was willing to pay defendant for services rendered, its offer stated that acceptance was by performance, and defendant performed the requested repairs. GMAC

1. That Bradshaw entered an *Alford* plea rather than undergoing a trial or entering a traditional guilty plea poses an additional issue, but one that we need not reach in this case.

paid defendant pursuant to the terms of the unilateral contracts entered into between the parties.

Appeal by defendant from judgment entered 5 April 2007 by Judge Howard E. Manning, Jr. in Wake County Superior Court. Heard in the Court of Appeals 4 March 2008.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Steven M. Sartorio and Scott A. Miskimon, for plaintiffs-appellees.

Connor Law Firm, P.L.L.C., by Gregory S. Conner; and Livgard & Rabuse, P.L.L.P., by Charles J. Lloyd, pro hac vice, for defendant-appellant.

JACKSON, Judge.

Cascade Auto Glass, Inc. ("defendant") appeals the granting of summary judgment in favor of CIM Insurance Corporation and seventeen other named plaintiffs in the instant case on 5 April 2007. For the reasons stated below, we affirm.

Defendant is an automobile glass replacement company doing business in North Carolina. The eighteen named plaintiffs ("GMAC") are all GMAC-affiliated insurance companies providing comprehensive automobile insurance coverage to insureds within North Carolina, including the repair or replacement of damaged automobile windshields. Between 1999 and 2004, defendant replaced broken windshield glass in at least 2,284 GMAC-insured vehicles, over 525 of which were North Carolina vehicles.

Prior to 1999, GMAC administered its own glass coverage program, and generally paid the full amounts billed by defendant for work performed for its insureds. In 1999, GMAC entered into an agreement with Safelite Solutions—an affiliate of Safelite Auto Glass ("Safelite")—to serve as third-party administrator of its auto glass program. Thereafter, Safelite communicated the prices that GMAC would agree to pay defendant for its services, which generally were lower than what GMAC previously had paid.

Defendant disputed the Safelite prices. Notwithstanding defendant's protests, once an insured filed a claim, Safelite would send defendant a confirmation fax, including the previously stated price GMAC would pay, and a statement that "[p]erformance of services constitutes acceptance of the above price . . . ." Defendant then would

perform repair or replacement services and bill GMAC the rates it deemed "fair and reasonable." Defendant also disputed the prices Safelite provided in the confirmation faxes.

GMAC, through Safelite, submitted payments to defendant according to the prices it quoted in its various communications with defendant. Defendant accepted the payments from GMAC and deposited the money into its corporate accounts, without returning any funds to GMAC.

Defendant has had similar pricing disputes in Idaho and Washington, and brought suit in those states seeking to recover " 'unpaid' balances" from insurance carriers in those states. Defendant also threatened to file a complaint against GMAC. Consequently, on 15 February 2005, GMAC brought the instant action for declaratory judgment, seeking a declaration of the rights of the parties. In response, on 21 March 2005, defendant counterclaimed for breach of contract as to the alleged unpaid balances.

On 29 September 2006, GMAC filed a motion for summary judgment, which was heard on 19 February 2007. By that time, both the Idaho and Washington appellate courts had issued opinions affirming their respective lower courts' granting of summary judgment against defendant. *See Cascade Auto Glass, Inc. v. Idaho Farm Bureau Ins. Co.*, 141 Idaho 660, 115 P.3d 751 (2005); *Cascade Auto Glass v. Progressive Ins.*, 135 Wash. App. 760, 145 P.3d 1253 (2006), *disc. rev. denied*, 161 Wash. 2d 1012, 166 P.3d 1217 (2007). The trial court in the instant case also granted summary judgment against defendant by order filed 5 April 2007. Defendant appeals.

By its first assignment of error, defendant argues that summary judgment was inappropriate because there were genuine issues of material fact regarding whether GMAC breached the terms of its policy. We disagree.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2007). The trial court must consider the evidence in the light most favorable to the non-moving party. *See Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003). If there is any evidence of a genuine issue of material fact, a motion for summary judgment should be denied. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 471, 597 S.E.2d 674, 694 (2004).

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, 699, 314 S.E.2d 506, 508 (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 an affirmative defense 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 demonstrating the existence of a *prima facie* case. *Id.* (citation omitted).

In reviewing the evidence at summary judgment, "[a]ll inferences of fact from the proofs offered at the hearing must be drawn against the movant and in favor of the party opposing the motion." *Boudreau v. Baughman*, 322 N.C. 331, 343, 368 S.E.2d 849, 858 (1988) (citing *Page v. Sloan*, 281 N.C. 697, 706, 190 S.E.2d 189, 194 (1972)). This Court reviews an order allowing summary judgment *de novo*. *See Summey*, 357 N.C. at 496, 586 S.E.2d at 249.

In its 5 April 2007 order, the trial court based its judgment on three grounds: (1) GMAC complied with the terms of its insurance contract; (2) GMAC paid defendant in accordance with unilateral contracts GMAC entered into with defendant; and (3) defendant's actions in cashing checks sent to it by GMAC, knowing that GMAC considered those payments "final," constituted an accord and satisfaction of any potential claim defendant might assert. "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).

A unilateral contract is formed when one party makes a promise and expressly or impliedly invites the other party to perform some act as a condition for making the promise binding on the promisor. *See Gurvin v. Cromartie*, 33 N.C. 174, 179 (1850) (One mode of contract is "when one party promises, in consideration that the other will or will not do some act.")

> [W]here one makes a promise, conditioned upon the doing of an act by another, and the latter does that act, the contract is not void for want of mutuality, and the promisor is liable though the promisee did not at the time of the promise engage to do the act; for upon the performance of the condition by the promisee, the

> contract becomes clothed with a valid consideration, which relates back and renders the promise obligatory.

Erskine v. Chevrolet Motors Co., 185 N.C. 479, 489, 117 S.E. 706, 710 (1923).

In the instant case, GMAC, through Safelite, communicated the prices it was willing to pay defendant for services rendered to its insureds. These prices were communicated in several ways: (1) via letter to defendant's shops, (2) via telephone when initial claims were made, (3) via confirmation fax after claims were made but before work was performed, and (4) via eventual payment of invoices at the GMAC rate rather than defendant's rate. The confirmation faxes stated, "[p]erformance of services constitutes acceptance of the above price . . . ." Although defendant protested the stated prices, these protests admitted that the confirmation faxes constituted offers—"The purpose of this letter is to address [the confirmation faxes] and to dispel any notion that we are in agreement with the *offered pricing*."

"It is a fundamental concept of contract law that the offeror is the master of his offer. He is entitled to require acceptance in precise conformity with his offer before a contract is formed." *MacEachern v. Rockwell International Corp.*, 41 N.C. App. 73, 76, 254 S.E.2d 263, 265, *disc. rev. denied*, 297 N.C. 611, 257 S.E.2d 219 (1979) (citing *Morrison v. Parks*, 164 N.C. 197, 189, 80 S.E. 85, 86 (1913)). Here, the offer stated that acceptance was by performance. Because defendant performed the requested repairs or replacements, it accepted the terms of GMAC's offers, forming valid unilateral contracts at GMAC's stated prices. *See Id.* at 76, 254 S.E.2d at 266 ("[W]hen the offer so provides, it may be accepted by performing a specific act rather than by making a return promise." (citing *Koppers Co., Inc. v. Chemical Corp.*, 9 N.C. App. 118, 126, 175 S.E.2d 761, 767 (1970))).

GMAC paid defendant pursuant to the terms of the unilateral contracts entered into between the parties. Defendant has not been "underpaid" and is due no further payments. Therefore, summary judgment was properly granted against defendant.

Affirmed.

Judges WYNN and BRYANT concur.

VICTORIA L. ROEMER, PLAINTIFF v. PREFERRED ROOFING, INC., FORMERLY KNOWN AS PREFERRED ROOFING, L.L.C., DEFENDANT

No. COA07-1554

(Filed 3 June 2008)

Construction Claims; Statutes of Limitation and Repose—roofing system—negligence—breach of contract—breach of warranty—motion to dismiss—specific performance

The trial court did not err in a negligence, breach of contract, and breach of warranty case arising out of the installation of a new roofing system by granting defendant roofing company's motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6), because: (1) plaintiff's complaint filed 18 July 2007 alleged the roofing project was completed in the summer of 2000, and plaintiff accepted the completed project; (2) plaintiff's complaint was filed approximately seven years after substantial completion of the improvement, and thus plaintiff's action was barred by the statute of repose under N.C.G.S. § 1-50(a)(5)a prohibiting an action to recover damages for the defective or unsafe condition of an improvement to real property that is not brought within six years of substantial completion of the improvement; (3) plaintiff's claim for monetary damages only was barred by the statute of repose; and (4) plaintiff's remedy for breach of an alleged lifetime warranty claim brought more than six years from the later of the specific act or omission of defendant giving rise to the cause of action or substantial completion of the improvement lies in specific performance and not damages, and plaintiff's complaint failed to assert a claim for specific performance of the alleged lifetime warranty.

Appeal by plaintiff from order entered 15 October 2007 by Judge Richard L. Doughton in Forsyth County Superior Court. Heard in the Court of Appeals 15 May 2008.

William E. West, Jr., for plaintiff-appellant.

Robert J. Lawing and H. Brent Helms, for defendant-appellee.

TYSON, Judge.

Victoria Roemer ("plaintiff") appeals from order entered, which granted Preferred Roofing, Inc.'s ("defendant") motion to dismiss. We affirm.

I. Background

On or about 23 November 1999, plaintiff and defendant entered into a contract to remove the existing roof on plaintiff's home and replace it with a new roofing system. Several years after the project was completed, plaintiff discovered alleged defects with the roof including: (1) loose slate tiles; (2) separation of gutters from the house; and (3) rotten wood under the roof.

On 18 July 2007, plaintiff filed a complaint and alleged claims of: (1) negligence; (2) breach of contract; and (3) breach of warranty. Plaintiff's complaint asserted defendant had: (1) negligently performed its obligations under the contract; (2) failed to install the new roof in a professional and competent manner as was required by the parties' contract; and (3) failed to comply with its express lifetime warranty of the dependability and reliability of the installation of the roof. Plaintiff sought compensatory damages in an amount in excess of $10,000.00.

On 19 September 2007, defendant moved to dismiss all of plaintiff's claims. Defendant's motions to dismiss alleged: (1) plaintiff had failed to obtain valid service of process over defendant; (2) the trial court lacked jurisdiction over both defendant and the subject matter of the action; and (3) plaintiff's complaint failed to state any claim upon which relief may be granted pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Defendant withdrew its motions to dismiss challenging service of process and jurisdiction. On 12 October 2007, plaintiff filed a motion for voluntary dismissal without prejudice of her negligence and breach of contract claims.

On 15 October 2007, the trial court entered its order, which found "as a matter of law that plaintiff's [c]omplaint is barred by the applicable statute of repose and that defendant's motion to dismiss should be allowed." The trial court dismissed plaintiff's claim for damages for breach of warranty with prejudice. Plaintiff appeals.

II. Issue

Plaintiff argues the trial court erroneously dismissed her complaint under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

III. Breach of Warranty Claim

Plaintiff argues her "complaint . . . stated a claim upon which relief could be granted." We disagree.

A. Standard of Review

"A motion to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure presents the question whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *Lynn v. Overlook Development*, 328 N.C. 689, 692, 403 S.E.2d 469, 471 (1991) (citation omitted). "A statute of limitation or repose may be the basis of a 12(b)(6) dismissal if on its face the complaint reveals the claim is barred." *Forsyth Memorial Hospital v. Armstrong World Industries*, 336 N.C. 438, 442, 444 S.E.2d 423, 426 (1994) (citation omitted).

> Dismissal of a complaint is proper under the provisions of Rule 12(b)(6) of the North Carolina Rules of Civil Procedure when one or more of the following three conditions is satisfied: (1) when the complaint on its face reveals that no law supports plaintiff's claim; (2) when the complaint reveals on its face the absence of fact sufficient to make a good claim; (3) when some fact disclosed in the complaint necessarily defeats the plaintiff's claim.

Oates v. JAG, Inc., 314 N.C. 276, 278, 333 S.E.2d 222, 224 (1985) (citation omitted). "This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd*, 357 N.C. 567, 597 S.E.2d 673 (2003).

B. Analysis

N.C. Gen. Stat. § 1-50(a)(5)a (2007) states:

> No action to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property shall be brought more than six years from the later of the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of the improvement.

"[N.C. Gen. Stat. § 1-50(a)(5)a] is a statute of repose and provides an outside limit of six years for bringing an action coming within its terms." *Whittaker v. Todd*, 176 N.C. App. 185, 187, 625 S.E.2d 860, 861 (citing *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 427-28, 302 S.E.2d 868, 873 (1983)), *disc. rev. denied*, 360 N.C. 545, 635 S.E.2d 62 (2006).

"Unlike an ordinary statute of limitations which begins running upon accrual of the claim, the period contained in the statute of repose begins when a specific event occurs, regardless of whether a cause of action has accrued or whether any injury has resulted." *Black v. Littlejohn*, 312 N.C. 626, 633, 325 S.E.2d 469, 474-75 (1985) (internal citations omitted). "If the action is not brought within the specified period, the plaintiff literally has *no* cause of action. The harm that has been done is *damnum absque injuria*—a wrong for which the law affords no redress." *Boudreau v. Baughman*, 322 N.C. 331, 341, 368 S.E.2d 849, 857 (1988) (internal quotation omitted) (emphasis original).

Plaintiff's complaint, filed 18 July 2007, alleged the roofing project "was completed in the summer of 2000, and [p]laintiff accepted the completed project." Plaintiff's complaint was filed approximately seven years after "substantial completion of the improvement." N.C. Gen. Stat. § 1-50(a)(5)a. "Plaintiff's action is barred by the statute of repose which prohibits an action *to recover damages* for 'the defective or unsafe condition of an improvement to real property' that is not brought within six years of 'substantial completion of the improvement.' " *Whittaker*, 176 N.C. App. at 187, 625 S.E.2d at 861 (quoting N.C. Gen. Stat. § 1-50(a)(5)a) (emphasis supplied).

Plaintiff cites *Haywood Street Redevelopment Corp. v. Peterson Co.* for her assertion that the statute of repose does not bar their action to recover compensatory damages in an amount in excess of $10,000.00. 120 N.C. App. 832, 463 S.E.2d 564 (1995), *disc. rev. denied*, 342 N.C. 655, 467 S.E.2d 712 (1996). This Court, in *Whittaker*, addressed this argument and stated:

> In *Haywood*, the plaintiff sued for negligence, breach of contract, and breach of express and implied warranties. This Court held plaintiff's breach of warranty claims were not barred by the statute of limitations because the warranty was for a specified period of time and each day there was a breach a new cause of action accrued. In the instant case, however, plaintiff filed a complaint for monetary damages only and did not sue for breach of warranty. Thus, plaintiff's reliance on *Haywood* is misplaced. We conclude plaintiff's action for monetary damages is barred by the statute of repose, N.C. Gen. Stat. § 1-50(a)(5)a.

176 N.C. App. at 187, 625 S.E.2d at 861-62 (internal citation omitted). While plaintiff's complaint lists her third claim for relief as a breach of warranty action, plaintiff only sought compensatory damages in

an amount in excess of $10,000.00. Consistent with this Court's reasoning in *Whittaker*, plaintiff's claim for monetary damages only, is barred by the statute of repose pursuant to N.C. Gen. Stat. § 1-50(a)(5)a. 176 N.C. App. at 187, 625 S.E.2d at 861-62.

Plaintiff's remedy for breach of an alleged lifetime warranty claim that is "brought more than six years from the later of the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of the improvement[,]" lies in specific performance, and not damages. N.C. Gen. Stat. § 1-50(a)(5)a; *see* John N. Hutson, Jr. & Scott A. Miskimon, *North Carolina Contract Law* § 16-7, at 798-99 (2001) (citation omitted) ("Statutes of repose operate differently than statutes of limitation. The term of 'statute of repose' is used to distinguish ordinary statutes of limitation from those statutes that impose a deadline for filing suit unrelated to the actual accrual of the cause of action. A statute of repose serves as an unyielding and absolute barrier that prevents a plaintiff's right to bring suit even before his cause of action may accrue and functions to give a defendant a vested right not to be sued if the plaintiff fails to file within the prescribed time period.").

The trial court properly granted defendant's motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. This assignment of error is overruled.

IV. Conclusion

Plaintiff's action for monetary damages is barred by the applicable six-year statute of repose. N.C. Gen. Stat. § 1-50(a)(5)a. Plaintiff's complaint does not assert a claim for specific performance of the alleged lifetime warranty. The trial court properly granted defendant's motion to dismiss and its order is affirmed.

Affirmed.

Judges McCULLOUGH and STROUD concur.

STATE OF NORTH CAROLINA v. BILLY M. JOHNSON, DEFENDANT

No. COA07-971

(Filed 3 June 2008)

1. Criminal Law— insanity—no hearing—positive mental health examination—courtroom demeanor indicating competence

The trial court did not err by failing to conduct a hearing on an armed robbery defendant's capacity to proceed where he had filed a pro se notice of intent to rely on insanity, defendant's attorney later requested a continuance for a mental health examination, a mental health professional found defendant competent, no one requested a hearing on competence, and defendant's actions and courtroom behavior did not indicate incompetence.

2. Constitutional Law— right to self-representation—desire not clearly expressed

The trial court did not err in an armed robbery prosecution by failing to allow defendant to represent himself where defendant requested that the trial court terminate his appointed attorney but did not ask to represent himself.

Appeal by defendant from judgment entered 20 March 2007 by Judge Timothy L. Patti in Cleveland County Superior Court. Heard in the Court of Appeals 6 February 2008.

Attorney General Roy Cooper, by Special Deputy Attorney General James A. Wellons, for the State.

Russell J. Hollers, III, for defendant.

ELMORE, Judge.

A grand jury indicted Billy M. Johnson (defendant) for robbery with a dangerous weapon in 2005. Following defendant's conviction after a jury trial, the trial court sentenced defendant to 103 months' to 133 months' imprisonment. Defendant now appeals.

Three days after police arrested defendant, a district court judge entered a safekeeping order removing defendant from the county facilities to the Department of Corrections. The court's decision, which was based on defendant's refusal of necessary dialysis treatment, came after the court received a nurse's report that defendant

was refusing to cooperate with the staff, was on suicide watch, and had been throwing feces and urine.

One month later, the trial court granted defense counsel's motion to have defendant examined for the purposes of determining his competency to stand trial. Following the November 2005 examination, the forensic examiner concluded that defendant was "capable of proceeding to trial at this time."

Defendant, acting *pro se*, filed notice of his intent to rely on an insanity defense on 11 May 2006. On 25 September 2006, defendant's trial counsel filed a motion with the court requesting a continuance. The motion stated that although defendant had "from time to time" indicated that he planned to raise the defense of insanity, he had "expressed multiple intentions as to how he would ultimately proceed in this case." However, the motion indicated "[t]hat on September 22, 2006 the Defendant indicated to counsel his serious intend [sic] to proceed with an insanity defense in this matter." Stating that she was not prepared to present that defense, defendant's attorney requested a continuance "to allow for a mental health examination." The trial court granted the motion in an order entered 25 October 2006, ordering "that the Defendant shall be evaluated by the appropriate state facility . . . ."

On 20 February 2006, defendant again filed a handwritten *pro se* document with the trial court, this time requesting leave to terminate his court appointed attorney. The court took no action on defendant's request.

On 12 March 2007, the court called defendant's case for trial. Neither defendant nor his attorney mentioned anything about defendant's capacity to stand trial or his desire to terminate his attorney when the trial court asked if there were any matters that needed to be addressed. Throughout the trial, defendant was cooperative and appeared to be actively engaged in his defense. Defendant held a discussion with the court regarding his decision not to testify in his own defense, he requested that his attorney ask the trial court for an instruction on a lesser included offense, and he testified on his own behalf at his sentencing hearing. At the sentencing hearing, defendant's trial counsel stated that defendant had always treated her respectfully, and that defendant "helped me a great deal in his defense with his ideas and opinions about things."

[1] On appeal, defendant first argues that "the trial court erred in failing to conduct a hearing on [his] capacity to proceed." We disagree.

We find this Court's recent decision in *State v. Staten*, 172 N.C. App. 673, 616 S.E.2d 650 (2005), particularly helpful in our analysis. The defendant in that case, a mentally retarded man, argued that the court should have ordered a competency hearing *sua sponte*. *Id.* at 677, 616 S.E.2d at 654. As in this case, a mental health professional found that the *Staten* defendant was competent prior to trial. *Id.* at 676-77, 616 S.E.2d at 653. The *Staten* court stated,

> The question of capacity may be raised at any time by motion of the prosecutor, the defendant or defense counsel, or the court. Once a defendant's capacity to stand trial is questioned, the trial court must hold a hearing pursuant to N.C. Gen. Stat. § 15A-1002(b) (2003). A defendant has the burden of proof to show incapacity or that he is not competent to stand trial.

Id. at 678, 616 S.E.2d at 654 (quotations and citations omitted). No one requested a hearing in *Staten*; the same is true in the present case. However, as we acknowledged in *Staten*,

> [a] trial court has a constitutional duty to institute, *sua sponte*, a competency hearing *if there is substantial evidence that the accused may be mentally incompetent*. In other words, a trial judge is required to hold a competency hearing when there is a *bona fide* doubt as to the defendant's competency even absent a request.

Id. at 678, 616 S.E.2d at 654-55 (quotations and citations omitted) (emphasis in original). The issue therefore becomes whether there was *bona fide* doubt as to defendant's competency in this case. We hold that there was not.

> Evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant to a *bona fide* doubt inquiry. There are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated.

Id. at 678-79, 616 S.E.2d at 655 (quotations and citations omitted). In this case, as in *Staten*, defendant's actions and courtroom behavior did not indicate that defendant was incompetent. He participated in the proceedings, his demeanor was appropriate, and his trial counsel represented that he was competent. *See id.* at 678, 616 S.E.2d at 654 ("[T]he court gives significant weight to defense counsel's represen-

tation that a client is competent, since counsel is usually in the best position to determine if his client is able to understand the proceedings and assist in his defense.") (quotations and citations omitted). Moreover, the only examination conducted as to defendant's capacity resulted in a determination that he was fit to stand trial. As we stated in *Staten*, "where, as here, the defendant has been . . . examined relative to his capacity to proceed, and all evidence before the court indicates that he has that capacity, he is not denied due process by the failure of the trial judge to hold a hearing." *Id.* at 684, 616 S.E.2d at 658 (quotations and citations omitted) (alteration in original). The trial court did not err by choosing not to conduct a hearing.

[2] We also disagree with defendant's contention that the trial court should have allowed him to represent himself. Contrary to defendant's argument, this case is not controlled by this Court's decision in *State v. Walters*, 182 N.C. App. 285, 641 S.E.2d 758 (2007). In *Walters*, the defendant "clearly and unequivocally declared before trial that he wanted to represent himself and did not want assistance of counsel when he stated, 'I'd rather just go ahead and represent myself.' " *Id.* at 291, 641 S.E.2d at 761. Defendant in the present case merely requested that the trial court terminate his appointed attorney; at no time did he request to represent himself.

Defendant attempts to persuade this Court that any ambiguity is the fault of the trial court. Defendant argues that had the trial court conducted a hearing as defendant requested, it would have been abundantly clear that he did, in fact, wish to represent himself, and that he should not be penalized for the trial court's failure to conduct such a hearing. We are not convinced. Defendant had ample opportunity to state to the trial court that he wished to represent himself. He failed to do so. His written request that his attorney be terminated does not amount to a request to represent himself. As our Supreme Court has established, "[s]tatements of a desire not to be represented by court-appointed counsel do not amount to expressions of an intention to represent oneself." *State v. Hutchins*, 303 N.C. 321, 339, 279 S.E.2d 788, 800 (1981) (citations omitted). The trial court did not err.

Having conducted a thorough review of the briefs and record in this case, we find no error.

No error.

Judges McCULLOUGH and ARROWOOD concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 3 JUNE 2008)

AUSTIN HATCHER REALTY, INC. v. ARNOLD No. 07-1377	Brunswick (07CVS255)	Affirmed in part and reversed in part
BAKER v. BAKER No. 07-1175	Wake (06CVD2086)	Affirmed in part, remanded in part
BOWICK-RICHARDSON v. FAYETTEVILLE STATE UNIV. No. 07-983	Cumberland (07CVS2069)	Affirmed
CORBETT v. GRAY No. 07-1239	Wake (05CVS3310)	Reversed and remanded
GLENN v. TDM CORP. No. 07-1194	Ind. Comm. (I.C. No. 435536)	Affirmed
IN RE J.E.K. & L.A.F.K. No. 08-140	Haywood (06JT32-33)	Affirmed
IN RE J.M. No. 08-34	Johnston (07JA20)	Affirmed
IN RE S.J. No. 08-132	Pitt (06JT64)	Affirmed
LEE v. LEE No. 07-979	Lenoir (98CVD155)	Affirmed
MOORE v. RHODES No. 07-1394	Columbus (05CVS489)	Affirmed
NAIK v. HR PROVIDENCE RD., LLC No. 07-1285	Mecklenburg (07CVS3548)	Affirmed
SEMON v. DOZIER No. 07-1460	Buncombe (04CVS364)	Affirmed
STATE v. BAILEY No. 07-989	Cabarrus (05CRS53959) (05CRS15362)	No error
STATE v. BOHLER No. 07-1331	Moore (06CRS51158-61) (07CRS53)	No error in part, vacated and remanded in part
STATE v. CLARK No. 07-1267	Wake (04CRS88225)	No error
STATE v. CLARK No. 07-1318	Union (03CRS56971-73)	Affirmed

STATE v. EPPS No. 07-1234	Hoke (05CRS50202-03)	No error
STATE v. HARRIS No. 07-1494	Martin (05CRS50703)	No error
STATE v. WALL No. 07-1245	Alamance (05CRS59014)	No error
TAYLOR v. TAYLOR GRAPHICS/ CREATIVE GRAPHICS No. 07-1220	Ind. Comm. (I.C. NO. 379748) (I.C. NO. 379751) (I.C. NO. 952127)	Affirmed

APPENDIX

ORDER ADOPTING SUPPLEMENTAL RULES
OF PRACTICE AND PROCEDURE
FOR THE NORTH CAROLINA
eFILING PILOT PROJECT

Order Adopting Supplemental Rules of Practice and Procedure For the North Carolina eFiling Pilot Project

Supplemental Rules for the North Carolina eFiling Pilot Project are hereby adopted as described below:

SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE FOR THE NORTH CAROLINA eFILING PILOT PROJECT FOR CHOWAN AND DAVIDSON COUNTIES INITIALLY, AND THEN ALSO FOR WAKE COUNTY
Adopted May 26, 2009, *nunc pro tunc* May 15, 2009

RULE 1—INTRODUCTION

1.1—Citation to Rules. These rules shall be known as the "Supplemental Rules of Practice and Procedure for the North Carolina eFiling Pilot Project," and may be cited as the "eFiling Rules." A particular rule may be cited as "eFiling Rule ——."

1.2—Authority and Effective Date. The eFiling Rules are promulgated by the Supreme Court of North Carolina pursuant to G.S. 7A-49.5. They are effective as of May 15, 2009.

1.3—Scope and Purpose. The eFiling Rules apply to civil superior court cases and to foreclosures under power of sale filed on or after the effective date in Chowan and Davidson Counties. Upon addition of Wake County to the pilot project by the North Carolina Administrative Office of the Courts (the "AOC"), these rules shall apply to civil superior court cases and to foreclosures under power of sale filed in Wake County on or after the effective date of the implementation of the pilot project in Wake County, and the public announcement thereof by AOC. In general, these rules initially allow, but do not mandate, electronic filing by North Carolina licensed attorneys of pleadings and other documents required to be filed with

the court by the North Carolina Rules of Civil Procedure (the "Rules of Civil Procedure") and permit electronic notification of the electronic filing of documents between attorneys. Initially, they do not permit electronic filing by *pro se* parties or attorneys not licensed by the State of North Carolina, and they do not permit electronic filing of documents in cases not initially filed electronically.

1.4—Integration with Other Rules. These rules supplement the Rules of Civil Procedure and the General Rules of Practice for Superior and District Courts (the "General Rules"). The filing and service of documents in accordance with the eFiling Rules is deemed to comply with the Rules of Civil Procedure and the General Rules. If a conflict exists between the eFiling Rules and the Rules of Civil Procedure or the General Rules, the eFiling Rules shall control.

RULE 2—DEFINITIONS

2.1—"Cloak" means the process by which portions of an original document within the court's document management system are obscured when viewed electronically by all non-court personnel other than parties to the case.

2.2—"Document" means data that may be filed electronically under the eFiling Rules.

2.3—"eFiler" means a holder who makes, or who attempts, under eFiling Rule 5, to make an electronic filing or who authorizes another person to make an electronic filing using the holder's electronic identity.

2.4—"Electronic Identity" means the combination of username and password issued to a person by the AOC under eFiling Rule 3.1.

2.5—"Holder" means a person with an AOC approved electronic identity.

RULE 3—ELECTRONIC IDENTITIES

3.1—Issuance. Upon application and upon completion of the training, if any, required by the AOC, the AOC shall issue an electronic identity to any attorney who

(a) is licensed to practice law in this state;

(b) has pending or intends to file or appear in a civil superior court case or a foreclosure under power of sale in a pilot county;

(c) designates a valid and operational email address; and

(d) provides all other information required by the AOC.

3.2—Scope of Electronic Identity. Electronic identities are not case specific.

3.3—Responsibility of Holder. Each holder is responsible for the confidentiality, security, and use of the holder's electronic identity. If an electronic identity becomes compromised, or any organization or affiliation change occurs, the holder shall immediately notify the AOC and request a change to the holder's user name, password or profile information as appropriate.

3.4—Effect of Use. Use of an electronic identity constitutes:

(a) an agreement by the holder to comply with the eFiling Rules;

(b) an appearance in the matter by the holder; and

(c) acknowledgement by the holder that the holder's designated email address is current.

3.5—Use by Others. If a holder authorizes another person to file using the holder's electronic identity, the holder retains full responsibility for any filing by the authorized person, and the filing has the same effect as use by the holder. An electronic filing by use of an electronic identity is deemed to have been made with the authorization of the holder unless the contrary is shown by the holder to the satisfaction of the trier of fact by clear and convincing evidence. A filing made by use of an electronic identity without authorization of the holder is void.

RULE 4—SIGNATURES AND AUTHENTICITY

4.1—Signatures. An electronically filed document requiring a signature is deemed to be signed by the eFiler pursuant to Rule 11 of the Rules of Civil Procedure, regardless of the existence of a handwritten signature on the paper, and must contain the name, postal address, e-mail address, and State Bar number of the eFiler, and the name of the eFiler preceded by the symbol "/s/" in the location at which a handwritten signature normally would appear. However, affidavits and exhibits to pleadings with the original handwritten signatures must be scanned and filed in Portable Document Format (PDF) or TIFF format.

4.2—Signature of Person(s) Other than eFiler. An eFiler who files a document signed by two or more persons representing different parties shall confirm that all persons signing the document have agreed to its content, represent to the court in the body of the document or in an accompanying affidavit that the agreement has been obtained, and insert in the location where each handwritten signature otherwise would appear the typed signature of each person,

other than the person filing, preceded by the symbol "/s/" and followed by the words "by permission." Thus, the correct format for the typed signature of a person other than the person filing is: "/s/ Jane Doe by permission." Unless required by these Rules, a document filed electronically should not be filed in an optically scanned format displaying an actual signature.

4.3—Authenticity. Documents filed electronically in accordance with the eFiling Rules and accurate printouts of such documents shall be deemed authentic.

4.4—Preservation of Originals. The eFiler shall retain originals of each filed document until a final determination of the case is made by a court of competent jurisdiction. The court may order the eFiler to produce the original document.

RULE 5—ELECTRONIC FILING AND SERVICE

5.1—Permissive Electronic Filing. Pending implementation of revised rules by the North Carolina Supreme Court, electronic filing by a licensed North Carolina attorney is permitted only to commence a proceeding or in a proceeding that was commenced electronically. Electronic filing is not required to commence a proceeding. Subsequent filings made in a proceeding commenced electronically may be electronic or non-electronic at the option of the filer.

5.2—Exceptions to Electronic Delivery. Pleadings required to be served under Rule 4 and subpoenas issued pursuant to Rule 45 of the Rules of Civil Procedure must be served as provided in those rules and not by use of the electronic filing and service system. Unless otherwise provided in a case management order or by stipulation, filing by or service upon a *pro se* party is governed by eFiling Rule 5.3.

5.3—*Pro se* Parties. A party not represented by counsel shall file, serve and receive documents pursuant to the Rules of Civil Procedure and the General Rules.

5.4—Format. Documents must be filed in PDF or TIFF format, or in some other format approved by the court, in black and white only, unless color is required to protect the evidentiary value of the document, and scanned at 300 dots per inch resolution.

5.5—Cover Sheet Not Required. Completion of the case initiation requirements of the electronic filing and service system, if it contains all the required fields and critical elements of the filing, shall constitute compliance with the General Rules as well as G.S. 7A-34.1, and no separate AOC cover sheet is required.

5.6—Payment of Filing Fees. Payment of any applicable filing and convenience fees must be done at the time of filing through the

electronic payment component of the electronic filing and service system. Payments shall not include service of process fees or any other fees payable to any entity other than the clerk of superior court.

5.7—Effectiveness of Filing. Transmission of a document to the electronic filing system in accordance with the eFiling Rules, together with the receipt by the eFiler of the automatically generated notice showing electronic receipt of the submission by the court, constitutes filing under the North Carolina General Statutes, the Rules of Civil Procedure, and the General Rules. An electronic filing is not deemed to be received by the court without receipt by the eFiler of such notice. If, upon review by the staff of the clerk of superior court, it appears that the filing is inaccessible or unreadable, or that prior approval is required for the filing under G.S. 1-110, or for any other authorized reason, the clerk's office shall send an electronic notice thereof to the eFiler. Upon review and acceptance of a completed filing, personnel in the clerk's office shall send an electronic notice thereof to the eFiler. If the filing is of a case initiating pleading, personnel in the clerk's office shall assign a case number to the filing and include that case number in said notice. As soon as reasonably possible thereafter, the clerk's office shall index or enter the relevant information into the court's civil case processing system (VCAP).

5.8—Certificate of Service. Pending implementation of the court's document management system, and the integration of the electronic filing and service system with the court's civil case processing system, a notice to the eFiler showing electronic receipt by the court of a filing does not constitute proof of service of a document upon any party. A certificate of service must be included with all documents, including those filed electronically, indicating thereon that service was or will be accomplished for applicable parties and indicating how service was or will be accomplished as to those parties.

5.9—Procedure When No Receipt Is Received. If a receipt with the status of "Received" is not received by the eFiler, the eFiler should assume the filing has not occurred. In that case, the eFiler shall make a paper filing with the clerk and serve the document on all other parties by the most reasonably expedient method of transmission available to the eFiler, except that pleadings required to be served under Rule 4 and subpoenas issued pursuant to Rule 45 of the Rules of Civil Procedure must be served as provided in those rules.

5.10—Retransmission of Filed Document. After implementation of the court's document management system, if, after filing a document electronically, a party discovers that the version of

the document available for viewing through the electronic filing and service system is incomplete, illegible, or otherwise does not conform to the document as transmitted when filed, the party shall notify the clerk immediately and, if necessary, transmit an amended document, together with an affidavit explaining the necessity for the transmission.

5.11—Determination of Filing Date and Time. Documents may be electronically filed 24 hours a day, except when the system is down for maintenance, file saves or other causes. For the purpose of determining the timeliness of a filing received pursuant to Rule 5.7, the filing is deemed to have occurred at the date and time recorded on the receipt showing a status of "Received."

5.12.—Issuance of Summons. At case initiation, the eFiler shall include in the filing one or more summons to be issued by the clerk. Upon the electronic filing of a counterclaim, crossclaim, or third-party complaint, the eFiler may include in the filing one or more summons to be issued by the clerk. Pursuant to Rule 4 of the Rules of Civil Procedure, the clerk shall sign and issue those summons and scan them into the electronic filing and service system. The eFiler shall print copies of the filed pleading and summons to be used for service of process. Copies of documents to be served, any summons, and all fees associated with service shall be delivered by the eFiler to the process server. Documents filed subsequent to the initial pleading shall contain a certificate of service as provided in Rule 5.8.

RULE 6—SEALED DOCUMENTS AND PRIVATE INFORMATION

6.1—Filing of Sealed Documents. A motion to file a document under seal may be filed electronically or in paper form and designated "Motion to Seal." A document which is the subject of a motion to seal must be submitted to the court in paper form for *in camera* review. Documents submitted under seal in paper form shall be retained by the clerk under seal until a final ruling is made on the motion to seal. The court may partially grant the motion and order the submission of a redacted version to be made a part of the record. If the court authorizes the filing of a redacted version, the filer shall perform the redaction authorized by the court, and re-file the redacted version in paper form. A paper copy of any order authorizing the filing of a document under seal or the filing of a redacted document must be attached to the document and delivered to the clerk's office. Upon implementation of the court's document management system, documents for which a motion to seal was denied, documents unsealed by order of the court, and redacted versions ordered filed by the court shall be scanned into the electronic filing and service system by personnel in

the clerk's office as soon as reasonably possible. Sealed documents and original versions of documents later ordered filed in redacted form shall be retained in paper form under seal pending further orders of the court.

6.2—Requests by a Party for Sealing of Previously Filed Documents. Any attorney licensed in North Carolina and representing a party may file, electronically or in paper form, a motion to seal all or part of any previously filed document, regardless of who previously filed that document. A party not represented by counsel may file such a motion in paper form only. The court may partially grant the motion and order the movant to submit a redacted version to be made a part of the record. A paper copy of any order authorizing the filing of a redacted replacement document must be attached to the redacted version and delivered to the clerk's office. As soon as practicable after receiving the order sealing a previously filed document or replacing it with a newly filed redacted version, the clerk shall print, seal and retain the original document in paper form pending further orders of the court, and, when so ordered, remove and replace the original document in the electronic filing and service system with the redacted version.

6.3—Private Information. Except where otherwise expressly required by law, filers must comply with G.S. 132-1.10(d) to exclude or partially describe sensitive, personal or identifying information such as any social security, employer taxpayer identification, drivers license, state identification, passport, checking account, savings account, credit card, or debit card number, or personal identification (PIN) code or passwords from documents filed with the court. In addition, minors may be identified by initials, and, unless otherwise required by law, social security numbers may be identified by the last four numbers. It is the sole responsibility of the filer to omit or redact non-public and unneeded sensitive information within a document. The clerk of superior court will not review any document to determine whether it includes personal information.

6.4—Requests for Redaction or Removal of a Document by a Non-party. Any person not a party to a proceeding has the right to request the removal or redaction of all or part of a document previously filed and available on-line for public viewing in the electronic filing and service system, if the document contains sensitive, personal or identifying information about the requester, by filing a request in compliance with G.S. 132-1.10(f). As soon as practicable after the receipt of such a request, the clerk shall (1) prepare a redacted version of the electronic document removing the identifying information identified by the requester, or (2) otherwise cloak the affected portions of the document in the electronic filing and service system, so

that the designated portions of the document are not viewable by the public on-line. The request for redaction or removal is not a public record and access thereto is restricted to the clerk of superior court or the clerk's staff, or upon order of the court. The original unredacted or uncloaked electronic version of the document shall remain available to parties to the proceeding.

RULE 7—COMMUNICATION OF MATERIAL NOT FILED

7.1—Communication with Court. A communication with the court that is not filed electronically must be simultaneously sent by the author to all attorneys for parties in the case. If a party is not represented by counsel, or if an attorney cannot receive e-mail, the communication shall be sent to such party or attorney by the most reasonably expedient method available to the sending party. The communication to other parties shall contain an indication, such as "cc via e-mail," indicating the method of transmission.

7.2—Discovery. Discovery and other materials required to be served on other counsel or a party, and not required to be filed with the court, shall not be electronically filed with the court**.**

RULE 8—GOOD FAITH EFFORTS

Parties shall endeavor reasonably, and in good faith, to resolve technical incompatibilities or other obstacles to electronic communications among them, provided that no extensive manual reformatting of documents is required. If a party asserts that it did not receive an e-mail communication or could not fully access its contents, the sending party shall promptly forward the communication to the party by other means. Any attempt or effort to avoid, compromise or alter any security element of the electronic filing and service system is strictly prohibited and may subject the offending party to civil and criminal liability. Any person becoming aware of evidence of such an occurrence shall immediately notify the court.

RULE 9—ORDERS, DECREES AND JUDGMENTS

9.1—Proposed Order or Judgment. Any proposed order or judgment shall be tendered to the court in paper form or as an electronic filing in Microsoft Office Word 2000 format or other file format approved by the court.

9.2—Entry of Order, Judgment and Other Matters. Upon implementation of the document management component of the electronic filing and service system, a judge, or the clerk of superior court when acting as the trier of fact, may file electronically all orders, decrees, judgments and other docket matters. Such filing shall con-

stitute entry of the order, decree, judgment or other matter pursuant to Rule 58 of the Rules of Civil Procedure. Each order, judgment, or decree must bear the date and the name of the judge or clerk issuing the order. Signed orders, decrees and judgments in paper form shall be forwarded as soon as reasonably possible by the judge to the clerk of superior court, and shall be deemed entered under Rule 58 of the Rules of Civil Procedure when filed with the clerk. As soon as reasonably possible, personnel in the clerk's office shall scan the document into the electronic filing and service system.

9.3—Notice of Entry. After implementation of the court's document management system and the integration of the electronic filing and service system with the court's civil case processing system, immediately upon the electronic entry of an order, decree, judgment or other matter, the electronic filing and service system shall broadcast a notification of electronic filing to all persons registered electronically to participate in the case. Transmission of the notice of entry constitutes service pursuant to Rule 58 of the Rules of Civil Procedure.

These Supplemental Rules for the North Carolina eFiling Pilot Project shall be effective on the 15th day of May, 2009.

Adopted by the Court in Conference this 26th day of May, 2009, *nunc pro tunc* 15 May 2009. These rules shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals. These rules shall also be published as quickly as practicable on the North Carolina Judicial Branch of Government Internet Home Page (http://www.nccourts.org).

Hudson, J.
For the Court

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APPEAL AND ERROR—Continued

CHILD ABUSE AND NEGLECT—Continued

mined that custody should be continued in DSS based on findings of fact. **In re A.S., 679.**

Dispositional order—ambiguous—remanded—The trial court's dispositional order for a child adjudicated neglected was vacated and remanded where the appellate court could not determine what was found or what the court intended to order. **In re A.S., 679.**

Evidence concerning siblings—no objection—A child neglect adjudication was supported by sufficient evidence where DSS offered into evidence, without objection, reports from DSS and the guardian ad litem that provided support for the court's findings regarding the other children in the family. Without an objection, the issue was not preserved for appellate review. Although DSS requested that the trial court take judicial notice of the facts of the other children's cases, it is not clear whether the court ever specifically ruled on that request. **In re A.S., 679.**

Findings concerning grandparents—supported by evidence—In a hearing adjudicating child abuse and neglect and the cessation of reunification efforts with the parents, the evidence supported the trial court's findings concerning the grandparents' unwillingness to acknowledge the nature and source of the child's injuries or to deny respondent (the mother) access to the child if the child was placed in their home. **In re B.W., 328.**

Infant's injuries—aggravated circumstances—The serial infliction of multiple fractures of the skull, leg, and ribs upon a prematurely born and malnourished infant during the first eight weeks of life qualifies as "aggravated circumstances" under N.C.G.S. § 7B-101(2). **In re B.W., 328.**

Newborn still in hospital—older sibling abused—evidence of neglect of newborn—sufficiency—The facts relating to a sibling were sufficient to support a conclusion that a newborn who had not yet left the hospital was neglected. **In re A.S., 679.**

Nonsecure custody order—entered by magistrate—trial court jurisdiction—Even assuming that the magistrate lacked authority to enter a nonsecure custody order for an allegedly neglected child, no authority was cited suggesting that this stripped the trial court of subject matter jurisdiction. The trial court later entered a nonsecure custody order pending further hearings. **In re A.S., 679.**

Reunifications efforts ceased—aggravating circumstances—no abuse of discretion—The trial court's decision to cease reunification efforts was supported by the necessary finding under N.C.G.S. § 7B-507(b)(2) where the court determined that the child's injuries constituted an aggravated circumstance under N.C.G.S. § 7B-101(2). Nothing in the statute requires another court to find aggravated circumstances before reunification efforts are stopped. There was no abuse of discretion in ceasing reunification efforts given respondent's lack of concern for the child and the lack of an inclination to come to terms with the gravity of the abuse he suffered while in her care. **In re B.W., 328.**

Statement of standard of proof—sufficiency—The trial court's adjudication of child neglect was sufficient where it stated the standard of proof with the language "from the foregoing, the court concludes through clear, cogent and convincing evidence. . . ." **In re A.S., 679.**

CHILD ABUSE AND NEGLECT—Continued

Statements by attorney—not evidentiary—not prejudicial—In a hearing adjudicating child abuse and neglect and the cessation of reunification efforts with the parents, any error in allowing statements by an attorney regarding pending criminal charges was not prejudicial because the trial court's finding on the issue was not necessary to its disposition. **In re B.W., 328.**

Subject matter jurisdiction—filing of petition—The trial court had subject matter jurisdiction to consider a neglected child petition where the petition did not contain a "filed" stamp and a magistrate had made a handwritten notation that he had filed it. The record indicates that the petition was in fact filed with the clerk's office; even if the petition was filed after issuance of the nonsecure custody order, the district court would not be deprived of jurisdiction. Moreover, the district court later entered an order for continued nonsecure custody which specifically found subject matter jurisdiction because a petition was filed. **In re A.S., 679.**

CHILD SUPPORT, CUSTODY, AND VISITATION

Child custody—domestic partners—focus on legal parent's intentions—The trial court did not err in a domestic partner's child custody case when applying the test under *Price*, 346 N.C. 68 (1997), by basing its determination in part on defendant biological mother's intentions as to plaintiff domestic partner's role in the children's lives because the court's focus must be on whether the legal parent has voluntarily chosen to create a family unit and to cede to the third party a sufficiently significant amount of parental responsibility and decision-making authority to create a permanent parent-like relationship with his or her child. **Estroff v. Chatterjee, 61.**

Child custody—domestic partners—sufficiency of findings of fact—third-party's burden of proof—The trial court did not err in a child custody case brought by a domestic partner by determining that plaintiff failed to meet her burden of proof under *Price*, 346 N.C. 68 (1997), because the findings reflect that defendant did not choose to create a family unit with two parents, did not intend for plaintiff to be a de facto parent, did not allow plaintiff to function fully as a parent, but instead saw plaintiff as a significant loving adult caretaker as modeled on the roles of adults to which defendant was accustomed as a result of her Indian upbringing; the fact that a plaintiff provided caretaking and financial support, engaged in parent-like duties and responsibilities, and had a substantial bond with the child does not necessarily meet the requirements of *Price* and *Mason*; and the findings are sufficient to support the trial court's determination that plaintiff did not establish that defendant engaged in conduct inconsistent with her paramount constitutionally-protected status as a parent. **Estroff v. Chatterjee, 61.**

Child custody—same sex parents—best interest of child standard—In a child custody case involving same sex domestic partners, the question was whether the birth parent had acted inconsistently with her paramount parental right, making the applicable standard the best interest of the child. The nature of the relationship is of no legal significance to custody and visitation, and the question of whether a domestic partner may acquire the status of a parent is not presented here. **Mason v. Dwinnell, 209.**

CRIMINAL LAW—Continued

CRIMINAL LAW—Continued

DAMAGES AND REMEDIES

REAL PROPERTY—Continued

signatory of a lease when she signed the lease, and the trial court did not err by granting defendants' motion for summary judgment. Depositions showed that the person signing the lease fluctuated between lucidity and confusion, but there was no indication that she was not lucid or lacked the mental incapacity to appreciate what she was doing in the forty-five minutes leading up to the signing of the lease. **Barbee v. Johnson, 349.**

Consent to lease—ratification—summary judgment—There was a genuine issue of fact as to whether plaintiff knew that monthly payments received from defendants were made in accordance with an agreement in a lease, and the trial court erred by entering summary judgment for defendant. Although there was a genuine issue about whether plaintiff authorized his wife to sign his name to a lease, there was also an issue of ratification. **Barbee v. Johnson, 349.**

Lease—undue influence in obtaining signature—There was a genuine issue of fact as to whether defendants exercised undue influence in obtaining a signature on a lease, and the trial court should not have granted summary judgment for defendants. It is clear that at least three of the seven factors indicative of undue influence exist in this case, as well as the issue of consideration for the lease's option to purchase. **Barbee v. Johnson, 349.**

RULES OF CIVIL PROCEDURE

Rule 12(b)(6)—treated as summary judgment—The trial court properly treated a motion to dismiss under Rule 12(b)(6) as a motion for summary judgment where it considered matters outside the pleadings. **Barbee v. Johnson, 349.**

SCHOOLS AND EDUCATION

Assignment of students to year-round schools—informed parental consent not required—The trial court erred by concluding the a local board of education may not assign students to year-round schools without informed parental consent. **Wake Cares, Inc. v. Wake Cty. Bd. of Educ., 1.**

Board of education's authority—operation of year-round schools—Local boards of education have the authority to create and operate year-round schools. **Wake Cares, Inc. v. Wake Cty. Bd. of Educ., 1.**

Standing—challenge to mandatory year-round schools—parents of students—The individual plaintiffs, parents of public school students, have standing to bring a declaratory judgment action individually and as guardians ad litem of their children challenging a county board of education's plan to assign students to year-round schools on a mandatory basis. **Wake Cares, Inc. v. Wake Cty. Bd. of Educ., 1.**

Standing—nonprofit organization—associational basis inapplicable—Wake Cares, Inc., a nonprofit organization, did not have associational standing to bring a declaratory judgment action challenging a county board of education's plan to convert traditional calendar schools to year-round schools and then to assign students to those schools on a mandatory basis because the organization has no members and could not seek relief "on behalf of its members." **Wake Cares, Inc. v. Wake Cty. Bd. of Educ., 1.**

WORKERS' COMPENSATION—Continued

from plaintiff's vocational expert was credible, and the evidence supported what was essentially a finding of futility. The burden then shifted to defendants, which they did not meet as the Commission rejected as not credible defendants' evidence that suitable jobs were available which plaintiff was capable of obtaining. **Roset-Eredia v. F.W. Dellinger, Inc., 520.**

Exclusive remedy—employment conceded—The Workers' Compensation Act is the exclusive remedy for a resident advisor in a university residence hall who allegedly developed asthma from mold and mildew in the building. The determinative factor is whether an employee-employer relationship exists and plaintiff conceded numerous times that he was an employee of defendant university. **Christopher v. N.C. State Univ., 666.**

Lien—recovery from judgment—last clear chance—The trial court did not err by finding that APAC was not entitled to recover on its workers' compensation lien from the negligence judgment awarded to its employee, plaintiff Outlaw, after the steam roller he was driving was struck from behind by a truck. Even where last clear chance was submitted and found by the jury (as here), the General Assembly intended for N.C.G.S. § 97-10.2(e) to apply. **Outlaw v. Johnson, 233.**

Maximum medical improvement—disability—In a workers' compensation case, the Industrial Commission properly found from the medical evidence that plaintiff had reached maximum medical improvement; properly concluded under this factual scenario (in which plaintiff did not establish a loss of wage-earning capacity) that temporary total disability ended when plaintiff reached maximum medical improvement; had competent evidence in differing medical opinions to support a finding that plaintiff's impairment rating fell between zero and six percent and averaged three percent; and properly determined plaintiff's compensation and defendant's excess payments. **Hogan v. Terminal Trucking Co., 758.**

Maximum medical improvement—evidence—The Industrial Commission did not err by finding that plaintiff had reached maximum medical improvement on a certain date and that she was not entitled to total disability benefits after that date. **Cross v. Falk Integrated Techs., Inc., 274.**

Occupational disease—statute of limitations—date of injury—date of disability—The Industrial Commission did not err by concluding that plaintiff's claim for workers' compensation death benefits was not barred by the statute of limitations set forth in N.C.G.S. § 97-38 because the fact that this is an occupational disease case as opposed to an injury by accident case reveals the date relevant for purposes of the statute of limitations is the date of disability rather than the date of injury; the statute of limitations began to run on 1 April 1999, the date the Commission found that decedent became incapable of earning the wages that she was receiving at the time of the injury; and the fact that decedent began experiencing symptoms of her occupational disease on 1 April 1997, the stipulated date of injury, is irrelevant, as decedent maintained her original earning capacity until 1 April 1999. **Kelly v. Duke Univ., 733.**

Payments made but not due—deduction from permanent award—remanded for specific findings—The Industrial Commission was within its authority in a workers' compensation case in specifying that amounts were not "due and payable" when made and that those payments be deducted from plaintiff's award

WORKERS' COMPENSATION—Continued

of permanent partial impairment benefits. However, the Commission did not specify the exact amount of the credit and the matter was remanded for appropriate findings. **Cross v. Falk Integrated Techs., Inc., 274.**

Repair of truck—best evidence rule not applicable—In a workers' compensation action involving a truck accident, a manager's testimony about the inspection and repair of the truck was competent even though plaintiff contended that it was not competent under the best evidence rule. The best evidence rule did not apply since the challenged finding did not seek to establish the content of a writing. **Hogan v. Terminal Trucking Co., 758.**

Return to school after release to work—not supportive of disability—The choice of a workers' compensation plaintiff to return to school after her release for work did not support her contention of disability, despite her argument that pursuit of an engineering degree was a reasonable effort to find employment. Educational pursuits have been approved as proper vocational rehabilitation after disability has been established, but not for purposes of establishing disability. Moreover, defendants offered vocational assistance and identified several available positions that were suitable for plaintiff without further education. **Cross v. Falk Integrated Techs., Inc., 274.**

Termination under company policy regarding accidents—stipulations—An Industrial Commission finding and conclusion that plaintiff was terminated by his employer pursuant to a company policy regarding accidents was adequately supported by the stipulations of the parties and was binding on appeal. **Hogan v. Terminal Trucking Co., 758.**

Third-party settlement—finding not supported by evidence—not prejudicial—While the evidence did not support an Industrial Commission finding regarding plaintiff's third-party settlement in a workers' compensation case, the finding was not crucial to the determination of plaintiff's entitlement to benefits and the same result would have obtained without the questioned finding. There was no prejudice. **Cross v. Falk Integrated Techs., Inc., 274.**

Total disability compensation—separate award for loss of vision—The Industrial Commission erred in a workers' compensation case by awarding decedent's estate a separate award of 240 weeks for loss of vision under N.C.G.S. § 97-31 when decedent had already been awarded total disability compensation under N.C.G.S. § 97-29. **Kelly v. Duke Univ., 733.**

Updated FCE—adoption of recommendation of vocational expert and doctor—The Industrial Commission did not err by not addressing the issue of whether an updated Functional Capacity Evaluation was warranted, as defendants contended. The Commission addressed the necessity of an FCE by its adoption of the recommendation of plaintiff's vocational expert, as corroborated by plaintiff's treating physician, that plaintiff instead consult a medical specialist. **Roset-Eredia v. F.W. Dellinger, Inc., 520.**

ZONING

De novo review by superior court—properly applied—The superior court correctly applied the de novo standard of review when considering a board of adjustment decision. The conclusion that the board did not act arbitrarily or

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