NORTH CAROLINA COURT OF APPEALS REPORTS

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1. Appointed and sworn in 22 December 2009.
2. Retired 12 January 2010.
3. Resigned 7 February 2010.

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Samuel M. Tate	Morganton
John L. Whitley	Wilson

1. Appointed and sworn in 19 February 2010.
2. Appointed and sworn in 18 February 2010.
3. Appointed and sworn in 29 January 2010.
4. Appointed and sworn in 17 February 2010.

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

STATE OF NORTH CAROLINA v. RICKY KYLE CORBETT

No. COA07-856

(Filed 17 June 2008)

Appeal and Error— guilty plea—double jeopardy motion to dismiss denied

Defendant's appeal to the Court of Appeals was dismissed where defendant pled guilty in district court, that plea was stricken and indictments were issued in superior court, defendant moved to dismiss based on double jeopardy, the superior court denied that motion, and defendant entered a plea of guilty in superior court. Although defendant argued that the case is controlled by *Menna v. New York*, 423 U.S. 61, which held that a guilty plea does not necessarily waive a double jeopardy claim, that case appears to be in conflict with *State v. Hopkins*, 279 N.C. 473, and the Court of Appeals is bound by the North Carolina Supreme Court unless otherwise instructed. Defendant may, however, file a motion for appropriate relief with the superior court.

Judge ELMORE dissenting.

Appeal by defendant from judgment entered 2 April 2007 by Judge James C. Spencer, Jr. in Alamance County Superior Court. Heard in the Court of Appeals 2 April 2008.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Kathryne E. Hathcock, for the State.

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

HUNTER, Judge.

Ricky Kyle Corbett ("defendant") appeals from a guilty plea of felony habitual driving while intoxicated ("DWI"). The superior court made findings of mitigation and sentenced defendant to a term of thirteen months to sixteen months in prison. After careful consideration, defendant's appeal is dismissed.

Defendant was charged with misdemeanor driving while impaired ("misdemeanor DWI") by a uniform citation issued on 7 January 2006 in Alamance County. The citation instructed defendant to appear in district court to face the charge in the citation. Meanwhile, a grand jury indicted defendant in superior court on 5 September 2006 for misdemeanor DWI and felony habitual driving while impaired ("felony habitual DWI") (case number 06CRS050232). Both charges stemmed from the same incident on 7 January 2006 for which defendant was originally cited. The grand jury issued a superseding indictment for the same two offenses on 25 September 2006. Defendant's case was placed on an administrative calendar for hearing in superior court on 11 December 2006.

Defendant's misdemeanor DWI citation in case number 06CRS050233, however, was not dismissed from district court following defendant's indictment in superior court. While defendant's case was pending in superior court, defendant pled guilty in district court on 27 November 2006 to the misdemeanor DWI offense in case number 06CRS050233. The district court continued the case for sentencing until 27 December 2006. Following defendant's guilty plea in district court, the State dismissed the felony habitual DWI charge in superior court case number 06CRS050232, because the citation had been inadvertently left in district court and defendant had already pled guilty in district court to the underlying misdemeanor DWI offense.

At defendant's 27 December 2006 sentencing hearing in district court, the State moved to strike defendant's previously entered guilty plea in case number 06CRS050233. The district court issued an order on 29 December 2006 concluding that because defendant had been

indicted for the misdemeanor and felony DWI offenses in superior court on 5 September 2006, the district court lacked jurisdiction to take defendant's guilty plea on 27 November 2006. Therefore, the district court struck defendant's 27 November 2006 guilty plea to the misdemeanor DWI charge as void *ab initio*. Defendant was never sentenced for the misdemeanor DWI offense in district court.

After defendant's original guilty plea in district court was stricken, a grand jury issued another superseding indictment in superior court for misdemeanor DWI and felony habitual DWI (case number 07CRS000184) on 2 January 2007. Defendant moved to dismiss the new charges in superior court on the grounds of double jeopardy, claiming that his prior guilty plea to the misdemeanor DWI offense in district court precluded the State from (1) charging him with the same misdemeanor DWI offense in superior court, and (2) using the misdemeanor DWI offense charged in superior court as a predicate offense for the felony habitual DWI charge. Defendant's case was heard in superior court on 2 April 2007, and the superior court denied defendant's motion to dismiss. Defendant then pled guilty to the felony habitual DWI charge in exchange for the State dismissing the misdemeanor DWI charge.

Defendant presents one issue for this Court's review: Whether the superior court erroneously failed to dismiss the charges against him on the basis of double jeopardy, in violation of both the United States Constitution and the North Carolina Constitution.

The State filed a motion to dismiss defendant's appeal on 24 October 2007. The State contends that defendant has no statutory right to appeal his conviction and that defendant has waived appellate review of his double jeopardy argument.

We must first determine whether defendant, by pleading guilty, has waived review of the issues he presented to this Court.

A defendant's right to appeal a conviction is "purely statutory." *State v. Shoff*, 118 N.C. App. 724, 725, 456 S.E.2d 875, 876 (1995). "[U]nder N.C.G.S. § 15A-1444(e), a defendant who has entered a plea of guilty is not entitled to appellate review as a matter of right, unless the defendant is appealing sentencing issues or the denial of a motion to suppress, or the defendant has made an unsuccessful motion to withdraw the guilty plea." *State v. Pimental*, 153 N.C. App. 69, 73, 568 S.E.2d 867, 870 (2002) (citing *State v. Dickson*, 151 N.C. App. 136, 564 S.E.2d 640 (2002)).

The State contends that under *State v. Hopkins*, 279 N.C. 473, 183 S.E.2d 657 (1971), defendant has no right to an appeal. We agree.

In *Hopkins*, the defendant was indicted in superior court for first degree burglary, which was later reduced to nonfelonious breaking and entering. The defendant moved to dismiss the charge on double jeopardy grounds, but the trial court denied the defendant's motion. *Id.* at 473-74, 183 S.E.2d at 657. The defendant then pled guilty to nonfelonious breaking and entering and appealed his conviction based on the denial of his plea of former jeopardy. *Id.* at 474, 183 S.E.2d at 658. The Supreme Court of North Carolina held that the defendant had waived his right to appeal this issue:

> The constitutional right not to be placed in jeopardy twice for the same offense, like other constitutional rights, may be waived by the defendant and such waiver is usually implied from his action or inaction when brought to trial in the subsequent proceeding. . . .
>
> The present defendant . . . entered a pleas of guilty . . . after his previously entered plea of former jeopardy was overruled. He . . . thereby waived his right, if any, to dismissal of the charge on the ground of former jeopardy[.]

Id. at 475-76, 183 S.E.2d at 659.

Defendant, however, argues that *Menna v. New York*, 423 U.S. 61, 46 L. Ed. 2d 195 (1975), controls. The defendant in *Menna* was indicted in New York state court for refusing to testify before a grand jury. *Id.* at 61, 46 L. Ed. 2d at 197. The defendant sought dismissal of the case on double jeopardy grounds, claiming that he had previously been adjudicated in contempt of court for refusing to testify on the same occasion. *Id.* The trial court denied the defendant's motion, and the defendant pled guilty to the indictment. *Id.* Rather than attacking his guilty plea in a collateral action, the *Menna* defendant immediately appealed his conviction on double jeopardy grounds. *Id.* at 62, 46 L. Ed. 2d at 197. The New York Court of Appeals held that the defendant had waived appellate review of his double jeopardy claim by entering a counseled guilty plea. *Id.*

The United States Supreme Court reversed the New York court. The Court held that "[w]here the State is precluded by the United States Constitution from haling a defendant into court on a charge, federal law requires that a conviction on that charge be set aside even if the conviction was entered pursuant to a counseled plea of guilty."

Id. at 62, 46 L. Ed. 2d at 197. In a footnote, the Court clarified its holding: "We do not hold that a double jeopardy claim may never be waived. We simply hold that a plea of guilty to a charge does not waive a claim that—judged on its face—the charge is one which the State may not constitutionally prosecute." *Id.* at 63 n.2, 46 L. Ed. 2d at 198 n.2.

Although *Menna* and *Hopkins* appear to be in conflict with one another, we are bound by the Supreme Court of North Carolina's decision on this issue until otherwise instructed. *Cannon v. Miller*, 313 N.C. 324, 324, 327 S.E.2d 888, 888 (1985) (holding that the Court of Appeals, after abolishing two tort causes of actions, "acted under a misapprehension of its authority to overrule decisions of the Supreme Court of North Carolina and its responsibility to follow those decisions, until otherwise ordered by the Supreme Court"); *State v. Parker*, 140 N.C. App. 169, 172, 539 S.E.2d 656, 659 (2000) (where the defendant asked the Court of Appeals to review a statute in light of a recent United States Supreme Court decision, the Court of Appeals noted that the Supreme Court of North Carolina had already addressed an analogous issue in light of the recent federal case, and therefore the Court of Appeals was bound by the Supreme Court of North Carolina's decision). Moreover, this Court has previously followed the *Hopkins* Court's decision in *State v. Hughes*, 136 N.C. App. 92, 97, 524 S.E.2d 63, 66 (1999), *disc. review denied*, 351 N.C. 644, 543 S.E.2d 878 (2000), *superseded by statute on other grounds*, N.C. Gen. Stat. § 15A-1340.34 (2007), and we are therefore also bound by the decisions of this Court as well. *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court").

Defendant's appeal is therefore dismissed. Defendant may, however, file a motion for appropriate relief with the superior court pursuant to N.C. Gen. Stat. § 15A-1413 (2007). *See State v. Jamerson*, 161 N.C. App. 527, 530, 588 S.E.2d 545, 547 (2003).

Dismissed.

Judge STROUD concurs.

Judge ELMORE dissents in a separate opinion.

ELMORE, Judge, dissenting.

I respectfully dissent from the majority opinion dismissing defendant's appeal. Because I believe that this Court is bound by the United States Supreme Court's decision in *Menna v. New York*, 423 U.S. 61, 46 L. Ed. 2d 195 (1975), I would address defendant's appeal on the merits and vacate defendant's felony habitual DWI conviction in case number 07 CRS 184.

Although the State correctly identifies the general rule applying to collateral challenges to guilty pleas, the United States Supreme Court has carved out an exception that applies in the case before us. In *Blackledge v. Perry*, 417 U.S. 21, 40 L. Ed. 2d 628 (1974), the defendant was convicted in North Carolina District Court of misdemeanor assault. Pursuant to North Carolina law, the defendant gave notice of appeal for a trial *de novo* in superior court. *Id.* at 22-23, 40 L. Ed. 2d at 631. After the defendant filed his notice of appeal, but prior to his trial in superior court, the prosecutor obtained an indictment charging the defendant with felony assault arising from the same circumstances as the original misdemeanor charge. The defendant pled guilty to the felony charge in superior court. *Id.* at 23, 40 L. Ed. 2d at 631. Months later, the defendant filed a *habeas corpus* petition in federal district court, claiming that the felony indictment for which he pled guilty constituted double jeopardy and deprived him of due process. *Id.* at 23, 40 L. Ed. 2d at 632. The district court granted the writ. *Id.* at 24, 40 L. Ed. 2d at 632.

On appeal, the United States Supreme Court first held that the Due Process Clause of the Fourteenth Amendment prohibited the State from "respond[ing] to [the defendant]'s invocation of his statutory right to appeal by bringing a more serious charge against him prior to the trial *de novo*." *Id.* at 28-29, 40 L. Ed. 2d at 635. The Court next addressed the question of whether the defendant's guilty plea to the felony charge in superior court precluded him from challenging his conviction in the *habeas corpus* proceeding. The State argued that the defendant's constitutional arguments were foreclosed pursuant to *Tollett v. Henderson*, 411 U.S. 258, 36 L. Ed. 2d 235 (1973), and a line of cases beginning with *Brady v. United States*, 397 U.S. 742, 25 L. Ed. 2d 747 (1970) (the *Brady* trilogy). The United States Supreme Court disagreed:

> While [the State's] reliance upon the *Tollett* opinion is understandable, there is a fundamental distinction between this case and that one. Although the underlying claims presented in *Tollett*

> and the *Brady* trilogy were of constitutional dimensions, none went to the very power of the State to bring the defendant into court to answer the charge brought against him. The defendants in *McMann v. Richardson*, for example, could surely have been brought to trial without the use of the allegedly coerced confessions, and even a tainted indictment of the sort alleged in *Tollett* could have been "cured" through a new indictment by a properly selected grand jury. In the case at hand, by contrast, the nature of the underlying constitutional infirmity is markedly different. Having chosen originally to proceed on the misdemeanor charge in the District Court, the State of North Carolina was, under the facts of this case, simply precluded by the Due Process Clause from calling upon the respondent to answer to the more serious charge in the Superior Court. Unlike the defendant in *Tollett*, [the defendant in *Blackledge*] is not complaining of "antecedent constitutional violations" or of a "deprivation of constitutional rights that occurred prior to the entry of the guilty plea." Rather, the right that he asserts and that we today accept is the right not to be haled into court at all upon the felony charge. The very initiation of the proceedings against him in the Superior Court thus operated to deny him due process of law.

Id. at 30-31, 40 L. Ed. 2d at 635-36 (quoting *Tollett*, 411 U.S. at 266-67, 36 L. Ed. 2d at 243).

Although the United States Supreme Court in *Blackledge* did not address the defendant's double jeopardy argument, it noted the similarities between double jeopardy principles and its due process holding in *Blackledge*. According to the Court, the Double Jeopardy Clause of the Fifth Amendment was distinctive because " 'its practical result is to prevent a trial from taking place at all, rather than to prescribe [sic] procedural rules that govern the conduct of a trial.' " *Id.* at 31, 40 L. Ed. 2d at 636 (quoting *Robinson v. Neil*, 409 U.S. 505, 509, 35 L. Ed. 2d 29, 33 (1973)). The Court explained that

> [w]hile our judgment today is not based upon the Double Jeopardy Clause, we think that the quoted language aptly describes the due process right upon which our judgment *is* based. The "practical result" dictated by the Due Process Clause in this case is that North Carolina simply could not permissibly require [the defendant] to answer to the felony charge. That being so, it follows that his guilty plea did not foreclose him from attacking his conviction in the Superior Court proceedings through a federal writ of habeas corpus.

Id. The defendant was therefore allowed to attack the constitutional infirmities preceding his guilty plea, and because the Court had previously found that the state court proceedings deprived the defendant of due process, the Court affirmed the issuance of the writ of *habeas corpus*. *Id.* at 32, 40 L. Ed. 2d at 636.

One year after *Blackledge*, the United States Supreme Court reached a similar result in *Menna v. New York*, 423 U.S. 61, 46 L. Ed. 2d 195 (1975). The defendant in *Menna* was indicted in New York state court for refusing to testify before a grand jury. *Id.* at 61, 46 L. Ed. 2d at 197. The defendant sought dismissal of the case on double jeopardy grounds, claiming that he had previously been adjudicated in contempt of court for refusing to testify on the same occasion. The trial court denied the defendant's motion, and the defendant pled guilty to the indictment. *Id.* Rather than attacking his guilty plea in a collateral action, as did the defendants in *Blackledge*, *Tollett*, and the *Brady* trilogy, the *Menna* defendant immediately appealed his conviction on double jeopardy grounds. The New York Court of Appeals held that under *Tollett*, the defendant had waived appellate review of his double jeopardy claim by entering a counseled guilty plea. *Id.* at 62, 46 L. Ed. 2d at 197.

The United States Supreme Court reversed the New York court. Relying on *Blackledge*, the Court held that "[w]here the State is precluded by the United States Constitution from haling a defendant into court on a charge, federal law requires that a conviction on that charge be set aside even if the conviction was entered pursuant to a counseled plea of guilty." *Id.* at 62, 46 L. Ed. 2d at 197. In a footnote, the Court reconciled its holdings in *Blackledge* and *Menna* with its earlier cases:

> Neither Tollett v. Henderson, nor our earlier cases on which it relied, e.g., Brady v. United States and McMann v. Richardson, stand for the proposition that counseled guilty pleas inevitably "waive" all antecedent constitutional violations. . . . The point of these cases is that a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case. In most cases, factual guilt is a sufficient basis for the State's imposition of punishment. A guilty plea, therefore, simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction, if factual guilt is validly established. Here, however, the claim is that the

> State may not convict petitioner no matter how validly his factual guilt is established. The guilty plea, therefore, does not bar the claim.
>
> We do not hold that a double jeopardy claim may never be waived. We simply hold that a plea of guilty to a charge does not waive a claim that—judged on its face—the charge is one which the State may not constitutionally prosecute.

Id. at 62, 46 L. Ed. 2d at 197 n.2 (citations and emphasis omitted). *See Broce*, 488 U.S. 563, 574-76, 102 L. Ed. 2d 927, 939-40 (explaining the *Blackledge/Menna* exception to the rule barring collateral attack on a guilty plea). Because the defendant had not waived his double jeopardy argument by pleading guilty to the indictment, the Court remanded the case to the New York Court of Appeals for a determination of the merits of the defendant's double jeopardy claim. *Id.* at 63, 46 L. Ed. 2d at 198.

I find *Menna* directly applicable to the case currently before this Court. Defendant here was charged in superior court based on an indictment that he alleges the State was precluded from bringing. Defendant moved to dismiss the case on double jeopardy grounds, but the trial court denied defendant's motion. Defendant then pled guilty to the indictment, and immediately appealed his conviction. The general rule established in the *Brady* trilogy and *Tollette* does not apply to this situation. Defendant is not challenging "antecedent constitutional violations" or a "deprivation of constitutional rights that occurred prior to the entry of [his] guilty plea." *Tollett*, 411 U.S. at 266-67, 36 L. Ed. 2d at 243. Rather, as in *Blackledge* and *Menna*, defendant here argues that regardless of whether he is guilty of the crimes charged, the State was precluded from haling him into court to answer for those crimes. Under *Menna*, a guilty plea does not bar such a claim. *Menna*, 423 U.S. at 62, 46 L. Ed. 2d at 197 n.2.

The State correctly notes that the United States Supreme Court in *Broce* applied the general rule established by the *Brady* trilogy and *Tollett*, even though the *Broce* defendants challenged their convictions on double jeopardy grounds. However, the defendants in *Broce* were differently situated from the defendant in *Menna* and defendant in the case before us. The *Broce* defendants never raised a double jeopardy argument at trial, and pled guilty to two indictments which, on their face, described separate conspiracies. *Broce*, 488 U.S. at 576, 102 L. Ed. 2d at 940. The United States Supreme Court first recalled

in its holding in *Menna* that " 'a plea of guilty to a charge does not waive a claim that—*judged on its face*—the charge is one which the State may not constitutionally prosecute.' " *Id.* at 575, 102 L. Ed. 2d at 940 (emphasis in original) (quoting *Menna*, 423 U.S. at 63, 46 L. Ed. 2d at 198 n.2). The Court then determined that the *Broce* defendants' double jeopardy claim could not be judged on its face. Rather, according to the Court, the *Broce* defendants "[could not] prove their claim by relying on [the] indictments and the existing record. Indeed . . . they [could not] prove their claim without contradicting those indictments, and that opportunity [was] foreclosed by the admissions inherent in their guilty pleas." *Id.* at 576, 102 L. Ed. 2d at 940. In contrast, the trial court in *Menna* should have dismissed the charge at the time the plea was entered because "the indictment was facially duplicative of the earlier offense of which the defendant had been convicted." *Id.* at 575, 102 L. Ed. 2d at 940. So too, in *Blackledge*, the trial court should have dismissed the charge because it could have determined, based on the face of the indictment, that the state had no constitutional power to bring the indictment. *Id.* In neither case "did the defendants seek further proceedings at which to expand the record with new evidence," and the trial court should have dismissed the charges "on the basis of the existing record." *Id.*

In the case before us, as in *Menna*, the trial court was able to make a determination of the merits of defendant's double jeopardy claim based solely upon the indictment, which defendant argued was duplicative on its face. Unlike in *Broce*, defendant does not "seek further proceedings at which to expand the record with new evidence." *Id.* Therefore, *Broce* does not control our decision today, and under *Menna*, defendant's appeal may properly be considered by this Court.

I recognize that my proposed holding today may be in conflict with the North Carolina Supreme Court's decision in *Hopkins*, and I acknowledge that this Court cannot overrule a decision of the North Carolina Supreme Court. *See*, *e.g.*, *Cannon v. Miller*, 313 N.C. 324, 327 S.E.2d 888 (1985) (stating that when the Court of Appeals abolished the causes of action for alienation of affections and criminal conversation, the Court of Appeals had "acted under a misapprehension of its authority to overrule decisions of the Supreme Court of North Carolina and its responsibility to follow those decisions, until otherwise ordered by the Supreme Court"); *State v. Parker*, 140 N.C. App. 169, 172, 539 S.E.2d 656, 659 (2000) (noting that when a defendant asked this Court to review a statute in light of a recent United

States Supreme Court decision the North Carolina Supreme Court had already addressed an analogous issue in light of the recent federal case, and therefore the Court of Appeals was bound by the North Carolina Supreme Court's decision); *Kinlaw v. Long*, 40 N.C. App. 641, 643, 253 S.E.2d 629, 630 (1979) (Declining to change a long-standing rule regarding breach of warranty actions, because "it is not [the North Carolina Court of Appeals'] prerogative to overrule or ignore clearly written decisions of our Supreme Court").

However, unlike the cases cited above, the current case does not present a situation in which we have been asked to change long-standing state law. Nor is this a situation in which we are asked to interpret and apply federal law after the North Carolina Supreme Court has already spoken on the federal issue. *Hopkins* predated the United States Supreme Court's decisions in *Blackledge* and *Menna*, and therefore *Hopkins* was not informed by the constitutional principles later established by the United States Supreme Court in those cases. Further, the North Carolina Supreme Court has not had occasion to review *Hopkins* in light of *Blackledge* and *Menna*.[1] When the United States Supreme Court has decided a certain matter, we are bound to apply that Court's rule. *See, e.g.*, *State v. McDowell*, 310 N.C. 61, 74, 310 S.E.2d 301, 310 (1984) ("[A] state court should exercise and apply its own independent judgment, treating, of course, decisions of the United States Supreme Court as binding."); *Enoch v. Inman*, 164 N.C. App. 415, 420, 596 S.E.2d 361, 365 (2004) ("North Carolina appellate courts are not bound, as to matters of federal law, by decisions of federal courts other than the United States Supreme Court."); *State v. Adams*, 132 N.C. App. 819, 820, 513 S.E.2d 588, 589 (1999) ("[W]ith the exception of decisions of the United States Supreme Court, federal appellate decisions are not binding upon

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1. Since the United States Supreme Court's decisions in *Blackledge* and *Menna*, the North Carolina Supreme Court has cited *Hopkins* in only two cases. In each case, the defendant failed to raise a double jeopardy defense before the trial court, pled guilty or was convicted by a jury, and subsequently tried to raise the double jeopardy issue on appeal. The Court cited *Hopkins* for the proposition that because the defendant had failed to make a motion to dismiss on double jeopardy grounds at trial, the defendant had waived his right to challenge his prosecution or conviction on double jeopardy grounds on appeal. *State v. Thompson*, 314 N.C. 618, 621, 336 S.E.2d 78, 79-80 (1985); *State v. McKenzie*, 292 N.C. 170, 175, 232 S.E.2d 424, 428 (1977). Although *Hopkins* may still apply to cases where the defendant failed to raise a double jeopardy argument at trial, the defendants in both *Hopkins* and in the current case made unsuccessful motions to dismiss the charges against them on double jeopardy grounds before entering their guilty pleas. Our Supreme Court has not applied *Hopkins* to analogous facts since the United States Supreme Court's decisions in *Blackledge* and *Menna*.

either the appellate or trial courts of this State"). Therefore, *Hopkins* should not control our decision in the present case.[2]

The State also argues that defendant has no statutory right to appeal his conviction. This Court has previously noted that "[i]n North Carolina, a defendant's right to appeal in a criminal proceeding is purely a creation of state statute." *State v. Pimental*, 153 N.C. App. 69, 72, 568 S.E.2d 867, 869 (2002). Under N.C. Gen. Stat. § 15A-1444, a criminal defendant who has pled guilty may appeal as a matter of right only in limited circumstances, *e.g.*, if the sentence imposed by the trial court contains a term of imprisonment that is not authorized by state statute. N.C. Gen. Stat. § 15A-1444(a2)(3) (2007). Otherwise, "the defendant is not entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest to a criminal charge in the superior court." N.C. Gen. Stat. § 15A-1444(e) (2007).

Admittedly, N.C. Gen. Stat. § 15A-1444 does not authorize a criminal defendant who pled guilty at trial to challenge his or her conviction on double jeopardy grounds as a matter of right. However, the United States Supreme Court cases cited above make clear that under these facts, defendant has the ability under the Fifth and Fourteenth Amendments to challenge the State's power to bring him into court on the DWI charges. *See Menna*, 423 U.S. at 62, 46 L. Ed. 2d at 197 ("Where the State is precluded by the United States Constitution from haling a defendant into court on a charge, federal law requires that a conviction on that charge be set aside even if the conviction was entered pursuant to a counseled plea of guilty."). Defendant's ability to challenge his conviction in this regard exists in addition to whatever statutory rights he may have to appeal his conviction under North Carolina law.

For the reasons stated above, I would deny the State's motion to dismiss defendant's appeal. I would therefore address defendant's double jeopardy argument on its merits.

It is well established that "[t]he Double Jeopardy Clause of the North Carolina and United States Constitutions protects against . . . a second prosecution after conviction for the same offense." *State v. Strohauer*, 84 N.C. App. 68, 72, 351 S.E.2d 823, 826 (1987) (citing *North Carolina v. Pearce*, 395 U.S. 711, 23 L. Ed. 2d 656 (1969); State *v. Gardner*, 315 N.C. 444, 451, 340 S.E.2d 701, 707 (1986)).

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2. I do not suggest, however, that *Hopkins* is inapplicable in all cases. I would hold only that in cases such as this, where *Hopkins* and *Blackledge/Menna* yield conflicting results, the latter cases must control.

The question of whether a second prosecution for a crime violates a defendant's protection against double jeopardy under the United States and North Carolina Constitutions is fully reviewable *de novo* as a question of law. *State v. Newman*, 186 N.C. App. 382, 386, 651 S.E.2d 584, 587 (2007).

This Court should first determine whether the district court maintained jurisdiction over defendant's misdemeanor DWI action after defendant was indicted for the same offense in superior court. Defendant argues that the district court retained such jurisdiction. The State disagrees and contends that when defendant was indicted on the misdemeanor DWI and felony habitual DWI charges by the grand jury in superior court, the district court lost jurisdiction over the misdemeanor DWI charge.

Under state statute, district courts have exclusive, original jurisdiction for the trial of misdemeanor criminal actions. N.C. Gen. Stat. § 7A-272(a) (2007). In contrast, superior courts have exclusive, original jurisdiction over "all criminal actions not assigned to the district court division," including felony criminal actions. N.C. Gen. Stat. § 7A-271(a) (2007). Therefore, when defendant was issued the citation for the misdemeanor DWI charge on 7 January 2006, the district court gained jurisdiction over the case pursuant to N.C. Gen. Stat. § 272(a).

Superior courts, however, have jurisdiction to try a misdemeanor case in five limited circumstances, including when the misdemeanor charge "is a lesser included offense of a felony on which an indictment has been returned." N.C. Gen. Stat. § 7A-271(a)(1) (2007). A lesser included offense is " '[a] crime that is composed of some, but not all, of the elements of a more serious crime and that is necessarily committed in carrying out the greater crime.' " *State v. Hinton*, 361 N.C. 207, 210, 639 S.E.2d 437, 440 (2007) (quoting *Black's Law Dictionary* 1111 (8th ed. 2004)). The offense of driving while impaired under N.C. Gen. Stat. § 20-138.1 is a lesser included offense of felony habitual driving while impaired, as all of the elements of the lesser charge are required to convict a defendant of the greater charge. *See* N.C. Gen. Stat. § 20-138.5 (2005) ("A person commits the offense of habitual impaired driving if he drives while impaired as defined in G.S. 20-138.1 and has been convicted of three or more offenses involving impaired driving . . . within seven years of the date of this offense."). Therefore, under N.C. Gen. Stat. § 7A-271(a)(1), the superior court gained jurisdiction to try defendant on the misdemeanor DWI charge when the grand jury indicted

defendant on the felony habitual DWI charge on 5 September 2006. *See, e.g.*, *State v. Lobohe*, 143 N.C. App. 555, 559, 547 S.E.2d 107, 110 (2001) (holding that the superior court had jurisdiction over a misdemeanor DWI charge where the defendant was also indicted for felony habitual DWI).

The question, then, is whether the district court lost jurisdiction over the misdemeanor charge when the superior court gained jurisdiction on 5 September 2006. The State argues that the district court did lose jurisdiction, and points to *State v. Gunter*, 111 N.C. App. 621, 433 S.E.2d 191 (1993), to support its argument. In *Gunter*, the defendant was charged with misdemeanor DWI by citation in district court. While the defendant's case was pending, a grand jury issued a presentment to the district attorney requesting that he investigate the misdemeanor DWI offense. The grand jury later indicted the defendant for the misdemeanor DWI. The charges in district court were dismissed, and the defendant was tried and convicted in superior court of misdemeanor DWI. *Id.* at 623, 433 S.E.2d at 192. On appeal, the defendant claimed that the district court had exclusive jurisdiction over his case pursuant to N.C. Gen. Stat. § 7A-272. *Id.* at 623, 433 S.E.2d at 193. This Court disagreed and affirmed the defendant's conviction. We first noted that under the jurisdictional exceptions listed in N.C. Gen. Stat. § 7A-271(a), the superior court has jurisdiction to try a misdemeanor case "[w]hen the charge is initiated by a presentment." N.C. Gen. Stat. § 7A-271(a)(2) (2007). Therefore, we held that even though the case "was properly under the jurisdiction of the district court and not the superior court when the citation was issued," *id.* at 624, 433 S.E.2d at 193, the subsequent presentment by the grand jury brought the action "properly within the jurisdiction of the superior court pursuant to N.C.G.S. § 7A-271(a)(2)." *Id.* at 625, 433 S.E.2d at 194.

The State contends that *Gunter* stands for the proposition that when the grand jury indicted defendant in the current case, the district court lost jurisdiction over the misdemeanor charge. I would disagree. Under N.C. Gen. Stat. § 7A-271(a)(1):

> (a) *The superior court has exclusive, original jurisdiction* over all criminal actions not assigned to the district court division by this Article, *except that the superior court has jurisdiction* to try a misdemeanor:
>
> (1) Which is a lesser included offense of a felony on which an indictment has been returned[.]

N.C. Gen. Stat. § 7A-271(a)(1) (2007) (emphases added). The statutory language makes clear that while N.C. Gen. Stat. § 7A-271(a) gives superior courts jurisdiction over certain misdemeanor criminal actions, it does not purport to give superior courts *exclusive* jurisdiction over such actions, as it does over felony criminal actions. Indeed, *Gunter* merely recognized that in such situations, jurisdiction is "properly," though not exclusively, within the jurisdiction of the superior court. *See Gunter*, 111 N.C. App. at 625, 433 S.E.2d at 194.

Therefore, when a district court has jurisdiction over a misdemeanor criminal action under N.C. Gen. Stat. § 7A-272(a), and a superior court then acquires jurisdiction of the action pursuant to N.C. Gen. Stat. § 7A-271(a), the two courts share concurrent jurisdiction over the action. *See State v. Karbas*, 28 N.C. App. 372, 373-74, 221 S.E.2d 98, 99-100 (1976) (recognizing that N.C. Gen. Stat. §§ 7A-271(a) and 7A-272 operate to give a district court and a superior court concurrent jurisdiction over the misdemeanor offense). The State may then choose to prosecute the action in either district court or superior court. I would therefore find that when defendant was indicted in superior court on 5 September 2006, the district court and superior court shared concurrent jurisdiction over the misdemeanor DWI action.

The next step in the proper analysis of this case is to determine whether the district court had jurisdiction to enter defendant's guilty plea on 27 November 2006. As explained above, the district court and superior court shared concurrent jurisdiction over the misdemeanor DWI action once defendant was indicted in superior court on 5 September 2006. We have previously stated that "[w]here two courts have concurrent jurisdiction of certain offenses, the court first exercising jurisdiction in a particular prosecution obtains jurisdiction to the exclusion of the other." *Karbas*, 28 N.C. App. at 374, 221 S.E.2d at 100. In addition, a district court will lose jurisdiction over the action if it enters a *nolle prosequi*, at which time the superior court may proceed with the action. *Id.* In the current case, the district court never entered a *nolle prosequi* before it accepted defendant's guilty plea. Therefore, we must determine whether the district court or the superior court first exercised its jurisdiction over the misdemeanor DWI action.

Defendant received a citation for the misdemeanor DWI offense on 7 January 2006. A citation "serves as the pleading of the State for a misdemeanor prosecuted in the district court." N.C. Gen. Stat. § 15A-922(a) (2007). Defendant was later indicted for the same

offense by the grand jury on 5 September 2006. An indictment serves as "[t]he pleading in felony cases and misdemeanor cases initiated in the superior court division." N.C. Gen. Stat. § 15A-923(a) (2007). Although these pleadings gave the district court and superior court concurrent jurisdiction over the misdemeanor DWI offense under N.C. Gen. Stat. §§ 7A-271(a) and 7A-272(a),[3] the district court was the first court to exercise its jurisdiction over the prosecution by accepting defendant's guilty plea on 27 November 2006.[4] The record suggests that the superior court did not actually attempt to exercise jurisdiction over the action until 2 April 2007, when defendant moved to dismiss, and subsequently pled guilty to, both the misdemeanor and felony DWI offenses. Therefore, under *Karbas*, the district court obtained jurisdiction *to the exclusion* of the superior court when it first exercised its concurrent jurisdiction in the action by accepting defendant's guilty plea on 27 November 2006. *Karbas*, 28 N.C. App. at 374, 221 S.E.2d at 100.

The next step in the analysis is to determine when jeopardy attached for the misdemeanor DWI offense. The well-settled rule in North Carolina is that

> jeopardy attaches when a defendant in a criminal prosecution is placed on trial: (1) On a valid indictment or information, (2) before a court of competent jurisdiction, (3) after arraignment, (4) after plea, and (5) when a competent jury has been empaneled and sworn to make true deliverance in the case.

State v. Ross, 173 N.C. App. 569, 572-73, 620 S.E.2d 33, 36 (2005) (quoting *State v. Bell*, 205 N.C. 225, 228, 171 S.E. 50, 52 (1933)). In a criminal proceeding in district court, a valid citation charging an offense within the jurisdiction of the district court is sufficient to satisfy element one. *Cf. State v. Coats*, 17 N.C. App. 407, 415, 194 S.E.2d 366, 371 (1973) (stating that a valid warrant charging such an offense satisfies element one in a district court criminal proceeding). As dis-

3. We note that the issuance of a citation, or warrant, is not the same as an exercise of jurisdiction. *See State v. Austin*, 31 N.C. App. 20, 25, 228 S.E.2d 507, 511 (1976) (stating that "outstanding misdemeanor warrants, on which defendant has never been brought to trial, did not prevent the Superior Court from exercising its jurisdiction over the felony offenses.")

4. The district court may actually have exercised its jurisdiction over the misdemeanor DWI action months before it accepted defendant's guilty plea. The citation issued to defendant on 7 January 2006 instructed defendant to appear in district court at 9:00 a.m. on 28 February 2006. However, the record contains no evidence regarding what occurred at the 28 February 2006 hearing, nor does it contain evidence that the hearing actually took place.

cussed above, the district court had jurisdiction over the misdemeanor DWI action, thus satisfying element two. Element three was met when the State called upon defendant to plead to the offense in district court. *Id.* Element four was met when defendant entered his guilty plea in district court on 27 November 2006. Further, we have previously recognized that jeopardy may attach based on these four elements alone when a defendant pleads guilty to the offense charged. *See, e.g.*, *Ross*, 173 N.C. App. at 573, 620 S.E.2d at 36.

It is true that although the district court accepted defendant's guilty plea, the district court also voided defendant's guilty plea before it issued a judgment and sentenced defendant in the misdemeanor DWI action. The North Carolina Supreme Court has previously implied that jeopardy attaches when a trial court accepts a defendant's guilty plea and sentences the defendant. *See State v. Wallace*, 345 N.C. 462, 467, 480 S.E.2d 673, 676 (1997) (holding that jeopardy did not attach when the trial court rejected the defendant's guilty plea and never imposed a sentence); *State v. Maynard*, 311 N.C. 1, 39-40, 316 S.E.2d 197, 218 (1984) (Frye, J., concurring in part and dissenting in part) (finding that jeopardy attached when the trial court accepted the defendant's guilty plea and sentenced the defendant); *State v. Johnson*, 95 N.C. App. 757, 760, 383 S.E.2d 692, 694 (1989) (finding that jeopardy attached when trial court adjudicated the defendant's plea and imposed a sentence). Our Supreme Court has not previously considered whether jeopardy attaches upon a trial court's acceptance of a defendant's guilty plea alone. However, our Court has recently stated that jeopardy attaches when a defendant's plea is accepted by the trial court. *See Ross*, 173 N.C. App. at 573, 620 S.E.2d at 36 (stating that jeopardy "attach[es] upon the court's acceptance of a plea of guilty"). In the current case, the plea adjudication form signed by the district court clearly states: "The defendant's plea is accepted by the Court and is ordered recorded." Therefore, I would hold that jeopardy attached on the misdemeanor DWI charge when the district court accepted defendant's guilty plea on 27 November 2006.

Finally, we must determine whether defendant was subject to double jeopardy in superior court for the offense to which he had previously pled guilty in district court.

Regarding the misdemeanor DWI offense, because the district court had accepted defendant's guilty plea, "the Double Jeopardy Clause of the North Carolina and United States Constitutions [protected defendant] against . . . a second prosecution after conviction

for the same offense." *Strohauer*, 84 N.C. App. at 72, 351 S.E.2d at 826. Therefore, the superior court erred by failing to dismiss the misdemeanor DWI charge on double jeopardy grounds.[5]

I would find that the superior court also erred by failing to dismiss the felony habitual DWI charge. Our Court has previously stated that "when an offense is a necessary element in and constitutes an essential part of another offense, and both are in fact only one transaction, a conviction or acquittal of one is a bar to a prosecution to the other." *State v. Urban*, 31 N.C. App. 531, 534, 230 S.E.2d 210, 212 (1976). In *Urban*, the defendant was charged with misdemeanor simple possession of marijuana, and was also indicted for unlawful and felonious possession of marijuana, possession with intent to sell marijuana, and possession with intent to manufacture marijuana. *Id.* at 532, 230 S.E.2d at 211. The defendant pled guilty in district court to the misdemeanor charge, and was sentenced based on his plea. *Id.* at 533, 230 S.E.2d at 211. When the defendant's felony case came to trial in superior court, the court dismissed each felony charge on double jeopardy grounds because each charge was a greater offense that included the lesser included offense of simple possession to which the defendant had already plead guilty. *Id.* This Court affirmed the superior court:

> To allow defendant's prosecution in superior court for the greater offense in this case would subject him to double jeopardy as to the lesser included offense. . . . The election to try defendant in district court for misdemeanor possession was perhaps an inadvertence in view of the apparent evidence which would support conviction of a felony in superior court. However, the State is bound by that election. It is true, as the State argues, that by defendant's plea to the lesser offense in district court he was not in jeopardy of the greater offense and harsher penalties of superior court. However, defendant has been convicted and punished already for the lesser offense . . . and to try defendant for the greater offense . . . would also subject defendant to trial of the lesser included offense for which he has been convicted already. Since in fact there was only one transaction this would be double jeopardy as to the lesser offense.

Id. at 536, 230 S.E.2d at 213.

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5. Although the State ultimately dropped the misdemeanor DWI charge in exchange for defendant's guilty plea to the felony habitual DWI charge, defendant was still facing prosecution for both offenses at the time the superior court denied his motion to dismiss.

In the current case, jeopardy attached on the lesser included offense of misdemeanor DWI when defendant pled guilty in district court. For the superior court to have tried defendant for the greater offense of felony habitual DWI, arising from the same transaction, would have been to subject defendant to double jeopardy as to the lesser offense. Therefore, I would hold that the superior court erred by failing to dismiss the felony habitual DWI charge on double jeopardy grounds.

For the reasons stated above, I would vacate defendant's conviction for felony habitual DWI in case number 07 CRS 184.[6]

ROBIN JOYCE HELMS, PLAINTIFF v. DONALD RAY HELMS, DEFENDANT

No. COA07-1090

(Filed 17 June 2008)

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

Although the trial court's order contains several items that may be subject to challenge in an equitable distribution case including setting the value of the marital residence as the future sales price of the residence instead of the net fair market value on the date of separation, failing to specify the reasons for the delay in plaintiff's receipt of defendant's monthly retirement checks and commencement of alimony payments after the sale of the marital residence, and the trial court's entering of conflicting findings and conclusions regarding the classification of plaintiff's lump sum award of $18,000 as her share of defendant's retirement benefits, these issues will not be considered on appeal because they are neither assigned as error nor argued in the brief as required by N.C. R. App. P. 10(a).

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6. Defendant has suggested that this Court remand the case for resentencing in district court in accordance with defendant's 27 November 2006 guilty plea to misdemeanor DWI. However, I note that we are unable to order such a remedy. The only appeal taken in this case was defendant's appeal from the superior court's judgment in case number 07 CRS 184. Neither party has appealed from the district court's 29 December 2006 order in case number 06 CR 50233 striking defendant's guilty plea, albeit on erroneous grounds. Therefore, the district court's 29 December 2006 order should remain in effect.

2. Divorce— alimony—dependent spouse—supporting spouse—accustomed standard of living prior to separation

The trial court did not err in an alimony and equitable distribution case by concluding as a matter of law under N.C.G.S. § 50-16.1A that plaintiff wife was a dependent spouse and defendant husband was a supporting spouse because: (1) although defendant contends the trial court should have included the fact that plaintiff will receive 41.5 percent of his retirement checks upon the sale of the marital residence when it was determining plaintiff's monthly income, plaintiff's status as dependent spouse is not determined based upon events set to occur in the future, but is instead established according to plaintiff's accustomed standard of living prior to the parties' separation; (2) the findings of fact demonstrated that during the marriage and at the time of the hearing, plaintiff had an income-expenses deficit of $627 per month, thus supporting the conclusion that she was a dependent spouse; (3) a surplus of income over expenses is sufficient in and of itself to warrant a supporting spouse classification, and the findings of fact showed defendant's income-expenses surplus supported this classification; and (4) this determination, along with the trial court's determination of the amount of alimony awarded to plaintiff, are subject to reconsideration following the final equitable distribution or may be modified by motion in the cause and proof of a substantial change of circumstances.

3. Divorce— equitable distribution—marital property—401(k) retirement account

The trial court did not abuse its discretion in an equitable distribution case by awarding each of the parties one-half of defendant husband's 401(k) retirement account because: (1) defendant failed to present any evidence tending to show the number of years his 401(k) account existed prior to the marriage; (2) in an equitable distribution affidavit, defendant stipulated the account was marital property and listed the word "none" under separate property; and (3) defendant failed to meet his burden of showing what portion of the pension was separate property.

Judge STEPHENS concurring in part and dissenting in part.

Appeal by defendant from order entered 18 May 2007 by Judge James H. Faison, III in Pender County District Court. Heard in the Court of Appeals 5 March 2008.

Lea, Rhine, Rosbrugh & Chleborowicz, by Lori W. Rosbrugh, for plaintiff-appellee.

Lanier, Fountain & Ceruzzi, by John W. Ceruzzi, for defendant-appellant.

TYSON, Judge.

Donald Ray Helms ("defendant") appeals from order entered on remand from this Court directing a distribution of the parties' marital and divisible property. We affirm.

I. Background

Robin Joyce Helms ("plaintiff") and defendant were married on 27 June 1981 and lived together as husband and wife for over twenty years. No children were born from the marriage. Plaintiff discovered that defendant had engaged in a three-year adulterous relationship with another woman. Plaintiff and defendant separated on 30 June 2003 when plaintiff moved out of the marital residence. Since the separation, defendant has been living in the marital residence with his paramour.

On 29 June 2004, plaintiff filed a verified complaint against defendant for: (1) post separation support; (2) permanent alimony; (3) equitable distribution; and (4) attorney fees. On 31 August 2004, defendant filed an answer and pled the affirmative defense of recrimination as an absolute bar to alimony.

In an order entered 23 February 2005, the trial court found that: (1) plaintiff was a dependent spouse and defendant was a supporting spouse and (2) defendant had engaged in adultery during the course of the marriage. The trial court ordered defendant to pay plaintiff $350.00 monthly for post-separation support until the sale of the marital residence. Upon sale, defendant was ordered to begin paying plaintiff: (1) 41.5 percent of his monthly retirement checks and (2) $400.00 per month in permanent alimony. Plaintiff was also awarded $18,000.00 as "her past due share of [d]efendant's retirement payments for the 19 months between [the] date of separation and the date of trial." The trial court also ordered that plaintiff's net vested share of $55,199.68 plus interest of defendant's 401(k) retirement account be transferred into her separate account. Defendant appealed from this order on 22 March 2005.

This Court reversed the trial court's order and remanded the case for further findings of fact. *See Helms v. Helms*, 179 N.C. App. 225,

633 S.E.2d 891 (2006) (unpublished). Our Court held the trial court erred by declaring plaintiff a dependent spouse and defendant a supporting spouse without entering the requisite findings of fact concerning the parties' accustomed standard of living prior to the separation and defendant's total living expenses at the time of the hearing. *Id.* This Court also held the trial court erred in determining the respective shares of the parties' 401(k) retirement accounts because the trial court's findings were insufficient to support the specific monetary award. *Id.*

On 18 May 2007, the trial court filed its order on remand. In its order, the trial court included specific findings of fact regarding the parties' accustomed standard of living prior to separation and the respective shares of defendant's 401(k) retirement account. The trial court's order on remand did not change the trial court's prior award to plaintiff. Defendant appeals.

II. Issues

Defendant argues the trial court erred by: (1) finding plaintiff is a dependent spouse and defendant is a supporting spouse pursuant to N.C. Gen. Stat. § 50-16.1A and (2) erroneously determining the parties' respective shares of defendant's 401(k) retirement account.

[1] We recognize the trial court's order contains several items that may be subject to challenge. First, the trial court set the value of the marital residence as the future sales price of the residence and not the net fair market value on the date of separation. We note that the trial court's order necessarily fails to account for post-separation appreciation or diminution in value of the marital residence because both the sale price of the house and the date of distribution are unknown. Secondly, the trial court failed to specify the reasons for the delay in plaintiff's receipt of 41.5 percent of defendant's monthly retirement checks and commencement of alimony payments until the sale of the marital residence, which acts as a deterrent for defendant to agree to the sale. Thirdly, the trial court entered conflicting findings and conclusions regarding the classification of plaintiff's lump sum award of $18,000.00 as "her share of defendant's retirement benefits." Pursuant to Rule 10(a) of the North Carolina Rules of Appellate Procedure, "the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal . . . ." N.C.R. App. P. 10(a) (2008). These issues are neither assigned as error, nor argued in the briefs, and are not properly before us.

III. N.C. Gen. Stat. § 50-16.1A

[2] Defendant argues the trial court erred by concluding as a matter of law that plaintiff is a dependent spouse and defendant is a supporting spouse pursuant to N.C. Gen. Stat. § 50-16.1A. We disagree.

A. Standard of Review

We review a trial court's finding that a party is entitled to alimony *de novo*. *Barrett v. Barrett*, 140 N.C. App. 369, 371, 536 S.E.2d 642, 644 (2000) (citation omitted).

B. Analysis

At the outset, we examine the two-step inquiry the trial court is statutorily required to follow in determining alimony:

> First is a determination of whether a spouse is *entitled* to alimony. N.C. Gen. Stat. § 50-16.3A(a). Entitlement to alimony requires that one spouse be a dependent spouse and the other be a supporting spouse[.] *Id.* If one is entitled to alimony, the second determination is the *amount* of alimony to be awarded. N.C. Gen. Stat. § 50-16.3(b).

Id. (emphasis original). Defendant argues that the trial court erred by classifying plaintiff as a dependent spouse and defendant as a supporting spouse, but does not contest the amount of alimony awarded.

1. Dependent Spouse

N.C. Gen. Stat. § 50-16.1A(2) (2005) defines a dependent spouse as a "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." This Court has stated:

> A spouse is "actually substantially dependent" if he or she is currently unable to meet his or her own maintenance and support. *Williams v. Williams*, 299 N.C. 174, 180, 261 S.E.2d 849, 854 (1980). A spouse is "substantially in need of maintenance" if he or she will be unable to meet his or her needs in the future, even if he or she is currently meeting those needs. *Id.* at 181-82, 261 S.E.2d at 855.

Barrett, 140 N.C. App. at 371, 536 S.E.2d at 644-45. "[I]n other words, the court must determine whether one spouse would be unable to maintain his or her accustomed standard of living, *established prior to separation*, without financial contribution from the other." *Vadala*

v. Vadala, 145 N.C. App. 478, 481, 550 S.E.2d 536, 538 (2001) (citation and quotation omitted) (emphasis supplied). "[T]o properly find a spouse dependent the court need only find that the spouse's reasonable monthly expenses exceed her monthly income and that the party has no other means with which to meet those expenses." *Beaman v. Beaman*, 77 N.C. App. 717, 723, 336 S.E.2d 129, 132 (1985). It necessarily follows that the trial court must look at the parties' income and expenses in light of their accustomed standard of living. *See Williams v. Williams*, 299 N.C. 174, 182, 261 S.E.2d 849, 856 (1980) ("The incomes and expenses measured by the standard of living of the family as a unit must be evaluated from the evidence presented.").

Defendant asserts plaintiff will receive 41.5 percent of defendant's retirement checks upon the sale of the marital residence and the trial court erred by failing to include this amount in its determination of plaintiff's monthly income, which affected her status as a dependent spouse. Defendant's argument is without merit. Plaintiff's status as dependent spouse is not determined based upon events set to occur in the future, but is established according to plaintiff's accustomed standard of living prior to the parties' separation. *Vadala*, 145 N.C. App. at 481, 550 S.E.2d at 538.

Here, the trial court made the following findings of fact:

> 8. PLAINTIFF'S INCOME: During the marriage, the Plaintiff worked as a dental assistant, earning $2,600.00 per month. Approximately one month after separation, Plaintiff lost her job due to a downsizing at her place of employment. At the time of the trial, Plaintiff worked as a secretary for Gideon's Heating and Air, earning a monthly income of $1,256.00 and also had a second job as a waitress, earning an additional average income of $152.00 per month. Plaintiff was restricted in search for reemployment as a dental assistant due to the development of carpal tunnel syndrome in both of her wrists during the last several years of her employment as a dental assistant. This condition was documented by her employer and her treating physician. The Plaintiff had also developed situational depression due to the breakup of her marriage and must take several antidepressant medications prescribed by her counselor to enable her to work.
>
> . . . .
>
> 10. PLAINTIFF'S EXPENSES: Plaintiff has monthly living expenses in the amount of $2,035.00 per month. The Court has examined these monthly expenses and finds them to be reason-

> able in light of the standard of living established by the parties during the marriage. . . .
>
> . . . .
>
> 14. The Plaintiff does not have sufficient income to meet her monthly needs and maintain her accustomed standard of living without support from the Defendant.
>
> . . . .
>
> 16. Plaintiff remains actually substantially dependent upon the Defendant for her maintenance and support and is substantially in need of maintenance and support from the Defendant.

Defendant failed to except to any of the trial court's findings of fact contained in its 18 May 2007 order. Where an appellant does not except to the trial court's findings of fact, they are presumed to be supported by competent evidence and are binding on appeal. *Hall v. Hall*, 65 N.C. App. 797, 799, 310 S.E.2d 378, 380 (1984).

Here, the trial court's findings of fact demonstrate that during the marriage and at the time of the hearing, plaintiff had an income-expenses deficit of $627.00 per month. The trial court's findings of fact are sufficient to support its conclusion that plaintiff is a dependent spouse pursuant to N.C. Gen. Stat. § 50-16.1A(2). *Beaman*, 77 N.C. App. at 723, 336 S.E.2d at 132.

2. Supporting Spouse

Our Supreme Court has stated, "evidence one spouse is dependent does not necessarily infer the other spouse is supporting." *Williams*, 299 N.C. at 186, 261 S.E.2d at 857. A supporting spouse is statutorily defined as a "husband or wife, upon whom the other spouse is actually substantially dependent for maintenance and support or from whom such spouse is substantially in need of maintenance and support." N.C. Gen. Stat. § 50-16.1A(5) (2005). This Court has stated, "[a] surplus of income over expenses is sufficient in and of itself to warrant a supporting spouse classification." *Barrett*, 140 N.C. App. at 373, 536 S.E.2d at 645 (citing *Beaman*, 77 N.C. App. at 723, 336 S.E.2d at 132).

Here, the trial court found that at the time of separation: (1) defendant's total monthly income was at a minimum $3,339.41 per month and (2) defendant's actual monthly expenses were approximately $2,800.00 per month. Defendant's income-expenses surplus

supports the trial court's classification of defendant as a supporting spouse pursuant to N.C. Gen. Stat. § 50-16.1A(5).

Prior to the enactment of our current alimony statute in 1995, our trial courts were instructed that "an alimony award should follow equitable distribution, duly taking into account the division of the marital property and the resulting estates of the parties." *Patterson v. Patterson*, 81 N.C. App. 255, 258, 343 S.E.2d 595, 598 (1986) (citing *Talent v. Talent*, 76 N.C. App. 545, 334 S.E.2d 256 (1985)). Under the present statute, however, a claim for alimony "may be heard on the merits prior to the entry of a judgment for equitable distribution, and if awarded, the issues of amount and of whether a spouse is a dependent or supporting spouse may be reviewed by the court after the conclusion of the equitable distribution claim." N.C. Gen. Stat. § 50-16.3A(a) (2005). The trial court found plaintiff is the dependent spouse and defendant is the supporting spouse. This determination along with the trial court's determination of the amount of alimony awarded to plaintiff are subject to reconsideration following the final equitable distribution or may be modified by motion in the cause and proof of a substantial change of circumstances. This assignment of error is overruled.

IV. 401(k) Retirement Account

[3] Defendant argues the trial court erroneously determined the parties' respective shares of defendant's 401(k) retirement account. We disagree.

A. Standard of Review

"The standard of review of the percentage division of marital property in equitable distribution cases is for an abuse of discretion." *Squires v. Squires*, 178 N.C. App. 251, 256, 631 S.E.2d 156, 159 (2006) (citation omitted). "A ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

B. Analysis

This Court previously remanded the issue of the 401(k) retirement account to the trial court based upon the parties' failure to present any evidence tending to show the value of the account on the date of separation. *See Helms*, 179 N.C. App. at 225, 633 S.E.2d at

891. At the hearing on remand, defendant presented the trial court with a written record that established the account was worth $111,805.02 on the date of separation.

It is undisputed that plaintiff is entitled to a portion of defendant's 401(k) account. At the equitable distribution hearing, plaintiff testified that she and her counsel had determined that she was entitled to $42,098.38 based upon the number of years she was married to defendant and the years defendant was employed. Defendant now argues this admission was binding upon the trial court. We disagree.

This Court addressed a similar issue in *Embler v. Embler*, 159 N.C. App. 186, 582 S.E.2d 628 (2003). In *Embler*, the defendant argued that the trial court erred by classifying his pension plan solely as marital property because one-third of defendant's employment occurred before the marriage. 159 N.C. App. at 191, 582 S.E.2d at 632. The defendant did not present any evidence of the pre-marital value of the pension and had stipulated on the equitable distribution form that the pension was marital property. *Id.* This Court stated, "[t]he court thus had no evidence by which it could accurately calculate the pre-marital value of the pension. Defendant bore the burden of showing what portion of the pension was separate property and cannot now complain because he failed to meet his burden." *Id.*

Here, defendant failed to present any evidence tending to show the number of years his 401(k) account existed prior to the marriage. In his equitable distribution affidavit, defendant stipulated the account was marital property and listed the word "none" under separate property. Defendant did not meet his "burden of showing what portion of the pension was separate property." *Id.* Defendant failed to show the trial court abused its discretion by awarding plaintiff one-half of defendant's 401(k) retirement account. *See Young v. Gum*, 185 N.C. App. 642, 647, 649 S.E.2d 469, 473 (2007) (citing N.C. Gen. Stat. § 50-20(c) (2005)) (holding there is a presumption that marital and divisible property will be distributed half to each spouse). This assignment of error is overruled.

V. Conclusion

The trial court properly classified plaintiff as a dependent spouse and defendant as a supporting spouse pursuant to N.C. Gen. Stat. § 50-16.1A. Defendant failed to show the trial court abused its discretion by awarding plaintiff one-half of defendant's 401(k) retirement account. The trial court's order is affirmed.

Affirmed.

Judge McGEE concurs.

Judge STEPHENS concurs in part and dissents in part by separate opinion.

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

This case confounds me. My confusion undoubtedly springs from the trial court's attempt to resolve simultaneously the issues of postseparation support, alimony, and equitable distribution, but is worsened by the manner in which these issues were "resolved." Nevertheless, I reluctantly agree with the majority's opinion that the trial court did not abuse its discretion in awarding Plaintiff one-half of Defendant's 401(k) account. However, I vote to reverse the trial court's order because: (1) I conclude that the trial court was without subject matter jurisdiction to award postseparation support beyond the date of the order's entry because the order also awarded alimony, and (2) I disagree with the majority's opinion that the trial court properly concluded that Plaintiff is entitled to alimony. Thus, I dissent.

Preliminarily, I note that this Court *reversed* and remanded the 23 February 2005 "Equitable Distribution Order." The trial court's 18 May 2007 "Order on Remand," however, purported to leave "[a]ll remaining provisions of the [Equitable Distribution] Order, not inconsistent with the terms [of the Order on Remand] . . . in full force and effect." Because the Order on Remand does not contain all of the findings necessary for a complete review of Defendant's appeal, we find ourselves in the curious position of having to compare the two orders to discern which provisions of the Equitable Distribution Order survived our reversal. The two orders are not readily comparable, and the trial court's action hinders and impedes our review.

Next, I agree with the majority that Defendant failed to assign error to "several items" that are clearly subject to challenge on appeal. Having thoroughly and exhaustively reviewed the record in this case, however, I submit that Defendant was as puzzled by the trial court's orders as I am, as the orders defy simple analysis. For example, in the Equitable Distribution Order, the trial court conflated the issues of equitable distribution and postseparation support, stating,

> Plaintiff is entitled to nineteenth [sic] months of retirement benefits she has not received since the date of the parties' separation at $924.91 plus interest and her share of any increases, which equals at least $17,573.29. These monies are not post-separation support, but are the Plaintiff's vested asset[,]

but then awarding, from the proceeds of the sale of the marital residence,

> $18,000.00 to Plaintiff as her past due share of Defendant's retirement payments for the 19 months between date of separation and the date of trial. This award is post-separation support granted.

Aside from the plain contradiction in the trial court's classification of Plaintiff's share of Defendant's retirement income, a determination that has potential tax ramifications, the trial court apparently picked the sum of $18,000.00 out of a hat.[1] Given the opportunity to clarify its order by this Court's first opinion in this case, the trial court stated in the Order on Remand that:

> Defendant shall pay the sum of $350.00 per month to Plaintiff as post separation support. The first prospective payment shall be due on March 1, 2005 and shall continue until such time as the former marital home is sold. As for retroactive post separation

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1. The plaintiff in an equitable distribution action is required to provide detailed information regarding the identification, classification, and value of marital and separate property as of the date of separation by filing an equitable distribution inventory affidavit. N.C. Gen. Stat. § 50-21(a) (2005). The defendant is required to provide the same information after receiving the plaintiff's affidavit. *Id.* "A party who fails to file the required equitable distribution inventory affidavit can be subject to sanctions pursuant to N.C. Gen. Stat. § 1A-1, Rule 37, up to and including dismissal of the claim." *Young v. Gum*, 185 N.C. App. 642, 649, 649 S.E.2d 469, 474 (2007) (citing N.C. Gen. Stat. § 50-21(a); N.C. Gen. Stat. § 1A-1, Rule 37(b)(2)), *disc. review denied*, 362 N.C. 374, ––– S.E.2d ––– (2008).

The majority opinion refers to Defendant's "equitable distribution affidavit." Presumably, the majority refers to a document in the record on appeal labeled "Equitable Distribution Affidavit of the Defendant." This document is neither executed nor file-stamped. Interestingly, in his first brief to this Court in COA05-1346, the same attorney who represents Defendant in this appeal wrote:

> The undersigned appellate counsel for Defendant performed a diligent search of the Pender County Clerk of Court's file with regard to this matter and he has been unable to locate any copies of a filed equitable distribution affidavit from either the Plaintiff or the Defendant, nor does the Exhibits/Evidence Log from the trial of this matter indicate that any such equitable distribution affidavit was entered into evidence. . . . The undersigned appellate counsel for Defendant has conferred with appellate counsel for the Plaintiff who has likewise not been able to locate any such equitable distribution affidavit.

> support, from his net share of the sale proceeds of the former marital residence, the Defendant shall pay $18,000.00 to Plaintiff for the time between the date of separation and the date of trial.
>
> . . . .
>
> 3. Defendant shall pay the sum of $3,150.00 to Plaintiff within 120 days of the entry of this Order as post separation support payments due for September, 2006 through May, 2007.

We are left to presume that the sum of $18,000.00 awarded as "retroactive post separation support" is the same $18,000.00 the trial court found and concluded was Plaintiff's vested asset.[2] We are likewise left to presume Defendant began making postseparation support payments of $350.00 beginning in March 2005 as previously ordered, but that he stopped making those payments in September 2006. In any event, I am loathe to affirm an order which defies review.

Moreover, I hesitate to affirm an order which clearly contradicts the provisions of our General Statutes. Postseparation support is "spousal support to be paid until the earlier of . . . [t]he date specified in the order for postseparation support [or] *[t]he entry of an order awarding or denying alimony*." N.C. Gen. Stat. § 50-16.1A(4) (2005) (emphasis added); *Evans v. Evans*, 169 N.C. App. 358, 610 S.E.2d 264 (2005); *Rowe v. Rowe*, 131 N.C. App. 409, 507 S.E.2d 317 (1998). In this case, the order awards alimony. The order also awards postseparation support to be paid beyond the date of the order's entry. Such action plainly contradicts the legislative directive.

More importantly, I would hold that the trial court's action in entering an order awarding alimony deprived the court of subject matter jurisdiction to award postseparation support prospective from the order's entry. *In re T.R.P.*, 360 N.C. 588, 590, 636 S.E.2d 787, 790 (2006) (stating that subject matter jurisdiction is " '[j]urisdiction over the nature of the case *and the type of relief sought*[]' ") (quoting *Black's Law Dictionary* 856 (7th ed. 1999)) (emphasis added); *see* N.C. Gen. Stat. § 50-16.1A(4) (defining postseparation support). It is well-established that an issue of subject matter jurisdiction may be raised at any stage of a case and may be raised by a court on its own motion. " 'A universal principle as old as the law is that the proceedings of a court without jurisdiction of the subject matter are a

2. Nineteen months of the award of vested retirement benefits is $17,573.29. Nineteen months of postseparation support in the amount of $350.00 per month, however, is only $6,650.00.

nullity.' " *T.R.P.*, 360 N.C. at 590, 636 S.E.2d at 790 (quoting *Burgess v. Gibbs*, 262 N.C. 462, 465, 137 S.E.2d 806, 808 (1964)). The trial court's award of postseparation support beyond the date of the order's entry should be vacated.

EQUITABLE DISTRIBUTION

By his second assignment of error, Defendant argues the trial court abused its discretion in awarding Plaintiff one-half of his 401(k) account. In an equitable distribution action, the trial court is required to provide for an equitable distribution of the parties' marital property and divisible property. N.C. Gen. Stat. § 50-20(a) (2005). To do so, the court must determine what is marital property and what is divisible property. *Id.* "Marital property" includes "all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties, and presently owned[.]" N.C. Gen. Stat. § 50-20(b)(1) (2005). "Divisible property" includes, *inter alia*:

> All appreciation and diminution in value of marital property and divisible property of the parties occurring after the date of separation and prior to the date of distribution, except that appreciation or diminution in value which is the result of postseparation actions or activities of a spouse shall not be treated as divisible property.

N.C. Gen. Stat. § 50-20(b)(4)(a) (2005). While marital property is valued as of the date of separation, divisible property must be valued *as of the date of distribution*. N.C. Gen. Stat. § 50-21(b) (2005).

As the majority notes, the trial court did not value the marital residence as of the date of separation. Interestingly, a review of the transcript from the hearing held prior to the entry of the Equitable Distribution Order reveals that the first half of the hearing was dedicated to resolving this very issue. Furthermore, as the majority states, the trial court's order necessarily fails to account for post-separation appreciation or diminution in value of the marital residence because both the sale price of the house and the date of distribution are unknown. In light of these unknowns, I question whether the trial court's order completely resolves the equitable distribution claim and whether this appeal is interlocutory. In its discussion of the alimony award, the majority tacitly acknowledges the interim nature of the distributive award, stating that the trial court's alimony determinations are "subject to reconsideration following the *final*

equitable distribution[.]" (Emphasis added.) At a minimum, however, the trial court's order does not comply with our equitable distribution statutes.

Nevertheless, by his second assignment of error, Defendant only argues that the trial court was bound by the parties' admission that Plaintiff was entitled to receive $42,098.38 from Defendant's 401(k) retirement account. Defendant does not argue that the trial court's order violates our statutes. I agree with the majority that the parties' admission is not binding upon the trial court and, therefore, vote to overrule Defendant's second assignment of error.

ALIMONY

By his first assignment of error, Defendant argues the trial court erred in determining that Plaintiff is entitled to alimony. I agree.

The majority reasons that "[p]laintiff's dependent spouse status is not determined based upon events set to occur in the future, but *is established according to plaintiff's accustomed standard of living prior to the parties' separation*." (Emphasis added.) The majority then states that "the trial court's findings of fact demonstrate that during the marriage and *at the time of the hearing*, plaintiff had an income-expenses deficit of $627.00 per month." (Emphasis added.) The findings of fact recited in the majority's opinion do not support the majority's statement that, during the marriage, Plaintiff had an income-expenses deficit of $627.00. According to the findings, Plaintiff was earning $1,192.00 less per month at the time of the hearing than on the date of separation. Moreover, the majority's reliance on Plaintiff's income-expenses deficit at the time of the hearing is in plain opposition to its statement that Plaintiff's dependent spouse status is determined according to Plaintiff's accustomed standard of living prior to the parties' separation.

Although I agree with the majority that our current statute authorizes a trial court to hear and award a claim for alimony prior to the entry of a judgment for equitable distribution and that the trial court's alimony determinations are subject to reconsideration following the final equitable distribution, this solution to the problems raised by this appeal is unappealing. As one leading scholar noted after the current statute's enactment,

> hearing the alimony claim [before the completion of an equitable distribution] is likely to be a *waste of judicial and other resources* and will certainly bring *added expenses to the parties*. The caveat to this statement would involve the *unlikely event*

> that the results of equitable distribution would not change the alimony duration or amount, or the dependency status—an eventuality that, given the potential of the expanded factors that can be used to increase the assets and income of the supporting spouse, is *so unlikely as to stretch the imagination.*

Sally Burnett Sharp, *Step by Step: The Development of the Distributive Consequences of Divorce in North Carolina*, 76 N.C. L. Rev. 2017, 2085-86 (1998) (footnote omitted) (emphasis added). Professor Sharp's prognostication has come true in this case. *See, e.g.*, *Helms v. Helms*, 179 N.C. App. 225, 633 S.E.2d 891 (2006) (unpublished) (addressing the trial court's initial attempt to resolve this matter).

In light of the flawed nature of the trial court's orders, I cannot agree with the result reached by the majority. In my opinion, the trial court's determinations that, for purposes of alimony, Plaintiff is the dependent spouse and Defendant is the supporting spouse should be reversed. The trial court's award of alimony should also be reversed, and I would remand this case to the trial court. On remand, I would instruct the trial court to enter one order containing all of its findings. I would further remind the trial court that postseparation support terminates upon the entry of an award of alimony. If the trial court chooses to delay an alimony award until the marital home sells, the trial court should also delay its determination of the spouses' statuses until that time. I note with interest that this result comports with the result urged by Plaintiff in her first brief to this Court, in which she wrote:

> The trial court set no deadline for the sale of the former marital home, thus allowing [Defendant] to pay [Plaintiff] alimony [sic] in the sum of $350.00 indefinitely, and preventing [Plaintiff] from receiving her $924.91 monthly share of [Defendant's] retirement benefits. While [Plaintiff] contends that the trial court was correct in [its] determination that she is the dependant [sic] spouse and [Defendant] is the supporting spouse, based on the foregoing "distribution" of marital assets, she recognizes *the need for the trial court to properly deal with equitable distribution* before there is any reconsideration of classification as a dependant [sic] spouse.

(Emphasis added.) I dissent from the majority's opinion to the extent it affirms the trial court's award of postseparation support and alimony. Otherwise, I concur.

IN THE MATTER OF: E.X.J. AND A.J.J., MINOR CHILDREN

No. COA07-1235

(Filed 17 June 2008)

1. Termination of Parental Rights— standing—home state—temporary emergency jurisdiction

The trial court did not err by concluding that the Rutherford County Department of Social Services (DSS) had standing to file a petition or motion for termination of parental rights even though North Carolina was not the children's home state as defined under the UCCJEA at the time of the filing of the juvenile petition in this action because: (1) a trial court is entitled to assert temporary emergency jurisdiction of a child under N.C.G.S. § 50A-204(a) if the child is present in this State and the child has been abandoned or it is necessary in an emergency to protect the child when the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse; (2) the record established that emergency jurisdiction existed at the time DSS filed its juvenile petition where respondent mother told a social worker that she had been in an abusive relationship with respondent father in Alabama and that she did not have an ability to take care of the children or have anyone else willing or able to care for the children; and (3) N.C.G.S. § 50A-204(b) provides that a child custody determination made under this section remains in effect until an order is obtained from a court of a state having jurisdiction under N.C.G.S. §§ 50A-201 through 50A-203, and there had been no prior custody proceedings or court orders entered with regard to the minor children in the State of Alabama or in the State of North Carolina prior to respondent mother moving to Rutherford County, North Carolina in April 2005, nor by any other state with jurisdiction since the initial nonsecure custody orders entered in this State granting DSS custody.

2. Termination of Parental Rights— jurisdiction—temporary jurisdiction moot—home state

The trial court did not lack jurisdiction under the UCCJEA to terminate respondent parents' parental rights even though respondents contend the court was limited to entering temporary orders based on the temporary nature of emergency jurisdiction under N.C.G.S. § 50A-204, because: (1) by the time of the filing of the petition and motion for termination of parental rights, respondent mother and the two children had been physically

present in North Carolina for two years; (2) respondent father's residency in Alabama was immaterial to the analysis of the children's home state since home state is defined under N.C.G.S. § 50A-102(7) as the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding; (3) any issue of temporary jurisdiction is now moot given the children's residency and the lack of any other custody proceedings or orders in other states; and (4) while N.C.G.S. § 7B-1101 would preclude basing the termination of parental rights court's jurisdiction on N.C.G.S. § 50A-204, the holding of *In re M.B.*, 179 N.C. App. 572 (2006), established the court's jurisdiction in North Carolina under N.C.G.S. § 50A-201(a)(1) based on being the home state.

3. Termination of Parental Rights— personal jurisdiction—prior adjudication order—service of summons and petition to only one parent

The trial court did not lack personal jurisdiction in a termination of parental rights case even though respondent father contends he was never personally served with the summons and petition in the underlying adjudication action because: (1) even when a summons is issued to only one parent of a child, the court still has jurisdiction to determine the status of the child in an abuse, neglect and dependency proceeding; (2) the record on appeal included the return of service indicating that respondent mother was personally served on 27 April 2005 with the summonses and juvenile petitions relating to both children; (3) in contrast to termination of parental rights proceedings, the trial court was not required to determine the culpability of each parent as to the children in the dependency adjudication hearings; (4) our appellate courts have previously rejected attempts to link initial adjudication and termination of parental rights orders in such a way as to make the termination of parental rights order dependent on the validity of the initial adjudication order, motions in the cause and original petitions for termination of parental rights may be sustained irrespective of earlier juvenile court activity, and the initial adjudication order in this case was not before the Court of Appeals; and (5) respondent father had full notice of the termination of parental rights proceeding and a full opportunity to be heard.

Judge TYSON concurring in part and dissenting in part.

Appeal by respondent mother and respondent father from judgment entered 31 July 2007 by Judge Laura A. Powell in Rutherford County District Court. Heard in the Court of Appeals 18 February 2008.

Goldsmith, Goldsmith & Dews, P.A., by James W. Goldsmith, for petitioner-appellee.

Susan J. Hall for respondent-appellant father.

Jon W. Myers for respondent-appellant mother.

North Carolina Guardian ad Litem Program, by Pamela Newell Williams, for guardian ad litem.

GEER, Judge.

Respondent mother and respondent father appeal from the trial court's judgment and order terminating their parental rights to their minor children E.X.J. ("Eddie") and A.J.J. ("Annie").[1] Respondents primarily challenge the trial court's subject matter jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA") to enter the initial adjudication order determining the children to be dependent. Respondents argue that Alabama, not North Carolina, was the children's "home state" at that time, and no other basis for jurisdiction in North Carolina existed. Respondents contend that since the trial court initially lacked jurisdiction, the court that entered the termination of parental rights order also lacked jurisdiction.

This appeal is controlled by *In re M.B.*, 179 N.C. App. 572, 635 S.E.2d 8 (2006). Based on that decision, because the trial court properly exercised its emergency jurisdiction under the UCCJEA in entering the initial adjudication and because the children and respondent mother had been present in this State for two years by the time of the filing of these proceedings to terminate parental rights, *M.B.* requires that we hold that the trial court had subject matter jurisdiction over these proceedings. Accordingly, we affirm the trial court's order.

Facts

Respondent mother arrived in Rutherford County, North Carolina on 19 April 2005 with Eddie and Annie. The next day, she went to the Rutherford County Department of Social Services ("DSS") and re-

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1. The pseudonyms "Eddie" and "Annie" will be used throughout the opinion to protect the children's privacy and for ease of reading.

ported that she was not mentally or financially able to care for her children, that she had no friends or family willing or able to care for them, and that she wanted them to be placed in foster care until she was able to care for them herself.

Respondent mother and her children had been living in Lee County, Alabama with respondent father. The minor children were born in Alabama and had lived there all their lives except for a brief period from November 2004 to February 2005 when they were in North Carolina. Respondent mother told DSS that she fled Alabama because respondent father was physically abusive toward her and the children. She stated that he consumed alcohol and used marijuana on a daily basis and would throw things at her and hit her. On one occasion, when he became angry with respondent mother, he threw Eddie against a wall; on another occasion he threw Annie out the back door after a fight with respondent mother.

Respondent mother told the social worker that she had no home, no money, no job, and no transportation. DSS offered her a place to stay at a domestic violence or homeless shelter, but she refused. DSS then obtained nonsecure custody of Eddie and Annie on 20 April 2005, and a written order was entered on 21 April 2005. On 21 April 2005, DSS filed juvenile petitions alleging that Eddie and Annie were dependant and neglected juveniles. A summons for each child was personally served on respondent mother, but the summonses mailed to respondent father in Alabama were returned "unclaimed," and the record does not indicate that he was served through any other means.

After filing the juvenile petitions, DSS contacted the Lee County, Alabama Department of Human Resources ("DHR"). DHR reported that although it had two prior reports involving the children, there was no open case on the family, but DHR would assist DSS in any way possible.

An order entered 28 April 2005 continued nonsecure custody with DSS and set the hearing on the juvenile petitions for 13 May 2005. The adjudication hearing was ultimately continued twice, with the hearing eventually being set for 26 August 2005. On 12 August 2005, notice for the 26 August 2005 adjudication hearing was mailed to respondent father in Alabama. Respondent father sent a letter to the clerk of court dated 21 August 2005 and filed 30 August 2005 stating that he was "not able to make it" to the adjudication but that he currently had a "good job and . . . a place to stay" and would be getting a raise and a place of his own in the near future.

The adjudication hearing was held as scheduled on 26 August 2005. Respondent mother admitted the allegations of dependancy as set forth in the juvenile petitions and stipulated that Eddie and Annie were dependant juveniles. She also stipulated that it was in the best interests of her minor children that DSS retain custody. Based on these stipulations, the court, in an order entered 11 October 2005, adjudicated Eddie and Annie as dependant and determined that it was in their best interests to remain in DSS custody.

After a review hearing was held on 24 February 2006, the court entered an order on 21 March 2006 again concluding that it was in the children's best interests to remain in the foster homes provided by DSS. Permanency planning hearings were conducted on 10 April 2006 and again on 25 September 2006. In an order entered 6 October 2006, the court ceased reunification efforts and changed the permanent plan to adoption for both children.

On 6 and 14 December 2006, DSS filed motions in the cause to terminate respondents' parental rights as to Eddie and Annie. On 23 April 2007, at the direction of the court, apparently based on DSS' failure to serve respondent father with a summons and the petition in the initial adjudication proceeding, DSS filed an amended motion to terminate respondent mother's parental rights and a separate petition to terminate respondent father's parental rights. Respondent mother was properly served with the amended motion, while summonses were issued and served in connection with the petition on respondent father and the guardian ad litem for the children.

The trial court conducted the termination of parental rights hearing on 24 July 2007. At the close of DSS' evidence, respondents moved to dismiss the motion and petition on the ground that the court lacked subject matter jurisdiction. The court denied the motion, as well as respondent father's motion to dismiss for lack of personal jurisdiction based on the fact that he had not been served in the initial adjudication proceeding.

In its 31 July 2007 judgment and order, the trial court determined that grounds existed to terminate respondent mother's parental rights as to both children under N.C. Gen. Stat. § 7B-1111(a)(2) and (3) (2007). The court found grounds for terminating respondent father's parental rights under N.C. Gen. Stat. § 7B-1111(a)(5). The court then determined that it was in the children's best interests to terminate respondents' parental rights and ordered DSS to proceed with plans

for adoption. Respondents timely appealed from the court's 31 July 2007 judgment and order.

Discussion

[1] Respondents first argue that DSS lacked standing to pursue termination of their parental rights because DSS had not been granted custody of the children by a court of competent jurisdiction. Under N.C. Gen. Stat. § 7B-1103(a)(3) (2007), a petition or motion to terminate the parental rights of a parent may be filed by a "county department of social services . . . to whom custody of the juvenile has been given by a court of competent jurisdiction." If DSS does not lawfully have custody of the children, then it lacks standing to file a petition or motion to terminate parental rights, and the trial court, as a result, lacks subject matter jurisdiction. *In re Miller*, 162 N.C. App. 355, 358, 590 S.E.2d 864, 866 (2004).

We note that the 28 April 2005 nonsecure custody order—a form document—stated that "North Carolina is the home state of the named juvenile(s)." It is, however, undisputed that at the time of the filing of the juvenile petition in this action, North Carolina was not the children's "home state," as defined by the UCCJEA, N.C. Gen. Stat. § 50A-201(a)(1) (2007). Nevertheless, a trial court is entitled to assert "temporary emergency jurisdiction if the child is present in this State and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse." N.C. Gen. Stat. § 50A-204(a) (2007).

Although the initial 21 April 2005 nonsecure custody order did not assert a basis for jurisdiction, and the 28 April 2005 order continuing custody contained boilerplate language regarding "home state" jurisdiction, the trial court, in its 11 October 2005 initial adjudication, found with respect to jurisdiction:

> The mother moved to North Carolina from Alabama with her two children. She alleges that her move was to flee an abusive relationship with the father of the children. Upon arrival in Rutherford County, NC the mother contacted Rutherford County DSS to advise that she had no means to care for the children. Rutherford County DSS has worked closely with the mother to procure employment, housing, medical treatment for the children and mental health treatment for the mother. The mother was recently hospitalized following a suicide attempt. She is no longer

employed and lacks housing, and thus the present ability to care for her children.

Similarly, in the termination of parental rights order on appeal, the court found in pertinent part, with respect to jurisdiction:

> On April 19, 2005, the respondent mother, together with the children's maternal grandmother, came to Rutherford County Department of Social Services with the children and requested the agency to take custody of the minor children. The respondent mother told the social worker that she had been in an abusive relationship with the respondent father, and did not have an ability to take care of the children, or have any friends or family who were willing or able to take care of the children. The respondent mother told the social worker she could not mentally or financially care for the children. The Rutherford County DSS offered to assist the respondent mother in obtaining shelter at the domestic violence shelter or homeless shelter, but the respondent mother refused the services. DSS filed a juvenile petition, and was granted non-secure custody of the children on April 20, 2005.

These findings are not challenged on appeal and, therefore, are binding on this Court. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

These findings establish a basis for emergency jurisdiction. It is immaterial to the question of the trial court's subject matter jurisdiction in granting nonsecure custody to DSS that the trial court did not make the necessary findings. With respect to the bases for jurisdiction set forth in N.C. Gen. Stat. § 50A-201 and N.C. Gen. Stat. § 50A-203 (2007), our appellate courts have specifically held that the "statutes do not require a finding of fact (although this would be the better practice) . . . ." *In re T.J.D.W., J.J.W.*, 182 N.C. App. 394, 397, 642 S.E.2d 471, 473, *disc. review denied in part*, 361 N.C. 568, 651 S.E.2d 562, *aff'd per curiam in part*, 362 N.C. 84, 653 S.E.2d 143 (2007). N.C. Gen. Stat. § 50A-204 is no different than § 50A-201(a)(1), which this Court noted "states only that certain circumstances must exist, not that the court specifically make findings to that effect . . . ." *T.J.D.W.*, 182 N.C. App. at 397, 642 S.E.2d at 473. Here, the record establishes that emergency jurisdiction under § 50A-204 existed at the time DSS filed its juvenile petition. DSS was, therefore, awarded custody by a court of competent jurisdiction. *See T.J.D.W.*, 182 N.C. App. at 398, 642 S.E.2d at 474 (noting that

the record "provides ample evidence as to the whereabouts at the relevant times of all participants").

Respondents, however, urge that emergency jurisdiction is temporary. Nonetheless, N.C. Gen. Stat. § 50A-204(b) specifically provides: "If there is no previous child-custody determination that is entitled to be enforced under this Article and a child-custody proceeding has not been commenced in a court of a state having jurisdiction under G.S. 50A-201 through G.S. 50A-203, a child-custody determination made under this section *remains in effect until an order is obtained from a court of a state having jurisdiction under G.S. 50A-201 through G.S. 50A-203*." (Emphasis added.)

It is undisputed, as the court found in the termination of parental rights order, that "[p]rior to the respondent mother moving to Rutherford County, North Carolina, in April 2005, there had been no prior custody proceedings or court orders entered with regard to the minor children in the State of Alabama, or in the State of North Carolina." It is equally undisputed that no other orders have been entered by any other state with jurisdiction since the initial nonsecure custody orders entered in this State granting DSS custody. By operation of N.C. Gen. Stat. § 50A-204(b), therefore, those custody orders "remain[ed] in effect," and DSS had standing to file a petition or motion for termination of parental rights.

[2] As a second basis for reversal of the trial court's termination of parental rights order, respondents point to the temporary nature of emergency jurisdiction under N.C. Gen. Stat. § 50A-204 and argue that the court was limited to entering temporary orders and, therefore, lacked jurisdiction under the UCCJEA to terminate respondents' parental rights. A critical issue with respect to this argument is whether "home state" jurisdiction may be determined as of the date of the filing of the petition or motion for termination of parental rights.[2] Although respondents assume, without citing authority, that the determination should be made as of the date of the filing of the initial juvenile petition, DSS assumes, also without citing any authority, that the determination should be made as of the date of the filing of the petition or motion to terminate parental rights. The parties do not dispute that "home state" jurisdiction did not exist as of the date of the filing of the juvenile petition, but that North Carolina would

2. Because of our disposition of this issue, we do not address DSS' contention that jurisdiction also existed under N.C. Gen. Stat. § 50A-201(a)(2) or N.C. Gen. Stat. § 50A-204(b).

meet the definition of "home state," N.C. Gen. Stat. § 50A-102(7) (2007), if it were determined as of the date of the initiation of the termination of parental rights proceedings.

The statute itself, N.C. Gen. Stat. § 50A-201(a)(1), requires that this State be "the home state of the child on the date of the commencement of the proceeding." The definitions statute for the UCCJEA states: " 'Commencement' means the filing of the first pleading in a proceeding." N.C. Gen. Stat. § 50A-102(5). The UCCJEA does not, however, define "proceeding." There is, however, a definition of a "Child-custody proceeding":

> "Child-custody proceeding" means a proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue. The term includes a proceeding for divorce, separation, *neglect*, *abuse*, *dependency*, guardianship, paternity, *termination of parental rights*, and protection from domestic violence in which the issue may appear. The term does not include a proceeding involving juvenile delinquency, contractual emancipation, or enforcement under Part 3 of this Article.

N.C. Gen. Stat. § 50A-102(4) (emphasis added). This definition does not, however, unambiguously resolve the question whether neglect, abuse, and dependency proceedings should be viewed for § 50A-201 purposes as separate proceedings from a termination of parental rights proceeding. *See also* N.C. Gen. Stat. § 7B-1101 (2007) (granting district courts "exclusive original jurisdiction to hear and determine any petition or motion relating to termination of parental rights to any juvenile who resides in, is found in, or is in the legal or actual custody of a county department of social services or licensed child-placing agency in the district at the time of filing of the petition or motion").

Nevertheless, we need not specifically resolve this question because *In re M.B.*, 179 N.C. App. 572, 635 S.E.2d 8 (2006), establishes that "home state" jurisdiction exists in this case. In *M.B.*, as in this case, North Carolina was not the child's home state when the trial court entered a nonsecure custody order. *Id.* at 572, 635 S.E.2d at 9. The child had moved to North Carolina on 28 March 2005. *Id.* The trial court adjudicated the child neglected on 17 June 2005. *Id.* at 573, 635 S.E.2d at 9. On 10 October 2005, the trial court entered an order finding that no custody order had been entered or was pending in any other state and that the child and her parents had, by that time, lived in North Carolina for six months. *Id.* at 576, 635 S.E.2d at 11.

This Court held that the trial court had jurisdiction to enter the initial custody orders, on 22 April 2005 and in May 2005, based on N.C. Gen. Stat. § 50A-204 emergency jurisdiction. *M.B.*, 179 N.C. App. at 576, 635 S.E.2d at 11. With respect to the adjudication order, the Court held that "any issue of temporary jurisdiction is now moot" because M.B. and her parents had been physically present in North Carolina for more than six months, and no custody order had been entered and no custody proceeding was pending in any other state. *Id.* The Court held further: "Thus, North Carolina is now the home state under the UCCJEA . . ., and as such, North Carolina courts have jurisdiction to determine child custody." *Id.* The Court concluded: "After M.B., M.B.'s mother, and respondent father had remained in North Carolina for more than six months, and when no custody orders were entered in any other state, North Carolina became the home state wherein the trial court had jurisdiction under the UCCJEA to enter orders adjudicating M.B. neglected." *Id.*

Similarly, in this case, we have already held that the trial court had emergency jurisdiction to enter the initial nonsecure custody orders. By the time of the filing of the petition and motion for termination of parental rights, Eddie, Annie, and respondent mother had been physically present in North Carolina for two years. Further, the court found that "[p]rior to the respondent mother moving to Rutherford County, North Carolina, in April, 2005, there had been no prior custody proceedings or court orders entered with regard to the minor children in the State of Alabama, or in the State of North Carolina. . . . No custody proceedings involving the minor children have been filed either prior to or subsequent to April 20, 2005 in Alabama or any other state (other than this pending juvenile proceeding)."

The only distinction between this case and *M.B.* is the fact that respondent father is not and has not been a resident of North Carolina. "Home state," however, is defined as "the state in which *a child lived* with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding." N.C. Gen. Stat. § 50A-102(7) (emphasis added). The focus is thus on how long *the child* has lived in the state with either one parent or someone acting as a parent. The father's residency is, therefore, immaterial to the analysis of *M.B.* Thus, respondent father's residency in Alabama does not, in this case, change the children's "home state."

M.B. requires us to conclude "that any issue of temporary jurisdiction is now moot." Given the children's residency and the lack of any other custody proceedings or orders in other states, "North Carolina became the home state wherein the trial court had jurisdiction under the UCCJEA to enter orders" terminating respondents' parental rights. *M.B.*, 179 N.C. App. at 576, 635 S.E.2d at 11.

Respondent father points also to N.C. Gen. Stat. § 7B-1101's proviso that "before exercising jurisdiction under this Article regarding the parental rights of a nonresident parent, the court shall find that it has jurisdiction to make a child-custody determination under the provisions of G.S. 50A-201 or G.S. 50A-203, *without regard to G.S. 50A-204*." (Emphasis added.) While this provision would preclude basing the termination of parental rights court's jurisdiction on N.C. Gen. Stat. § 50A-204, the holding in *M.B.* establishes that the court's jurisdiction in this termination of parental rights proceeding fell under the "home state" jurisdiction of N.C. Gen. Stat. § 50A-201(a)(1).

[3] Finally, respondent father advances the additional argument that he "was never personally served with the summons and petition in the underlying [adjudication] action; thus the trial court lacked personal jurisdiction, and the adjudication judgment would be void." According to respondent father, this lack of personal jurisdiction in the adjudication phase means that "[t]he trial court therefore had no subject matter jurisdiction to enter the termination order."

This argument overlooks the well-established principle that even when a summons is issued to only one parent of a child, the court still has jurisdiction to determine the status of the child in an abuse, neglect, and dependency proceeding. *See In re Poole*, 151 N.C. App. 472, 476-77, 568 S.E.2d 200, 203 (2002) (Timmons-Goodson, J., dissenting) (holding that failure to issue and serve summons on respondent father did not divest court of subject matter jurisdiction to find child dependent when summons was issued and served on mother), *adopted per curiam*, 357 N.C. 151, 579 S.E.2d 248 (2003). *See also In re Arends*, 88 N.C. App. 550, 554, 364 S.E.2d 169, 171 (1988) (holding that "in order to have a child declared dependent, it is not necessary to serve the petition [or motion] on both parents, but only on one of them").

The record on appeal includes the return of service indicating that respondent mother was personally served on 27 April 2005 with the summonses and juvenile petitions relating to both children. Accordingly, the trial court had subject matter jurisdiction over the initial adjudication proceeding.

The dissent's contention otherwise reflects a misunderstanding of adjudication proceedings. The dissent argues that the trial court did not have jurisdiction to enter an order adjudicating E.X.J. and A.J.J. to be dependant *as to respondent father*. This Court has, however, held that in these types of proceedings—in contrast to termination of parental rights proceedings—the trial court is not required to determine the culpability of each parent as to the children. In *In re J.S.*, 182 N.C. App. 79, 86, 641 S.E.2d 395, 399 (2007), the Court explained:

> The purpose of abuse, neglect and dependency proceedings is for the court to determine whether the juvenile should be adjudicated as having the status of abused, neglected or dependent. . . . The purpose of the adjudication and disposition proceedings should not be morphed on appeal into a question of culpability regarding the conduct of an individual parent.

As a result, in this case, there was no adjudication of dependency as to a particular parent; there was just an adjudication that the children were dependent.

Further, both our Supreme Court and this Court have previously rejected attempts to link initial adjudication and termination of parental rights orders in such a way as to make the termination of parental rights order dependent on the validity of the initial adjudication order. In *In re R.T.W.*, 359 N.C. 539, 553, 614 S.E.2d 489, 497 (2005), the Supreme Court emphasized, in reversing this Court: "Simply put, a termination order rests on its own merits." Likewise, this Court explained: "[B]y necessarily tying the adjudication proceedings and termination of parental rights proceedings together, respondent misapprehends the procedural reality of matters within the jurisdiction of the district court: Motions in the cause and original petitions for termination of parental rights may be sustained *irrespective* of earlier juvenile court activity." *In re O.C. & O.B.*, 171 N.C. App. 457, 463, 615 S.E.2d 391, 395 (2005). Thus, there is no legal basis for the dissenting opinion's suggestion that the trial court lacked jurisdiction in the termination of parental rights proceeding because the father was not served with a summons in the initial adjudication proceeding.

We also note that the dissenting opinion in effect urges that the initial adjudication order must be reversed. Yet, that order is not before us. The father's notice of appeal does not, in violation of N.C.R. App. P. 3(d), "designate the judgment or order from which appeal is taken," but, in any event, the initial adjudication was

entered in 2005, and, therefore, any purported appeal would be untimely under Rule 3(c). This Court does not have jurisdiction over the initial adjudication order.

The dissenting opinion also cites to the official commentary to N.C. Gen. Stat. § 50A-205 (2007), which states: "Parents whose parental rights have not been previously terminated and persons having physical custody of the child are specifically mentioned as persons who must be given notice." Yet, in this case, respondent father did receive notice and an opportunity to be heard. DSS did not ultimately file a motion in the cause—the initial adjudication proceeding—with respect to the termination of respondent father's parental rights. Instead, DSS filed a separate petition—an independent action—and properly served respondent father with a summons and that petition. Further, the initial adjudication order was not in any way relied upon as a basis for terminating respondent father's parental rights. Respondent father had full notice of the termination of parental rights proceeding and a full opportunity to be heard. Therefore, this assignment of error by respondent father is overruled.

Much of the remaining discussion in the dissenting opinion was not argued by respondent father at trial or on appeal. Therefore, those matters are not before this Court, and we do not address them. In addition, although respondents assign error to a number of the trial court's findings of fact and conclusions of law, they make no arguments that the evidence does not support the trial court's findings or that the findings do not, in turn, support its conclusions. These assignments of error, therefore, are deemed abandoned. N.C.R. App. P. 28(a). Accordingly, we affirm the trial court's order terminating respondents' parental rights.

Affirm.

Judge JACKSON concurs.

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

TYSON, Judge concurring in part and dissenting in part.

I concur with that portion of the majority's opinion, which affirms the trial court's order terminating respondent-mother's parental rights. I disagree with that portion of the majority's opinion, which

affirms the trial court's order terminating respondent-father's parental rights. DSS failed to properly serve the summonses and petitions of the original adjudication action as is constitutionally required by the Fourteenth Amendment of the United States Constitution and as is statutorily required by N.C. Gen. Stat. § 50A-205. I vote to vacate the trial court's orders with respect to respondent-father and respectfully dissent.

I. Notice

Undisputed evidence shows the non-resident respondent-father was never served with the initial summonses and juvenile petitions and the trial court lacked personal jurisdiction over him to enter the adjudication order. Respondent-father asserts that without personal jurisdiction over him to enter the adjudication order, DSS's emergency intervention ended and the children should have been returned to his home in Alabama. Without any statutory basis for continued DSS intervention, the trial court was divested of jurisdiction to enter any order terminating respondent-father's parental rights.

North Carolina district courts have "exclusive, original [subject matter] jurisdiction over any case involving a juvenile who is alleged to be abused, neglected, or dependent." N.C. Gen. Stat. § 7B-200 (2005). North Carolina has also adopted the Uniform Child-Custody Jurisdiction and Enforcement Act ("UCCJEA"), which contains jurisdictional and notice requirements that DSS must satisfy in order for the district court to assert, acquire, and maintain jurisdiction to adjudicate dependency petitions over non-resident parents. N.C. Gen. Stat. § 50A-101, *et. seq.*

The record shows and the majority's opinion acknowledges that DSS properly contacted the Lee County, Alabama Department of Human Resources ("DHR"), who advised DSS it "would assist [] DSS in any way possible." Although never served with the summons and petition, respondent-father sent a letter to the clerk of court dated 21 August 2005, prior to the adjudication hearing, stating that he was "not able to make it" to the hearing, but that he currently had a "good job and . . . a place to stay" and would be getting a raise and a place of his own in the near future.

Even presuming the exercise of "temporary emergency jurisdiction" was proper, without valid service of process upon respondent-father, that exercise ended when DSS became aware that the children's home state was Alabama, their father was a resident there, and DHR would "assist [] DSS in any way possible."

N.C. Gen. Stat. § 7B-200(b) provides that "[t]he court shall have jurisdiction over the parent or guardian of a juvenile who has been adjudicated abused, neglected, or dependent . . . *provided the parent or guardian has been properly served with summons* . . . ." (Emphasis supplied). This express statutory limitation and pre-condition must be satisfied before jurisdiction is acquired. *Id.* "[S]ubject matter jurisdiction may be raised at any time by the parties or by the court *ex mero motu*." *In re J.D.S.*, 170 N.C. App. 244, 248, 612 S.E.2d 350, 353 (citations omitted), *cert. denied*, 360 N.C. 64, 623 S.E.2d 584 (2005). This Court has repeatedly stated that "[t]he summons, not the complaint, constitutes the exercise of the power of the State to bring the defendant before the court." *Childress v. Forsyth County Hospital Auth.*, 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); *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[.]").

This Court has previously held that a trial court acquired authority to enter an adjudication of dependency when the summons and juvenile petition was served only upon one parent. *See In re Poole*, 151 N.C. App. 472, 476, 568 S.E.2d 200, 203 (2002) (Timmons-Goodson, J., dissenting) (citing *In the Matter of Ardens*, 88 N.C. App. 550, 554, 364 S.E.2d 169, 171 (1988)), *rev'd per curiam for reasons stated in the dissent*, 357 N.C. 151, 579 S.E.2d 248 (2003). However, the Court in *In re Poole* relied upon case law that based its analyses upon a now repealed and amended statute which provided that the summons must be served upon "the parents *or either of them*." *See* N.C. Gen. Stat. § 7A-283 (1969) (repealed 1979) (emphasis supplied); *In the Matter of Arends*, 88 N.C. App. at 554, 364 S.E.2d at 171; *In re Yow*, 40 N.C. App. 688, 691, 253 S.E.2d 647, 649, *disc. rev. denied*, 297 N.C. 610, 257 S.E.2d 223 (1979).

N.C. Gen. Stat. § 7B-406(a) (2005) mandates that "[i]mmediately after a petition has been filed alleging that a juvenile is abused, neglected, or dependent, *the clerk shall issue* a summons to *the parent*, guardian, custodian, or caretaker requiring them to appear for a hearing at the time and place stated in the summons." (Emphasis supplied). *See also* N.C. Gen. Stat. § 7B-101 (2005) ("The singular includes the plural, the masculine singular includes the feminine singular and masculine and feminine plural unless otherwise specified."). With this amendment, due process and our General Assembly require

the summons and juvenile petition to be served upon each parent. N.C. Gen. Stat. § 7B-406(a). Any notion requiring only one parent to be served with the summons and juvenile petition to adjudicate the rights of the parent not properly served with process: (1) presents dangerous repercussions to a parent's constitutional right to exclusive care, custody, and control of their minor children; (2) is constitutionally deficient; and (3) is inconsistent with the purposes of the juvenile code. *See* N.C. Gen. Stat. § 7B-100(a) (2005) (providing that one of the purposes of the juvenile code is "[t]o provide procedures for the hearing of juvenile cases that assure fairness and equity and that protect the constitutional rights of juveniles and parents[.]").

Further, the facts before us are distinguishable from the facts presented in *In re Poole*. The UCCJEA did not control the analysis or outcome of that case, because the issues before the Court in *In re Poole* dealt solely with intrastate parties and matters. *See In re Poole*, 151 N.C. App. at 476, 568 S.E.2d at 202-03 ("The petition for adjudication of neglect and dependency was brought pursuant to the Juvenile Code, and there is no indication in the record that any other court in any other State might have competing jurisdiction. As such, the UCCJEA simply does not control the outcome of the case at bar."). Here, the trial court entered the initial nonsecure custody orders and the adjudication order based upon jurisdiction under the UCCJEA.

The UCCJEA mandates:

> *[b]efore a child-custody determination is made under this Article*, notice and an opportunity to be heard in accordance with the standards of G.S. 50A-108 *must be given to all persons* entitled to notice under the law of this State as in child-custody proceedings between residents of this State, *any parent* whose parental rights have not been previously terminated, and any person having physical custody of the child.

N.C. Gen. Stat. § 50A-205(a) (2005) (emphasis supplied). The official comment to section 50A-205 states, "[p]arents whose parental rights have not been previously terminated and persons having physical custody of the child *are specifically mentioned as persons who must be given notice*." N.C. Gen. Stat. § 50A-205 official commentary, para. 1 (emphasis supplied). The official comment further states, "[a]n order is entitled to interstate enforcement and nonmodification under this Act *only if there has been notice and an opportunity to be heard*." N.C. Gen. Stat. § 50A-205 official commentary, para. 2

(emphasis supplied). There is no dispute that respondent-father, an Alabama resident, was entitled to service of process and notice before his parental rights were impaired and his children were unlawfully kept away from him in another state.

Here, copies of the initial summonses and juvenile petitions were issued to respondent-father and were returned as "unclaimed." Service was not accomplished by any other means. At the time of the adjudication hearing, respondent-father had never been notified of the allegations in the juvenile petition, of any alleged conduct by him that was inconsistent with his constitutionally protected parental rights, nor the basis upon which DSS was relying to adjudicate E.X.J. and A.J.J. Based upon the mandatory notice requirements of the UCCJEA, the trial court could not enter "a child-custody determination" regarding E.X.J. and A.J.J. or deny or impact respondent-father's constitutionally protected rights to the exclusive "care, custody, and control" of his minor children without notice and an opportunity to be heard to contest the allegations. N.C. Gen. Stat. § 50A-205; *Adams v. Tessener*, 354 N.C. 57, 60, 550 S.E.2d 499, 501 (2001) (citation omitted).

II. Due Process

Failure to issue and serve the initial summonses and juvenile petitions upon respondent-father also implicates his Fourteenth Amendment due process rights. *See Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 314, 94 L. Ed. 865, 873 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."); *see also In the Matter of Ardens*, 88 N.C. App. at 555, 364 S.E.2d at 172 ("[T]he failure to serve [respondent-father] with notice of the neglect and dependency proceedings raises the question of whether the father has been deprived of his right to due process[.]").

In determining whether respondent-father's due process rights have been violated, this Court is required to engage in balancing the rights of the father to exclusive care, custody, and control of his minor children, the State's interest in the welfare of the children, and the childrens' right to be protected by the State. *In the Matter of Arends*, 88 N.C. App. at 555, 364 S.E.2d at 172. This Court recently reiterated:

> as noted by our Supreme Court, the 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. 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 [and service] to each of the parties named in the statute is a minimally burdensome limitation on government action.

In re S.F., 190 N.C. App. —–, —–, —– S.E.2d —–, —–, (2008) (internal citation and quotation omitted).

Here, the trial court adjudicated E.X.J. and A.J.J. to be dependant based upon respondent-mother's stipulation. Her allegations that she fled Alabama to escape "an abusive relationship" with respondent-father were wholly unsubstantiated. No clear, cogent, and convincing evidence in the record supports any abuse or neglect of either child by respondent-father. Finally, the trial court entered no findings or conclusions that either child was neglected or abused by respondent-father in the adjudication order.

Respondent-father was hundreds of miles away, residing and working in another state and was without any notice of the mother's unsubstantiated allegations contained in the juvenile petition. There can be no dispute DSS's lack of notice and service violated respondent-father's constitutional due process rights. *Id.* Due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane*, 339 U.S. at 314, 94 L. Ed. at 873.

Because the Fourteenth Amendment and the UCCJEA require that "any parent whose parental rights have not been previously terminated []" must be given notice and an opportunity to be heard before a "child-custody determination is made[,]" the trial court did not acquire jurisdiction over respondent-father to enter an order adjudicating E.X.J. and A.J.J. as dependant as to him. N.C. Gen. Stat. § 50A-205(a). Because the trial court lacked jurisdiction to enter the adjudication order, it necessarily follows that the trial court lacked jurisdiction to terminate respondent-father's parental rights on any ground.

DSS's failure to serve respondent-father with the initial summonses and petitions violated his constitutional right to due process. The trial court's adjudication of dependency and order terminating respondent-father's parental rights is void for want of jurisdiction and should be vacated.

III. Conclusion

Earlier this month, this Court unanimously reiterated:

> While the best interest of . . . [the] juveniles in neglect, abuse, and dependency proceedings is our polar star, 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. 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.

In re S.F., 190 N.C. App. at –––, ––– S.E.2d at ––– (internal citation and quotations omitted).

Because DSS failed to serve the non-resident respondent-father with the requisite summonses and juvenile petitions, which violated his due process and statutory rights, the trial court's order terminating respondent-father's parental rights is void for want of jurisdiction and should be vacated. N.C. Gen. Stat. § 50A-205. Because I would vacate the trial court's order terminating respondent-father's parental rights for lack of subject matter jurisdiction, "the 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." *Id.* (quoting N.C. Gen. Stat. § 7B-201.). I respectfully dissent.

[191 N.C. App. 53 (2008)]

IN THE MATTER OF RAYMOND M. MARSHALL

No. COA07-629

(Filed 17 June 2008)

Contempt— criminal contempt—failure to hold show cause order before different judge

The trial court erred by holding respondent attorney in criminal contempt when it did not have the show cause order returned before a different judge even though defendant failed to make such a motion, and the judgment is vacated, because: (1) N.C.G.S. § 5A-15(a) provides that the order must be returned before a different judge when circumstances cited in the statute caused the objectivity of the judge to be reasonably questioned; (2) the statute neither expressly nor impliedly places any responsibility on respondent to file a motion for recusal; (3) N.C.G.S. § 5A-15(a) imposes a duty on the judge to acknowledge that his involvement in the acts allegedly constituting the contempt could reasonably cause others to question the judge's objectivity, and, in such circumstance, to return the show cause order before a different judge *ex mero motu*; (4) distinguishable from *Key*, 182 N.C. App. 624 (2007), the acts constituting respondent's alleged criminal contempt in this case, as well as the circumstances surrounding those acts, took place before the same judge who issued the show cause order, conducted the contempt hearing, and ultimately found respondent in criminal contempt; (5) the record revealed the criminal contempt with which defendant was charged, regarding his failure to appear for calendar call and failure to return legal authority the judge had requested, was based upon acts so involving the judge that his objectivity may reasonably have been questioned; and (6) there was a reasonable possibility that, had the order been returned before a different judge, a different result would have been reached.

Judge STEELMAN dissenting.

Appeal by Respondent from order entered 19 October 2006 by Judge Michael E. Helms in Forsyth County Superior Court. Heard in the Court of Appeals 4 February 2008.

Rudolf Widenhouse & Fialko, by M. Gordon Widenhouse Jr., for Respondent-Appellant.

Attorney General Roy Cooper, by Assistant Attorney General Charles E. Reece, for the State.

STEPHENS, Judge.

On 19 October 2006, Judge Helms convened a hearing at which Raymond M. Marshall ("Respondent") was to show cause why he should not be held in criminal contempt for his conduct during a criminal trial over which Judge Helms presided. At the contempt hearing, Judge Helms found that Respondent's saying "Lord" in a loud voice, in front of the jury, with his arms raised up, and in response to a ruling of the court was willfully contemptuous. Judge Helms sentenced Respondent to 30 days in jail, suspended the sentence, and placed Respondent on probation for one year. As conditions of probation, Respondent was ordered to (1) surrender his license to practice law for 30 days, which would be reduced to 15 days if he performed and paid the fee for 70 hours of community service; (2) obtain and pay for an evaluation for anger management; and (3) obtain and pay for treatment or counseling in connection with anger management, if recommended. Additionally, as a special condition of the suspended sentence, Respondent was required to serve 48 hours in the local jail. From this judgment, Respondent appeals.

I. Background

A. Calendar Call

Judge Helms presided over the 18 September 2006 session of misdemeanor appeals for Forsyth County. At calendar call, Respondent was not present with his client when his case was called. Alan Doorasamy, counsel for the co-defendant of Respondent's client, told Judge Helms that he thought Respondent was somewhere in the building, but that he was running a few minutes late. Mr. Doorasamy then indicated that the parties had agreed to continue the trial of his and Respondent's clients to February 2007. When Judge Helms said, "Anyway, it's nice to see you, sir[,]" Mr. Doorasamy believed the case had been continued and told this to Respondent when he saw Respondent in the hallway after calendar call.

Later that day, Judge Helms summoned Respondent to his courtroom to explain his absence from calendar call. The next day, Respondent appeared before Judge Helms and explained that he

understood the parties had agreed to continue the criminal case to February 2007, and that his presence at calendar call was therefore not still expected. Judge Helms then announced that he was setting the case peremptorily as the first case on the 2 October 2006 trial docket. Respondent objected, contending that the State and defendants could agree to a continuance. Judge Helms told Respondent to show him a case or statute to that effect. After some discussion, Judge Helms had the bailiff escort Respondent from the courtroom. When Respondent did not return later that day with a case or statute to support his earlier contention, Judge Helms issued a show cause order, requiring Respondent to appear before him on 20 September 2006 to show cause why Respondent should not be held in contempt for failing to appear for calendar call and for failing to return with the legal authority Judge Helms had requested.

At the 20 September show cause hearing, Judge Helms determined that the witnesses who had previously said Respondent was standing just outside the courtroom during calendar call were not certain enough to testify about the matter under oath, and that it was possible Respondent had not heard Judge Helms' order to return with the law in question. Therefore, Judge Helms found that Respondent should not be held in contempt of court.

B. Motion to Recuse

Prior to jury selection in the underlying criminal case, Respondent made a motion for Judge Helms to recuse himself pursuant to N.C. Gen. Stat. § 15A-1223. Respondent alleged that Judge Helms had "displayed marked negative personal feelings toward [Respondent], and displayed an unfavorable personal disposition or mental attitude toward[] [Respondent,] thereby creating a likelihood of, or the appearance of, bias as would negatively affect [D]efendant[']s confidence of his due process rights to a fair and impartial trial." Respondent also requested that the motion to recuse be heard by another superior court judge. Without first hearing Respondent on his request that the recusal motion be heard by another judge, Judge Helms denied the request, positing, "Well, Mr. Marshall, you're fully aware of the volumes of case law that suggest that it's the judge from whom the attorneys are seeking the relief that the relief must be requested." During the contentious hearing on the motion to recuse, Respondent asked Judge Helms to "please allow [him] to finish" when he had been interrupted. Judge Helms responded, "As difficult as it is, Mr. Marshall, I will allow you to finish." Judge Helms expressed that

he did "not take lightly a motion for [him] to recuse [himself] from a case," and further stated to Respondent,

> So I don't know why—you're the one that's wrong in all this, but I'm the one that's being accused of being the bad guy. And, you know, that's difficult for me to swallow, Mr. Marshall, quite frankly. But go ahead. I've given you the floor and I'll do my best to maintain.

Judge Helms also stated, "I don't have long left on the bench. I've never been held at the will of the attorneys and I don't intend to go out with this feeling on my part that somebody got something over on me[.]" In ultimately denying Respondent's motion to recuse, Judge Helms explained:

> I will encourage you to go back—I've been a judge for 26 years . . . to find any occasion when I have, because of something a lawyer or a defendant has done or failed to do, done anything whatsoever wrong. I have a reversal rate of about [10]%. I'm right nine out of ten. If I jerked people around and treated people unfairly, the way you suggest that I would in this case, I would suggest to you that I would have a much higher reversal rate than I do. A record of which I am quite proud [].

C. Criminal Trial

During a hearing on several motions made after jury selection, an issue arose about the defendants being black and the charging officers being white. Judge Helms warned Respondent, an African American, "I'm not going to let you play that card in the courtroom in front of a jury." When Respondent replied, "It's not a card to play[,]" Judge Helms responded, "Yes, it is. Yes, it is to base it on race as opposed to basing it on the facts that come from the witness stand, Mr. Marshall, is wrong. It's an advantage that you should not gain, whether it is true or not . . . ."

The act that formed the basis for the contempt judgment occurred during the cross-examination of the State's first witness, a police officer. Respondent questioned the officer about her call for "help" after the officer described calling for "assistance." Judge Helms intervened, saying, "You're getting into a semantic thorn bush here, you all. Assistance is help. Help is assistance. We're getting hung up on the use of words. Just tell us what you did ma'am." When Respondent attempted to address the court, Judge Helms cut him off and, after Respondent declined Judge Helms' offer to "look up those

two words," Judge Helms stated, "Well then let's move along." Respondent then inquired into the length of time that had passed between the time the officer walked up to the individual she claimed was one of the defendants and the time when both defendants were taken away by the police. Judge Helms perceived Respondent's questions to be repetitive, urged Respondent to "[m]ove along[,]" and inquired, "Mr. Marshall, how many times are we going to go over this same stuff?" After Respondent framed the question several different ways, the witness answered, "I'm saying that I can't give you an exact time frame because I was not looking at my watch." Respondent then stated, "And then, therefore, you could—you would not argue that it was five minutes?" At that point, Judge Helms interrupted, stating, "She's not arguing, Mr. Marshall. As I recall—the jury will recall what she said. She said between—it could have been five; it could have been 20. Was that your answer, ma'am?" When the witness replied, "Yes, Your Honor[,]" Respondent exclaimed, "Lord."

After excusing the jury, Judge Helms said to Respondent:

> Mr. Marshall, I'll hear from you why I should not ultimately hear from you on why you should not be held in contempt of court for saying "Lord" when the Court had made a ruling in this case that was adverse to what you wanted the Court to rule.
>
> Now, sir, I am not going to sit through this entire trial fighting with you tooth and nail over every item of evidence that you care to dissect when its probative value is insignificant, if important at all. Whether it was "help" or "assistance"—we spent 10 minutes on whether it was "help" or "assistance."

Later in the trial, Judge Helms addressed his appearance of partiality:

> It has looked like I've been picking on you the whole trial, and maybe that was one of your intentions. I don't know. It's certainly not my intention to do anything other than just have you stay within the bounds of professional propriety in the trial of this case.
>
> . . . .
>
> This is not Mike against—this is not Judge Helms against Mr. Marshall. Even though it may have appeared that way at some times by necessity, but I'm in search of the truth as well.

After Respondent's client was found guilty of assault on a governmental official, and before sentencing in the matter, the following exchange took place between Judge Helms and Respondent:

> [Judge Helms]: So I don't understand, Mr. Marshall, why you continue to want to act like, quite frankly, like you're out there in the parking lot at McDonald's on this evening just doing what you choose to do without regard to the apparent authority or actual authority of people in charge; in this courtroom, it's me. Now, you may not like me, you may not like the way I try a case, but that's neither here nor there as far as I'm concerned. You are expected, as an officer of this Court, to abide by the rules and to remain within the boundaries of professional propriety, which are well defined and which go on in courtrooms across the country every day.
>
> Now, we'll get into this more when I entertain the contempt hearing, which I plan to do after lunch. Right now, Mr. Marshall, do you have anything at all to offer by way of what the Court should consider as it decides what [is] an appropriate sentence for your client who has been convicted by these 12 jurors?
>
> [Respondent]: Yes, Your Honor, I object to your—all that you've said; and I will not trade insults with you and I will not—I don't need an audience to do it. I have no more to say, Your Honor.

D. Contempt Hearing

At the beginning of the contempt hearing, Judge Helms explained to Respondent:

> I have previously told you . . . that I only intended to focus on the one offending act, allegedly offending act, committed by you in my presence during a sitting of court while we were trying a case in front of the jury. However, I want to make sure that you understand that, while I am only concentrating on that one act, it is impossible to look at that one act in a vacuum or a void, which means that the entire conduct of the trial will be in the mind of the court when it determines this issue of whether or not you should be held in contempt for your conduct and what, if any, action is appropriate to remedy the situation.

After conducting the hearing, Judge Helms concluded that Respondent's conduct was willfully contemptuous and constituted direct criminal contempt of court. Judge Helms then sentenced

Respondent to 30 days in jail, suspended the sentence, and placed Respondent on probation for one year. In determining this sentence, Judge Helms initiated and considered *ex parte* communications with non-parties in order "to gain some insight" into Respondent. At the hearing, Judge Helms stated:

> And I have asked people, what is it—I have been trying to gain some insight into you, Mr. Marshall. I have learned about your football days back at West Virginia, your son's really outstanding football record at Duke, at least when he had a line good enough to protect him. You told me about your hard upbringing, I shared with you some of mine. But I'm still looking for what on earth would make an officer of the court conduct himself that way.
>
> . . . .
>
> The response I get is: "It's just Raymond, just Raymond." And I am thinking, "How sad."

II. Discussion

Defendant argues that the trial court erred in not returning the show cause order for contempt before a different judge because Judge Helms' objectivity could reasonably have been questioned.

According to the plenary proceedings for criminal contempt, "[i]f the criminal contempt is based upon acts before a judge which so involve him that his objectivity may reasonably be questioned, the order *must* be returned before a different judge." N.C. Gen. Stat. § 5A-15(a) (2005) (emphasis added). Although, as a general rule, a defendant's failure to object to an alleged error by the trial court precludes raising the error on appeal, s*ee* N.C. R. App. P. 10(a); *State v. Reynolds*, 307 N.C. 184, 297 S.E.2d 532 (1982), "when a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court's action is preserved, notwithstanding defendant's failure to object at trial." *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985). In this case, Respondent did not move to have the show cause order returned before a different judge. Thus, we must first determine whether the failure to make such motion precludes this Court from addressing Respondent's assignment of error.

When construing statutes, "[i]f the statute is clear and unambiguous, we will apply the plain meaning of the words, with no need to resort to judicial construction." *Wiggs v. Edgecombe Cty.*, 361 N.C.

318, 322, 643 S.E.2d 904, 907 (2007). Here, the language of the contempt statute states unequivocally that "the order *must* be returned before a different judge" when the circumstances cited in the statute cause the objectivity of the judge to be reasonably questioned. N.C. Gen. Stat. § 5A-15(a) (emphasis added). The statute neither expressly nor impliedly places any responsibility on a respondent to file a motion for recusal. Had the legislature intended that a motion be required, the statute would have been drafted similarly to N.C. Gen. Stat. § 15A-1223, which states:

> A judge, *on motion of the State or the defendant*, must disqualify himself from presiding over a criminal trial or other criminal proceeding if he is:
>
> (1) Prejudiced against the moving party or in favor of the adverse party; or
>
> . . . .
>
> (3) Closely related to the defendant by blood or marriage; or
>
> (4) For any other reason unable to perform the duties required of him in an impartial manner.

N.C. Gen. Stat. § 15A-1223(b) (2005) (emphasis added).

The State argues that N.C. Gen. Stat. § 15A-1223 provides the exclusive procedure by which a judge may be disqualified from hearing any criminal matter. We disagree. While the motion required by N.C. Gen. Stat. § 15A-1223 must be made in a criminal proceeding where either the state or the defendant alleges bias, close familial relationship, or absence of impartiality on the part of the presiding judge, the legislature specifically codified an exception to this requirement for criminal contempt proceedings where the acts constituting the contempt so involve the judge issuing the show cause order that his objectivity could be reasonably questioned. Given the judge's omnipotent role as opposing party, witness, finder of fact, and arbiter of law in a criminal contempt proceeding where the allegedly contemptuous acts so involve him or her, the legislature recognized the unduly inflammatory effect that a respondent's motion to return a show cause order before a different judge could have, and, thus, in this limited circumstance, did not impose such a prerequisite. Instead, N.C. Gen. Stat. § 5A-15(a) imposes a duty on the judge to acknowledge that his involvement in the acts allegedly constituting the contempt could reasonably cause others to question the judge's

objectivity and, in such circumstance, to return the show cause order before a different judge *ex mero motu*.

Although North Carolina appellate courts have addressed issues regarding recusal of a judge where bias or prejudice was alleged, this Court has never considered this issue in a criminal contempt proceeding where the judge's objectivity could reasonably have been questioned because of his involvement in the acts allegedly constituting the contempt. For example, in *In re Robinson*, 37 N.C. App. 671, 247 S.E.2d 241 (1978), and *In re Dale*, 37 N.C. App. 680, 247 S.E.2d 246 (1978), notice of charges against respondent-attorney issued by a superior court judge in a disciplinary proceeding stated that respondent " '*negligently . . . failed to perfect the appeal or to seek appellate review*' " by any other permissible means in four criminal cases, violating the Code of Professional Responsibility. *Robinson*, 37 N.C. App. at 678, 247 S.E.2d at 245; *Dale*, 37 N.C. App. at 681, 247 S.E.2d at 247. After denying respondent's motion to recuse, the judge found facts consistent with the charges specified and suspended respondent from the practice of law for one year. On appeal, this Court held the trial court erred in not granting respondent's motion to recuse as the language of the notice of charges constituted a prejudgment of respondent's conduct by the issuing judge, creating an appearance of bias and prejudice.

More recently, in *State v. Key*, 182 N.C. App. 624, 643 S.E.2d 444, *disc. review denied*, 361 N.C. 433, 649 S.E.2d 398 (2007), respondent-attorney abandoned his client outside the courtroom prior to his client's probation violation hearing. The superior court judge before whom respondent failed to appear issued an order directing respondent to appear before the Senior Resident Superior Court Judge to show cause why he should not be subject to disciplinary action and/or punished for contempt. The Senior Resident Superior Court Judge before whom the matter was set subsequently issued an amended show cause order, setting forth in detail the basis for the alleged criminal contempt. After a hearing, respondent was found guilty of criminal contempt and sentenced to 30 days in jail.

On appeal, respondent contended that the language of the amended order, similar to the language in *Robinson* and *Dale*, demonstrated that the Senior Resident Superior Court Judge was biased against respondent. *Id.* Although respondent had not made a motion for the judge's recusal, respondent alleged the judge should have recused himself from hearing the matter *ex mero motu*. Citing the fact that the respondent in *Robinson* and *Dale* had made a motion to

recuse the trial judge for alleged bias, and noting in a footnote that, pursuant to N.C. Gen. Stat. § 15A-1223, "in criminal cases, a motion to disqualify a judge must be in writing, accompanied by supporting affidavit(s) and filed at least five days before the call of the case for trial," *id.* at 632, 643 S.E.2d at 450-01 n.2, this Court dismissed respondent's argument for failure to preserve the assignment of error for appellate review.

Although, as in *Key*, Respondent in this case did not make a motion to have the show cause order issued by Judge Helms returned before another judge, the case at bar is distinguishable from *Key*. First, whereas *Key* points out that respondent in *Robinson* and *Dale* made a motion to recuse the judge for his alleged bias, *Robinson* and *Dale* involved disciplinary proceedings for violations of the Code of Professional Responsibility while this case involves a criminal contempt proceeding governed by N.C. Gen. Stat. § 5A-15. Furthermore, unlike in *Key* where the acts constituting respondent's alleged criminal contempt took place before a different judge than the judge respondent contended was biased, here, the acts constituting Respondent's alleged criminal contempt, as well as the circumstances surrounding those acts, took place before Judge Helms, the same judge who issued the show cause order, conducted the contempt hearing, and ultimately found Respondent in criminal contempt. As noted, in *Key* the superior court judge before whom respondent failed to appear for the probation violation hearing, and who issued the original show cause order based on respondent's conduct, returned the order before a different judge, thus complying with the statutory mandate of N.C. Gen. Stat. § 5A-15.

Accordingly, as *Key* is readily distinguishable from the case at bar, the holding in *Key* does not require dismissal of Respondent's assignment of error for failure to make a motion for recusal in this case. In light of this determination, we conclude that we may address Respondent's argument that the trial court erred in not returning the show cause order for contempt before a different judge.

The record reflects that conflict between Judge Helms and Respondent originated on 18 September 2006 with Respondent's failure to appear for calendar call. This resulted in Judge Helms summoning Respondent to court to explain his absence. Respondent appeared before the Judge the following day and, after an exchange between the parties, Judge Helms had a bailiff escort Respondent from the courtroom. The next day, Judge Helms issued a show cause order against Respondent for failing to appear at calendar call and for

failing to return to court the previous day with a copy of the statute or case law Respondent had referenced. A hearing on the show cause order was held by Judge Helms, and Respondent was found not to be in contempt.

Respondent then made a motion for Judge Helms to recuse himself from the underlying criminal trial and requested the motion be heard by another judge. Judge Helms immediately denied Respondent's request to have the motion heard before another judge and, after a contentious hearing, also denied Respondent's motion to recuse. Numerous heated exchanges took place between Judge Helms and Respondent during the subsequent criminal trial, both before and after the act that Judge Helms found constituted criminal contempt. When Judge Helms ultimately heard the contempt matter, he stated,

> While I am only concentrating on that one act, it is impossible to look at the one act in a vacuum or void, which means that the entire conduct of the trial will be in the mind of the court when it determines this issue of whether or not [Respondent] should be held in contempt.

The record before this Court abundantly reveals that the criminal contempt with which Respondent was charged was based upon acts so involving Judge Helms that his objectivity may reasonably have been questioned. Indeed, Judge Helms appeared to have recognized this fact when he stated, "This is not Mike against—this is not Judge Helms against Mr. Marshall. Even though it may have appeared that way at some times by necessity[.]" Since one purpose behind the statute is to maintain public confidence in the courts, even the appearance of a lack of objectivity must be avoided. *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145, 21 L. Ed. 2d 301 (1968) (stating that a judge must avoid even the appearance of bias), *reh'g denied*, 393 U.S. 1112, 21 L. Ed. 2d 812 (1969). Accordingly, the trial court erred in not returning the show cause order before a different judge. As the record reflects there was a reasonable possibility that, had the order been returned before a different judge, a different result would have been reached, *State v. Johnson*, 164 N.C. App. 1, 595 S.E.2d 176, *disc. review denied*, 359 N.C. 194, 607 S.E.2d 659 (2004), we vacate the trial court's judgment finding Respondent in criminal contempt.

In light of this holding, we need not address Respondent's remaining assignments of error.

For the above-stated reasons, the trial court's order is

VACATED.

Chief Judge MARTIN concurs.

Judge STEELMAN dissents in a separate opinion.

STEELMAN, Judge, dissenting.

This case is controlled by this Court's holding in *State v. Key*, 182 N.C. App. 624, 643 S.E.2d 44 (2007), *disc. review denied*, 361 N.C. 433, 649 S.E.2d 398 (2007), and must be dismissed. *Key* involved a criminal contempt proceeding where there was no motion to recuse the hearing judge, and the defendant then attempted to call into question the impartiality of the judge for the first time on appeal. This Court held "[t]his assignment of error has not been properly preserved and is dismissed." *Key* at 632-33, 643 S.E.2d at 451. The majority's lengthy attempt to distinguish *Key* cannot change its fundamental and controlling holding. I would dismiss Respondent's appeal.

JACK DAILEY, PLAINTIFF v. DONALD POPMA AND R. W. BEAVER, JR., DEFENDANTS

No. COA07-310

(Filed 17 June 2008)

1. Appeal and Error— appealability—interlocutory order—certification—personal jurisdiction

Although an appeal from the order granting defendant's motion to dismiss is from an interlocutory order since plaintiff's claims against another defendant remain pending, plaintiff was entitled to immediate appellate review based on the trial court's N.C.G.S. § 1A-1, Rule 54(b) certification and also by virtue of N.C.G.S. § 1-277(b) since plaintiff's claim was dismissed as a result of the trial court's decision that it lacked personal jurisdiction over defendant.

2. Jurisdiction— personal jurisdiction—internet postings—minimum contacts

The trial court did not err in a libel and civil conspiracy case arising out of defamatory comments posted on the internet by

dismissing plaintiff North Carolina resident's complaint against defendant Georgia resident based on lack of personal jurisdiction because: (1) whether internet postings confer jurisdiction in a particular forum hinges on the manifested intent and focus of defendant, and plaintiff presented no evidence suggesting that defendant, through his internet postings, manifested an intent to target and focus on North Carolina readers as required by the test in *Young*, 315 F.3d 256 (2003), for asserting personal jurisdiction over defendant; (2) plaintiff did not supply the court with the internet postings that form the basis for his libel suit and his assertion that personal jurisdiction existed over defendant; (3) defendant's assertion that he understood some of the participants in the pertinent internet bulletin board discussions were not located in North Carolina evidence a lack of focus on North Carolina residents; (4) the fact that some unspecified number of participants in the discussion groups might be North Carolinians does not establish that defendant intended to focus on or target those North Carolina participants; and (5) defendant's affidavit presented evidence that no conspiracy existed, and plaintiff submitted no evidence opposing defendant's showing.

Appeal by plaintiff from order entered 28 December 2006 by Judge Douglas S. Albright, Sr. in Guilford County Superior Court. Heard in the Court of Appeals 16 October 2007.

Smith, James, Rowlett & Cohen, LLP, by Norman B. Smith, for plaintiff-appellant.

Hunter, Higgins, Miles, Elam & Benjamin, PLLC, by Gilbert J. Andia, Jr., for defendant-appellee Donald Popma.

GEER, Judge.

Plaintiff Jack Dailey appeals from an order dismissing his claims against defendant Donald Popma on the ground that defendant has insufficient contacts with the State of North Carolina for personal jurisdiction to exist in this State. Plaintiff, a resident of North Carolina, claims that defendant, a resident of Georgia, posted defamatory statements about plaintiff on the internet. According to plaintiff, because the effect of the defamation occurred in North Carolina, sufficient minimum contacts exist.

The internet presents unique considerations when it comes to issues of personal jurisdiction. Because of the nature of the internet,

this Court, in *Havey v. Valentine*, 172 N.C. App. 812, 616 S.E.2d 642 (2005), adopted the Fourth Circuit's personal jurisdiction test for internet communications set out in *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707 (4th Cir. 2002), *cert. denied*, 537 U.S. 1105, 154 L. Ed. 2d 773, 123 S. Ct. 868 (2003). In this case, we adopt the Fourth Circuit's refinement of that test in *Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002), *cert. denied*, 538 U.S. 1035, 155 L. Ed. 2d 1065, 123 S. Ct. 2092 (2003). Because plaintiff has presented no evidence suggesting that defendant, through his internet postings, manifested an intent to target and focus on North Carolina readers, the record contains no basis, under the *Young* test, for asserting personal jurisdiction over defendant.

Facts

On 1 September 2006, plaintiff filed a complaint that asserted claims for libel and civil conspiracy arising out of internet postings. According to the complaint:

> During July and August, 2006, defendants posted numerous false and defamatory statements about plaintiff on the internet, these statements including that the plaintiff, (a) committed embezzlement; (b) committed theft; (c) is a cheat and a liar; (d) is going to be wearing an orange jumpsuit; (e) is a crook; (f) committed felonies; (g) is an asshole; (h) acted clandestinely and illegally; (i) is dishonest; (j) is a devious con man; (k) is a scumbag; (l) is the equivalent of a molester of boys; (m) will be convicted on multiple counts; (n) is extremely underhanded; (o) is a lying fraud.

The complaint alleged the following basis for personal jurisdiction over defendant:

> Defendant Donald Popma is a citizen and resident of Loganville, Georgia. This defendant is engaged in substantial activities within the State of North Carolina, including entering into a conspiracy with defendant R. W. Beaver, Jr., to engage in a course of defamation of plaintiff, and the publication of defamatory writings on the internet, which were intended to be, and which were, received and read by numerous individuals in the State of North Carolina.

On 3 November 2006, defendant filed a motion to dismiss for lack of personal jurisdiction pursuant to Rule 12(b)(2) of the Rules of Civil Procedure. The motion was supported by an affidavit of defendant, stating that defendant had sold his Cary home in October 2005, had not been present in North Carolina since that time, and was not

engaged in any activity in North Carolina at the time he was served with the summons.

With respect to the July and August 2006 internet postings that were the subject of the complaint, defendant stated that all internet postings made by him during that period were done while in Georgia. Defendant further stated:

> Although the Plaintiff has not attached copies of the specific postings he believes to be defamatory of him, I did participate in a number of Internet bulletin board discussions in which the topic related to shooting "camps" being conducted by Plaintiff. The camps were located in Ramseur, North Carolina and at least one other state (specifically, e.g., Alabama). These camps were attended by enthusiasts from a number of locations across the southeastern United States, and I, upon information and belief, [sic] some of the participants in the bulletin board discussion were not located in North Carolina.

Defendant denied having any discussions with R. W. Beaver, Jr. about posting information regarding plaintiff on the internet.

On 28 December 2006, the trial court entered an order granting defendant's motion to dismiss. The court found that defendant "has insufficient contacts with the forum state of North Carolina for this Court to maintain personal jurisdiction over him." Plaintiff filed a written notice of appeal on 10 January 2007. On 17 January 2007, plaintiff, pursuant to N.C.R. Civ. P. 60(b)(1) and 54(b), filed a motion to amend the trial court's judgment to provide that it was a final judgment as to defendant, and there was no just reason for delay. The trial court granted the motion on 24 January 2007 and amended its order to state: "This is a final judgment as to plaintiff's claims against defendant Donald Popma, and it is determined that there is no just reason for delay, so that this order of the court is to be subject to review on appeal, as provided in Rule 54(b) of the Rules of Civil Procedure." The order further provided that plaintiff's 10 January 2007 notice of appeal was withdrawn without prejudice. Plaintiff filed a new notice of appeal on 24 January 2007.

<u>Grounds for Appellate Review</u>

[1] We first note that the order granting defendant's motion to dismiss is an interlocutory order since plaintiff's claims against R.W. Beaver, Jr. remain pending. An appeal from an interlocutory order is permissible "only if (1) the trial court certified the order under Rule

54(b) of the Rules of Civil Procedure, or (2) the order affects a substantial right that would be lost without immediate review." *Boyd v. Robeson County*, 169 N.C. App. 460, 464, 621 S.E.2d 1, 4, *disc. review denied*, 359 N.C. 629, 615 S.E.2d 866 (2005). The burden rests on the appellant to establish the basis for an interlocutory appeal. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994).

Jurisdiction in this case exists not only because of the trial court's Rule 54(b) certification, but also by virtue of N.C. Gen. Stat. § 1-277(b) (2007). That statute provides: "Any interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant . . . ." Since plaintiff's claim was dismissed as a result of the trial court's decision that it lacked personal jurisdiction over defendant, plaintiff has a right to an immediate appeal of that order.

Motion to Dismiss

[2] When reviewing an order deciding a motion to dismiss for lack of personal jurisdiction, we determine whether the findings of fact of the trial court are supported by competent evidence; if so, we must affirm the trial court's decision. *Replacements, Ltd. v. Midwesterling*, 133 N.C. App. 139, 140-41, 515 S.E.2d 46, 48 (1999). Findings of fact are not, however, required in the absence of a request by the parties. *A.R. Haire, Inc. v. St. Denis*, 176 N.C. App. 255, 258, 625 S.E.2d 894, 898 (2006). *See also* N.C.R. Civ. P. 52(a)(2) ("Findings of fact and conclusions of law are necessary on decisions of any motion or order ex mero motu only when requested by a party and as provided by Rule 41(b)."). When, as here, the court does not make findings of fact, " 'it will be presumed that the judge, upon proper evidence, found facts sufficient to support his judgment.' " *A.R. Haire, Inc.*, 176 N.C. App. at 258, 625 S.E.2d at 898 (quoting *City of Salisbury v. Kirk Realty Co.*, 48 N.C. App. 427, 429, 268 S.E.2d 873, 875 (1980)). We must then review the record to determine whether there is competent evidence to support the trial court's "presumed findings." *Id.* at 258-59, 625 S.E.2d at 898.

Usually, personal jurisdiction issues are presented in one of three procedural postures: "(1) the defendant makes a motion to dismiss without submitting any opposing evidence; (2) the defendant supports its motion to dismiss with affidavits, but the plaintiff does not file any opposing evidence; or (3) both the defendant and the plaintiff submit affidavits addressing the personal jurisdiction

issues." *Banc of Am. Secs. LLC v. Evergreen Int'l Aviation, Inc.*, 169 N.C. App. 690, 693, 611 S.E.2d 179, 182 (2005). This case falls into the second category.

When, as here, the defendant presents evidence in support of his motion, the " 'allegations [in the complaint] can no longer be taken as true or controlling and plaintiff[] cannot rest on the allegations of the complaint.' " *Id.* (quoting *Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 615-16, 532 S.E.2d 215, 218, *appeal dismissed and disc. review denied*, 353 N.C. 261, 546 S.E.2d 90 (2000)). In that event, to determine whether there is sufficient evidence to establish personal jurisdiction, the court must consider: "(1) any allegations in the complaint that are not controverted by the defendant's affidavit and (2) all facts in the affidavit (which are uncontroverted because of the plaintiff's failure to offer evidence)." *Id.* at 693-94, 611 S.E.2d at 183.

Substantively, in deciding whether a North Carolina court has personal jurisdiction over a nonresident defendant, we must apply a two-step analysis: "First, the transaction must fall within the language of the State's 'long-arm' statute. Second, the exercise of jurisdiction must not violate the due process clause of the fourteenth amendment to the United States Constitution." *Tom Togs, Inc. v. Ben Elias Indus. Corp.*, 318 N.C. 361, 364, 348 S.E.2d 782, 785 (1986). Since neither plaintiff nor defendant disputes the applicability of the long-arm statute, the sole issue before this Court is whether the trial court properly concluded that asserting jurisdiction over defendant would violate due process.

"To satisfy the due process prong of the personal jurisdiction analysis, there must be sufficient 'minimum contacts' between the nonresident defendant and our state 'such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.' " *Skinner v. Preferred Credit*, 361 N.C. 114, 122, 638 S.E.2d 203, 210 (2006) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 102, 66 S. Ct. 154, 158 (1945)). Our Supreme Court has noted that "[t]he concept of 'minimum contacts' furthers two goals. First, it safeguards the defendant from being required to defend an action in a distant or inconvenient forum. Second, it prevents a state from escaping the restraints imposed upon it by its status as a coequal sovereign in a federal system." *Miller v. Kite*, 313 N.C. 474, 477, 329 S.E.2d 663, 665 (1985).

There are two theories under which personal jurisdiction may exist consistent with the Due Process Clause: General jurisdiction

and specific jurisdiction. *Skinner*, 361 N.C. at 122, 638 S.E.2d at 210. In this case, there is no reliance on general jurisdiction. "Specific jurisdiction exists when the cause of action arises from or is related to defendant's contacts with the forum." *Id.* What constitutes "minimum contacts" depends on the quality and nature of the defendant's contacts on a case-by-case basis, but, regardless of the circumstances, there must be " 'some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State.' " *Chadbourn, Inc. v. Katz*, 285 N.C. 700, 705, 208 S.E.2d 676, 679 (1974) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253, 2 L. Ed. 2d 1283, 1298, 78 S. Ct. 1228, 1240 (1958)). The defendant's contact with the forum state must be " 'such that he should reasonably anticipate being haled into court there.' " *Tom Togs, Inc.*, 318 N.C. at 365, 348 S.E.2d at 786 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 62 L. Ed. 2d 490, 501, 100 S. Ct. 559, 567 (1980)).

The dispositive question before this Court is whether posting messages on an internet bulletin board about a North Carolina resident and businessman constitutes sufficient minimum contacts to support a finding of personal jurisdiction over an out-of-state defendant. The only North Carolina case dealing with internet activity as a basis for personal jurisdiction is *Havey v. Valentine*, 172 N.C. App. 812, 616 S.E.2d 642 (2005). *Havey* adopted the test set out by the United States Court of Appeals for the Fourth Circuit in *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707 (4th Cir. 2002), *cert. denied*, 537 U.S. 1105, 154 L. Ed. 2d 773, 123 S. Ct. 868 (2003), for personal jurisdiction based on internet communications. *Havey*, 172 N.C. App. at 816-17, 616 S.E.2d 647-48.

The Fourth Circuit in *ALS Scan* held that:

> a State may, consistent with due process, exercise judicial power over a person outside of the State when that person (1) directs electronic activity into the State, (2) with the manifested intent of engaging in business or other interactions within the State, and (3) that activity creates, in a person within the State, a potential cause of action cognizable in the State's courts. Under this standard, a person who simply places information on the Internet does not subject himself to jurisdiction in each State into which the electronic signal is transmitted and received.

ALS Scan, Inc., 293 F.3d at 714. There is no dispute that plaintiff has met the third prong of the *ALS Scan* test. The issue on appeal is

whether plaintiff has demonstrated that defendant falls within the first two prongs of *ALS Scan*.

The Fourth Circuit refined the *ALS Scan* test in *Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002), *cert. denied*, 538 U.S. 1035, 155 L. Ed. 2d 1065, 123 S. Ct. 2092 (2003), to address whether the posting of materials on a website, as we have here, is sufficient activity to extend jurisdiction to the forum state. The Fourth Circuit noted that "[w]hen the Internet activity is, as here, the posting of news articles on a website, the *ALS Scan* test works more smoothly when parts one and two of the test are considered together." *Id.* at 263.

In *Young*, the warden of a Virginia prison brought a libel suit in the United States District Court for the Western District of Virginia against Connecticut newspapers based on articles criticizing harsh conditions at the prison—which by contract with Connecticut housed Connecticut prisoners to alleviate overcrowding in Connecticut prisons. The warden relied upon the following contacts with Virginia in asserting specific personal jurisdiction over the newspapers:

> (1) the newspapers, knowing that Young was a Virginia resident, intentionally discussed and defamed him in their articles, (2) the newspapers posted the articles on their websites, which were accessible in Virginia, and (3) the primary effects of the defamatory statements on Young's reputation were felt in Virginia. Young emphasizes that he is not arguing that jurisdiction is proper in any location where defamatory Internet content can be accessed, which would be anywhere in the world. Rather, Young argues that personal jurisdiction is proper in Virginia because the newspapers understood that their defamatory articles, which were available to Virginia residents on the Internet, would expose Young to public hatred, contempt, and ridicule in Virginia, where he lived and worked.

Id. at 261-62. In this case, plaintiff makes an almost identical argument.

In addressing the *Young* plaintiff's contentions, the Fourth Circuit pointed out that "the fact that the newspapers' websites could be accessed anywhere, including Virginia, does not by itself demonstrate that the newspapers were intentionally directing their website content to a Virginia audience." *Id.* at 263. The court believed that "[s]omething more than posting and accessibility" in the forum state was needed in order for the newspapers to have purposefully—

through electronic means—directed their activity in a substantial way to the forum state. *Id.* The court determined that the dispositive question in such cases should be whether the defendant "through the Internet postings, manifest[ed] an intent to target and focus on [the forum state's] readers." *Id.* The court, after reviewing the newspapers' website and the actual articles, concluded that no basis for jurisdiction existed. *Id.*

We find the *Young* court's reasoning persuasive and consistent with this Court's analysis in *Havey*. We, therefore, adopt the test set out in *Young*. The question presented in this appeal becomes, therefore: Did defendant, through his internet postings, manifest an intent to target and focus on North Carolina readers?

The trial court's "presumed" finding that defendant did not manifest the necessary intention is supported by the record. Plaintiff did not supply the court with the internet postings that form the basis for his libel suit and his assertion that personal jurisdiction exists over defendant. As a result, the record contains no evidence that the postings textually targeted or focused on North Carolina readers. Defendant's affidavit indicates that he participated in a number of internet bulletin board discussions related to shooting "camps" conducted by plaintiff in at least North Carolina and Alabama, which camps were attended "by enthusiasts from a number of locations across the southeastern United States . . . ." Defendant further stated that he understood that some of the participants in the bulletin board discussions were not located in North Carolina. These assertions are evidence of a lack of focus on North Carolina residents.

In oral argument, however, plaintiff's counsel contended that we could assume from defendant's affidavit that some of the participants were, in fact, from North Carolina. The fact that some unspecified number of participants in the discussion groups might be North Carolinians does not, however, establish that defendant intended to focus on or target those North Carolina participants. *See Burleson v. Toback*, 391 F. Supp. 2d 401, 415 (M.D.N.C. 2005) ("Plaintiff's emphasis on the participation by a few residents of North Carolina in [the websites and web forum], while relevant, does not warrant the Court's exercise of personal jurisdiction because their limited participation does not indicate an intent by Defendants to focus on or target North Carolina.").

Plaintiff also argues that defendant's conspiracy with Beaver, a North Carolina resident, to post material about plaintiff constituted

purposeful activity directed at North Carolina. Although plaintiff has failed to cite any authority that a conspiracy with a North Carolina resident is sufficient to establish minimum contacts, we need not address that issue. Defendant's affidavit presented evidence that no conspiracy existed, and plaintiff has submitted no evidence opposing defendant's showing. Under our standard of review as to Rule 12(b)(2) motions, we must take defendant's assertions as true. The conspiracy alleged in the complaint cannot, therefore, support a determination that personal jurisdiction exists over defendant.

Plaintiff's primary argument is that the effect the postings had on him in North Carolina is sufficient under *Calder v. Jones*, 465 U.S. 783, 79 L. Ed. 2d 804, 104 S. Ct. 1482 (1984), and *Saxon v. Smith*, 125 N.C. App. 163, 479 S.E.2d 788 (1997), to establish personal jurisdiction over defendant. *Havey*, however, by adopting the *ALS Scan* test, established that for internet activity the effect on a plaintiff is not enough. A holding otherwise would confer jurisdiction in each state in which a plaintiff was affected by internet postings. The defense of lack of personal jurisdiction would, in effect, be eliminated from all cases involving defamation on the internet because:

> [T]he Internet is omnipresent—when a person places information on the Internet, he can communicate with persons in virtually every jurisdiction. If we were to conclude as a general principle that a person's act of placing information on the Internet subjects that person to personal jurisdiction in each State in which the information is accessed, then the defense of personal jurisdiction, in the sense that a State has geographically limited judicial power, would no longer exist. The person placing information on the Internet would be subject to personal jurisdiction in every State.

ALS Scan, Inc., 293 F.3d at 712.

Saxon, upon which plaintiff relies, does not control the result in this case since it did not involve an internet communication. This Court noted in *Saxon* that in deciding whether minimum contacts exist, "[a]mong appropriate factors to be considered are *the quantity and nature of the contact*, the relationship between the contact and the cause of action, the interest of the forum state, the convenience of the parties, and the location of witnesses and material evidence." 125 N.C. App. at 173, 479 S.E.2d at 794 (emphasis added). The defendants in *Saxon* had physically sent 100 newsletters to North Carolina—an action specifically directed at North Carolina readers. An internet

posting, such as the ones in this case—which is not "sent" anywhere in particular, but rather can be accessed from anywhere in the world—is a contact of a qualitatively different "nature" than a physical mailing.

The federal district court in *Burleson* confronted an identical argument as that made by plaintiff in this case. The *Burleson* plaintiff, who raised miniature horses as guide animals, had sued for libel based on postings on websites and in a web forum criticizing the use of guide horses. The court observed that reliance on "effects" alone was precluded by *Young*:

> The Fourth Circuit again emphasized that "[a]lthough the place that the plaintiff feels the alleged injury is plainly relevant . . . it must ultimately be accompanied by the defendant's own [sufficient minimum] contacts with the state if jurisdiction . . . is to be upheld." *Young*, 315 F.3d at 262 (*quoting ESAB Group [v. Centricut*, *Inc.*, 126 F.3d 617, 626 (1997), *cert. denied*, 523 U.S. 1048, 140 L. Ed. 2d 513, 118 S. Ct. 1364 (1998)]). Therefore, a finding of jurisdiction on this ground in the present case would erode the rule elucidated by the Fourth Circuit and would unreasonably confer jurisdiction in the forum state of every plaintiff who may be impacted by a posting on an Internet bulletin board.

391 F. Supp. 2d at 416.

This view of internet activity and minimum contacts has also been adopted by other jurisdictions. *See Machulsky v. Hall*, 210 F. Supp. 2d 531, 542 (D.N.J. 2002) (posting of defamatory material on "feedback" web page regarding products and customer service of New Jersey resident insufficient for jurisdiction in New Jersey when defendant "posted statements to a global audience and did not target specifically any of [plaintiff's] potential customers in New Jersey"); *Barrett v. Catacombs Press*, 44 F. Supp. 2d 717, 728 (E.D. Pa. 1999) (holding that posting of allegedly libelous messages to listservs and USENET discussion groups not sufficient to establish jurisdiction in Pennsylvania even though majority of harm occurred in Pennsylvania); *Griffis v. Luban*, 646 N.W.2d 527, 535-36 (Minn. 2002) (evidence that defendant's allegedly defamatory statements on internet newsgroup were intentionally directed at plaintiff, whom defendant knew was Alabama resident, were not sufficient for personal jurisdiction in Alabama court when record did not indicate statements were targeted at the state of Alabama or Alabama audience apart from plaintiff; newsgroup was organized around particular sub-

ject and not Alabama; readers were not necessarily from Alabama), *cert. denied*, 538 U.S. 906, 155 L. Ed. 2d 225, 123 S. Ct. 1483 (2003).

In sum, whether internet postings confer jurisdiction in a particular forum hinges on the manifested intent and focus of the defendant. Because plaintiff has failed to establish that defendant posted the material in the bulletin board discussions with the intent to direct his content to a North Carolina audience, personal jurisdiction does not exist over defendant in North Carolina courts. Accordingly, we affirm the trial court's dismissal of plaintiff's complaint for lack of personal jurisdiction.

Affirmed.

Judges STEELMAN and STROUD concur.

STEPHEN N. SELLERS, PLAINTIFF v. THOMAS MORTON, FRANK KINCAID, AND STROUPE MIRROR COMPANY, INC., DEFENDANTS

No. COA07-1069

(Filed 17 June 2008)

1. Appeal and Error— notice of appeal—date of service

The trial court did not err by denying defendants' motion to dismiss plaintiff's appeal based on the date of service of notice of appeal. The trial court was free to weigh the credibility of evidence concerning the date of service and find a particular date; presumed findings supported by competent evidence are deemed conclusive on appeal.

2. Contracts— tortious interference—resale of business—evidence of malice

The trial court did not err by granting summary judgment for defendants on a claim for tortious interference with contract arising from the sale of plaintiff's business to defendants Morton and Kincaid and its subsequent resale to defendant Stroupe Mirror. Plaintiff contended that malice was present in the circumstances surrounding the Stroupe purchase agreement, but the evidence did not support plaintiff's contentions, and a legitimate business reason was presented for the sale.

3. Conspiracy— civil—breach of agreements—sufficiency of evidence

The trial court did not err by granting summary judgment for defendants on a claim for civil conspiracy arising from the sale of plaintiff's business to defendants Morton and Kincaid and its subsequent resale to defendant Stroupe Mirror. The threshold issue was whether plaintiff forecast evidence of an agreement between defendants to cause the first purchaser (SGI) to breach its lease and non-compete agreements with plaintiff, but the evidence shows that the second sale was entered into in an effort to remove a lien and does not support the allegation that defendants intentionally excluded payment to plaintiff.

4. Unjust Enrichment— sale and resale of business—benefit not conferred on defendants

The trial court did not err by granting summary judgment for defendants on a claim for unjust enrichment arising from the sale of plaintiff's business to defendants Morton and Kincaid and its subsequent resale to defendant Stroupe Mirror. Plaintiff did not prove that he conferred a benefit on defendants, which is necessary in order to recover on an unjust enrichment claim.

5. Damages and Remedies— punitive—summary judgment on underlying claim

The trial court did not err by granting summary judgment for defendants on a claim for punitive damages arising from the sale of plaintiff's business to defendants Morton and Kincaid and its subsequent resale to defendant Stroupe Mirror. Summary judgment was correctly granted on the underlying tortious interference claim.

6. Discovery— summary judgment before end of discovery period—no discovery sought by opposing party

The trial court did not err by ruling on motions for summary judgment before the end of a discovery period where there was no evidence that plaintiff (the opposing party) sought discovery prior to the motions for summary judgment, no record of any objections to hearing the motions for summary judgment, and no action by plaintiff to continue the hearing for pretrial discovery.

Appeal by plaintiff and defendants from orders entered 8 June 2007 by Judge John O. Craig, III and 10 August 2007 by Judge R. Stuart Albright in Guilford County Superior Court. Heard in the Court of Appeals 19 February 2008.

Douglas S. Harris, for plaintiff-appellant.

Wyatt, Early, Harris, Wheeler, LLP, by William E. Wheeler, for defendant Stroupe Mirror Company, Inc.

Keziah, Gates & Samet, L.L.P., by Andrew S. Lasine, for defendants Thomas Morton and Frank Kincaid.

CALABRIA, Judge.

Stephen N. Sellers ("plaintiff") appeals the trial court's order granting summary judgment in favor of Stroupe Mirror Company, Inc. ("Stroupe Mirror"), Thomas Morton ("Morton"), and Frank Kincaid ("Kincaid," collectively "defendants"). Defendants appeal the trial court's order denying their motion to dismiss plaintiff's appeal. We affirm.

Plaintiff was the president and sole shareholder of Sellers Glass Industries, Inc. ("Sellers Glass"). Morton and Kincaid were the principal officers, directors and shareholders of SGI Acquisitions, LLC ("SGI"). In January 2001, plaintiff sold substantially all of the assets of Sellers Glass to SGI.

Shortly after the sale of assets, plaintiff and SGI entered into two separate contracts. On 31 January 2001, plaintiff entered into a "Consulting and Non-Competition Agreement" ("non-compete agreement") with SGI where plaintiff agreed to provide consulting services to SGI for a period of 90 days along with a covenant not to compete with SGI for a term of five years. SGI agreed to pay plaintiff $100,000.00 in sixty equal monthly installments as consideration for plaintiff's services and plaintiff's covenant not to compete.

The second contract, a lease agreement with SGI, was signed on 1 February 2001. Plaintiff leased real property to SGI for an initial term of six years ("lease agreement"). The lease agreement provided:

> During the first four years of the initial term, Tenant shall pay to Landlord for the use and occupancy of the Premises the annual rental at the base rate of $75,000.00, payable in monthly installments in the amount of $6,250.00. . . . During the fifth and sixth years of the initial term, Tenant shall pay Landlord . . . monthly installments of $4,375.00.

On 13 August 2001, Morton and Kincaid changed the name of their company from SGI to Glass Solutions, LLC ("Glass Solutions"). Prior to the name change, SGI entered into a loan agreement with

Merrill Lynch Business Financial Services, Inc. ("Merrill Lynch"). The loan agreement granted Merrill Lynch a security interest in all of SGI's assets, including the assets acquired from Sellers Glass. On 8 October 2003, Glass Solutions defaulted on its loan with Merrill Lynch. As a result of its financial situation, Glass Solutions sold all its assets to Stroupe Mirror and on 16 January 2004, Stroupe Mirror assumed liability for some of Glass Solutions' debts according to the terms of an asset purchase agreement ("purchase agreement"). Specifically, Stroupe Mirror agreed to pay $300,000.00 to satisfy Glass Solutions' indebtedness to its group of investors. Stroupe Mirror also entered into employment agreements with Morton and Kincaid with simultaneous consulting contracts.

Although Stroupe Mirror did not assume Glass Solutions' liability for either the lease agreement or the non-compete agreement, plaintiff continued receiving payments from Glass Solutions for the lease agreement and the non-compete agreement until the first week in February 2004. At that time, Glass Solutions completely stopped making payments.

On 6 April 2004, plaintiff received a letter from Glass Solutions' attorney notifying him that Glass Solutions had ceased all operations effective 26 January 2004. The attorney's letter also informed plaintiff that Glass Solutions had no remaining funds for payments on either the lease agreement or the non-compete agreement.

On 5 January 2007, Sellers filed a complaint against defendants alleging tortious interference with contract, civil conspiracy with an illegal purpose, unjust enrichment against Kincaid and Morton, and punitive damages.[1]

On 15 May 2007, Stroupe Mirror filed a Motion for Summary Judgment. On 24 May 2007, Morton and Kincaid also moved for summary judgment. On 8 June 2007 in Guilford County Superior Court, the Honorable John O. Craig, III granted both motions for summary judgment in favor of defendants ("the order").

Plaintiff filed a notice of appeal from the order on 6 July 2007. The Certificate of Service attached to plaintiff's notice of appeal described the date of service as 6 July 2006, however, the envelopes containing plaintiff's notice of appeal were postmarked 10 July 2007.

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1. Plaintiff also filed a breach of contract complaint against Sellers Acquisition Group ("SAC"), a holding company for SGI, which he later voluntarily dismissed without prejudice.

Stroupe Mirror filed and served a motion to dismiss plaintiff's appeal on 12 July 2007, and Morton and Kincaid filed motions to dismiss the appeal on 24 July 2007 ("motions to dismiss the appeal"). On 10 August 2007, the Honorable R. Stuart Albright denied the motions to dismiss the appeal. From this order, defendants appeal.

I. Order Denying Motions to Dismiss Appeal

[1] Defendants argue this Court lacks jurisdiction to hear plaintiff's appeal because plaintiff's notice of appeal was defective. We disagree.

The order granting summary judgment in favor of defendants was entered 8 June 2007. Defendants assert plaintiff's notice of appeal from the summary judgment order was not "served" within the statutorily allotted time of thirty days. The envelopes used to send the notice of appeal to defendants' attorneys were postmarked 10 July 2007. In addition, defendants contend the certificate of service attached to the notice of appeal did not comply with the Rules of Appellate Procedure because the certificate of service indicates the service date was 6 July 2006, but the envelopes serving the notice of appeal were postmarked on 10 July 2007.

The trial court is not required to make findings of fact absent a request by the parties, and if neither party requests findings of fact, there is a presumption that the trial court, upon proper evidence, found facts sufficient to support its ruling. *Data Gen. Corp. v. Cty. of Durham*, 143 N.C. App. 97, 101, 545 S.E.2d 243, 246 (2001). When the trial court sits as a finder of fact, questions concerning the weight and credibility of the evidence are the province of the trial court. *Cartin v. Harrison*, 151 N.C. App. 697, 703, 567 S.E.2d 174, 178 (2002). "Conclusions of law that are correct in light of the findings are also binding on appeal." *State v. Howell*, 343 N.C. 229, 239, 470 S.E.2d 38, 43 (1996).

We conclude the trial court did not err in denying defendants' motion to dismiss plaintiff's appeal. The Rules of Appellate Procedure require the notice of appeal to be filed and served within thirty (30) days after entry of judgment "if a party has been served with a copy of the judgment within the three-day period prescribed by Rule 58 of the Rules of Civil Procedure. . . ." N.C.R. App. P. 3(c)(1) (2007). The summary judgment order was served on 8 June 2007 and the notice of appeal was filed on 6 July 2007. The notice of appeal may be served as provided in Rule 26 of the Rules of Appellate

Procedure. N.C.R. App. P. 3(e) (2007). Rule 26(d) of the appellate rules provides that proof of service can be effectuated by:

> an acknowledgment of service by the person served or proof of service in the form of a statement of the date and manner of service and the names of the persons, certified by the person who made service. Proof of service shall appear on or be affixed to the papers filed.

N.C.R. App. P. 26(d) (2007).

The certificate of service raises a rebuttable presumption of valid service. *Hocke v. Hanyane*, 118 N.C. App. 630, 633, 456 S.E.2d 858, 860 (1995) (quoting *In re Cox*, 36 N.C. App. 582, 586, 244 S.E.2d 733, 736 (1978)). Here, plaintiff's "Certificate of Service," signed and dated by the plaintiff's attorney, was attached to the notice of appeal. Stroupe Mirror contends the certificate of service does not indicate when the notice of appeal was served. We disagree. The certificate of service reads:

> This is to certify that I have served the foregoing Plaintiff's Notice of Appeal on Defendants by forwarding a copy of same by first-class mail, postage prepaid, and addressed to the attorneys for Defendants whose names and addresses appear below.
>
> . . . .
>
> This the 6th day of July 2006. /s/ Douglas S. Harris Attorney for Plaintiff

The trial court did not err in concluding the date indicating the date of service was sufficient to withstand the motion to dismiss because the date, 6 July 2006, was an obvious typographical error. Plaintiff presented evidence in the form of two affidavits indicating plaintiff filed the notice on 6 July 2007 and placed it in the mail on the same day. In addition, the notice of appeal was clocked in at the Guilford County Courthouse at 3:16 p.m. on 6 July 2007. Although defendants argue they rebutted the presumption of valid service by submitting the envelopes post-marked 10 July 2007, the trial court was free to weigh the credibility of the envelopes against plaintiff's affidavits and find the date of service to be 6 July 2007.[2]

2. We note that N.C. Rules of Appellate Procedure, Rule 27(b) provides that when a party "has the right to do some act or take some proceedings within a prescribed period after service of a notice or other paper on him and the notice or paper is served upon him by mail, three days shall be added to the prescribed period." The certificate of service attached to the summary judgment order indicates the order was served by

"Where such presumed findings are supported by competent evidence, they are deemed conclusive on appeal, despite the existence of evidence to the contrary." *Data Gen. Corp.*, *supra.* This assignment of error is overruled.

II. Summary Judgment

[2] Plaintiff asserts the trial court erred in granting defendants' summary judgment motions because genuine issues of material fact existed rendering summary judgment improper. We disagree.

The standard of review on appeal for a summary judgment is whether there is a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. *Oliver v. Roberts*, 49 N.C. App. 311, 314, 271 S.E.2d 399, 401 (1980); *Barbour v. Little*, 37 N.C. App. 686, 692, 247 S.E.2d 252, 256 (1978). "The question is whether the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is a genuine issue as to any material fact." *Tuberculosis Assoc. v. Tuberculosis Assoc.*, 15 N.C. App. 492, 494, 190 S.E.2d 264, 265 (1972).

Plaintiff argues because a number of facts are disputed, summary judgment was improper. In order to survive a summary judgment motion, the opposing party must forecast evidence indicating the existence of a triable issue of material fact. *Kidd v. Early*, 289 N.C. 343, 370, 222 S.E.2d 392, 410 (1976). We therefore examine whether plaintiff forecasted evidence of disputed facts which are material to plaintiff's claims. Plaintiff brought claims for tortious interference with contract, civil conspiracy with an illegal purpose, unjust enrichment, and punitive damages based on the interference with contract claims.

A. Tortious Interference with Contract

To establish a claim for tortious interference with contract, a plaintiff must show:

> (1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person; (2) the defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) and in doing so acts without justification; (5) resulting in actual damage to plaintiff.

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hand delivery or deposited in the U.S. Mail. Since we do not know the manner of service for the summary judgment order, we do not rely on this rule; however, if served by mail, service on 10 July 2007 would be proper.

White v. Cross Sales & Eng'g Co., 177 N.C. App. 765, 768-69, 629 S.E.2d 898, 901 (2006). Interference is without justification if a defendant's motive is not "reasonably related to the protection of a legitimate business interest." *Privette v. University of North Carolina*, 96 N.C. App. 124, 134, 385 S.E.2d 185, 190 (1989).

> Whether an actor's conduct is justified depends upon "the circumstances surrounding the interference, the actor's motive or conduct, the interests sought to be advanced, the social interest in protecting the freedom of action of the actor[,] and the contractual interests of the other party." *Peoples Security Life Ins. Co. v. Hooks*, 322 N.C. at 221, 367 S.E.2d at 650. Generally speaking, interference with contract is justified if it is motivated by a legitimate business purpose, as when the plaintiff and the defendant, an outsider, are competitors. *Id.* at 221-22, 367 S.E.2d at 650.

Embree Construction Group, Inc. v. Rafcor, Inc., 330 N.C. 487, 498, 411 S.E.2d 916, 924 (1992). A complainant must show that the defendant acted with malice and for a reason not reasonably related to the protection of a legitimate business interest of the defending party. *Market America, Inc. v. Christman-Orth*, 135 N.C. App. 143, 158, 520 S.E.2d 570, 581 (1999) (quotation omitted).

Plaintiff contends malice was present due to circumstances surrounding the purchase agreement. Specifically, (1) Morton misrepresented to plaintiff whether Glass Solutions' investors received any money under the purchase agreement, (2) Stroupe Mirror entered the purchase agreement as revenge for plaintiff's refusal to sell Glass Solutions to Stroupe Mirror years earlier, (3) plaintiff was the only unsecured creditor who did not receive funds under the purchase agreement, and (4) Morton and Kincaid asked one of plaintiff's affiants to give false testimony.

Plaintiff did not forecast sufficient evidence to support his contention that he was the only creditor that was not paid under the purchase agreement. The purchase of Glass Solutions' assets affected all of Glass Solutions' liabilities, not just the contracts with plaintiff. The purchase agreement provided that "[Glass Solutions] convenants that [Glass Solutions] shall[,] at or prior to Closing[,] satisfy all present liabilities of [Glass Solutions] affecting the Assets and shall timely and fully satisfy all other liabilities of [Glass Solutions] to its creditors." Glass Solutions, Kincaid and Morton also warranted to Stroupe Mirror that the purchase agreement would not affect Glass Solutions' contracts with other creditors, including the lease agreement

and the non-compete agreement. The purchase agreement provides that "[Stroupe Mirror] may, but shall not be obligated, to assume any of [Glass Solutions'] contracts listed on Exhibit 5(d)." Exhibit 5(d) lists eight contracts, two of which are the lease agreement and non-compete agreement with plaintiff. This evidence does not support plaintiff's contention that Stroupe Mirror intentionally induced the purchase of assets in order to interfere with plaintiff's contracts with Glass Solutions, since Stroupe Mirror could disclaim liability for the contracts that were held by other creditors. In addition, even if Morton misrepresented the terms of the purchase agreement to plaintiff and encouraged false testimony, those facts do not support a finding that Stroupe Mirror, Kincaid, and Morton intentionally induced Glass Solutions' failure to perform its agreements with plaintiff. *Pleasant Valley Promenade v. Lechmere, Inc.*, 120 N.C. App. 650, 657, 464 S.E.2d 47, 54 (1995). We also conclude that defendants Kincaid and Morton presented a legitimate business reason for selling the assets: to satisfy the lien held by Merrill Lynch.

B. Civil Conspiracy

[3] "There is no independent cause of action for civil conspiracy." *Toomer v. Garrett*, 155 N.C. App. 462, 483, 574 S.E.2d 76, 92 (2002) (citation omitted). "Only where there is an underlying claim for unlawful conduct can a plaintiff state a claim for civil conspiracy by also alleging the agreement of two or more parties to carry out the conduct and injury resulting from that agreement." *Id.* (citing *Muse v. Morrison*, 234 N.C. 195, 66 S.E.2d 783 (1951)).

> A threshold requirement in any cause of action for damages caused by acts committed pursuant to a conspiracy must be the showing that a conspiracy in fact existed. The existence of a conspiracy requires proof of an agreement between two or more persons. Although civil liability for conspiracy may be established by circumstantial evidence, the evidence of the agreement must be sufficient to create more than a suspicion or conjecture in order to justify submission to a jury.

Dove v. Harvey, 168 N.C. App. 687, 690-91, 608 S.E.2d 798, 801 (2005) (quoting *Henderson v. LeBauer*, 101 N.C. App. 255, 261, 399 S.E.2d 142, 145 (1991)). In *Henderson*, plaintiff alleged doctors conspired to cover up circumstances surrounding her husband's death. *Id.* This Court affirmed summary judgment for defendants because plaintiff's evidence was insufficient to show defendants agreed to cover up her husband's death. *Id.* Similarly, in *Pleasant Valley Promenade*, 120

N.C. App. at 657, 464 S.E.2d at 54, this Court concluded there was insufficient evidence to support plaintiff's allegations that defendants conspired to close defendant's store for the purpose of breaching plaintiff's contract, where the closing of the store was an operational decision made by the defendant.

Here, plaintiff alleges Stroupe Mirror bribed Kincaid and Morton to enter a purchase agreement to sell Glass Solutions' assets. Plaintiff further alleges the consulting fees paid to Kincaid and Morton did not benefit Glass Solutions, Kincaid and Morton were incompetent in the glass business, Morton misrepresented to plaintiff whether investors were paid, and Glass Solutions was the only creditor not paid under the purchase agreement.

The threshold issue is whether plaintiff forecasted evidence of an agreement between Stroupe Mirror, Kincaid, and Morton that caused Glass Solutions to breach the lease and non-compete agreements with plaintiff. The evidence shows that Kincaid and Morton decided to enter the purchase agreement with Stroupe Mirror in an effort to remove Merrill Lynch's lien on Glass Solutions' assets. The terms of the purchase agreement do not support plaintiff's allegation that defendants intentionally excluded payment to plaintiff. This assignment of error is overruled.

C. Unjust Enrichment against Morton and Kincaid

[4] Plaintiff alleges Morton and Kincaid were unjustly enriched by the employment and consulting contracts which benefitted them and not Glass Solutions. Plaintiff contends funds which would have been used to pay plaintiff were applied to pay Morton and Kincaid under their employment and consulting agreements with Stroupe Mirror.

"In order to establish a claim for unjust enrichment, a party must have conferred a benefit on the other party." *D.W.H. Painting Co. v. D.W. Ward Constr. Co.*, 174 N.C. App. 327, 334, 620 S.E.2d 887, 893 (2005). Here, plaintiff's unjust enrichment claim is based on employment and consulting contracts "benefitting" Kincaid and Morton, which plaintiff alleges were paid at the expense of Glass Solutions. Plaintiff does not prove that he conferred a benefit on defendants, which is necessary in order to recover on an unjust enrichment claim. *Southeastern Shelter Corp. v. BTU, Inc.*, 154 N.C. App. 321, 330, 572 S.E.2d 200, 206 (2002) ("In order to recover on a claim of unjust enrichment, a party must prove that it conferred a benefit on another party, that the other party consciously accepted the benefit, and that

the benefit was not conferred gratuitously or by an interference in the affairs of the other party."). This assignment of error is overruled.

D. Punitive Damages

[5] Plaintiff argues Morton and Kincaid acted with malice by entering into the purchase agreement with Stroupe Mirror. Plaintiff alleges Stroupe Mirror previously tried to buy Glass Solutions from plaintiff. Since Stroupe Mirror was unsuccessful, plaintiff alleges Stroupe Mirror had a motive to exclude payment to plaintiff when it purchased the assets of Glass Solutions.

"Punitive damages may be awarded only if the claimant proves that the defendant is liable for compensatory damages and that one of the following aggravating factors was present and was related to the injury for which compensatory damages were awarded: (1) Fraud. (2) Malice. (3) Willful or wanton conduct." N.C. Gen. Stat. § 1D-15(a) (2007). Since we conclude that the trial court did not err in granting summary judgment on plaintiff's claims of tortious interference, plaintiff is not entitled to compensatory damages. Therefore, the trial court did not err in concluding as a matter of law plaintiff was not entitled to punitive damages. *See Di Frega v. Pugliese*, 164 N.C. App. 499, 508, 596 S.E.2d 456, 463 (2004) (concluding punitive damages were not warranted where record was devoid of evidence of a civil conspiracy or unfair and deceptive practices claim).

III. Discovery

[6] Plaintiff contends the trial court erred in ruling on the motions for summary judgment before the end of the discovery period. We disagree.

"[I]t is ordinarily error when a court hears and rules upon a motion for summary judgment while discovery is pending and the party seeking discovery has not been dilatory or lazy in doing so." *Shroyer v. Cty. of Mecklenburg*, 154 N.C. App. 163, 169, 571 S.E.2d 849, 852 (2002) (internal quotations and brackets omitted) (citation omitted). However, where there is no evidence that plaintiff sought discovery prior to the motions for summary judgment, no record of any objections to hearing the motions for summary judgment, and no action on the part of plaintiff to continue the hearing to allow additional time for pre-trial discovery, there is no error in proceeding with the summary judgment hearing. *Id.*

Here, the only discovery requests that are included in the record on appeal are from defendants. Defendants served the discovery

requests in February and May 2007. The summary judgment motion was heard on 5 June 2007. Plaintiff did not include any evidence in the record showing that he was awaiting discovery responses from defendants at the time of the summary judgment hearing. While plaintiff alleges in his appellate brief that he "intended to take James Stroupe's deposition," plaintiff does not allege his failure to depose witnesses prior to the summary judgment hearing was attributable to actions by the court or by defendants. Plaintiff was free to serve discovery requests prior to the June 2007 hearing and was free to object to the summary judgment hearing on that basis. This assignment of error is overruled.

IV. Conclusion

We affirm the trial court's denial of defendants' motion to dismiss plaintiff's appeal and the trial court's grant of summary judgment in favor of defendants on plaintiff's tortious interference with contract, civil conspiracy, unjust enrichment, and punitive damages claims.

Affirmed.

Judges WYNN and McGEE concur.

STATE OF NORTH CAROLINA v. MARCUS DEVIN RIFFE

No. COA07-1130

(Filed 17 June 2008)

1. Sexual Offenses— exploitation of minor—computer images—knowledge of character or content of files

The evidence that defendant had knowledge of the character or content of material on his computer was sufficient to deny his motion to dismiss a charge of third-degree sexual exploitation of a minor, even if the statute required knowledge of both the character and content of the material.

2. Sexual Offenses— exploitation—images on a computer—possession

The evidence that defendant was in possession of child pornography on a computer was sufficient in a prosecution for third-degree sexual exploitation of a minor.

3. Sexual Offenses— amendment of indictment—sexual exploitation of minor—date of offense

The trial court did not err by allowing the State to amend indictments for third-degree sexual exploitation of a minor to change the date of each count where time was not an essential element of the crime and defendant did not present an alibi defense.

4. Evidence— child pornography—video clips shown to jury—no abuse of discretion

The trial court did not abuse its discretion in a prosecution for third-degree sexual exploitation of a minor by allowing the State to show the jury twelve video clips of children engaged in sexual activity. Defendant had stipulated that the computer contained images of sexual activity, but a stipulation does not preclude the State from proving all of the essential elements of its case, and a non-duplicative, brief presentation of the evidence was appropriate as it served as the basis for the charges.

Appeal by defendant from judgments entered 30 March 2007 by Judge Richard W. Stone in Randolph County Superior Court. Heard in the Court of Appeals 5 March 2008.

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

Jonathan L. Megerian for defendant-appellant.

HUNTER, Judge.

Marcus Devin Riffe ("defendant") appeals from judgments entered on 30 March 2007 pursuant to a jury verdict finding him guilty of twelve counts of third degree sexual exploitation of a minor in violation of N.C. Gen. Stat. § 14-190.17A (2007). Defendant was sentenced to six consecutive suspended sentences of a minimum of five months' imprisonment and a maximum of six months' imprisonment. Defendant was also sentenced to a supervised probationary term of thirty-six months. After careful consideration, we find that defendant's trial was free from error.

On 11 February 2004, Deputy Joe H. Cline and Lieutenant Keith Owenby served a search warrant, for a matter unrelated to the current charges, on defendant's place of business. The only person present when the search warrant was executed was Everette

Franklin Brown. Because Mr. Brown was the only individual present, the officers read the warrant to him. There was evidence presented that Mr. Brown may have actually resided in defendant's place of business in a separate room. Upon serving the warrant, Deputy Cline walked inside defendant's place of business to an office area, where a Compaq Presario desktop computer registered to defendant was located on a desk ("defendant's computer").

In and around the desk, Deputy Cline found: A receipt signed by defendant, a payment receipt that stated defendant's name and address, a deposit slip dated 2 February 2004 from Bank of America and signed by defendant, defendant's parents' bank book, and a Wachovia Bank deposit slip "in the name of Marcus D. Riffe." Next to the desk, Deputy Cline also found an open box of pornographic magazines. Lieutenant Owenby seized defendant's computer.

After obtaining a search warrant to inspect defendant's computer, police found twelve files with names indicating that the files contained child pornography; these names are set out below. Additionally, approximately 200 files were found with titles that implied that they contained either adult or child pornography and 100 similar files that had been deleted from his "My Shared" folder. In defendant's "Stars Folder," another 150 files had titles that indicated that they contained child pornography.

On 16 June 2005, Deputy Cline served arrest warrants on defendant for twelve counts of third degree sexual exploitation of a minor. Defendant stated that "he did look at porn on the computer" in question. Defendant did not present any evidence at trial.

Defendant presents the following issues for this Court's review: (1) whether the trial court erred in denying defendant's motion to dismiss the charges for insufficient evidence; (2) whether the trial court erred by permitting the State to amend indictments after trial had begun; and (3) whether the trial court erred in admitting video evidence of child pornography after defendant stipulated that the evidence in question constituted pornography.

I.

[1] Defendant first argues that the trial court erred in failing to grant his motion to dismiss the charges of third degree sexual exploitation of a minor on the grounds that the State presented insufficient evidence as to the charges. We disagree.

This Court reviews a motion to dismiss for insufficient evidence to determine whether "there is substantial evidence [] of each essential element of the offense charged[.]" *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). "The trial court is *not* required to determine that the evidence excludes every reasonable hypothesis of innocence prior to denying a defendant's motion to dismiss." *Powell*, 299 N.C. at 101, 261 S.E.2d at 118. All evidence "is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal[.]" *Id.* at 99, 261 S.E.2d at 117.

"A person commits the offense of third degree sexual exploitation of a minor if, knowing the character or content of the material, he possesses material that contains a visual representation of a minor engaging in sexual activity." N.C. Gen. Stat. § 14-190.17A(a).[1] The elements of the offense are: "(1) knowledge of the character or content of the material, and (2) possession of material that contains a visual representation of a minor engaging in sexual activity." *State v. Dexter*, 186 N.C. App. 587, 594-95, 651 S.E.2d 900, 905-06 (2007). This Court in *Dexter* also rejected defendant's argument that in order to sustain a conviction under the statute, the State must establish that a

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1. The term "material" is defined as: "Pictures, drawings, video recordings, films or other visual depictions or representations but not material consisting entirely of written words." N.C. Gen. Stat. § 14-190.13(2) (2007). "Sexual activity" includes any of the following:

a. Masturbation, whether done alone or with another human or an animal.

b. Vaginal, anal, or oral intercourse, whether done with another human or with an animal.

c. Touching, in an act of apparent sexual stimulation or sexual abuse, of the clothed or unclothed genitals, pubic area, or buttocks of another person or the clothed or unclothed breasts of a human female.

d. An act or condition that depicts torture, physical restraint by being fettered or bound, or flagellation of or by a person clad in undergarments or in revealing or bizarre costume.

e. Excretory functions; provided, however, that this sub-subdivision shall not apply to G.S. 14-190.17A.

f. The insertion of any part of a person's body, other than the male sexual organ, or of any object into another person's anus or vagina, except when done as part of a recognized medical procedure.

N.C. Gen. Stat. § 14-190.13(5).

defendant " 'knowing[ly] possess[ed]' " the material in question. *Id.* at 592, 651 S.E.2d at 905.

Defendant concedes that the computer in question contained visual representations of minors engaging in sexual activity on its hard drive. We thus limit our discussion to whether the State presented substantial evidence as to whether defendant had knowledge of the character or content of the material and whether defendant was in possession of such material.

A.

The issue of whether defendant had knowledge of the character or content of the material under this statute has not been addressed by our appellate courts. This Court has, however, addressed whether defendants have knowledge of the character *and* content of obscene material for the purpose of dissemination of obscenity in violation of N.C. Gen. Stat. § 14-190.1 (2007). *See State v. Roland*, 88 N.C. App. 19, 362 S.E.2d 800 (1987). Under the obscenity statute, a defendant may be convicted only upon "knowledge of the character or nature of the materials, [*and*] also knowledge of their content." *Id.* at 28, 362 S.E.2d at 806 (emphasis added). The statute in the present case, however, is stated in the disjunctive; that is, the knowledge requirement will be satisfied where defendant had knowledge of the materials' character *or* their content. Accordingly, the obscenity statute is only some guide to interpretation of the knowledge requirement in N.C. Gen. Stat. § 14-190.17A(a).

In *Roland*, this Court held that the State had presented sufficient evidence as to the defendant's knowledge of the obscene materials *and* content because: (1) the defendant had been seen by a testifying police officer at the bookstore which distributed the obscene materials on two prior occasions; (2) "the box containing the film and the covers of the magazines were illustrated with pictures[,]" with corresponding testimony from an officer that "these pictures were indicative of the contents of the film and magazines[;]" and (3) "the jury had the opportunity to examine the film and magazines themselves to determine whether the box and covers reflected the materials' contents, as proof that defendant had knowledge of such." *Roland*, 88 N.C. App. at 29, 362 S.E.2d at 806.

In the instant case, Deputy Cline testified that defendant operated a business out of the warehouse where the computer was found.

As defendant concedes, the computer in question did contain images of a minor engaging in sexual activity. Although there were no graphic illustrations on the electronic folder containing the child pornography, State Bureau of Investigation Special Agent Cullop testified that he found twelve files saved to the computer with names indicating that they contained child pornography. Specifically, some of the files were saved as "Child Porn, Very Illegal," "Pedo Childlover underscore little, underscore collection, underscore video, underscore 0147.mpg," "04 Y O eaten by dad.mpg.," "Child Porn Kiddie Underage Illegal Natalia," and "Thirteen Till Child Porn, Exclamation, Exclamation, Exclamation, and then in parentheses, Illegal Preteen Underage Lolita Kiddy." The written descriptions of these files, like the visual descriptions of the videos and print media in *Roland*, were also indicative of the character and contents of the files. *See also State v. Watson*, 88 N.C. App. 624, 631, 364 S.E.2d 683, 687 (1988) (noting that using a written description to catagorize obscene material was evidence of a defendant's knowledge of the character and content of the material); *State v. Johnston*, 123 N.C. App. 292, 299, 473 S.E.2d 25, 30 (1996) (same). Indeed, Guilford County Department of Information and Services computer forensic analysis Scott Redmon testified that child pornography had been found on the hard drive. Finally, the jury in this case, like the one in *Roland*, was allowed to review all twelve of the computer files to determine whether the file names reflected the materials' content.

Thus, under *Roland*, the State has presented evidence sufficient to submit the charge to the jury even if the statute in question required knowledge of both the character and content of the material.[2] Accordingly, it cannot be said that the State failed to present sufficient evidence from which the jury could infer that defendant possessed knowledge as to the character or nature of the material or its content. Defendant's arguments to the contrary are therefore rejected.

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2. We recognize that this Court has refused to apply case law under the obscenity statute, N.C. Gen. Stat. § 14-190.1(a), in interpreting N.C. Gen. Stat. § 14-190.17A(a). *State v. Howell*, 169 N.C. App. 58, 63-64, 609 S.E.2d 417, 420-21 (2005). In *Howell*, however, the issue was one of multiplicitous charges, not one regarding knowledge of the character or content of the material. Accordingly, we are not bound by the *Howell* Court's refusal to use case law stemming from the obscenity statute, as the issues in the instant case are distinct from those in *Howell*. *See In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("[w]here a panel of the Court of Appeals *has decided the same issue*, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court") (emphasis added).

B.

[2] Defendant next argues that the State failed to present sufficient evidence that he was in possession of the material. We disagree.

At the outset, defendant argues that he did not "knowingly possess" the materials. Knowing possession is not an element of the statute. *Dexter*, 186 N.C. App. at 595, 651 S.E.2d at 905. The absence of such an element is likely based on the state legislature's concern that a defendant could avoid criminal liability by downloading content barred by the statute, view it, and then attempt to delete the file. Whether defendant is able to actually erase the file would become irrelevant, as the defendant could then argue that he or she did not have " 'knowing possession' " of the illegal content. Putting aside defendant's misstatement of the law, this Court must determine whether defendant was in possession of the material. *Id.*

A defendant is in possession of child pornography when he or she has "the power and intent to control the disposition of the images." *Id.* at 595-96, 651 S.E.2d at 906. Sufficient evidence of possession has been found where each image had been opened and saved on a defendant's hard drive, regardless as to which directory they were found in. *State v. Howell*, 169 N.C. App. at 64, 609 S.E.2d at 421. Accordingly, we must determine whether the State presented evidence that the computer in question was defendant's and whether the images had been opened and saved on that computer.

As to whether defendant owned the computer in question, the State presented evidence tending to show that it was found at defendant's place of business. The computer was also registered to defendant. In addition to this evidence, the State also presented evidence that a receipt signed by defendant, a payment receipt which included defendant's name and address, and two deposit slips—one bearing defendant's signature, the other his name—were found in and around the desk where the computer was located. Under such circumstances, the State clearly presented sufficient evidence for the jury to determine if the computer in question was in fact defendant's.

As to whether the files in question were saved on defendant's hard drive and had been opened, the State presented evidence that all the files were saved on the hard drive and were last opened on 11 February 2004, the day the computer was seized by police. Accordingly, the State has presented sufficient evidence as to possession. Defendant's assignment of error as to this issue is therefore rejected.

II.

[3] Defendant next argues that the trial court committed reversible error when it allowed the State to amend the indictments for third degree sexual assault of a minor over defendant's objection. We disagree.

The indictments alleged the date of the offenses on 30 August 2004. Defendant's trial counsel, during opening argument, stated that evidence would be presented that on 30 August 2004, the computer was "in the possession of a Randolph County Sheriff Department" and had been for approximately six months prior to trial. Consistent with this opening argument, defendant's counsel cross-examined all witnesses regarding whether defendant was in possession of the hard drive on the date alleged in the indictments. Each witness called that day conceded that on 30 August 2004, the computer in question was in the possession of a law enforcement agency and not defendant.[3] During the morning of the second day of trial, the State moved to amend the indictments in order to change the date of each count. The trial court allowed the amendment over defendant's objection.

"[T]he purpose of an indictment is to give a defendant notice of the crime for which he is being charged." *State v. Bowen*, 139 N.C. App. 18, 27, 533 S.E.2d 248, 254 (2000). "A bill of indictment may not be amended." N.C. Gen. Stat. § 15A-923(e) (2007). The term "amended" in N.C. Gen. Stat. § 15A-923(e), however, has been interpreted to mean that "a bill of indictment may not be amended in a manner that substantially alters the charged offense." *State v. Silas*, 360 N.C. 377, 380, 627 S.E.2d 604, 606 (2006). In determining whether there has been a substantial alteration, we must consider whether the indictment enables the accused to prepare for trial. *Id.*

In order to prevail, defendant "must show a fatal variance between the offense charged and the proof as to . . . an essential element of the offense." *State v. Pickens*, 346 N.C. 628, 646, 488 S.E.2d 162, 172 (1997). In the instant case, the amendment was made regarding the time of the alleged criminal conduct. Thus, if "time is not an essential element of [N.C. Gen. Stat. § 14-190.17A(a)], an amendment relating to the date of the offense is permissible since the amendment would not 'substantially alter the *charge* set forth in the indictment.' " *State v. Brinson*, 337 N.C. 764, 767, 448 S.E.2d 822, 824 (1994) (quot-

3. Lieutenant Keith Owenby, Detective Mike Bye, and Detective Joe Cline all agreed that defendant was not in possession of the computer's hard drive on the date alleged in the indictment.

ing *State v. Price*, 310 N.C. 596, 598-99, 313 S.E.2d 556, 559 (1984)). As we have set out above, the elements of N.C. Gen. Stat. § 14-190.17A(a) include only the elements of knowledge and possession. *See Dexter, supra*.

"A variance as to time, however, becomes material and of the essence when it deprives a defendant of an opportunity to adequately present his defense." *Price*, 310 N.C. at 599, 313 S.E.2d at 559. The only cases cited to this Court by defendant or uncovered by research where time may become material are those in which a defendant has asserted an alibi defense. *See e.g.*, *State v. Custis*, 162 N.C. App. 715, 718-19, 591 S.E.2d 895, 898 (2004). In cases in which time is not an essential element of the crime and an alibi defense has not been presented, it has been held that an amendment as to the date of the offense is not material. *See State v. Simpson*, 159 N.C. App. 435, 438, 583 S.E.2d 714, 716 (2003). Since defendant did not present an alibi defense and time is not an element of the offense, we therefore find no error as to this issue.

III.

[4] Defendant's final argument is that the trial court committed reversible error in admitting and allowing the State to show the jury twelve video clips of children engaged in sexual activity. We disagree.

Defendant argues that because he stipulated that the computer contained images of child pornography that would be violative of the statute in question, the evidence was not relevant. Defendant's contention is without merit.

" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2007). Clearly, the existence of videos on defendant's computer depicting sex acts is relevant to whether defendant had knowledge of their existence and whether the participants in the sex acts were in fact minors. As to the stipulation, the State correctly points out that "[a] party cannot control the admission of competent evidence by tendering stipulations deemed to be less damaging to his cause than the live testimony of the witness himself." *State v. Jones*, 294 N.C. 642, 650, 243 S.E.2d 118, 123 (1978). Simply put, a stipulation does not preclude the State from proving all essential elements of its case. *State v. Elkerson*, 304 N.C. 658, 665, 285 S.E.2d 784, 789 (1982).

Defendant also argues that the evidence, even if relevant, was unfairly prejudicial and should not have been admitted. *See* N.C. Gen. Stat. § 8C-1, Rule 403 (2007) ("[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence"). Evidence will be considered "unfairly prejudicial" when it has "an undue tendency to suggest a decision on an improper basis, usually an emotional one." *State v. Hennis*, 323 N.C. 279, 283, 372 S.E.2d 523, 526 (1988).

Whether evidence is unduly prejudicial "is within the discretion of the trial court and will not be overturned absent an abuse of discretion." *State v. Roache*, 358 N.C. 243, 284, 595 S.E.2d 381, 408 (2004). An abuse of discretion results when a trial court's ruling is " 'manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.' " *Id.* (citation omitted).

As a general matter, images or photographs are competent to explain or illustrate what a witness could describe in words. *Hennis*, 323 N.C. at 283, 372 S.E.2d at 526. The probative value of photographs or images may be eclipsed by its tendency to prejudice if they are inflammatory, excessive, or repetitious. *Id.* at 284, 372 S.E.2d at 526. "The fact that a photograph depicts a horrible, gruesome or revolting scene does not render it incompetent." *State v. Sledge*, 297 N.C. 227, 231, 254 S.E.2d 579, 583 (1979).

In the instant case, we find no abuse of discretion. The State showed only a few seconds from each of the twelve clips to the jury. Each clip represented the foundation for one of the charges levied against defendant. Moreover, the images were non-duplicative. *Cf. Hennis*, 323 N.C. at 286-87, 372 S.E.2d at 528 (holding that a defendant was entitled to a new trial after the State twice displayed "thirty-five duplicative photographs" of murder victims with "redundant content" to the jury). Nor were the images displayed in a "slow, silent manner" on an "unusually large screen." *Id.* at 286, 372 S.E.2d at 528. The gravamen of a violation of N.C. Gen. Stat. § 14-190.17A is the image of a minor or minors engaging in sexual activity; accordingly, a non-duplicative, brief presentation of such evidence is appropriate as it serves as the basis for the charges. We therefore find no abuse of discretion in admission of the disputed evidence, and defendant's arguments to the contrary are rejected.

IV.

In conclusion, the trial court did not err in denying defendant's motion to dismiss the charges against him. Additionally, we find no error in the amendment of the indictments against defendant. Finally, the trial court did not abuse its discretion in admitting videos of minors engaged in sexual activity.

No error.

Judges ELMORE and STROUD concur.

STATE OF NORTH CAROLINA v. TYRONE DAVID WILLIAMS

No. COA07-1304

(Filed 17 June 2008)

1. Constitutional Law— Sixth Amendment—jury selection—impasse with attorney—trial tactics not the issue

The trial court did not violate defendant's Sixth Amendment rights by prohibiting him from making final decisions about peremptory challenges when there was an alleged absolute impasse between defendant and defense counsel regarding peremptory challenges. The impasse concerned the necessity of defendant standing trial, not an impasse concerning trial tactics. Even assuming an impasse concerning trial tactics, defendant's strategy for exercising peremptory challenges was unlawfully discriminatory and defense counsel could not have complied with defendant's requests.

2. Constitutional Law— double jeopardy—use of prior conviction

The trial court did not err by denying defendant's motion to dismiss a habitual felon indictment where it resulted from a prior conviction used to support both a current conviction for possession of a firearm by a felon and defendant's sentencing as a habitual felon.

Appeal by Defendant from judgment entered 12 December 2006 by Judge Jay D. Hockenbury in Duplin County Superior Court. Heard in the Court of Appeals 28 April 2008.

Attorney General Roy Cooper, by Assistant Attorney General, Charles E. Reece for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender, Benjamin Dowling-Sender, for Defendant.

ARROWOOD, Judge.

Tyrone David Williams (Defendant) appeals from judgments entered 12 December 2006, convicting him of assault with a firearm on a law enforcement officer as a violent habitual felon, assault with a deadly weapon inflicting serious injury as a violent habitual felon, larceny of a firearm, and possession of a firearm by a convicted felon. We find no error.

At approximately 10:00 P.M. on 10 September 2005, Officer Mitchell Anderson (Officer Anderson) of the Rose Hill Police Department, responded to a domestic dispute in Duplin County, North Carolina. Defendant and his girlfriend, Tania Brown (Brown) were "fighting in the street[.]" When Officer Anderson arrived, he observed Brown on the ground and Defendant standing over her. Defendant ran when he saw Officer Anderson's patrol vehicle. Brown was distressed but she had no visible injuries; Officer Brown pursued Defendant on foot, believing he had assaulted Brown.

Officer Anderson caught up with Defendant in a dark area, after Defendant had fallen in the chase; thereafter, Defendant stood up and approached Officer Anderson, and the two men wrestled, falling into nearby bushes. Officer Anderson told Defendant to stop resisting, but Defendant instead pronounced, "Let me go." Officer Anderson then attempted to use pepper spray to subdue Defendant; however, Defendant broke the cap off of the cannister, rendering the pepper spray inoperable. After again demanding that Officer Anderson let him go, Defendant declared, "Fine, I'm going for your gun then." Officer Anderson placed his hand over his gun to prevent Defendant from removing it from the safety holster. After Defendant continued to struggle, Officer Anderson realized his pistol was not in its holster, and Defendant again demanded that Officer Anderson let him go. Officer Anderson refused, and thereafter, he felt Defendant's hand near the side of his chest and saw the top of his gun. He saw the gun flash as it fired, and Defendant ran. The bullet lodged in Officer Anderson's left side between his rib cage and his back; and as a result of his injuries, Officer Anderson had only partial use of his left arm and shoulder.

Police discovered Defendant inside a mobile home in Onslow County, hiding underneath a bed. He later told the deputy that "[t]he gun's . . . under the bed where they found me."

Defendant's trial on the charges of assault with a firearm on a law enforcement officer, larceny of a firearm, felonious possession of a stolen firearm, assault with a deadly weapon with intent to kill inflicting serious injury, possession of a firearm by a convicted felon, and attaining both habitual felon and violent habitual felon status, began on 27 November 2006. On 8 December 2006, a jury found Defendant guilty of assault with a deadly weapon inflicting serious injury, assault with a firearm on a law enforcement officer, larceny of a firearm, felonious possession of a stolen firearm, and possession of a firearm by a convicted felon. On 11 December 2006, the jury found Defendant to be a violent habitual felon, and on 12 December 2006, the jury found Defendant to be a habitual felon. On 12 December 2006, the trial court entered judgment based on the foregoing verdicts, sentencing Defendant to concurrent terms of life imprisonment without parole for assault with a firearm on a law enforcement officer as a violent habitual felon, life imprisonment without parole for assault with a deadly weapon inflicting serious injury as a violent habitual felon, 116-149 months imprisonment for larceny of a firearm as an habitual felon, and 116-149 months imprisonment for possession of a firearm by a convicted felon as an habitual felon. From these judgments, Defendant appeals.

Peremptory Challenges

[1] In his first argument, Defendant contends that the trial court violated Defendant's Sixth Amendment rights, as set forth in *State v. Ali*, 329 N.C. 394, 407 S.E.2d 183 (1991), by prohibiting him from making final decisions about peremptory challenges when there was an absolute impasse between Defendant and defense counsel regarding peremptory challenges. We disagree.

"[T]actical decisions—such as which witnesses to call, which motions to make, and how to conduct cross-examination—normally lie within the attorney's province." *State v. Brown*, 339 N.C. 426, 434, 451 S.E.2d 181, 187 (1994). " 'However, when counsel and a fully informed criminal defendant client reach an absolute impasse as to such tactical decisions, the client's wishes must control; this rule is in accord with the principal-agent nature of the attorney-client relationship.' " *Id.* at 434, 451 S.E.2d at 186 (quoting *Ali*, 329 N.C. at 404, 407 S.E.2d at 189). "The attorney is bound to comply with her client's

lawful instructions, 'and her actions are restricted to the scope of the authority conferred.' " *Ali*, 329 N.C. at 403, 407 S.E.2d at 189 (quoting *People v. Wilkerson*, 123 Ill. App. 3d 527, 532, 463 N.E.2d 139, 143-44 (1984)). "In such situations . . . defense counsel should make a record of the circumstances, her advice to the defendant, the reasons for the advice, the defendant's decision and the conclusion reached. *Ali*, 329 N.C. at 404, 407 S.E.2d at 189.

In *State v. McCarver*, 341 N.C. 364, 462 S.E.2d 25 (1995), our Supreme Court distinguished *Ali*, reasoning that a disagreement between counsel and the defendant did not rise to the level of an "absolute impasse." In *McCarver*, the testimony of one witness "had a profound effect upon [the defendant,]" *McCarver*, 341 N.C. at 384, 462 S.E.2d at 36, after which the defendant "spoke privately with defense counsel, who . . . stated that defendant 'will not speak.' " *Id.* Counsel for the defendant then explained the following to the court:

> Two or three times this morning [the defendant] wanted me to stop the trial and I refused. Frankly, I was on the edge of my seat wondering if [the defendant] would simply get up and walk out. I'm not saying he's violent or anything like that, but he's just having a hard time hearing it.
>
> I would like the Court to know that, if I may. I will not let [the defendant] run this case. He knows that. He does not control the defense, he can make suggestions. But if his state is so bad, Your Honor, I may stand up at a point and say, "May we have a short recess?"

Id. at 385, 462 S.E.2d at 36. Our Supreme Court reasoned that "[a]lthough defense counsel in the present case may have employed a better choice of words in describing the situation at the time, we find no indication in the record of 'an absolute impasse' between the client and the defense team as it concerned trial tactics." *Id.*

Here, too, we believe the record does not indicate " 'an absolute impasse' between the client and the defense team *as it concerned trial tactics*." *Id.* at 384, 462 S.E.2d at 36 (emphasis added). The evidence concerning an "absolute impasse" cited by Appellant centered on Defendant's dissatisfaction with the fact that Defendant was required stand trial at all, rather than a specific disagreement regarding an exact choice of peremptory challenges.

From the commencement of the trial, Defendant displayed aggressive and abrasive behavior toward the court and his attorney,

regarding the trial process, itself. Specifically, during *voir dire* hearings, Defendant expressed dissatisfaction with defense counsel because he was formerly a prosecutor and because he attempted to persuade Defendant to take a plea bargain. Defendant addressed the court: "Your Honor, they can go ahead and grant my time. I'll come back on appeal[.] . . . Just give me my time now[.]" Regarding the plea bargain, defense counsel explained, "[Defendant] does not want to do the strategy where he would plead guilty [to two charges] . . . [and e]ven though I think it's a good strategy decision, he has the right, the final right on a plea of guilty[.]" The trial court denied Defendant's motion for the discharge or substitution of his court appointed counsel, after which Defendant became violent, declaring, "Your Honor, let me say this for the record; if the man comes near me, I'm going to f—- him up; that's point blank. I'm just telling you, if he comes back over here, I'm going to f—- him up. He come [sic] back here, I'm going to f—- him up." Defendant then cleared the defense table with his hands and threw a laptop computer into the wooden portion of the bar, leaving a significant mar in the wood approximately three inches in diameter. Defendant yelled, "I [will] f—- that mother f——- up. Man, just give me my mother f——- time. Give me my mother f——- time. . . . Give me a life sentence. You ain't [sic] scaring me with a life sentence." Defense counsel then stated, "Judge my whole trial is on that laptop and it's gone. My whole trial." After Defendant was taken into custody, he continued to be aggressive, and he was involved in an affray in which he broke his hand. Thereafter, the court "requir[ed] that throughout the trial . . . the defendant [will] have leg shackles on under his pants so that he will not be able to move about[.]"

When court resumed the next day, Defendant again declared, "I don't want to have a trial. I don't want to have the trial period." Defendant stated, "The law don't state [sic] I have to be here because you stated you can run a trial without me being here." Repeatedly, Defendant argued with the court, stating, "you all run the trial without me being here, you know, that's how I feel. . . . Your Honor, I feel I don't want to be here." Defendant then abruptly stood up, and the bailiff ordered Defendant, "You can have a seat. Sit down[;] sit down. Sit down." Rather than sitting down, Defendant became aggressive and was forced into his seat by several bailiffs; Defendant declared, "Hey, get off me, man."

After a short discussion, the court asked Defendant whether he would "promise not to be disruptive[,]" advising, "[t]his is your trial; your trial, Mr. Williams." Defendant replied, "This y'all [sic] trial."

Again, Defendant said, "[n]o, I don't want to have no [sic] trial. . . . I ain't—I ain't [sic] coming. I don't want to be here. I don't want to talk no more [sic] about this case period."

The following interaction between the court, defense counsel and Defendant, was put forward by Defendant as evidence of their disagreement regarding peremptory challenges:

> Court: All right; so are we ready to bring the jurors in?
>
> [Defense Counsel]: Judge, there's one thing I need to double check before you announce the—before we announce here. I want to make sure I don't mess up my—
>
> Court: Well, you're the one that's going to announce the jurors you want excused.
>
> [Defense Counsel]: Yes, sir.
>
> Defendant: Hey, Your Honor, I need to talk to you. You were saying that—when I was talking to my lawyer, he told me I don't have no say-so over picking a jury. He told me—
>
> [Defense Counsel]: I asked him who he wanted to take off and he said—
>
> Defendant: No, he didn't.
>
> Court: No, that's why we had a recess.
>
> Defendant: I mean, it's like this; I'm not going in front of no jury more dominate Caucasian. I don't want to have a trial. I don't want to have the trial period. I'm not going up in front of no jury if I can't have no say-so who I pick. [sic] . . . That's point blank. You got 132 people out there and it's more dominate Caucasian; you know what I'm saying? If I ain't [sic] satisfied with them or comfortable with them, you know, what I'm saying? It should be everybody have a chance. . . .
>
> Court: Well, I'll give you an opportunity.
>
> Defendant: The State got their chance to pick.
>
> Court: Mr. Williams, let me finish before you interrupt me, please. I took a recess now, because your lawyer wanted to talk to you about the challenges since he's finished his initial *voir dire* of this panel. And have you discussed these potential jurors with your client, [Defense Counsel]?

> [Defense Counsel]: Judge, I told him that I was going to take off four of the jurors and that I always save—I've been stung before in cases where I have exhausted all of my challenges at the beginning. He asked me to take off <u>*ten*</u> of the jurors. I told him I could only take off <u>*six*</u>. I told him strategically that I felt I should only take off four. . . .
>
> Court: The law says you have six challenges. You can use them however you want to use them throughout the *voir dire* process, and your lawyer and you need to discuss this and, you know, decide how many of these six you want to use at this particular point in the *voir dire*.

Primarily, we note that at this point in the *voir dire*, a final decision regarding peremptory challenges had not been made by either defense counsel or Defendant. Rather, Defendant abrasively ordered defense counsel to dismiss ten jurors—a legal impossibility—and defense counsel strategically advised Defendant that he could dismiss at most six, and that he would advise dismissing only four, saving the remaining two peremptory challenges for later use. This is not evidence, as Defendant argues, of an absolute impasse, because a decision regarding peremptory challenges had not yet been made. After defense counsel advised Defendant that he only had six peremptory challenges, the court again explained to Defendant, "[t]he law says you have six challenges. You can use them however you want to use them throughout the *voir dire* process." A few minutes later, the court again explained, "you can't take ten off; you're limited to six[,]" after which Defendant stated, "I don't want them [sic] six." The record does not reflect to which six Defendant specifically referred, or whether Defendant, in fact, actually referred to six specific jurors. The court then again counseled Defendant that he was limited to six peremptory challenges, and "why don't you discuss [whether to use all six] with [your lawyer]." Defendant replied, referring to Paramour, "[w]hatever six he [sic] talking about, I don't want them[,]" deferring the decision to defense counsel. Despite Defendant's continued combativeness, the court then stated, "I'll give you some time [to talk], if you . . . want it." Defendant twice stated, "No, sir[,]" even though defense counsel asked for "[j]ust one second, Judge."

Defendant again became disruptive and was escorted from the courtroom, after which the court stated the following for the record:

> [T]he jury selection continued with the absence of the defendant. The jury was passed by the State to complete the panel of 12. . . . [T]he defendant's counsel, with the absence of the defendant, questioned these four new jurors and hasn't passed on them yet, but I'm going to give [defense counsel] a chance to go and discuss this selection back with his client, who does not want to be here[.]

In the Defendant's absence, defense counsel excused four jurors. The court stated, "now, again, the counsel will have an occasion to talk to the defendant[,]" but Defendant declared that "he didn't want to say anything to [his attorney] about this last four[.]" Defendant was then escorted back into the courtroom, and the court stated, "your lawyer has questioned the four new jurors, but he hasn't made any decision yet as to who he wants to exclude because . . . he wanted to have a chance to talk with you[.]" The court asked, "do you want to talk to your lawyer about the exclusion of these four new jurors?" Defendant replied, "No, sir." When asked a second time, Defendant again said, "No, sir."

Our Supreme Court has held that *Ali* does not apply where there is no indication of an absolute impasse. *See McCarver*, 341 N.C. at 385, 462 S.E.2d at 36. Certainly, we do not dispute that there was an absolute impasse in the instant between Defendant, his attorney and the court. However, we do not believe that the record indicates " 'an absolute impasse' between the client and the defense team *as it concerned trial tactics*." Rather, the foregoing evidence of record tends to show that the absolute impasse concerned Defendant's ill will toward his attorney and the court regarding the fact that Defendant must stand trial at all. Defendant certainly disagreed with defense counsel's advice regarding the jury selection, but specific disagreement did not rise to the level of an absolute impasse because Defendant ultimately deferred the decision to defense counsel.

We conclude that the following evidence tends to show that Defendant's aggressive, violent and abrasive behavior did not rise to the level of an absolute impasse regarding the specific decision as to peremptory challenges. First, Defendant did not advise defense counsel which six jurors he desired to excuse; in fact, Defendant did not advise defense counsel as to any particular juror he desired to excuse; Defendant tended to show displeasure with the process itself, rather instead of any particular juror in the *voir dire* proceedings; when asked to elaborate in the jury selection process as to which jurors to excuse, Defendant had nothing to add, but deferred to

defense counsel. After Defendant was escorted from the courtroom, due to his disruptive behavior, defense counsel excused only four jurors. The court again stated, "now, again, the counsel will have an occasion to talk to the defendant [regarding which jurors to excuse,]" but given the opportunity to speak, Defendant did not dispute defense counsel's use of four peremptory challenges instead of six, and "didn't want to say anything to [his attorney] about this last four[,]" again deferring decisions in the selection process to defense counsel. After Defendant was escorted back into the courtroom, the court directly stated, "your lawyer has questioned the four new jurors, but he hasn't made any decision yet as to who he wants to exclude because . . . he wanted to have a chance to talk with you[.]" When asked whether he "want[ed] to talk to [his] lawyer about the exclusion of these four new jurors[,]" Defendant replied, "No, sir[,]" deferring the decision defense counsel. In fact, Defendant repeatedly deferred to defense counsel's decision with regard to peremptory challenges, beginning with his initial statement: "[w]hatever six he [sic] talking about, I don't want them[.]" When either defense counsel or the court asked for Defendant's further input in the selection process, Defendant stated multiple times, in his usual combative and contentious manner, that he did not wish to further discuss the selection process at all, thus, deferring the decision to defense counsel.

We conclude that even though the foregoing evidence undoubtedly demonstrates an absolute impasse between Defendant and defense counsel as concerned the necessity, to Defendant's chagrin, that Defendant stand trial at all, the evidence does not demonstrate an impasse "*as it concerned trial tactics*." *McCarver*, 341 N.C. at 384, 462 S.E.2d at 36. This assignment of error is overruled.

Even assuming that an absolute impasse concerning trial tactics existed, *Ali*, 329 N.C. at 403, 407 S.E.2d at 189, further states that "when counsel and a fully informed criminal defendant client reach an absolute impasse as to such tactical decision . . . [t]he attorney is [only] bound to comply with her client's *lawful* instructions[,]" and Defendant's strategy for exercising peremptory challenges was unlawfully discriminatory. *See Georgia v. McCollum*, 505 U.S. 42, 46, 120 L. Ed. 2d 33, 43 (1992) (stating that "the Constitution prohibits a criminal defendant from engaging in purposeful racial discrimination in the exercise of peremptory challenges"); *State v. Locklear*, 349 N.C. 118, 141, 505 S.E.2d 277, 290 (1998) (stating that "discriminatory use of peremptory challenges on the basis of race is forbidden regardless of the respective races of the defendant and of the challenged

jurors"); *see also State v. Robbins*, 319 N.C. 465, 491, 356 S.E.2d 279, 295 (1987) (stating that the excusal of even a single juror for a racially discriminatory reason is impermissible).

Here, Defendant repeatedly stated, "I mean, it's like this; I'm not going in front of no jury more dominate Caucasian[;]" and "[y]ou got 132 people out there and it's more dominate Caucasian; you know what I'm saying?" At a later point in the *voir dire*, Defendant informed the court, "I said [to] my counsel . . . I don't feel represented right [sic] and I could not pick my jury because there wasn't [sic] enough African-Americans up there; half and half, that's what I said." When asked "what [other words] do you want to put in" the waiver of Defendant's right to an appearance before a jury, Defendant stated, "there's not enough African-Americans on the jury." Defendant also stated, "I'm not coming back for no [sic] conviction[,]" after which the court advised, "[you] don't know what's going to happen." Defendant retorted, "Yeah; I know it with ten whites." This statement is especially telling because of Defendant's initial demand that ten jurors be peremptorily challenged.

Defendant essentially concedes racially discriminatory intent in his recommendations to the trial court and to defense counsel regarding the exercise of peremptory challenges. Defense counsel could not have lawfully complied with Defendant's requests, even assuming *arguendo* that the disagreement reached the level of absolute impasse. *Locklear*, 349 N.C. at 141, 505 S.E.2d at 290; *Robbins*, 319 N.C. at 491, 356 S.E.2d at 295. This assignment of error is overruled.

<u>Motion to Dismiss</u>

[2] In his next argument, Defendant contends that the trial court erred in denying Defendant's motion to dismiss the habitual felon indictment. Defendant argues that his habitual felon indictment subjected him to double jeopardy because it resulted in the State's use of 2004 conviction for possession cocaine for two purposes—namely, to support Defendant's current conviction for possession of a firearm by a felon and to support Defendant's sentencing as a habitual felon. Defendant admits that "the Court has decided this issue against him in *State v. Crump*, 178 N.C. App. 717, 722, 632 S.E.2d 233, 235 (2006)[,]" yet nonetheless argues "for preservation for future appellate review." In *State v. Crump*, this Court rejected precisely the same argument Defendant makes in the instant case, holding that the use of a single prior felony conviction as an underlying conviction for a charge of possession of a firearm by a felon and for having attained

habitual felon status does not constitute double jeopardy, explaining that "the mere reliance on the 1998 conviction to establish that defendant was a recidivist for sentencing purposes does not implicate double jeopardy concerns." *Id.* at 722, 632 S.E.2d at 235. This Court is bound by our Court's holding in *Crump*. The trial court did not err by denying Defendant's motion to dismiss the habitual felon indictment. This assignment of error is overruled.

For the foregoing reasons, we find no error.

No Error.

Chief Judge MARTIN and Judge BRYANT concur.

JULIUS CAESER MOORE, PLAINTIFF v. NATIONWIDE MUTUAL INSURANCE COMPANY AND NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, DEFENDANTS

No. COA07-1397

(Filed 17 June 2008)

Insurance; Motor Vehicles— uninsured motorist—striking log in roadway—physical contact between vehicles required

The trial court did not err by granting defendants' N.C.G.S. § 1A-1, Rule 12(b)(6) motion to dismiss (treated as a grant of a motion for summary judgment based on the consideration of matters outside the pleading) in a breach of contract, unfair and deceptive trade practices, bad faith, and punitive damages case arising from defendant insurance companies' refusal of plaintiff's uninsured motorist claim after plaintiff struck a pine tree log that had allegedly fallen off a truck and was lying in the middle of the interstate because: (1) our courts have required physical contact between the vehicle operated by the insured motorist and the vehicle operated by a hit-and-run driver for the uninsured motorist provisions of N.C.G.S. § 20-279.21(b)(3)(b) to apply; and (2) no evidence showed from what vehicle, truck or trailer, if any, the pine tree log fell from, when it fell, or how long it had been lying on the interstate prior to impact.

Judge McCULLOUGH dissenting.

Appeal by plaintiff from order entered 22 August 2007 by Judge Phyllis M. Gorham in Duplin County Superior Court. Heard in the Court of Appeals 17 April 2008.

Crawford & Crawford, L.L.P., by Robert O. Crawford, III and Heather J. Williams, and Hemmings & Stevens, P.L.L.C., by Aaron C. Hemmings, for plaintiff-appellant.

George L. Simpson, III, for defendant-appellees.

TYSON, Judge.

Julius Caeser Moore ("plaintiff") appeals from judgment entered, which granted Nationwide Mutual Insurance Company and Nationwide Mutual Fire Insurance Company's (collectively, "Nationwide") motion to dismiss. We affirm.

I. Background

On 7 March 2007, plaintiff filed a complaint against Nationwide, his automobile insurer, and alleged claims for: (1) breach of contract; (2) unfair and deceptive trade practices; (3) bad faith; and (4) punitive damages. Plaintiff's complaint asserted: (1) on 28 January 2005, plaintiff "struck a pine tree log that had fallen off a truck and was lying in the middle of the interstate[]" and (2) Nationwide had refused plaintiff's uninsured motorist claim because "the policy is not applicable as a 'log' does not fit the definition of an 'uninsured motor vehicle.' "

On 18 May 2007, Nationwide moved to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. On 16 July 2007 the trial court heard arguments on Nationwide's motion to dismiss, granted Nationwide's motion, and filed its opinion on 22 August 2007. Plaintiff appeals.

II. Issue

Plaintiff argues the trial court erred when it granted Nationwide's motion to dismiss.

III. Standard of Review

N.C. Gen. Stat. § 1A-1, Rule 12(b) (2007) 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 filed 22 August 2007, the trial court stated that "[a]fter careful consideration of the briefs and oral arguments of counsel, it appears that the allegations of plaintiff's Complaint, taken as true, fail to state a claim upon which relief can be granted under any legal theory and that [Nationwide's] motion should be granted." Because the trial court considered matters "outside the pleading" when it heard Nationwide's motion to dismiss, we review the trial court's grant of Nationwide's motion to dismiss as the grant of a motion for summary judgment. *Id.*

> 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).

IV. Motion to Dismiss

Plaintiff argues the trial court erroneously granted Nationwide's motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. We disagree.

N.C. Gen. Stat. § 20-279.21(b)(3)(b) (2007) states:

> Where the insured, under the uninsured motorist coverage, claims that he has sustained bodily injury as the result of collision between motor vehicles and asserts that the identity of the operator or owner of a vehicle (other than a vehicle in which the insured is a passenger) cannot be ascertained, the insured may institute an action directly against the insurer . . . .

"Our courts have interpreted this statute to require physical contact between the vehicle operated by the insured motorist and the vehicle operated by the hit-and-run driver for the uninsured motorist provisions of the statute to apply." *McNeil v. Hartford Accident and Indemnity Co.*, 84 N.C. App. 438, 442, 352 S.E.2d 915, 917 (1987) (citing *Hendricks v. Guaranty Co.*, 5 N.C. App. 181, 167 S.E.2d 876, *cert. denied*, 275 N.C. 594 (1969) and *East v. Insurance Co.*, 18 N.C. App. 452, 197 S.E.2d 225 (1973)). Forty years ago, this Court stated, "[w]e are compelled to interpret the statute[] as written, leaving to the General Assembly the responsibility of writing and amending statutes." *Hendricks*, 5 N.C. App. at 184, 167 S.E.2d at 878.

In *Andersen v. Baccus*, our Supreme Court affirmed this Court's ruling and held an uninsured carrier was not liable where the automobile accident was caused by a third automobile which had contact with neither the decedent's automobile nor the defendant's automobile. 335 N.C. 526, 529, 439 S.E.2d 136, 138 (1994). In affirming this Court's ruling on this issue, our Supreme Court specifically approved this Court's analysis of N.C. Gen. Stat. § 20-279.21:

> Our interpretation of [N.C. Gen. Stat. §] 20-279.21 is further supported by the fact that the legislature has undertaken to amend the uninsured motorist statute subsequent to this Court's first interpreting it as requiring physical contact between the insured and the hit-and-run driver. To date, it has not chosen to amend the statute to indicate that [such] physical contact is not required. When the legislature acts, it is always presumed that it acts with full knowledge of prior and existing law; and where it chooses not to amend a statutory provision that has been interpreted in a specific, consistent way by our courts, we may assume that it is satisfied with that interpretation. Thus, in consideration of the time-tested prior rulings of this Court, we are constrained to conclude that any shift away from the 'physical contact' requirement must derive not from this Court, but from legislative action, or

action by our Supreme Court, which is the final arbiter for interpreting the statutes of this state.

Id. at 529, 439 S.E.2d at 138 (citation omitted) (quoting *Andersen v. Baccus*, 109 N.C. App. 16, 22, 426 S.E.2d 105, 108-09 (1993), *aff'd in part and rev'd in part*, 335 N.C. 526, 439 S.E.2d 136 (1994)). Our Supreme Court also stated it would adhere "to the principle of stare decisis . . . [and] decline to change existing judicial interpretation of the uninsured motorist statute, especially in light of the legislature's recent revision." *Id.* (citing N.C. Gen. Stat. § 20-279.21 (1993)).

Here, plaintiff's complaint alleged he had "struck a pine tree log that had fallen off a truck and was lying in the middle of the interstate." No evidence shows from what vehicle, truck or trailer, if any, the pine tree log fell from, when it fell, or how long it had been lying on the interstate prior to impact. Based on our Supreme Court's reasoning in *Andersen*, plaintiff's complaint fails to satisfy the physical contact requirement. 335 N.C. at 529, 439 S.E.2d at 138. Because the "essential element of [physical contact] is non-existent[,]" the trial court properly granted Nationwide's motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. *Wilkins*, 185 N.C. App. at 672, 649 S.E.2d at 661. This assignment of error is overruled.

The dissent's reliance on *McNeil* to extend the physical contact requirement to cover these facts is a wholly unwarranted extension, when our Supreme Court specifically rejected modification of the plain language of N.C. Gen. Stat. § 20-279.21 in *Andersen*. *McNeil*, 84 N.C. App. at 438, 352 S.E.2d at 915; *Andersen*, 335 N.C. at 529, 439 S.E.2d at 138. Furthermore, the dissent's reliance on the United States District Court for the Eastern District of North Carolina's holding in *Geico Ins. Co. v. Larson* is misplaced as that opinion is not binding precedent or authority and is contrary to our Supreme Court's interpretation of N.C. Gen. Stat. § 20-279.21 in *Anderson*. *Geico*, 542 F. Supp. 2d 441 (E.D.N.C. 2008); *Anderson*, 335 N.C. at 529, 439 S.E.2d at 138.

V. Conclusion

Plaintiff's complaint failed to allege physical contact between plaintiff's automobile and the vehicle that allegedly carried the pine tree log struck by plaintiff. Based on our Supreme Court's reasoning in *Andersen*, and this Court's longstanding precedent in *Hendricks* plaintiff's complaint fails to state a claim upon which relief may be granted. *Anderson*, 335 N.C. at 529, 439 S.E.2d at 138; *Hendricks*, 5

N.C. App. at 784, 167 S.E.2d at 878. The trial court properly granted Nationwide's motion to dismiss. The order appealed from is affirmed.

Affirmed.

Judge STROUD concurs.

Judge McCULLOUGH dissents by separate opinion.

McCULLOUGH, Judge, dissenting:

The majority holds that cargo which strikes another vehicle after falling off a hit-and-run vehicle does not satisfy North Carolina's physical contact rule. As I believe there is no functional difference between a vehicle and its cargo, I would reverse the trial court and hold that when cargo falls from a vehicle striking another automobile, the physical contact rule is satisfied.

Here, plaintiff filed suit after defendant insurer declined arbitration on the basis that a collision with a vehicle's cargo (a log) does not constitute a collision with the hit-and-run vehicle itself. The trial court dismissed plaintiff's suit pursuant to Rule 12(b)(6) of the N.C. Rules of Civil Procedure.

Rulings made pursuant to Rule 12(b)(6) are reviewed *de novo* by this Court with the complaint's factual allegations treated as being true. *Burgin v. Owen*, 181 N.C. App. 511, 512, 640 S.E.2d 427, 428, *cert. denied*, 361 N.C. 690, 652 S.E.2d 257 (2007).

The policy issued by Nationwide provides uninsured motorist coverage using the following language:

Insuring Agreement

We will pay compensatory damages which an **insured** is legally entitled to recover from the owner or operator of an **uninsured motor vehicle** because of:

1. **Bodily injury** sustained by an **insured** and caused by an accident; . . .

* * * *

The owner's or operator's liability for these damages must arise out of the ownership, maintenance or use of the **uninsured motor vehicle.**

* * * *

"**Uninsured motor vehicle**" means a land motor vehicle or trailer of any type:

1. To which neither:

   a. a liability bond or policy; nor

   b. cash or securities on file with the North Carolina Commissioner of Motor Vehicles; applies at the time of the accident.

2. To which a liability bond or policy applies at the time of the accident; provided its limit for liability is less than the minimum limit specified by the financial responsibility law of North Carolina.

3. Which, with respect to damages for **bodily injury** only, is a hit-and-run vehicle whose operator or owner cannot be identified and which hits:

   a. you or any **family member**;

   b. a vehicle which you or any **family member** are occupying; or

   c. **your covered auto.**

4. To which a liability bond or policy applies at the time of the accident but the bonding or insuring company:

   a. denies coverage; or

   b. is or becomes insolvent.

The statute mandating UM coverage provides:

> No policy . . . shall be . . . issued . . . in this state . . . unless coverage is provided therein . . . for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles and hit-and-run motor vehicles . . . .
>
> * * * *
>
> In addition to the above requirements relating to uninsured motorist insurance, every policy . . . shall be subject to the following provisions which need not be contained therein.
>
> a. A provision that the insured shall be bound by a final judgment taken by the insured against an uninsured motorist if

the insurer has been served with a copy of summons, complaint or other process in the action against the uninsured motorist . . . . The insurer, upon being served as herein provided, shall be a party to the action between the insured and the uninsured motorist though not named in the caption of the pleadings and may defend the suit in the name of the uninsured motorist or in its own name. . . .

b. Where the insured, under the uninsured motorist coverage, claims that he has sustained bodily injury as the result of collision between motor vehicles and asserts that the identity of the operator or owner of a vehicle (other than a vehicle in which the insured is a passenger) cannot be ascertained, the insured may institute an action directly against the insurer; provided, in that event, the insured [shall report the accident to a law enforcement officer and give the UM insurer notice of the accident as well].

N.C. Gen. Stat. § 20-279.21(b)(3) (2007).

Determining the meaning of language used in an insurance policy is a question of law that this Court determines *de novo* with any ambiguity resolved in favor of the policyholder as the insurer drafted the policy. *Trust Co. v. Insurance Co.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970).

Plaintiff contends that suit is authorized pursuant to paragraph 3 of the policy, as this paragraph covers a hit-and-run vehicle such as in the case at bar, while the insurer argues that there is no coverage as the hit-and-run vehicle did not hit the insured's vehicle itself. Instead a log from the hit-and-run vehicle struck the insured.

The principle issue before this Court is whether the "physical contact" rule has been satisfied when an item falls off the hit-and-run vehicle and strikes the insured's automobile. North Carolina has long followed the rule that when an unidentified vehicle causes an accident without actually hitting the insured's vehicle, there is no liability on the behalf of the insurance company. The requirement for physical contact with the uninsured vehicle is required by both the statute and the policy. *Hendricks v. Guaranty Co.*, 5 N.C. App. 181, 167 S.E.2d 876, *cert. denied*, 275 N.C. 594 (1969).

In *Petteway v. South Carolina Insurance Company*, 93 N.C. App. 776, 379 S.E.2d 80, *disc. review denied*, 325 N.C. 273, 384 S.E.2d 518 (1989), this Court stated in *dicta* that UM coverage requires a colli-

sion between motor vehicles and does not apply when the insured merely runs into something other than a vehicle, such as a ditch. *Id.* at 777-78, 384 S.E.2d at 81.

The purpose of the physical contact rule is to prevent fraudulent claims and has been maintained even when there is a disinterested eyewitness. (In *Petteway*, despite there being an eyewitness, recovery was denied.)

This Court has allowed recovery, however, when the unidentified tortfeasor collided with the rear of a car which collides with a third vehicle which then struck the insured. *McNeil v. Hartford Accident and Indemnity Co.*, 84 N.C. App. 438, 352 S.E.2d 915 (1987).

In *McNeil*, this Court ruled that the physical contact rule is satisfied if the plaintiff can prove that contact between the unidentified vehicle and their claimant's vehicle occurred through an unbroken chain collision caused by a collision between the hit-and-run vehicle and an intermediate vehicle. The question then becomes whether the physical contact rule is satisfied when an item falls from the unidentified vehicle and strikes the insured.

Recently, the U.S. District Court for the Eastern District of North Carolina had just such a case where a rock fell from an unidentified dump truck, striking the insured's vehicle causing it to run off the road, strike an embankment, and killing the driver.

In that case, *Geico Ins. Co. v. Larson*, (No. 5:06-CV-00505-BR), the district court, following a trend from other physical contact jurisdictions, held that the physical contact requirement could be met when the plaintiff can prove that the hit-and-run vehicle started an unbroken chain of events and that the reasoning from the *McNeil* case applied.

While not controlling, I find the *Geico* reasoning persuasive. Other jurisdictions have ruled likewise. *See, e.g.*, *Berry v. State Farm Mut. Auto Ins. Co.*, 219 Mich. App. 340, 556 N.W.2d 207 (1996); *Will v. Meridian Ins. Group, Inc.*, 776 N.E.2d 1233, 1234 (Ind. Ct. App. 2002); and *Pham v. Allstate Ins. Co.*, 254 Cal. Rptr. 152, 155 (Cal. App. 2d Dist. 1988).

I can see no difference between a vehicle and its cargo. Let us assume the hit-and-run vehicle was carrying its load of logs and that while changing lanes, one of the logs extending from the bed of the

truck struck plaintiff's automobile. Would that not be a collision with the vehicle itself? Why should cargo falling from a vehicle be treated differently than when it is attached?

I believe the logic of the *McNeil* case is applicable, and thus the complaint should be construed to state a cause of action.

MARIE A. CROSS AND SAMUEL A. SCUDDER, PLAINTIFFS v. CAPITAL TRANSACTION GROUP, INC., D/B/A CAPTRAN, AND WAYNE WALKER, DEFENDANTS

No. COA07-1519

(Filed 17 June 2008)

1. Workers' Compensation— assignment of claims—assignment of proceeds and advance assignment also barred

N.C.G.S. § 97-21 barred defendants' assertion of a lien on the proceeds of plaintiff's workers' compensation claim where defendant was the assignee of a company which invests capital in personal injury cases. The prohibition bars assignment of the proceeds, not just assignment of the Industrial Commission Form 18 claim, and the purposes of the Workers' Compensation Act are supported by the prohibition of advance assignment of workers' compensation benefits.

2. Workers' Compensation— money advanced on claim—essentially a loan—defendant barred as creditor

The essential character of money advanced on a workers' compensation claim was that of a loan, so that defendant was a creditor of plaintiff and could not assert a claim to her workers' compensation benefits. N.C.G.S. § 97-21.

Appeal by Plaintiffs from judgment entered 4 September 2007 by Judge R. Allen Baddour, Jr., in Wake County Superior Court. Heard in the Court of Appeals 20 May 2008.

Scudder & Hedrick, PLLC, by Samuel A. Scudder and April D. Seguin, for Plaintiff-Appellants.

Wayne C. Walker, Pro Se, for Defendant-Appellee Wayne C. Walker.

ARROWOOD, Judge.

Plaintiffs appeal an order declaring Defendant Wayne Walker to be the holder of a valid lien on $5,625.00 awarded to Plaintiff Cross in a settlement of her workers' compensation claim, and directing Plaintiff Scudder to disburse these funds to Walker. We reverse.

Plaintiffs are workers' compensation claimant, Marie Cross, and her attorney, Samuel Scudder. Defendants are Capital Transaction Group, Inc., d/b/a CapTran (CapTran), and Wayne Walker. CapTran "is a Nevada corporation engaged in the business of investing capital in personal injury cases." Defendant (Wayne Walker) is an assignee of CapTran's interest in the instruments at issue in this case.

In February 2002 Cross suffered a workplace injury for which she filed a workers' compensation claim. On 22 November 2002 Cross and CapTran executed a document titled "Transfer and Assignment of Proceeds and Security Agreement." Under the terms of this agreement, CapTran agreed to "advance $1500.00" to Plaintiff in return for "a portion of [Plaintiff's] future settlement and/or litigation proceeds" from her workers' compensation claim. The agreement, which obligated Plaintiff to repay CapTran the principal amount of $1500.00 and an additional "investment fee" of $1875.00, purported to grant CapTran a "security interest in the Proceeds of the Litigation for the original investment of $1500.00 plus [the investment fee amount]." The agreement also stated that if Plaintiff failed to obtain workers' compensation benefits, she would be excused from repaying CapTran.

On 23 December 2002 Cross and CapTran signed another agreement, identical to the first except for the dollar amounts involved. Pursuant to the second agreement, CapTran advanced Plaintiff another $1000.00, and obtained a "security interest" in that amount plus an additional $1250.00, again contingent on Plaintiff's receiving workers' compensation benefits. Under the terms of these contracts, Plaintiff then owed CapTran $2500.00, plus "investment fees" of $3125.00, for a total of $5625.00 of her workers' compensation proceeds.

In February 2006 Cross settled her workers' compensation claim. On 17 January 2007 Plaintiffs filed a Declaratory Judgment action against CapTran, seeking a declaration that CapTran did not have a lien on $5625.00 of Cross's workers' compensation benefits. Plaintiffs asserted that CapTran was barred from obtaining a lien on the proceeds of Cross's workers' compensation claim by N.C. Gen.

Stat. § 97-21 (2007). On 29 March 2007 Plaintiffs filed an amended complaint naming Wayne Walker as an additional defendant. In a series of assignments, Walker obtained CapTran's interest in the agreements signed by Cross and CapTran. Defendant CapTran was dismissed from the action, and is not a party to this appeal.

On 24 August 2007 the matter was heard by the trial court, and on 4 September 2007 the court entered an order declaring that Walker held a valid lien on $5625.00 of Cross's workers' compensation benefits, and ordering Scudder "to transfer the compensation proceeds in the amount of $5,625.00 to Defendant Walker." From this order Plaintiff timely appealed.

Standard of Review

"The standard of review in declaratory judgment actions where the trial court decides questions of fact is whether the trial court's findings are supported by any competent evidence. Where the findings are supported by competent evidence, the trial court's findings of fact are conclusive on appeal." *Lineberger v. N.C. Dep't of Corr.*, 189 N.C. App. 1, 7, 657 S.E.2d 673, 678 (2008) (citations omitted). "However, the trial court's conclusions of law are reviewable *de novo*." *Browning v. Helff*, 136 N.C. App. 420, 423, 524 S.E.2d 95, 98 (2000) (citations omitted).

Plaintiffs argue that the trial court erred by concluding that Defendant held a lien on Cross's workers' compensation benefits. At issue is the proper interpretation of N.C. Gen. Stat. § 97-21 (2007), "Claims unassignable and exempt from taxes and debts[,]" which provides in pertinent part:

> No claim for compensation under this Article shall be assignable, and all compensation and claims therefor shall be exempt from all claims of creditors and from taxes.

This appeal presents two questions: (1) does the prohibition in G.S. § 97-21 against assignment of a workers' compensation claim include a bar on the advance assignment of workers' compensation benefits? and (2) is Defendant a creditor of Plaintiff, and thus barred from asserting a claim to Plaintiff's workers' compensation proceeds? We answer both questions affirmatively, and conclude that (1) G.S. § 97-21 prohibits assignment of workers' compensation claims, benefits, or awards; and that (2) the transaction at issue was a loan and Defendant is a creditor of Plaintiff.

[1] We first consider the statutory provision that "[n]o claim for compensation under this Article shall be assignable[.]" Plaintiffs argue that "the plain language of the statute does not give rise to an interpretation differentiating a claim for compensation and the compensation arising from the claim." We agree.

"In resolving issues of statutory interpretation, we look first to the language of the statute itself." *Rhyne v. K-Mart Corp.*, 149 N.C. App. 672, 685, 562 S.E.2d 82, 92 (2002) (citing *Sara Lee Corp. v. Carter*, 351 N.C. 27, 519 S.E.2d 308 (1999)). As regards N.C. Gen. Stat. § 97-21, the statute's title states in part "Claims unassignable and exempt from taxes and debts[.]" (emphasis added). However, the statute addresses the bar on assignment of a workers' compensation "claim" separately from the exemption from creditors and taxes of "compensation and claims." The heading's use of the word "claims" to refer to both parts of the statute indicates that, for purposes of N.C. Gen. Stat. § 97-21, there is no functional difference between the "claim" and the "compensation."

The North Carolina Supreme Court also has used these terms interchangeably. In *Higgins v. Simmons*, 324 N.C. 100, 376 S.E.2d 449 (1989), the North Carolina Supreme Court discussed, in *dicta*, whether § 97-21 prohibited garnishment of a bank account that had been funded in part by proceeds from a workers' compensation claim. The Court stated that "the garnishee bank has no standing to enforce this right of its depositor under the Workers' Compensation Act" and explained:

> [T]he personal character of compensation payments has resulted in their being made nonassignable by statute[.] . . . Once the proceeds from a compensation claim have been deposited in a bank, they become indistinguishable from other funds on deposit.

Higgins, 324 N.C. at 103-04, 376 S.E.2d at 452 (emphasis added). Significantly, the Court stated that workers' compensation payments were not assignable.

Our conclusion, that G.S. § 97-21 prohibits assignment of a workers' compensation claim or of the proceeds of such a claim, is supported by the significant differences between an employee's statutory rights to workers' compensation benefits and an individual's common law rights in a personal injury or tort suit. For example, "the remedies sought in a workers' compensation claim and a tort claim are different, and . . . only tort claims, not workers' compensation claims, are

tried before a jury." *Brooks v. Paulk & Cope, Inc.*, 176 F. Supp. 2d 1270, 1276 (M.D. AL 2001) "There is no question that the Supreme Court agrees that benefits received on account of worker's compensation are different from damages awarded in connection with a tort claim." *In re Sanchez*, 362 B.R. 342, 349 (Bankr. W.D. MI. 2007). Thus, "[c]lassification of a claim as a worker's compensation claim, as opposed to a personal injury claim, produces very different results." *In re Gregoire*, 210 B.R. 432, 434 (Bankr. D.R.I. 1997). Indeed:

> [t]he distinction is not merely a procedural matter of bringing an action in the wrong forum. As amici point out, there are fundamental differences between a claim for workers' compensation benefits and a lawsuit seeking civil damages. . . . [T]he purposes, remedies available, evidentiary burdens, and standards of proof employed in adjudicating within the two distinct systems are different by legislative design.

HDH Corp. v. Atlantic Charter Ins. Co., 425 Mass. 433, 437-38, 681 N.E.2d 847, 851 (1997). In North Carolina:

> "By statute the Superior Court is divested of original jurisdiction of all actions which come within the provisions of the Workmen's Compensation Act." The Act provides that its remedies shall be an employee's only remedies against his or her employer for claims covered by the Act. N.C.G.S. § 97-10.1 [(2007)]. Remedies available at common law are specifically excluded.

Lemmerman v. A.T. Williams Oil Co., 318 N.C. 577, 579, 350 S.E.2d 83, 85 (1986) (quoting *Morse v. Curtis*, 276 N.C. 371, 375, 172 S.E.2d 495, 498 (1970)).

"The workers' compensation system is a creature of statute enacted by the General Assembly and is codified in Chapter 97 of the North Carolina General Statutes." *Frost v. Salter Path Fire & Rescue*, 361 N.C. 181, 184, 639 S.E.2d 429, 432 (2007). The Workers' Compensation Act provides that an employee is entitled to compensation for certain occupational diseases or for an "injury by accident arising out of and in the course of the employment[.]" N.C. Gen. Stat. § 97-2(6) (2007). "The term 'compensation' means the money allowance payable to an employee" pursuant to statute, N.C. Gen. Stat. § 97-2(11) (2007), and includes both disability and medical compensation. Disability 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[,]" N.C. Gen. Stat. § 97-2(9) (2007),

and disability compensation generally consists of the payment of approximately two-thirds of his salary for a certain period of time. *See* N.C. Gen. Stat. § 97-29 (2007) and G.S. § 97-31 (2007). "Medical compensation" is the "medical, surgical, hospital, nursing, and rehabilitative services, and medicines . . . and other treatment . . . as may reasonably be required to effect a cure or give relief[.]" N.C. Gen. Stat. § 97-2(19) (2007).

An injured employee is not required to prove negligence on the part of his employer to qualify for workers' compensation benefits; however, workers' compensation benefits "exclude all other rights and remedies of the employee. . . against the employer at common law or otherwise[.]" N.C. Gen. Stat. § 97-10.1 (2007). Thus:

> As this Court has often discussed, the North Carolina Workers' Compensation Act was created to ensure that injured employees receive sure and certain recovery for their work-related injuries without having to prove negligence on the part of the employer or defend against charges of contributory negligence. In exchange for these "limited but assured benefits," the employee is generally barred from suing the employer for potentially larger damages in civil negligence actions and is instead limited exclusively to those remedies set forth in the Act.

Whitaker v. Town of Scotland Neck, 357 N.C. 552, 556, 597 S.E.2d 665, 667 (2003) (quoting *Pleasant v. Johnson*, 312 N.C. 710, 712, 325 S.E.2d 244, 246-47 (1985)) (citation omitted).

"In ascertaining legislative intent, we are guided by the language of the statute, the spirit of the act, and what the statute seeks to accomplish. . . . The Workers' Compensation Act is designed to relieve against hardship. To that end, one of its primary purposes is to provide a swift and certain remedy to injured workers without the necessity of protracted litigation." *Foster v. Western-Electric Co.*, 320 N.C. 113, 116, 357 S.E.2d 670, 672-73 (1987) (citations omitted). We conclude that the purposes of the Workers' Compensation Act are supported by the prohibition against advance assignment of workers' compensation benefits.

Defendant argues that, because G.S. § 97-21 does not specify that the unassignability of workers' compensation claims applies to compensation awarded to a claimant, we should infer that workers' compensation benefits may be assigned. Defendant directs our attention to the common law distinction in personal injury claims between

assignment of claims and compensation for claims, and urges us to apply this distinction to assignment of workers' compensation claims. Defendant fails to articulate a rationale for importing this common law distinction into workers' compensation law, and we find none. Moreover, workers' compensation is a creature of statute, and there is a statute expressing a clear intent to bar assignment of workers' compensation benefits. In contrast, there is no analogous statute barring assignment of personal injury compensation.

We conclude that the prohibition in G.S. § 97-21 against assignment of a workers' compensation claim refers, not just to assignment of the Industrial Commission Form 18 "claim" filed by a workers' compensation claimant, but also bars assignment of the proceeds of such a claim.

[2] We next consider the second part of the statute which states that "all compensation and claims therefor shall be exempt from all claims of creditors[.]" G.S. § 97-21.

A "creditor" is defined in pertinent part in BLACK'S LAW DICTIONARY 396 (8th ed. 2004) as "(1) One to whom a debt is owed." "A debt is something due from one person, the debtor, to another called the creditor, and may be created by simple contract or evidenced by specialty or judgment according to the nature of the obligation giving rise to it." *Summit Silk Co. v. Kinston Spinning Co.*, 154 N.C. 421, 428-29, 70 S.E. 820, 823 (1911).

In the instant case, Defendant claims a lien on the proceeds of Plaintiff Cross's workers' compensation benefits, on the grounds that the terms of their agreement require Cross to repay him for the funds that Defendant advanced to Cross, as well as an additional "investment fee." We conclude that the transaction was a loan and that Defendant is a creditor of Plaintiff. As a creditor, Defendant cannot attach a lien on Plaintiff's workers' compensation benefits or compensation.

Defendant, however, argues that he is not a creditor, on the grounds that transaction was a "sale" not a loan. We disagree. "A loan is 'made upon the delivery by one party and the receipt by the other party of a given sum of money, an agreement, express or implied, to repay the sum lent, with or without interest.' . . . '[C]ourts of this state regard the substance of a transaction, rather than its outward appearance, as controlling.' " *State ex rel. Cooper v. NCCS Loans, Inc.*, 174 N.C. App. 630, 634, 624 S.E.2d 371, 374 (2005) (quoting *Kessing v.*

Mortgage Corp., 278 N.C. 523, 529, 180 S.E.2d 823, 827 (1971); and *Auto Supply v. Vick*, 303 N.C. 30, 37, 277 S.E.2d 360, 366 (1981)). In *Cooper* usurious "pay day loans" were disguised as contracts for the sale of Internet service. This Court concluded that the contracts were a sham:

> To review, in return for immediate cash, Advance Internet customers must repay both the sum advanced and an additional fee of at least 20% of the amount of cash received. . . . We conclude that, notwithstanding the facial resemblance to Internet service contracts, it is transparently obvious that defendants are offering loans, not *bona fide* internet service contracts.

Cooper, 174 N.C. App. at 638, 624 S.E.2d at 377. Similarly, in return for immediate cash, Cross signed an agreement obligating her to "both the sum advanced and an additional fee of [125%] of the amount of cash received." We conclude that this transaction constituted a loan, notwithstanding it's facial disguise as the "sale" of proceeds of workers' compensation "litigation." " 'Where a transaction is in reality a loan of money, whatever may be its form, . . . [t]he law considers the substance and not the mere form or outward appearance of the transaction in order to determine what it in reality is.' " *Kessing*, 278 N.C. at 531, 180 S.E.2d at 828 (quoting *Ripple v. Mortgage Corp.*, 193 N.C. 422, 424, 137 S.E. 156, 158 (1927)).

Moreover, the character of a transaction is not automatically changed by the inclusion of a condition under which repayment would be forgiven. "[I]t makes no difference in the result, if we construe the agreement as requiring repayment by the Texas corporations only in the event that their operations should prove successful. A loan is no less a loan because its repayment is made contingent[.]" *Island Petroleum Co. v. Commissioner*, 57 F.2d 992, 994 (4th Cir. 1932). "Neither is the term 'investment' in any way contradictory of a 'loan.' The word 'advance' in the connotation here used, commonly means a loan of money." *Whittemore Homes, Inc. v. Fleishman*, 190 Cal. App. 2d 554, 558, 12 Cal. Rptr. 235, 236 (1961) (citations omitted).

In the instant case, the parties' agreement provided that (1) Defendant would advance funds to Plaintiff; and (2) upon receipt of workers' compensation benefits, Plaintiff would repay the amount advanced and an additional "investment fee." We conclude that the essential character of this transaction was a loan. Accordingly, Defendant was a creditor of Plaintiff, and could not assert a claim to her workers' compensation benefits.

We agree with Plaintiffs that the North Carolina cases allowing certain parties to reach workers' compensation benefits are easily distinguished from this case. In *State v. Miller*, 77 N.C. App. 436, 335 S.E.2d 187 (1985), this Court held that the exemption of workers' compensation benefits from the claims of creditors did not apply to an order for child support. The Court held that the "obligation to support one's children is not a 'debt' in the legal sense of the word[, and] . . . helping to sustain the dependants of employees disabled on the job is one of the main purposes of our Workers' Compensation Act." *Id.* at 438-39, 335 S.E.2d at 188-89. The instant case does not implicate child support law.

In *Sara Lee Corp. v. Carter*, 351 N.C. 27, 35, 519 S.E.2d 308, 313 (1999), "overwhelming evidence presented at trial led the trial court to conclude, *inter alia*, that defendant engaged in fraud, breach of fiduciary duty, and unfair and deceptive acts or practices. The trial court then ordered that 'a constructive trust for the benefit of [plaintiff] is hereby imposed over any and all workers['] compensation benefits that [defendant] is or shall be entitled to receive[.]' " On appeal, the defendant argued that G.S. § 97-21 barred the trial court's imposition of a constructive trust. The North Carolina Supreme Court disagreed, holding that the statutory language "does not preclude the trial court from imposing the equitable remedy of a constructive trust . . . under this extraordinary and unique set of facts[.]" *Id.* at 35-36, 516 S.E.2d at 313-14. The holding in *Sara Lee* was based on the "extraordinary and unique" facts of that case, and upheld the trial court's imposition of the equitable remedy of a constructive trust, not a claimant's advance assignment of workers' compensation benefits.

For the reasons discussed above, we conclude that G.S. § 97-21 bars Defendant's assertion of a lien on the proceeds of Plaintiff's workers' compensation claim, and that the trial court's order must be

Reversed.

Judges HUNTER and ELMORE concur.

STATE OF NORTH CAROLINA, PLAINTIFF v. ANDRE LEVERN MILLER, DEFENDANT

No. COA07-1037

(Filed 17 June 2008)

1. Drugs— possession of cocaine—motion to dismiss—sufficiency of evidence—constructive possession

The trial court erred by denying defendant's motion to dismiss the charge of possession of cocaine because: (1) constructive possession depends on the totality of circumstances in each case, and mere presence in a room where drugs are located does not itself support an inference of constructive possession; and (2) in the instant case there was no evidence that defendant acted nervously when law enforcement entered or that he made any motion to attempt to hide anything, there was no evidence that defendant owned any of the items found near the contraband, the presence of defendant's birth certificate in the room in the absence of any other evidence of defendant's residence was not sufficient to show that defendant resided on the premises where the cocaine was found, defendant's relative proximately to the cocaine on the bed raised nothing more than mere suspicion given that the bed was extremely messy thus making the small cocaine rock very difficult to see, the cocaine on the bed was not in plain view, and the bag of cocaine behind the door could have been there for weeks.

2. Sentencing— habitual felon—underlying felony dismissed

Defendant's conviction for attaining the status of an habitual felon is vacated based on the dismissal of a charge for possession of cocaine.

Judge TYSON dissenting.

Appeal by defendant from judgment entered on or about 15 February 2007 by Judge Catherine C. Eagles in Forsyth County Superior Court. Heard in the Court of Appeals 17 January 2008.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Stanley G. Abrams, for the State.

Paul F. Herzog for defendant-appellant.

STROUD, Judge.

Defendant Andre Levern Miller appeals from judgment entered upon jury verdicts finding him guilty of possession of cocaine and attaining habitual felon status. Defendant contends that the State presented insufficient evidence of possession of cocaine, and therefore the trial court erred by failing to dismiss that charge. After careful review of the record, we agree with defendant. Accordingly, we reverse the order of the trial court denying defendant's motion to dismiss the charge of possession of cocaine and remand to the trial court with instructions to dismiss.

I. Background

The State presented evidence at trial tending to show the following: On 8 December 2005 Winston-Salem police officers entered the home at 1924 Dacian Street. Inside, the officers discovered defendant and one other person in a small bedroom in the home. The bedroom contained a bed, a TV stand, and a chair. The foot of the bed was about three feet from the door. The bed was extremely messy, unmade, with bedding of light colors and a floral bedspread on top. Defendant was sitting on the bed, and the other person was sitting in a chair. Upon searching the room the officers discovered a plastic bag containing crack cocaine behind the door and a "rock" of crack cocaine among the folds of the bedding, tied up in a small corner cut from a plastic bag. Defendant's birth certificate and driver license were on the TV stand in the bedroom.

On 1 May 2006, the Forsyth County Grand Jury indicted defendant for maintaining a place to keep a controlled substance, possessing cocaine with the intent to sell and deliver, and attaining the status of habitual felon. Defendant was tried before a jury in Forsyth County Superior Court from 12 to 13 February 2007, Judge Catherine C. Eagles presiding. At the close of the State's evidence, defendant moved to dismiss all charges. The trial court granted defendant's motion to dismiss the charge of maintaining a place to keep a controlled substance, but denied his motion to dismiss the cocaine possession charge. Defendant renewed his motion to dismiss at the close of all the evidence, and the trial court again denied the motion. Defendant was found guilty of possession of cocaine and attaining habitual felon status. The trial court sentenced defendant to 107 to 138 months. Defendant appeals.

II. Discussion

[1] Defendant contends that the trial court erred in denying his motion to dismiss the charge of possession of cocaine because the State presented insufficient evidence that defendant possessed the cocaine found in the bedroom where he was sitting. We agree.

When ruling on a motion to dismiss for insufficiency of the evidence to sustain a conviction, the trial court must consider the evidence in the light most favorable to the State, drawing all reasonable inferences in its favor. *State v. McCullers*, 341 N.C. 19, 28-29, 460 S.E.2d 163, 168 (1995). Evidence is sufficient to sustain a conviction when "substantial evidence exists as to each essential element of the offense charged and of the defendant being the perpetrator of that offense." *State v. Glover*, 156 N.C. App. 139, 142, 575 S.E.2d 835, 837 (2003). However, "if the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator, the motion to dismiss must be allowed . . . even [if] the suspicion aroused by the evidence is strong." *State v. Theer*, 181 N.C. App. 349, 356, 639 S.E.2d 655, 660 (citations and quotation marks omitted), *appeal dismissed*, 361 N.C. 702, 653 S.E.2d 159 (2007).

If the defendant is not in actual possession of contraband when it is discovered, the State may survive a motion to dismiss by presenting substantial evidence of constructive possession. *State v. Tisdale*, 153 N.C. App. 294, 297, 569 S.E.2d 680, 682 (2002). "Evidence of constructive possession is sufficient to support a conviction if it would allow a reasonable mind to conclude that defendant had the intent and capability to exercise control and dominion over the drugs." *State v. Carr*, 122 N.C. App. 369, 372, 470 S.E.2d 70, 73 (1996).

The State contends that the following incriminating circumstances are sufficient to show constructive possession: (1) defendant and only one other person were in the room where the cocaine was found, (2) a rock of crack cocaine was found in "plain view" on the bed where defendant had been sitting and the bag of cocaine found behind the door was within a few feet of where defendant had been sitting, and (3) defendant's drivers license and birth certificate were found on a table in the room. The State contends that the case *sub judice* is apposite to *State v. Matias*, where evidence that defendant was the only person who could have stuffed cocaine into the crease in the car seat was sufficient to survive a motion to dismiss. 354 N.C. 549, 556 S.E.2d 269 (2001). Defendant relies on *State v. Acolatse*,

where evidence that a police officer had seen the defendant make a throwing motion toward the bushes but cocaine was found on the roof of a garage not near the bushes, was not sufficient to survive a motion to dismiss. 158 N.C. App. 485, 581 S.E.2d 807 (2003).

"[C]onstructive possession depends on the totality of circumstances in each case." *State v. James*, 81 N.C. App. 91, 93, 344 S.E.2d 77, 79 (1986). "[M]ere presence in a room where drugs are located does not itself support an inference of constructive possession." *Id.* at 96, 344 S.E.2d at 81. However, "a showing by the State of other incriminating circumstances . . . permit[s] an inference of constructive possession." *Carr*, 122 N.C. App. at 372, 470 S.E.2d at 73. Incriminating circumstances which have been identified by this Court and the North Carolina Supreme Court as relevant to constructive possession include evidence that defendant: (1) owned other items found in proximity to the contraband, *State v. Autry*, 101 N.C. App. 245, 252, 399 S.E.2d 357, 362 (1991); (2) was the only person who could have placed the contraband in the position where it was found, *Matias*, 354 N.C. at 552-53, 556 S.E.2d at 271; (3) acted nervously in the presence of law enforcement, *State v. Butler*, 356 N.C. 141, 147-48, 567 S.E.2d 137, 141 (2002); (4) resided in, had some control of, or regularly visited the premises where the contraband was found, *James*, 81 N.C. App. at 95, 344 S.E.2d at 80-81; (5) was near contraband in plain view, *State v. Alston*, 91 N.C. App. 707, 710, 373 S.E.2d 306, 309 (1988); or (6) possessed a large amount of cash, *State v. Neal*, 109 N.C. App. 684, 687-88, 428 S.E.2d 287, 290 (1993).

Viewing the evidence in the light most favorable to the State, the totality of the circumstances in this case is not sufficient to support a finding of constructive possession of cocaine sufficient to survive the motion to dismiss. There was no evidence that defendant acted nervously when law enforcement entered nor that he made any motion to attempt to hide anything. Nor is there evidence that defendant owned any of the items found near the contraband. The presence of defendant's birth certificate in the room does raise a suspicion that defendant resided on the premises where the cocaine was found, but in the absence of any other evidence of defendant's residence, it is not sufficient to prove that defendant lived in the house. Defendant's relative proximity to the cocaine on the bed also raises nothing more that a suspicion, because the bedding was extremely messy, making the small cocaine rock very difficult to see. The cocaine on the bed was not in "plain view" as contended by the State. As properly noted by the trial judge, the bag of cocaine behind the door "could have

been there for weeks." The State's evidence has done nothing more than raise a strong suspicion as to defendant's guilt, and this was not sufficient to survive defendant's motion to dismiss. Accordingly, we reverse and remand with instructions to dismiss charge No. 05CRS042576, possession of cocaine.

[2] Because the trial court erred when it denied defendant's motion to dismiss charge No. 05CRS042576, it lacked jurisdiction to submit to the jury the charge of attaining the status of habitual felon. N.C. Gen. Stat. § 14-7.5; *State v. Smith*, 186 N.C. App. 57, 68, 650 S.E.2d 29, 36 (2007). Accordingly, we vacate defendant's conviction for attaining the status of habitual felon, No. 05CRS064796.

Reversed.

Judge GEER concurs.

Judge TYSON dissents in a separate opinion.

TYSON, Judge dissenting.

The majority's opinion concludes the State failed to present sufficient evidence tending to show defendant constructively possessed two packages of crack cocaine and holds the trial court erred by denying defendant's motion to dismiss the charge of possession of cocaine. The majority's opinion reverses the trial court's order and remands this case with instructions to dismiss the possession of cocaine charge and vacate defendant's habitual felon status. I disagree, vote to affirm the trial court's denial of defendant's motion to dismiss, and find no error in the jury's verdict or the judgment entered thereon. I respectfully dissent.

I. 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) (emphasis supplied).

II. Analysis

Possession of a controlled substance can be actual or constructive. *State v. Baldwin*, 161 N.C. App. 382, 391, 588 S.E.2d 497, 504-05 (2003). "Constructive possession of a substance applies where the defendant has both the power and intent to control its disposition or use. . . . If the defendant's possession over the premises is nonexclusive, constructive possession may not be inferred without other incriminating circumstances." *State v. Autry*, 101 N.C. App. 245, 251-52, 399 S.E.2d 357, 361-62 (1991) (internal citations and quotations omitted).

"A defendant's presence on the premises and close proximity to a controlled substance is a circumstance which may support an inference of constructive possession." *State v. Kraus*, 147 N.C. App. 766, 770, 557 S.E.2d 144, 148 (2001) (quoting *State v. Givens*, 95 N.C. App. 72, 78, 381 S.E.2d 869, 872 (1989)); *see also State v. Harvey*, 281 N.C. 1, 12-13, 187 S.E.2d 706, 714 (1972) (internal citation and quotation omitted) ("[T]he State may overcome a motion to dismiss or motion for judgment as of nonsuit by presenting evidence which places the accused within such close juxtaposition to the narcotic drugs as to justify the jury in concluding that the same was in his possession."). "[C]onstructive possession depends on the totality of circumstances in each case. No single factor controls, but ordinarily the question will be for the jury." *State v. James*, 81 N.C. App. 91, 93, 344 S.E.2d 77, 79 (1986) (citation omitted).

In *State v. Autry*, this Court affirmed the trial court's denial of a motion to dismiss the defendant's charge of possession with intent to sell or deliver cocaine, where evidence tended to show: (1) the defendant was found standing in a kitchen with two other people in a residence in which he did not live; (2) a .25-caliber semiautomatic pistol, four packages containing cocaine, and $47.00 in cash were located on a table inside the kitchen; (3) the table was surrounded by chairs and within arm's reach of the defendant; and (4) the defendant admitted his jacket was hanging on one of the chairs and the $47.00 in cash belonged to him. 101 N.C. App. at 252, 399 S.E.2d at 362.

Because the defendant in *Autry* claimed ownership of two of the four items on the table, this Court concluded the evidence was sufficient for a reasonable mind to infer that the defendant constructively possessed the cocaine, an essential element of the charge of possession with the intent to sell or deliver cocaine. *Id.* at 252-53, 399 S.E.2d at 362; *see also State v. Brown*, 310 N.C. 563, 570, 313 S.E.2d 585, 589 (1984) (holding the defendant had constructive possession of cocaine based upon evidence tending to show: (1) the defendant was found in the apartment with two other people when officers conducted a search; (2) cocaine was located on a table approximately six to eight inches away from where the defendant was standing when police arrived; and (3) officers recovered a key to the apartment and $1,700.00 in cash from the defendant's pockets).

The factual backgrounds presented in *Autry* and *Brown* are analogous to the facts at bar. The evidence presented at trial tended to show defendant was found with one other person in a small bedroom, located in a residence upon which officers had executed a search warrant. Winston-Salem Police Officer A.J. Santos ("Officer Santos") testified that upon entering the bedroom he observed an individual sitting in a chair located in the "back right corner" of the room. Defendant was sitting on the corner of the foot of the bed facing the door. As officers approached, defendant "slid off the bed onto the floor," approximately one to two feet away from the door.

Once officers had secured the scene, a secondary search was conducted. Officers recovered two plastic bags containing a white, rock-like substance, later shown to be crack cocaine. One package was recovered from behind the door, which both Officer Santos and Detective Paul opined was an area within defendant's reach prior to being handcuffed. A second package of crack cocaine was recovered from the bed where defendant had been seated. Officers also found defendant's driver's license and birth certificate on top of a TV stand located within the bedroom. Finally, a search of defendant's person revealed an undisclosed amount of money in his pockets.

Giving the State the benefit of all reasonable inferences that may be drawn from the evidence, defendant's close proximity to both packages containing crack cocaine and the presence of other items that belonged to and positively identified defendant is sufficient for a reasonable juror to conclude that defendant had the "power and intent" to exercise control over the two packages of cocaine recovered from the bedroom. *Autry*, 101 N.C. App. at 252, 399 S.E.2d at 362.

The State presented "substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense." *Wood*, 174 N.C. App. at 795, 622 S.E.2d at 123. The trial court properly denied defendant's motion to dismiss and submitted the possession of cocaine charge to the jury. Because I vote to uphold defendant's possession of cocaine conviction, the trial court also properly submitted defendant's charge of attaining habitual felon status to the jury.

III. Conclusion

Giving the State the benefit of all reasonable inferences that may be drawn from the facts at bar, sufficient evidence was presented tending to show the cocaine recovered from the bedroom was constructively possessed by defendant. *Id.* I vote to affirm the trial court's denial of defendant's motion to dismiss. The trial court properly submitted defendant's charges of possession of cocaine and attaining the status of habitual felon to the jury. I find no error in the jury's verdict and the judgment entered thereon and respectfully dissent.

ANDERSON TIMOTHY STACY, INDIVIDUALLY, AND AS GUARDIAN AD LITEM FOR ZACHARY ALLEN STACY AND JACOB NATHANIEL STACY, MINOR CHILDREN, PLAINTIFFS v. DR. JAMES G. MERRILL, IN HIS CAPACITY AS SUPERINTENDENT OF ALAMANCE-BURLINGTON BOARD OF EDUCATION, AL SMITH, IN HIS CAPACITY AS DIRECTOR OF TRANSPORTATION OF ALAMANCE-BURLINGTON BOARD OF EDUCATION, AND JEAN MANESS, IN HER CAPACITY AS PRINCIPAL OF R. HOMER ANDREWS ELEMENTARY SCHOOL, AND ALAMANCE-BURLINGTON BOARD OF EDUCATION, DEFENDANTS

No. COA07-1466

(Filed 17 June 2008)

1. Tort Claims Act— school bus accident—exclusive jurisdiction in Industrial Commission

The Industrial Commission had exclusive jurisdiction over claims arising from a school bus accident in which a child riding a bicycle fell into the path of the bus, and the trial court did not err by dismissing claims filed in superior court. The legislative intent was for N.C.G.S. § 143-300.1 to allow the Industrial Commission to hear tort claims alleging negligence arising

from and inseparably connected to events occurring at the time a school bus driver was operating the bus in the course of her employment.

2. Schools and Education— bus accident—sovereign immunity not waived

Even if the Industrial Commission did not have exclusive jurisdiction, the trial court did not err by dismissing claims arising from a school bus accident where defendant did not waive governmental immunity. Exclusions relating to automobiles in the board's risk management program and excess liability coverage applied here.

Appeal by plaintiffs from judgment entered 13 April 2007 by Judge R. Allen Baddour, Jr. in Alamance County Superior Court. Heard in the Court of Appeals 14 May 2008.

Forman Rossabi Black, P.A., by Amiel J. Rossabi and Emily J. Meister, for plaintiff-appellants.

Cranfill Sumner & Hartzog, L.L.P., by Ann S. Estridge, Alycia S. Levy, and Allison Serafin, for defendant-appellees.

STEELMAN, Judge.

Where defendants did not waive governmental immunity, the trial court did not err in dismissing plaintiffs' complaint.

I. Factual and Procedural Background

On 20 August 2004, Zachary and Jacob Stacy ("the minor plaintiffs"), brothers of decedent, Quentin Stacy, were students at R. Homer Andrews Elementary School. Plantiff Anderson Timothy Stacy is the father of the minor plaintiffs.

When school was dismissed on 20 August 2004, the three Stacy brothers left the school, retrieved their bicycles, and began to ride home along Avalon Road. At the same time, school buses were traveling along Avalon Road in the same direction. Before leaving school property, Quentin Stacy lost control of his bicycle, fell into the path of a school bus, and was killed. Zachary and Jacob Stacy witnessed the incident.

On 21 August 2006, plaintiffs filed a complaint in the Superior Court of Alamance County, naming as defendants the Alamance-

Burlington Board of Education ("the Board"); Dr. James Merrill, Superintendent of the Alamance-Burlington Board of Education; Al Smith, Director of Transportation; and Jean Maness, Principal of R. Homer Andrews Elementary School in their official capacities. On 8 February 2007, plaintiffs filed an amended complaint. Plaintiffs' amended complaint alleged the following negligent conduct on the part of defendants: (1) designing a pedestrian, bicycle and vehicular traffic plan with no clearly marked pedestrian or bicycle lanes, with no fence, sidewalk, curb or other structure to separate pedestrian and bicycle traffic and vehicular traffic; (2) failing to supervise the elementary school children leaving the school campus; (3) failing to supervise or provide adequate training of bus drivers, including failure "to warn of the dangers of traveling through the area on Avalon Road congested by the presence and close proximity of students walking or riding bicycles"; (4) failing to provide a reasonably safe exit route for the students at Andrews Elementary; (5) failing to ensure a safe, alternate means of travel between home and school for students who were not provided transportation by defendants; and (6) failing to teach children who were not provided transportation the safe manner in which to walk, ride, and travel in order to avoid injury and/or death. The amended complaint further alleged that as a result of defendants' conduct, Zachary and Jacob Stacy suffered severe emotional distress as a result of witnessing their brother's death, and Timothy Stacy incurred medical expenses. On the same day that plaintiffs filed their original complaint, plaintiff Anderson Timothy Stacy filed two claims on behalf of the minor plaintiffs under the Tort Claims Act with the Industrial Commission, alleging that Quentin Stacy was killed as a result of the negligence of the school bus driver and seeking damages for severe emotional distress and unreimbursed medical expenses.

On 21 February 2007, defendants filed a motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(2) of the North Carolina Rules of Civil Procedure. The motion to dismiss was heard on 9 April 2007. Judge Baddour considered numerous affidavits, arguments of counsel, and discovery materials. On 17 April 2007, Judge Baddour entered an order granting defendants' motion to dismiss pursuant to Rule 12(b)(1) and Rule 12(b)(2). On 27 July 2007, plaintiffs moved for relief from the 17 April order pursuant to Rule 60 of the North Carolina Rules of Civil Procedure. Following a hearing on 2 August 2007, plaintiffs' Rule 60 motion was denied by order filed on 16 August 2007. Plaintiffs appeal.

II. Standard of Review

"Our review of a motion to dismiss under Rule 12(b)(1) of the North Carolina Rules of Civil Procedure is *de novo*. . . . Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the [trial court]." *Peninsula Prop. Owners Ass'n v. Crescent Res., LLC*, 171 N.C. App. 89, 92, 614 S.E.2d 351, 353 (2005) (citations and quotation marks omitted). The standard of review of the trial court's decision to grant a motion to dismiss under Rule 12(b)(2) is whether the record contains evidence that would support the court's determination that the exercise of jurisdiction over defendants would be inappropriate. *See Stann v. Levine*, 180 N.C. App. 1, 22, 636 S.E.2d 214, 227 (2006).

III. Jurisdiction

In their only argument, plaintiffs contend that the trial court erred in dismissing their amended complaint for lack of jurisdiction. We disagree.

A. Jurisdiction of Industrial Commission

[1] The first issue we address is whether the Industrial Commission had exclusive jurisdiction to hear plaintiffs' claims.

> Under the doctrine of sovereign immunity, the State is immune from suit absent waiver of immunity. 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. An action against a commission or board created by statute as an agency of the State where the interest or rights of the State are directly affected is in fact an action against the State.

Meyer v. Walls, 347 N.C. 97, 104, 489 S.E.2d 880, 884 (1997) (internal citations omitted).

The Board is a local board of education as defined in N.C. Gen. Stat. § 115C-5(5) (2007). N.C. Gen. Stat. § 115C-42 (2007) provides that a local board of education may waive governmental immunity from liability for damage caused by the torts of its employees acting within the course of their employment upon the purchase of insurance. The statute contains a proviso that

> this section shall not apply to claims for damages caused by the negligent acts or torts of public school bus, or school transporta-

> tion service vehicle drivers, while driving school buses and school transportation service vehicles when the operation of such school buses and service vehicles is paid from the State Public School Fund.

Id. This proviso applies to the types of claims which are covered by N.C. Gen. Stat. § 143-300.1. *Smith v. McDowell County Bd. of Education*, 68 N.C. App. 541, 543, n. 1, 316 S.E.2d 108, 110, n. 1 (1984); *Stein v. Asheville City Bd. of Educ.*, 168 N.C. App. 243, 251, 608 S.E.2d 80, 86 (2005).

N.C. Gen. Stat. § 143-300.1 provides in pertinent part:

> The North Carolina Industrial Commission shall have jurisdiction to hear and determine tort claims against any county board of education or any city board of education, which claims arise . . . as a result of any alleged negligent act or omission of the driver . . . of a public school bus or school transportation service vehicle . . .

N.C. Gen. Stat. § 143-300.1(a) (2007). "Thus, there cannot be concurrent jurisdiction: if a plaintiff's claim against a Board of Education falls within the scope of N.C. Gen. Stat. § 143-300.1, then N.C. Gen. Stat. § 115C-42 excludes the claim from the waiver of immunity." *Stein* at 251, 608 S.E.2d at 86. The legislative intent for N.C. Gen. Stat. § 143-300.1 was to allow the Industrial Commission to hear "tort claims wherein certain alleged negligent acts or omissions arose out of, and were inseparably connected to, events occurring at the time a school bus driver was operating the bus in the course of her employment." *Newgent v. Buncombe County Bd. of Educ.*, 114 N.C. App. 407, 409, 442 S.E.2d 158, 159 (1994) (Orr, J., dissenting), *reversed per curiam*, 340 N.C. 100, 455 S.E.2d 157 (1995) (adopting dissent of Orr, J.).

In the instant case, plaintiffs do not dispute that the school bus driver is an employee whose acts are covered by N.C. Gen. Stat. § 143-300.1. Plaintiffs' Industrial Commission claim states that "[the bus driver] was driving . . . at a speed greater than the recommended speed and too fast for the conditions then existing[] . . . when [the bus driver] saw the children on bicycles and walking, he should have stopped his bus until the roadway was clear of children (bicyclists and pedestrians). *The accident was preventable by the driver.*" (emphasis added).

Plaintiffs' amended complaint in superior court alleges that, "as Quentin Stacy was proceeding along Avalon Road . . . he lost control of his bicycle, fell into the path of a school bus proceeding along such road, and was killed instantly."

Under the facts alleged in their amended complaint, plaintiffs' claims are "inseparably connected to[] events occurring at the time a school bus driver was operating the bus in the course of [his] employment[,]" and thus fall within the scope of N.C. Gen. Stat. § 143-300.1. *See Newgent* at 409, 442 S.E.2d at 159. We hold that the Industrial Commission had exclusive jurisdiction over plaintiffs' claims, and the trial court did not err in dismissing plaintiffs' claims. This argument is without merit.

B. Waiver of Immunity Through the Purchase of Liability Insurance

[2] Even assuming *arguendo* that the Industrial Commission did not have exclusive jurisdiction over plaintiffs' claims, under the facts of the instant case, defendants did not waive governmental immunity through the purchase of liability insurance.

Although a local board of education may waive governmental immunity by purchasing liability insurance pursuant to N.C. Gen. Stat. § 115C-42, "such immunity is waived only to the extent that said board of education is indemnified by insurance for such negligence or tort." N.C. Gen. Stat. § 115C-42. "Waiver of sovereign immunity may not be lightly inferred and State statutes waiving this immunity, being in derogation of the sovereign right to immunity, must be strictly construed." *Guthrie v. State Ports Authority*, 307 N.C. 522, 537-38, 299 S.E.2d 618, 627 (1983) (citations omitted). This rule of strict construction applies to exclusionary clauses in liability insurance policies, including automobile exclusions. *See Beatty v. Charlotte-Mecklenburg Bd. of Educ.*, 99 N.C. App. 753, 756, 394 S.E.2d 242, 244-45 (1990).

In the instant case, the Board participated in a risk management program known as the North Carolina School Boards Trust ("NCSBT"). The Board and NCSBT entered into a Trust Fund Agreement which covered acts or omissions occurring on the date of the incident in question. The Trust Fund Agreement contains a number of exclusions, including Exclusion Number 18, which provides that coverage does not apply

> [t]o any Claim arising out of or in connection with the ownership, leasing, purchasing, maintenance, operation, use, loading or

> unloading of any Automobile; or to any Claim arising out of or in connection with the hiring, training, or supervising of any person maintaining, operating, leasing, purchasing, using, loading or unloading any Automobile.

The Trust Fund Agreement defines "Automobile" as "a land motor vehicle, trailer or semi-trailer designed for travel on public roads but does not include mobile equipment."

Plaintiffs urge us to reject defendants' contention that their claims arise out of the ownership, maintenance, operation, use, loading or unloading of an automobile. Plaintiffs assert that the automobile exclusion in the Trust Fund Agreement does not apply to their negligence claims against these defendants because "nowhere in the allegations of Plaintiffs Amended Complaint is the bus driver's negligence alleged or implied." Plaintiffs contend that their amended complaint asserts "distinctly 'non-automobile proximate causes[.]' "

Plaintiffs' claims clearly "arise out of or in connection with" a school bus, which is encompassed within the definition of "Automobile" as defined in the Trust Fund Agreement. This Court examined a similar automobile exclusion involving a similar claim in *Beatty*, *supra*. We find the reasoning in *Beatty* instructive in the instant case.

In *Beatty*, a student was injured by a truck when he was attempting to reach his assigned school bus. The plaintiff's claims included negligent design of the school bus route and stop location, and we held that those claims fell within the ambit of the automobile exclusionary clause, stating

> it is inconceivable to us that defendant Board intended to exclude liability for injuries suffered by pupils while being transported by a school bus or in the process of boarding or disembarking from a school bus, but intended to waive immunity for injuries associated with the *design of a bus route* or the location of a bus stop.

Beatty at 756, 394 S.E.2d at 244-45 (emphasis added). As in *Beatty*, plaintiffs in the instant case specifically allege negligence on the part of defendants in the design of the pedestrian, bicycle, and vehicular traffic plan, and in their failure to provide a safe exit route for students. Strict construction of N.C. Gen. Stat. § 115C-42 and the Trust Fund Agreement compels the conclusion that plaintiffs' alleged injuries were caused, at least in part, by the negligence of a school bus driver and are exempt from coverage.

In addition to the Trust Fund Agreement, NCSBT contracted with FolksAmerica ("the Reinsurance Agreement") to provide excess general liability coverage and excess errors and omissions coverage for claims between $150,000.00 and $1,000,000.00. The Reinsurance Agreement provides "follow form" coverage and incorporates all terms and conditions of the Trust Fund Agreement, except where the Reinsurance Agreement specifically differs. Additionally, the declarations page of the Reinsurance Agreement states that it provides coverage for "General Liability—Bodily Injury and/or Property Damage Liability *other than automobile*." (emphasis added).

By its terms, the Reinsurance Agreement excludes plaintiffs' claims from coverage. The automobile exclusion in the Reinsurance Agreement corresponds to Exclusion 18 of the Trust Agreement, and there is no conflict between the two agreements. For this reason, we find plaintiffs' reliance on *Lail v. Cleveland Cty. Bd. of Educ.*, 183 N.C. App. 554, 645 S.E.2d 180 (2007), unpersuasive. *See Lail* (where a conflict existed between a reinsurance agreement and the underlying trust fund agreement, and the reinsurance agreement did not contain any exclusions related to plaintiff's claims, sovereign immunity had been waived).

We hold that the provisions of the Reinsurance Agreement exclude automobile liability and, as such, excess coverage was not available under the circumstances of the instant case. No coverage existed under either the Trust Fund Agreement or the Reinsurance Agreement for plaintiffs' alleged damages, and defendants retained their immunity as to plaintiffs' claims. We hold that the trial court did not err in dismissing plaintiffs' amended complaint, as well as denying their Rule 60 motion.

AFFIRMED.

Judges HUNTER and STEPHENS concur.

ROBERT MICHAEL STUART LUTHER AND JAMES LEONARD REESE, II, PLAINTIFFS v. HERMAN C. SEAWELL AND NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, DEFENDANTS

No. COA07-830

(Filed 17 June 2008)

1. Appeal and Error— notice of appeal—from only one of two orders

Plaintiffs' appeal from a summary judgment for defendant Farm Bureau was dismissed where there was also a summary judgment for defendant Seawell, Farm Bureau's employee, on a different date; there was only one notice of appeal, from the summary judgment for Seawell; plaintiff's argument that the notice of appeal was meant to apply to both orders was rejected; and the Court of Appeals declined to treat the matter as a petition for certiorari. The appeal would have been found to be without merit even if had been heard.

2. Appeal and Error— substantial rules violations—sanction but not dismissal

Plaintiffs' attorneys were ordered to pay double printing costs for numerous rules violations where the noncompliance with the appellate rules was substantial but not so gross as to warrant dismissal.

3. Insurance— homeowners—misrepresentations—application completed by insurance company employee—signed by plaintiffs

The trial court correctly granted summary judgment for defendant Seawell, an employee of an insurance company, in an action arising from misrepresentations on an insurance application. Although plaintiffs contended that they had given truthful answers to Seawell when he filled out the application, plaintiffs signed the application, and the policy would not have been issued had the correct information been provided.

4. Insurance— claim investigated—not a deceptive trade practice

Defendants did not engage in deceptive trade practices in an insurance claim by failing to investigate certain information where they diligently pursued questions as to liability for the fire and had their own independent investigator conduct inquiries.

5. Insurance— misrepresentations on application—adopted by signature

Plaintiff adopted representations on an insurance application form filled in by an insurance company employee by signing the application.

Appeal by plaintiffs from judgment entered 23 January 2007 by Judge W. David Lee in Richmond County Superior Court. Heard in the Court of Appeals 16 January 2008.

Law Office of Charles W. Collini, by Charles W. Collini, for plaintiff-appellant Robert Michael Stuart Luther; Law Office of Henry T. Drake, by Henry T. Drake, for plaintiff-appellant James Leonard Reese, II.

Young Moore and Henderson, P.A., by Walter E. Brock, Jr. and Matthew J. Gray, for defendant-appellee North Carolina Farm Bureau Mutual Insurance Company.

Anderson, Johnson, Lawrence, Butler & Bock, L.L.P., by Lee B. Johnson, for defendant-appellee Herman C. Seawell.

HUNTER, Judge.

Robert Michael Stuart Luther and James Leonard Reese, II ("plaintiffs") appeal from orders granting summary judgment to Herman C. Seawell and North Carolina Farm Bureau Mutual Insurance Company (collectively "defendants"). After careful review, we dismiss in part and affirm in part.

I.

On 23 April 2001, plaintiffs submitted an application for homeowner's insurance to defendant Farm Bureau; this application was physically filled out by defendant Seawell, with whom plaintiffs had previously met to provide the information necessary for the application. In the application, plaintiffs denied that they conducted business from their home, denied that their insurance was previously cancelled and other insurers had refused to issue them insurance, denied that they had a prior homeowner's claim in the last five years, and denied that they had any credit problems. The application was signed by plaintiff Luther.

In their depositions during discovery for this suit, both plaintiffs essentially admit that these answers were false. However, both men

assert that they orally gave defendant Seawell entirely truthful answers (that they had indeed had prior claims, for example), but Seawell told them those answers did not need to be included on the form for various reasons, including that the true answers would " 'mess up your insurance' " or prior claim amounts were too small to matter. Farm Bureau issued a policy based on the information in the application.

On 23 February 2002, a fire damaged the property at issue. Farm Bureau then began an investigation into the cause of the fire, including the appointment of a special investigator who inquired into the cause of the fire and conducted at least thirty-five interviews in that inquiry. Defendant Farm Bureau also paid $4,000.00 in advance payments to plaintiffs for clothing and other necessities.

Defendants apparently then refused to make any further payments, and plaintiffs brought suit against defendants for failure to procure insurance, deceptive trade practices, and fraud. In their answer, defendants put forth a series of affirmative defenses, including that plaintiffs made material misrepresentations in their application, making it voidable. Defendants then made motions for summary judgment, as did plaintiffs. The court granted defendants' motions and denied plaintiffs'. Plaintiffs appeal.

II.

Before addressing the merits of this appeal, we address defendant-appellees' motions to dismiss this appeal on the basis of a series of violations by plaintiffs of the rules of appellate procedure. Because different issues arise as to each defendant, we consider them separately.

A.

[1] First, we address the motion's assertion that dismissal is warranted in part because the record does not contain a notice of appeal from both orders granting summary judgment. There are two orders at issue here—one granting defendant Farm Bureau's motion for summary judgment, signed on 26 January 2007, and one granting defendant Seawell's motion for summary judgment, signed and entered on 23 January 2007. The record reflects only one notice of appeal, however, and it states that the appeal is from the summary judgment order "entered January 23, 2007." Only the latter order, the one dated 23 January 2007, has a file stamp on it; that stamp shows,

as stated, that the order was filed on 23 January 2007. Thus, the record does not contain a valid notice of appeal as to the order concerning defendant Farm Bureau entered 26 January 2007. Plaintiffs argue that the notice of appeal was clearly intended to apply to both orders and urges this Court to hear the appeal as to defendant Farm Bureau. We decline to do so.

This Court does have the authority pursuant to North Carolina Rule of Appellate Procedure 21(a)(1) to "treat the purported appeal as a petition for writ of certiorari" and grant it in our discretion. *State v. SanMiguel*, 74 N.C. App. 276, 277-78, 328 S.E.2d 326, 328 (1985); *see also Guthrie v. Conroy*, 152 N.C. App. 15, 19, 567 S.E.2d 403, 407 (2002) (where notice of appeal was filed 97 days late, Court "exercise[d] its discretion and grant[ed] *certiorari* to review plaintiff's claims on their merits, pursuant to N.C.R. App. P. 21"); *Seyboth v. Seyboth*, 147 N.C. App. 63, 65, 554 S.E.2d 378, 380 (2001) (where record reflected no notice of appeal, Court "consider[ed] defendant's assignment of error to the . . . order as a petition for *writ of certiorari*" and reviewed merits of appeal); *Anderson v. Hollifield*, 345 N.C. 480, 482, 480 S.E.2d 661, 663 (1997) (affirming this Court's discretion to do same); *Fearrington v. University of North Carolina*, 126 N.C. App. 774, 778, 487 S.E.2d 169, 172 (1997) (where notice of appeal was fatally defective, Court ruled "N.C.R. App. P. 21(a)(1) gives this Court the authority to treat the purported appeal as a petition for writ of *certiorari* to review the . . . order, and we elect to do so and consider the merits of petitioner's assignment of error"); *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 197 fn.3, 657 S.E.2d 361, 365 fn.3 (2008) ("a discussion of the judiciary's inherent power to issue extraordinary and remedial writs, and this Court's general supervisory authority, is beyond the scope of this opinion"). However, we decline to do so in this case.

Instead of arguing to this Court that this notice was intended to refer to both judgments, plaintiffs would have been better served to petition this Court for a writ of *certiorari* to hear the appeal. We are also influenced by the other rule violations noted below. We have, however, reviewed the appeal as to defendant Farm Bureau and, had we not dismissed defendant Farm Bureau's appeal, we would have found it to be without merit.[1]

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1. We note that defendant Farm Bureau will still be referenced in this opinion as defendant Seawell is an employee of defendant Farm Bureau and was representing the company when he performed the actions at issue.

B.

[2] As to defendant Seawell, proper notice of appeal exists in the record as noted above. Thus, we address only the other rules violations committed by plaintiffs in their appeal as to this defendant. These violations include the following: Failure to include agreed-upon documents and inclusion of documents not agreed upon in the record on appeal, in violation of Rule 12; inclusion of documents in the record bearing highlighting and handwritten argumentative commentary in violation of Rules 9, 11, and 12; failure to state grounds for appellate review in their brief, in violation of Rule 28(b)(4); failure to refer to the assignments of error in their brief, in violation of Rule 28(b)(6); and inclusion of a statement of facts that is highly argumentative and not supported by references to the record or transcript, in violation of Rule 28(b)(5). Due to these violations, sanctions are warranted against plaintiffs' attorneys; however, we decline to grant defendants' motion to dismiss as to defendant Seawell, as we do not believe such harsh sanctions are warranted in this case. Recently, our Supreme Court noted that "when a party fails to comply with one or more nonjurisdictional appellate rules, the court should first determine whether the noncompliance is substantial or gross under Rules 25 and 34. If it so concludes, it should then determine which, if any, sanction under Rule 34(b) should be imposed." *Dogwood Dev. & Mgmt. Co., LLC*, 362 N.C. at 201, 657 S.E.2d at 367. Given the number of rules violations in this case, we hold that plaintiffs' noncompliance was substantial in this case but not so gross as to warrant dismissal as to defendant Seawell. As such, we deny the motion to dismiss as to defendant Seawell and order plaintiffs' attorneys to pay double the printing costs of this appeal pursuant to Rule 34(b) of the North Carolina Rules of Appellate Procedure. We instruct the Clerk of this Court to enter an order accordingly.

III.

[3] 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.*

From the record, it appears that the order granting that motion was on the following bases: As to the claims of failure to procure insurance and fraud, defendant's affirmative defense that plaintiffs made material misrepresentations in their application; as to the claim of deceptive trade practices, that defendant investigated the claim diligently and with all due speed. We consider each in turn.

A.

Per statute, material misrepresentations in an application for an insurance policy may prevent recovery on the policy. *See* N.C. Gen. Stat. § 58-3-10 (2007) ("[a]ll statements or descriptions in any application for a policy of insurance . . . shall be deemed representations . . . , and a representation, *unless material or fraudulent*, will not prevent a recovery on the policy") (emphasis added). "[A] representation in an application for an insurance policy is deemed material 'if the knowledge or ignorance of it would naturally influence the judgment of the insurer in making the contract[.]' " *Goodwin v. Investors Life Insurance Co. of North America*, 332 N.C. 326, 331, 419 S.E.2d 766, 769 (1992) (citation omitted).

It appears to be undisputed that plaintiffs signed the application knowing that it contained misrepresentations about several pieces of information regarding their past credit and insurance histories. Per defendant Seawell's deposition and defendant Farm Bureau's responses to interrogatories, defendant Farm Bureau would not have issued the policy had the correct information been provided. As such, it appears that plaintiffs made material misrepresentations to obtain the policy and, therefore, the trial court was correct in granting summary judgment on that claim. As such, this argument is without merit.

B.

[4] Plaintiffs argue that defendant Farm Bureau and defendant Seawell as its representative engaged in deceptive trade practices by failing to investigate certain information, in violation of N.C. Gen. Stat. § 58-63-15(11) (2007), and their refusal to pay the mortgage as specified in the policy, in violation of N.C. Gen. Stat. § 58-63-15(11)(f), which gives as one basis for finding unfair claim practices "[n]ot attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear[.]"

As defendants note, however, there were questions as to liability for quite some time after the fire, and during that time defendants

pursued answers to those questions diligently. Concurrent with official investigations of the fire, defendants had their own, independent investigator conduct inquiries on the same matter. Plaintiffs supply no further basis in law or fact for this claim in its brief other than the bald statement that this is the case. As such, this argument is without merit.

C.

[5] Finally, plaintiffs argue that any representations made to defendant Farm Bureau were made by defendant Seawell, because he was the one who physically filled out the application form. That is, he asked defendants questions to obtain the information necessary to fill in the form, then marked the answers himself. However, plaintiff Luther signed the application before it was submitted to defendant Farm Bureau. As such, plaintiff adopted those representations as his own, and recovery is denied. *See Pittman v. First Protection Life Ins. Co.*, 72 N.C. App. 428, 435, 325 S.E.2d 287, 292 (1985) ("an insured who signs an application for insurance adopts it as his statement"); *see also Bell v. Nationwide Ins. Co.*, 146 N.C. App. 725, 728, 554 S.E.2d 399, 401 (2001) (" 'if an application for insurance containing material misrepresentations is filled in by the agent before being signed by the applicant, these are material misrepresentations of the applicant which bar recovery' ") (citation omitted).

IV.

Because plaintiffs made material misrepresentations on their insurance application and cannot prove deceptive practices on the part of defendant Seawell, we affirm the trial court's grant of plaintiffs' summary judgment motion as to defendant Seawell. Because no valid notice of appeal appears in the record as to the order concerning defendant Farm Bureau, we dismiss that portion of the appeal. Finally, due to their violations of the North Carolina Rules of Appellate Procedure, we order plaintiffs' attorneys to pay double the costs of printing this appeal.

Dismissed in part and affirmed in part.

Judges BRYANT and JACKSON concur.

LINDA RAMSEY AND ERIN KNOX, PLAINTIFFS v. CINDIE HARMAN, DEFENDANT

No. COA07-1536

(Filed 17 June 2008)

Stalking— comments posted on website—evidence not sufficient

The trial court's finding that defendant "stalked" plaintiffs in violation of N.C.G.S. § 50C-1 by posting messages on a website was not supported by any competent evidence and was vacated.

Appeal by defendant from order entered 7 September 2007 by Judge Thomas G. Foster, Jr. in Madison County District Court. Heard in the Court of Appeals 15 May 2008.

Robert J. Deutsch, P.A., by Robert J. Deutsch and Tikkun A.S. Gottschalk, for plaintiff-appellees.

Goldsmith, Goldsmith & Dews, P.A., by C. Frank Goldsmith, Jr., for defendant-appellant.

TYSON, Judge.

Cindie Harman ("defendant") appeals from entry of a No-Contact Order For Stalking Linda Ramsey and her minor child, Erin Knox (collectively, "plaintiffs"). We vacate the trial court's order.

I. Background

On 27 August 2007, plaintiffs filed a complaint against defendant for "stalking" and sought issuance of a civil no-contact order. Plaintiffs alleged defendant had "posted information on her website stating that Erin Knox [Linda Ramsey's daughter] harasses other children and accused [Erin Knox] of being the reason kids hate to go to school." Plaintiffs also alleged that on numerous occasions defendant had referred to Erin Knox on her website as "endangered," "offspring," "bully," and "possum," which caused Erin Knox to suffer emotional distress. At the hearing, defendant admitted publishing the following message on her website:

> With all the bulling [sic] and harassing that goes on in our school system. Then the trouble that went on Friday at Madison Middle. The first student in that age group that came to mind was Linda Knox's daughter. Wasn't this the student that harassed the

> Cantrell child? And we wonder why some kids hate to go to school. . . .

Defendant's website also featured: (1) a voice recording of plaintiffs' deceased mother and grandmother and (2) references to Linda Ramsey as being a "crow," "idiot," and "wack."

Plaintiffs sought a temporary civil no-contact order to be issued *ex parte* in order to protect Erin Knox from continued harassment. On 28 August 2007, the trial court granted plaintiffs' request and ordered defendant to cease entering comments on her website regarding Erin Knox or other members of plaintiffs' family.

On 7 September 2007, defendant filed a motion to dismiss and asserted the trial court's order violated her First Amendment rights to freedom of speech and the Communications Decency Act found at 47 U.S.C. § 203. Later that day, a hearing was held. Both parties testified and presented evidence. The trial court reviewed several of plaintiffs' exhibits including the following "blog" written by defendant and published on her website on 7 May 2007:

> If anyone retaliates against anyones [sic] children—Let me know—I will report it and follow up at the state level—This is all the more reason to do this.
>
> Why do you think there is so much of a problem at the schools—when it comes to bullying? Because these children watch their parents. Fine example Linda Ramsey—one of the biggest bullys [sic] in this county. She gets it honest . . .
>
> She learned from her mother and now she is teaching her daughter the ropes. This is fact and this county knows it. [] But it is going to stop and if you want change—WRITE THE LETTERS. . . . CH

The trial court found that defendant had harassed plaintiffs within the meaning of N.C. Gen. Stat. § 50C-1(6) and (7) and issued a civil no-contact order against defendant based, *inter alia*, upon the preceding message. Defendant was ordered to: (1) cease "cyber-stalking" plaintiffs; (2) cease harassment of plaintiffs; and (3) not contact plaintiffs by telephone, written communication, or electronic means. Defendant appeals.

II. Issues

Defendant argues the trial court erred by: (1) finding defendant had violated N.C. Gen. Stat. § 50C-1; (2) violating her First

Amendment constitutional and federal statutory rights of freedom of speech and of the press; and (3) conducting defendant's trial in a closed session.

III. N.C. Gen. Stat. § 50C-1

Defendant argues the trial court erred by finding defendant had "stalked" plaintiffs as defined by N.C. Gen. Stat. § 50C-1 and entering the civil no-contact order. We agree.

A. Standard of Review

"A trial judge, sitting without a jury, acts as fact finder and weigher of evidence. Accordingly, if [the] findings are supported by competent evidence, they are binding on appeal, although there may be evidence that may support findings to the contrary." *Southern Bldg. Maintenance v. Osborne*, 127 N.C. App. 327, 331, 489 S.E.2d 892, 895 (1997) (citation omitted).

B. Analysis

1. Stalking

"Stalking" is statutorily defined as:

> On more than one occasion, following or otherwise harassing, as defined in G.S. 14-277.3(c), another person without legal purpose with the intent to do any of the following:
>
> a. Place the person in reasonable fear either for the person's safety or the safety of the person's immediate family or close personal associates.
>
> b. Cause that person to suffer substantial emotional distress by placing that person in fear of death, bodily injury, or continued harassment and *that in fact causes that person substantial emotional distress*.

N.C. Gen. Stat. § 50C-1(6) (2007) (emphasis supplied).

Here, the trial court's sole finding of fact in its order stated: "Defendant has harassed plaintiffs within the meaning of [N.C. Gen. Stat. §] 50C-1(6) and (7) by knowingly publishing electronic or computerized transmissions directed at plaintiffs that torments, terrorizes, or terrifies plaintiffs and serves no legitimate purpose[.]" The trial court correctly articulated the definition of harassment pursuant to N.C. Gen. Stat. § 14-277.3(c) ("[f]or the purposes of this section, the term 'harasses' or 'harassment' means knowing con-

duct, including . . . computerized or electronic transmissions, directed at a specific person that torments, terrorizes, or terrifies that person and that serves no legitimate purpose."). However, a finding of harassment alone, even if supported by competent evidence, cannot be the sole basis to sustain entry of a civil no-contact order under N.C. Gen. Stat. § 50C-1(6).

2. Specific Intent

The statute requires the trial court to further find defendant's harassment was accompanied by the specific intent to either: (1) place the person in fear for their safety, or the safety of their family or close personal associates or (2) cause the person substantial emotional distress by placing that person in fear of death, bodily injury, or continued harassment and in fact cause that person substantial emotional distress. N.C. Gen. Stat. § 50C-1(6).

During the hearing, the trial court explicitly stated: "Any words or language threatening to inflict bodily harm, we don't have that, or physical injury, we don't have that[.]" Based upon the preceding statement, the trial court eliminated either of these grounds as a basis for the order. The only remaining ground to support the order would be that defendant had *intended to cause and in fact caused* plaintiffs to suffer substantial emotional distress from continued harassment. (Emphasis supplied).

This Court has previously interpreted what evidence is sufficient to establish the defendant intended to and in fact caused the plaintiff to suffer substantial emotional distress from continued harassment in the context of domestic violence protective orders. *See Wornstaff v. Wornstaff*, 179 N.C. App. 516, 634 S.E.2d 567 (2006), *aff'd without precedential value*, 361 N.C. 230, 641 S.E.2d 301 (2007). Even if *Wornstaff* were to have precedential value, its holding would not be particularly instructive based upon the very different factual backgrounds present in that case and the case at bar. *Id.*

N.C. Gen. Stat. § 50C-1(6) has only once been interpreted by this Court. *See Williams v. Vonderau*, 181 N.C. App. 18, 638 S.E.2d 644, *aff'd in part and rev'd in part*, 362 N.C. 76, 653 S.E.2d 144 (2007). In *Vonderau*, the central issues before this Court were: (1) whether an appeal of an entry of a civil no-contact order was moot based upon the expiration of the order prior to the appeal being heard and (2) whether the statute required more than one instance of harassment prior to entry of the order. *Id.* Neither *Wornstaff* nor

Vonderau provide substantial guidance on how to interpret N.C. Gen. Stat. § 50C-1(6) based upon the facts and issues presently before us.

3. Statutory Construction

The dispositive issue in this case is whether any evidence was presented to show defendant intended to and in fact caused plaintiffs to suffer substantial emotional distress. We note that our Supreme Court has defined "severe emotional distress" in the context of an action for negligent infliction of emotional distress and intentional infliction of emotional distress. *See Johnson v. Ruark Obstetrics*, 327 N.C. 283, 304, 395 S.E.2d 85, 97 (1990) ("In th[e] context [of negligent infliction of emotional distress], the term 'severe emotional distress' means any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so."); *Dickens v. Puryear*, 302 N.C. 437, 446-47, 276 S.E.2d 325, 331 (1981) (internal quotation omitted) (Liability arises under th[e] tort [of intentional infliction of emotional distress] when a defendant's conduct exceeds all bounds usually tolerated by decent society and the conduct causes mental distress of a very serious kind.").

However, neither the statue nor our prior case law defines "substantial emotional distress." We turn to the rules of statutory construction to decide this issue. Because our General Assembly chose not to define "substantial emotional distress," these terms must be given their plain meaning. *See State v. Thompson*, 157 N.C. App. 638, 644-45, 580 S.E.2d 9, 13 (citation omitted) ("[I]n construing a statute, undefined words should be given their plain meaning if it is reasonable to do so."), *disc. rev. denied*, 357 N.C. 469, 587 S.E.2d 72 (2003).

"Substantial" is defined as "considerable in [] value, degree, amount or extent[.]" *American Heritage Dictionary* 1727 (4th ed. 2000). *Black's Law Dictionary* defines emotional distress as "[a] highly unpleasant mental reaction (such as anguish, grief, fright, humiliation, or fury) that results from another person's conduct." *Black's Law Dictionary* 563 (8th ed. 2004). Applying the plain meaning of these terms, we hold that no substantial evidence was presented that tended to showed defendant intended to and in fact caused plaintiffs to suffer substantial emotional distress to warrant issuance of a civil no-contact order.

While Linda Ramsey's self-serving testimony indicated that she felt "threatened" by the messages, the trial court expressly stated the messages posted on defendant's website did not contain language "threatening to inflict bodily harm" or "physical injury." Plaintiffs' only other assertion was that Erin Knox became "embarrassed" when she had allegedly observed teachers viewing defendant's website in her school's library. Other evidence tended to show that access to defendant's website had been blocked at Erin Knox's school, which would make plaintiffs' contention implausible.

Further, during the hearing, defendant testified that she had "never had any communication with Linda Ramsey or her daughter[]" and the evidence shows Erin Knox's name had not been specifically mentioned on defendant's website. Defendant further explained that she had posted the 7 May 2007 "blog" in retaliation for: (1) messages posted by plaintiff Linda Ramsey on "madisonspeaks", a rival political commentary website and (2) an alleged threatening phone call defendant had received from plaintiffs' mother and grandmother. None of this evidence was contradicted.

Here, the record is wholly devoid of any evidence that tends to show the messages published on defendant's website were intended to and in fact caused plaintiffs to suffer "substantial emotional distress" as is required by N.C. Gen. Stat. § 50C-1(6). We also note the trial court failed to enter any findings of fact or conclusions of law regarding "substantial emotional distress" for either plaintiff. *Id.*

Without condoning the language used on defendant's website, the statute does not allow parties to implicate and interject our courts into juvenile hurls of gossip and innuendo between feuding parties where no evidence of any statutory ground is shown to justify entry of a no-contact order. Because the trial court's sole finding of fact does not compel a conclusion that defendant "stalked" plaintiffs in accordance with N.C. Gen. Stat. § 50C-1, the order appealed from is vacated. *Woodring v. Woodring*, 164 N.C. App. 588, 593, 596 S.E.2d 370, 374 (2004).

In light of our holding, it is unnecessary to and we do not address defendant's remaining assignments of error. See *State v. Wallace*, 49 N.C. App. 475, 484-85, 271 S.E.2d 760, 766 (1980) (citations omitted) ("If the case can be decided on one of two grounds, one involving a constitutional question, the other a question of lesser importance, the latter alone will be determined. The Court will not decide questions

of a constitutional nature unless absolutely necessary to a decision of the case.").

IV. Conclusion

The trial court's finding of fact that defendant "stalked" plaintiffs in violation of N.C. Gen. Stat. § 50C-1 by posting messages on a website is not supported by any competent evidence. The trial court's order is vacated.

Vacated.

Judges McCULLOUGH and STROUD concur.

STATE OF NORTH CAROLINA v. LAMONT DERRELL CARTER

No. COA07-1156

(Filed 17 June 2008)

1. Search and Seizure— traffic stop—motion to suppress evidence—papers

The trial court did not err in an accessory after the fact to murder and financial identity fraud case by denying defendant's motion to suppress evidence including papers seized during a search by an officer during a traffic stop because: (1) when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile; (2) defendant did not argue that his arrest for having an expired tag was not lawful, and there was no evidence to suggest such a conclusion; and (3) contrary to defendant's assertion, there is no requirement that the search be only for evidence of the crime for which defendant was arrested or that the illegal nature of that evidence be immediately apparent.

2. Sentencing— prior record level—prior conviction remanded for lesser felony

Defendant's motion for appropriate relief was granted and the case was remanded for the sole purpose of resentencing because: (1) at the sentencing hearing, defendant stipulated to having ten prior record points thus making him level IV; (2) one

of the prior convictions contributing to those ten points was a Class C felony for common law robbery which was remanded for resentencing based on a Class H felony for the charge of larceny from the person; and (3) deleting two points would make defendant a prior record level III instead of IV.

Appeal by defendant from an order entered 31 January 2007 by Judge Ronald L. Stephens in Wake County Superior Court. Heard in the Court of Appeals 19 March 2008.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Thomas J. Pitman, for the State.

Duncan B. McCormick for defendant-appellant.

HUNTER, Judge.

Lamont Derrell Carter ("defendant") appeals from the trial court's order denying his motion to suppress entered 31 January 2007. After careful review, we affirm this order. However, we grant defendant's motion for appropriate relief as to his sentence and remand for the sole purpose of resentencing.

I.

The State's evidence presented at trial tends to show the following: On 3 September 2003, Officer J.J. Yardley of the Raleigh Police Department was on patrol near the intersection of Longstreet and Stuart Streets, an area well known for criminal activity, including the sale of drugs. Officer Yardley was in a marked police cruiser, looking for vehicles not coming to a complete stop at the stop signs at the intersection and using a radar gun to enforce the twenty-five miles per hour speed limit.

Around 1:30 a.m., Officer Yardley noticed defendant approaching a stop sign at the intersection in his vehicle. According to Officer Yardley's testimony, defendant then began turning right, which would have taken him toward the police cruiser; when his headlights fell on the police cruiser, however, defendant hesitated and then turned left, taking him away from Officer Yardley.

Officer Yardley then began to follow defendant. While following defendant, Officer Yardley noticed that defendant's registration for a temporary tag was old or worn. Officer Yardley activated his blue lights and pulled defendant over.

Officer Yardley approached the vehicle from the passenger's side and asked defendant for his license and registration, which defendant gave him. Officer Yardley observed that the address on defendant's registration for the temporary tag did not match defendant's address on his driver's license, and that the registration for the temporary tag had expired on 25 August 2003. Officer Yardley also observed several whole pieces of paper lying on the passenger seat of the car and noticed that defendant seemed unusually nervous.

Officer Yardley returned to his police cruiser to call for backup before he initiated a full custody arrest of defendant. Officer Yardley decided to arrest defendant because of the late hour, defendant's suspicious driving appearing to try and avoid the police, his nervousness during the stop and, ultimately, defendant's expired registration tag and the inconsistencies in defendant's addresses. Officer Yardley waited in his cruiser for backup to arrive, at which point he placed defendant under arrest for having an expired tag.

Subsequent to defendant's arrest, Officer Yardley conducted a search of defendant's car, during which he noticed that the papers in the passenger seat had been ripped into smaller pieces. Officer Yardley then began to piece the papers back together, at which point he was able to determine that one of them was a change of address form for an American Express Card belonging to Eric M. White. Officer Yardley questioned defendant about the papers, and defendant replied that they were "personal stuff." Yardley also asked who Eric White was, and defendant stated that he did not know what Yardley was talking about. After defendant was taken to jail, the remaining papers were pieced together and turned over to investigators.

Before trial, defendant made a motion to suppress the evidence obtained from the stop. The trial court denied the motion. On the basis of the papers and other evidence, defendant was charged with being an accessory after the fact to murder, financial identity fraud, and having habitual offender status. Defendant pled guilty to these charges, reserving the right to appeal the order denying his motion to suppress. He was sentenced to 522 months' imprisonment. Defendant now appeals the order denying his motion to suppress.

II.

[1] Defendant's sole argument to this Court on appeal is that the papers seized in the search by Officer Yardley should have been

suppressed because they were obtained by an illegal search and seizure. We disagree.

The scope of this Court's review of a trial court's ruling on a motion to suppress "is strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982); *see also State v. Barden*, 356 N.C. 316, 340, 572 S.E.2d 108, 125 (2002), *cert. denied*, 538 U.S. 1040, 155 L. Ed. 2d 1074 (2003).

The trial court's order denying the motion to suppress contains the following conclusion of law, which clearly identifies three permissible grounds for a warrantless search: "[T]he papers initially seen in [1] plain view and later seized [2] pursuant to the arrest of the Defendant and [3] the search of his vehicle were seized lawfully and constitutionally[.]" This conclusion is based on findings of fact 6 and 9 through 12; however, defendant assigned error only to findings of fact 6 and 10, which read as follows:

> 6. The Defendant seemed nervous, and Yardley saw in plain view on the front seat of the car papers that appeared to have some writing on them and some with what appeared to be identifying information[.]
>
> . . .
>
> 10. Yardley placed the Defendant under arrest, searched his vehicle pursuant to that arrest, secured the vehicle, seized the pieces of paper, and transported the Defendant to the magistrate's office for further processing[.]

Defendant argues at length that the trial court erred in concluding that the papers were lawfully seized pursuant to either the plain view exception or the search incident to arrest exception to the general requirement that a search warrant be obtained before a search may take place. Because we uphold based on the latter, we do not address the former.

The disputed conclusion of law above is based on several findings of fact to which defendant did not assign error. Contained in these findings of fact is the following information: Defendant changed direction when he saw Officer Yardley's police vehicle at the intersection; the area was a "moderately high crime area"; Officer

Yardley began to follow defendant based on "the time of the day, the area, and the movement of the vehicle"; Officer Yardley observed that the defendant's vehicle had an old or worn temporary tag with an obscured expiration date; and Officer Yardley determined that defendant's temporary registration and plate expired on 25 August 2003. Because defendant does not dispute these findings of fact, they are binding on this Court. *See, e.g.*, *State v. Pendleton*, 339 N.C. 379, 389, 451 S.E.2d 274, 280 (1994), *cert. denied*, 515 U.S. 1121, 132 L. Ed. 2d 280 (1995). Officer Yardley testified that he decided to arrest defendant based on these facts as well as defendant's nervousness during their conversation.

> Generally, warrantless searches are presumed to be unreasonable and therefore violative of the Fourth Amendment of the United States Constitution. However, a well-recognized exception to the warrant requirement is a search incident to a lawful arrest. Under this exception, if the search is incident to a lawful arrest, an officer may "conduct a warrantless search of the arrestee's person and the area within the arrestee's immediate control."

State v. Logner, 148 N.C. App. 135, 139, 557 S.E.2d 191, 194 (2001) (citations omitted). The Court in *Logner* went on to note that the recent Supreme Court case of *New York v. Belton*, 453 U.S. 454, 69 L. Ed. 2d 768 (1981), "extended a search incident to a lawful arrest to vehicles[,]" and held that " 'when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.' " *Id.* at 139, 557 S.E.2d at 194-95. This statement has been reaffirmed by this Court and our state's Supreme Court a number of times. *See, e.g.*, *State v. Brooks*, 337 N.C. 132, 144, 446 S.E.2d 579, 587 (1994) ("[i]f officers have probable cause to arrest the occupants, they may search—incident to that arrest—the entire interior of the vehicle, including the glove compartment, the console, or any other compartment, whether locked or unlocked, and all containers found within the interior"); *State v. Wrenn*, 316 N.C. 141, 147, 340 S.E.2d 443, 448 (1986) ("[o]nce the officer made a lawful arrest in this case, he was authorized to search the passenger compartment of the vehicle"); *State v. VanCamp*, 150 N.C. App. 347, 352, 562 S.E.2d 921, 926 (2002) ("[o]ur appellate courts recognize the authority of an officer to search, incident to an arrest, the entire interior of the vehicle, including the glove compartment, console, or other interior compartments"); *State v. Fisher*, 141 N.C. App. 448, 455, 539

S.E.2d 677, 682 (2000) ("[i]t is well established that '[i]f officers have probable cause to arrest the occupants [of a vehicle], they may search—incident to that arrest—the entire interior of the vehicle") (citation omitted; second alteration in original). Defendant does not argue that his arrest was not lawful, and there is no evidence to suggest such a conclusion.

Defendant relies on a series of cases that state an arresting officer may lawfully search only for property connected to the crime with which he is charged. However, none of the cases relate to the search of a defendant within an automobile, and as such are irrelevant. Defendant attempts to graft on to the above-stated rule not only a requirement that the search be only for evidence of the crime for which the defendant was arrested, but also a requirement that the illegal nature of that evidence be immediately apparent. In none of the many cases cited above (*Brooks*, et al.) in which our Courts have considered this type of search has either been made a requirement. Defendant's argument is without merit and is overruled.

III.

[2] On 3 March 2008, defendant filed a motion for appropriate relief regarding his sentence. At his sentencing hearing, defendant stipulated through counsel to having ten prior record points, making him a level IV. One of the prior convictions contributing to those ten points was for common law robbery, a class C felony, in May 2006. That conviction was vacated—see *State v. Carter*, 186 N.C. App. 259, 650 S.E.2d 650 (2007)—on 2 October 2007 by this Court and remanded to Guilford County for resentencing based on a charge of larceny from the person, a class H felony. Defendant argues that he is thus entitled to a new sentencing hearing to determine his prior record level. It appears that this is an appropriate request; deleting two points from his total would give him a prior record level of III, rather than IV. As such, we remand for the sole purpose of resentencing.

IV.

Because the search producing the evidence was lawful, we affirm the trial court's ruling. We grant defendant's motion for appropriate relief and remand for the sole purpose of resentencing.

Affirmed in part; remanded in part.

Judges ELMORE and STROUD concur.

[191 N.C. App. 158 (2008)]

IN THE MATTER OF: J.Z.M., R.O.M., R.D.M., AND D.T.F., MINOR CHILDREN

No. COA06-1242-2

(Filed 17 June 2008)

Termination of Parental Rights— willfully leaving children in foster care without reasonable progress—clear, cogent, and convincing evidence

The trial court did not err by concluding that grounds existed to terminate respondent mother's parental rights because: (1) there was clear, cogent, and convincing evidence to support the trial court's determination under N.C.G.S. § 7B-1111(a)(2) that respondent willfully left the children in foster care for more than twelve months without showing to the satisfaction of the court that reasonable progress under the circumstances had been made; (2) respondent failed to complete the NOVA program to address domestic violence issues; (3) respondent failed to attend therapy sessions on a regular basis as recommended; and (4) respondent did not comply with her case plan and failed to address the issues which led to the removal of her children.

Upon remand by order of the North Carolina Supreme Court, appeal by respondent from order dated 18 April 2006 by Judge Louis A. Trosch in Mecklenburg County District Court. Heard in the Court of Appeals 29 March 2007.

Mecklenburg County Attorney's Office, by Tyrone C. Wade, for petitioner-appellee.

Charlotte Gail Blake for respondent-appellant.

Womble Carlyle Sandridge & Rice, PLLC, by Sarah A. Motley, for the guardian ad litem.

BRYANT, Judge.

This case originally came before this Court on 29 March 2007, by P.A.H.'s[1] (respondent) appeal from an order entered 18 April 2006 terminating her parental rights to the minor children, J.Z.M., R.O.M., and R.D.M. and dismissing the petition to terminate parental rights as to her minor child, D.T.F. On 3 July 2007, this Court filed a non-unanimous opinion reversing the trial court's order because the

1. Initials have been used throughout to protect the identity of the juveniles.

adjudicatory hearing was not held within the time frame established by N.C. Gen. Stat. § 7B-1109(a) and the delay was prejudicial to respondent. *In re J.M., R.M., R.M., D.F.*, 184 N.C. App. 474, 646 S.E.2d 631 (2007). Charlotte-Mecklenburg Youth and Family Services' (YFS/petitioner) appealed to the North Carolina Supreme Court as a matter of right pursuant to N.C. Gen. Stat. § 7A-30(2). The Supreme Court reversed the decision of this Court for the reasons stated in the dissenting opinion which held respondent failed to demonstrate she was prejudiced by the delayed hearing. *In re J.Z.M.*, 362 N.C. 167, 655 S.E.2d 832 (2008). The Supreme Court remanded the case to this Court for consideration of the remaining assignment of error raised by respondent's appeal. *Id.* For the reasons given below, we affirm the order of the trial court.

Facts and Procedural History

Respondent-mother and respondent-father lived together since February of 1994, were married in May of 1997, and were divorced in late 2003. YFS' first referral of inappropriate discipline by respondent-mother against one of her older children in 1994 was substantiated. In 1997, YFS substantiated a second referral for unstable housing and improper supervision of the children. Another referral in late 1998 similarly alleged that the family was homeless. Subsequent referrals were made in 1999, 2000, and 2003 for allegations of domestic violence between the respondent-parents.

R.O.M. was born in 1999, J.Z.M. was born in 2002 and R.D.M. was born in 2003; all were born in Mecklenburg County. All three are children of respondent-mother and respondent-father. On 5 December 2003, YFS removed the three children from the home of their mother. The trial court, on 3 February 2004, adjudicated the children as neglected and dependent juveniles. On 10 January 2005, YFS filed petitions to terminate respondent's parental rights. The hearing to terminate parental rights was continued on 27 October 2005 to 27 January 2006 and again to 7 March 2006. On 7 March 2006, the hearing to terminate parental rights as to J.Z.M., R.O.M., R.D.M., and D.T.F. was held. The order dated 18 April 2006 terminated parental rights as to J.Z.M., R.O.M., and R.D.M. and dismissed the petition as to D.T.F. Respondent-mother appeals.

In the remaining assignment of error before this Court, respondent argues the trial court erred in concluding that grounds existed to terminate her parental rights to the children because the findings of fact were not supported by competent evidence. We disagree.

"On appeal, the standard of review from a trial court's decision in a parental termination case is whether there existed clear, cogent, and convincing evidence of the existence of grounds to terminate respondent's parental rights." *In re Oghenekevebe*, 123 N.C. App. 434, 439, 473 S.E.2d 393, 398 (1996). The trial court's findings in this regard are binding on appeal "even though there may be evidence to the contrary." *In re Williamson*, 91 N.C. App. 668, 674, 373 S.E.2d 317, 320 (1988) (citation omitted). "It is the duty of the trial judge to consider and weigh all of the competent evidence, and to determine the credibility of the witnesses and the weight to be given their testimony." *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000) (citation omitted).

Here, the trial court terminated respondent-mother's parental rights under N.C. Gen. Stat. § 7B-101(15) (neglect) and N.C. Gen. Stat. § 7B-1111(a)(2) (willfully leaving the child in foster care for more than twelve months without showing to the satisfaction of the court that reasonable progress under the circumstances had been made). Because we find clear, cogent and convincing evidence to support the trial court's determination that grounds existed to terminate respondent-mother's parental rights based on willfully leaving the children in foster care for more than twelve months without showing to the satisfaction of the court that reasonable progress under the circumstances had been made. *In re B.S.D.S.*, 163 N.C. App. 540, 546, 594 S.E.2d 89, 93-94 (2004).

North Carolina General Statute § 7B-1111(a)(2) (2007) provides for termination of parental rights if "[t]he parent has willfully left the juvenile in foster care or placement outside the home for more than 12 [twelve] months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile." *Id.* Willfulness under this section means something less than willful abandonment and does not require a finding of fault by the parent. *Oghenekevebe*, 123 N.C. App. at 439, 473 S.E.2d at 398.

Respondent argues the trial court's finding that grounds existed to terminate her parental rights on the basis of willfully leaving the children in foster care for more than twelve months without showing to the satisfaction of the court that reasonable progress under the circumstances had been made was not supported by competent evidence. Respondent argues she made substantial progress in correcting the conditions that led to the removal of her children. The trial court made the following relevant findings:

> 22. The respondent mother did not complete parenting education as required by her case plan. . . .
>
> . . .
>
> 25. The respondent mother has not complied with the case plan or resolved any of the issues which led to placement of these children in custody. The respondent mother has not demonstrated the ability to provide consistent care and supervision for any of her children. After the respondent mother was discharged from the NOVA program, she contacted them and they consistently told her to go to individual therapy. She did not do that.

According to the mediation plan entered into on 28 January 2004 by respondent and YFS, respondent was required to complete a F.I.R.S.T. Assessment, complete a parenting capacity evaluation and follow through on all recommendations, and attend and participate in medical and therapeutic appointments for her children. Respondent was also required to complete NOVA, a domestic violence program, and complete an assessment at Behavioral Health. Prior to the 28 January mediation plan, respondent had entered the NOVA program, but was terminated for lack of attendance. Respondent subsequently reentered as part of the mediation agreement. Although respondent attended 25 sessions of NOVA, she was terminated prior to phase two of the program because she did not disclose to the program administrators that she was pregnant. During the time respondent was enrolled in NOVA she actively hid her pregnancy from the program administrators as well as her YFS case worker. Kathy Broome (Ms. Broome), Senior Case Coordinator for the NOVA program, testified respondent was terminated because of her dishonesty. In addition to not completing the NOVA program, respondent failed to attend therapy sessions on a regular basis as recommended. The trial court also made the following unchallenged finding:[2]

> 24. Respondent mother's testimony is not credible. She testified under direct examination that she had been working with a therapist and attending appointments monthly for the last year. However, on cross examination, respondent mother acknowledged she last met with her therapist two months ago and that her next appointment is scheduled for March 21, 2006. [Respondent] testified she had only seen her therapist seven

2. *See Schloss v. Jamison*, 258 N.C. 271, 275, 128 S.E.2d 590, 593 (1962) ("Where no exceptions have been taken to the findings of fact, such findings are presumed to be supported by competent evidence and are binding on appeal.").

> times since the first date in 2003. No other evidence was offered to support her claims and her testimony is inconsistent. The respondent mother has not attended therapy on a regular basis.

The trial court's findings are supported by clear, cogent, and convincing evidence that respondent did not comply with her case plan and failed to address the issues which led to the removal of the children.

Respondent also argues there was no evidence to support the trial court's finding that she continued to have a relationship with Walter M., her ex-husband. As a condition of the mediation plan, respondent was required to complete the NOVA program to address domestic violence issues—one of the reasons the children were removed from the home. Respondent failed to complete the program because she was dishonest about her relationship with Walter M. as well as her pregnancy. Although respondent testified she had no contact with Walter M., Ms. Broome testified that respondent was not honest about her relationship with Walter M. during her time in the NOVA program. The trial court is the trier of fact and determines the credibility of the witnesses. *Gleisner*, 141 N.C. App. at 480, 539 S.E.2d at 365. Although conflicting evidence was presented regarding respondent's relationship with Walter M., there is clear, cogent and convincing evidence to support the trial court's findings. Further, the trial court's conclusion that grounds existed to terminate respondent's parental rights on the basis of willfully leaving the children in foster care for more than twelve months without showing to the satisfaction of the court that reasonable progress under the circumstances had been made was supported by its findings. Therefore, this assignment of error is overruled.

Except as modified herein, the decision of the Supreme Court adopting the dissenting opinion and reversing the majority opinion of this Court filed on 3 July 2007 remains in full force and effect.

AFFIRMED.

Judges STEELMAN and ARROWOOD concur.

MAJESTIC CINEMA HOLDINGS, LLC, PLAINTIFF v. HIGH POINT CINEMA, LLC, D/B/A CONSOLIDATED THEATRES, DEFENDANT

No. COA08-17

(Filed 17 June 2008)

1. Landlord and Tenant— ejectment—conditional obligation to pay rent—summary judgment for tenant

There was no genuine issue of fact in a summary ejectment action, and summary judgment was properly granted for defendant, where the landlord argued that the meaning of a phrase relieving the tenant of the obligation to pay rent under certain circumstances was ambiguous. The meaning of the contract was clear and only one reasonable interpretation exists; moreover, the lease did not imply that rent was to be accrued and paid later, when the circumstances changed.

2. Landlord and Tenant— ejectment—lease agreement—conditional obligation to pay rent—not liquidated damages

There was no genuine issue of fact in an ejectment action as to whether a lease agreement provided for liquidated damages or an unenforceable penalty. While the lease gave the tenant the right to abstain from making rent payments under certain conditions, there is nothing to indicate that the provision was intended as a recovery for breach of contract and does not describe a liquidated damage.

Appeal by plaintiff from judgment entered 2 August 2007 by Judge L. Todd Burke in Guilford County Superior Court. Heard in the Court of Appeals 22 May 2008.

Craige Brawley Liipfert & Walker, LLP, by Susan J. Ryan, for plaintiff-appellant.

Kennedy Covington Lobdell & Hickman, by John H. Capitano, for defendant-appellee.

BRYANT, Judge.

Plaintiff Majestic Cinema Holdings, LLC, (landlord) appeals from a Guilford County Superior Court order granting defendant High Point Cinema, LLC, (tenant) summary judgment, dismissing landlord's complaint, and determining that tenant's counterclaim against landlord was moot.

In December 2003, landlord and tenant entered into a lease agreement wherein tenant agreed to rent a portion of the landlord's shopping center in order to operate a movie theatre. However, section fifty-one of the lease agreement provided "[t]enant shall have no obligation to pay any Rent" until several provisions are met. One such provision states

> (ii) in the event at least fifteen thousand (15,000) square feet of the Adjacent Retail Space is not open for business within 240 days after the Landlord Construction Date, Tenant shall have no obligation to pay any Rent hereunder after the expiration period of said 240 day period until such time as at least 15,000 square feet of the Adjacent Retail Space is open for business.

The "Landlord Construction Date" referenced in this provision is defined as "the date upon which Tenant . . . provide[s] Landlord access to the Adjacent Retail Space sufficient to commence construction activities (as evidenced by written notice from Tenant to Landlord . . .)."

On 16 August 2004, as evidence of the "Landlord Construction Date," tenant provided landlord written notice of access to adjacent retail space to commence construction. Thus, tenant initiated the 240 day window during which landlord must have opened for business 15,000 square feet of adjacent retail space or "[t]enant shall have no obligation to pay any Rent." On 13 April 2005, the 240 day window closed, but landlord had yet to open 15,000 square feet of adjacent retail space for business. Pursuant to the terms of the lease agreement, tenant ceased paying rent.

On 28 January 2006, landlord opened 15,000 square feet of adjacent retail space for business, and tenant resumed making rent payments. But, landlord also demanded the rent tenant withheld since 13 April 2005. Landlord argued the unpaid rent was due because section 51 of the lease agreement was unenforceable. Tenant refused payment. On 31 May 2006, landlord filed a complaint seeking both a declaratory judgment with regard to whether the provision in the lease agreement in which tenant had "no obligation to pay any Rent" was an unenforceable penalty and a damage award for tenant's breach of contract. Tenant answered the complaint and counterclaimed that tenant was entitled to recover actual and consequential damages for landlord's breach of contract.

On 2 July 2007, tenant filed a motion for summary judgment, and on 2 August 2007, the trial court entered an order for summary judgment wherein it found that there existed no genuine issue of material fact and concluded that tenant was entitled to judgment as a matter of law. The trial court granted tenant's motion for summary judgment, dismissed landlord's complaint, and determined that tenant's counterclaim was moot. Landlord appealed.

On appeal, landlord questions whether the trial court's grant of summary judgment was proper. Landlord argues there are genuine issues of material fact as to (I) whether the parties intended for section 51 to provide tenant with rent abatement and (II) whether rent abatement is a valid liquidated damages provision or an unenforceable penalty.

[1] Landlord first questions whether a genuine issue of material fact exists as to the meaning of the phrase "[t]enant shall have no obligation to pay any rent." Landlord argues the phrase is ambiguous and thus is a question for a trier of fact. We disagree.

Summary judgment when sought "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. R. Civ. P. 56(c) (2007). "Summary judgment is improper if any material fact is subject to dispute." *Thompson v. Bradley*, 142 N.C. App. 636, 640, 544 S.E.2d 258, 261 (2001) (citation omitted). And, "[i]n determining the grounds for summary judgment, the trial court must view the evidence in the light most favorable to the non-movant." *Vares v. Vares*, 154 N.C. App. 83, 86, 571 S.E.2d 612, 615 (2002) (citation omitted). "On appeal, an order allowing summary judgment is reviewed de novo." *Howerton v. Arai Helmut, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004) (citation omitted).

"A contract that is plain and unambiguous on its face will be interpreted by the court as a matter of law. When an agreement is ambiguous and the intention of the parties is unclear, however, interpretation of the contract is for the jury." *Schenkel & Shultz, Inc. v. Hermon F. Fox & Assocs., P.C.*, 362 N.C. 269, 273, 658 S.E.2d 918, 921 (2008) (internal citations omitted). "Stated differently, a contract is ambiguous when the writing leaves it uncertain as to what the agreement was . . . ." *Salvaggio v. New Breed Transfer Corp.*, 150 N.C. App. 688, 690, 564 S.E.2d 641, 643 (2002) (citation and internal quotations

omitted). "[I]f the meaning of the [contract] is clear and only one reasonable interpretation exists, the courts must enforce the contract as written; they may not, under the guise of construing an ambiguous term, rewrite the contract or impose liabilities on the parties not bargained for and found therein." *Duke Energy Corp. v. Malcolm*, 178 N.C. App. 62, 65, 630 S.E.2d 693, 695 (2006) (citation omitted).

Here, the lease agreement in Section 51 provides several criteria to be met by landlord with the added provision that if landlord fails to meet the criteria, for some period of time "[t]enant shall have no obligation to pay any Rent." Under section 51, "[t]enant shall have no obligation to pay any [r]ent hereunder after the expiration period of said 240 day period until such time as at least 15,000 square feet of the Adjacent Retail Space is open for business."

Landlord argues the portion of the provision stating "no obligation to pay any Rent hereunder after the expiration period of said 240 day period until such time as at least 15,000 square feet of the Adjacent Retail Space is open for business," can be interpreted to mean an accrual of rent that is to be paid after landlord becomes compliant and opens for business 15,000 square feet of adjacent retail space. However, such an interpretation would require specific language regarding the accrual of rent payments. The current lease agreement contains no such language. Therefore, we cannot say landlord's interpretation of the contract is reasonable.

We hold the meaning of the contract is clear and only one reasonable interpretation exists: Where 15,000 square feet of adjacent retail space was not open for business within 240 days of the Landlord Construction Date, tenant had no obligation to pay rent until the landlord opened the adjacent retail space for business. This does not imply that rent was to be accrued and paid later. Accordingly, we overrule landlord's assignment of error.

II

[2] Next, landlord questions whether there remains a genuine issue of material fact as to whether the lease agreement provides for liquidated damages or an unenforceable penalty. Landlord argues the section which requires the landlord to open 15,000 square feet of adjacent retail space or forego rent from tenant amounts to an unenforceable penalty. We disagree.

Again, we review the trial court's grant of summary judgment based on its interpretation of the lease agreement de novo. *Builders*

Mut. Ins. Co. v. North Main Constr., Ltd., 361 N.C. 85, 88, 637 S.E.2d 528, 530 (2006) (citations omitted).

"It is the simple law of contracts that as a man consents to bind himself, so shall he be bound." *Trotino v. Goodman*, 225 N.C. 406, 414, 35 S.E.2d 277, 283 (1945) (citations omitted). "Since the right of private contract is no small part of the liberty of the citizen, the usual and most important function of courts is to enforce and maintain contracts rather than to enable parties to escape their obligations[.]" *Calhoun v. WHA Med Clinic, PLLC*, 178 N.C. App. 585, 600, 632 S.E.2d 563, 573 (2006) (citation omitted). "[P]ublic policy requires the enforcement of contracts deliberately made which do not clearly contravene some positive law or rule of public morals." *Id.* And, "[i]t is well established that a sum specified in the contract as the measure of recovery in the event of a breach will be enforced if the court determines it to be a provision for liquidated damages, but not enforced if it is determined to be a penalty." *Brenner v. Little Red Schoolhouse, Ltd.*, 302 N.C. 207, 214, 274 S.E.2d 206, 211 (1981) (citation omitted).

> Liquidated damages are a sum which a party to a contract agrees to pay or a deposit which he agrees to forfeit, if he breaks some promise, and which, having been arrived at by a good-faith effort to estimate in advance the actual damage which would probably ensue from the breach, are legally recoverable or retainable . . . if the breach occurs. A penalty is a sum which a party similarly agrees to pay or forfeit . . . but which is fixed, not as a pre-estimate of probable actual damages, but as a punishment, the threat of which is designed to prevent the breach, or as security . . . to insure that the person injured shall collect his actual damages.

Kinston v. Suddreth, 266 N.C. 618, 620, 146 S.E.2d 660, 662 (1966) (citation and internal quotations omitted). In determining whether a fixed sum, described by the contract as a measure of recovery in the event of breach, is a liquidated damage or perhaps an unenforceable penalty, this Court will consider "the nature of the [c]ontract, the intention of the parties, [and] the sophistication of the parties . . . ." *E. Carolina Internal Med., P.A. v. Faidas*, 149 N.C. App. 940, 947, 564 S.E.2d 53, 57 (2002) (citation omitted).

Here, under section 51, the lease agreement states that

> (ii) in the event at least fifteen thousand (15,000) square feet of the Adjacent Retail Space is not open for business within 240

> days after the Landlord Construction Date, Tenant shall have no obligation to pay any Rent hereunder after the expiration period of said 240 day period until such time as at least 15,000 square feet of the Adjacent Retail Space is open for business.

While the provision provides tenant with the right to abstain from making rent payments under certain conditions, there is nothing to indicate the provision was intended as a recovery for breach of contract. Therefore, the provision does not describe a liquidated damage, and we need not consider if it amounts to an unenforceable penalty. Accordingly, landlord's assignment of error is overruled.

Affirmed.

Judges McCULLOUGH and STEPHENS concur.

ROBERT BAXTER, EMPLOYEE, PLAINTIFF v. DANNY NICHOLSON, INC., EMPLOYER, SELF-INSURED (KEY RISK MANAGEMENT SERVICES, SERVICING AGENT), DEFENDANT

No. COA07-865

(Filed 17 June 2008)

Workers' Compensation— evenly divided panel—hold-over commissioner

An Industrial Commission decision was remanded where one of the commissioners had properly served in a hold-over capacity since the expiration of his term, but the Governor issued a letter informing him that his successor had been appointed on the same day he signed this opinion and award. He was not a qualified officer de jure or de facto, his concurrence in the opinion was a nullity, and there was no majority on the evenly divided panel. The Industrial Commission acts by a majority of its qualified members.

Appeal by defendant from Opinion and Award entered 5 February 2007 and Order denying defendant's Motion to Vacate and for Reconsideration entered 13 March 2007 by the North Carolina Industrial Commission. Heard in the Court of Appeals 16 January 2008.

William D. Acton, Jr. for plaintiff-appellee.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Shelly W. Coleman, for defendant-appellant.

BRYANT, Judge.

Defendant Danny Nicholson, Inc. (employer) appeals from an Opinion and Award entered 5 February 2007, which found Plaintiff Robert Baxter (employee) totally disabled, reinstated the employee's temporary total disability benefits, and awarded employee attorney's fees. Additionally, employer appeals from an order denying it's motion to vacate and reconsider the 5 February 2007 Opinion and Award. We vacate the Opinion and Award and remand the matter to the Industrial Commission.

This case arises from a dispute between employee and employer as to employer's obligation to continue total disability benefit payments to employee after employee engaged in a trial return to work. A hearing on the matter was conducted before Deputy Commissioner Ronnie Rowell of the North Carolina Industrial Commission. Subsequently, the deputy commissioner entered an Opinion and Award which awarded employee compensation benefits, ordered employer to pay all medical expenses incurred or to be incurred by employee for so long as such treatment may reasonably be required, pay employee ten percent on the amounts owed him for unpaid past disability benefits and underpaid past disability benefits, and pay a reasonable attorney's fee of twenty-five percent (25%) of the compensation and penalties due employee. Employer sought review before the Full Commission.

On 14 November 2006, a Full Commission panel (hereafter "the Commission"), consisting of Commissioners Bernadine Ballance, Thomas Bolch, and Chairman Buck Lattimore, reviewed the competent evidence of record, and on 2 February 2007, Commissioner Ballance, with Commissioner Bolch concurring, signed an Opinion and Award which modified and affirmed the Opinion and Award of the deputy commissioner. Commissioner Lattimore dissented, resulting in a two-to-one split. That same day, the North Carolina Office of the Governor issued a letter informing Commissioner Bolch his term as Commissioner had expired and his successor had been appointed. On 5 February 2007, the Commission filed its Opinion and Award. A few days later, on 9 February 2007, Commissioner Bolch's successor took the oath of office.

Employer moved to vacate the Full Commission's Opinion and Award on the grounds that at the time it was filed Commissioner Bolch was not a qualified commissioner; thus, considering the split opinion, the Commission had no majority vote. The Commission denied the motion. Employer timely filed a notice of appeal to this Court from both the Opinion and Award and the denial of the motion to vacate the Opinion and Award.

On appeal, employer raises four issues: (I) whether the Commission erred by finding and concluding employee met his burden of proving ongoing disability; (II) whether the Commission erred by finding and concluding employer improperly terminated employee's benefits; (III) whether the Commission unjustifiably sanctioned employer; and (IV) whether the Opinion and Award of the Full Commission is void. We address only the last issue.

Employer argues Commissioner Bolch, who voted in the majority of the two-to-one split, was not a qualified commissioner at the time the Opinion and Award was filed because his term as commissioner had ended and his successor had been appointed. Employer argues that as a result, the Commission lacked the majority needed to act. We agree.

The Full Commission shall review an award, heard and determined by a deputy commissioner of the North Carolina Industrial Commission, as a three-member panel. N.C. Gen. Stat. § 97-85 (2007). "The North Carolina Industrial Commission . . . acts by a majority of its qualified members at the time decision is made." *Gant v. Crouch*, 243 N.C. 604, 607, 91 S.E.2d 705, 707 (1956). "Thus, a vote of two members constitutes a majority of the Commission empowered to act for the three-member Commission." *Estes v. North Carolina State Univ.*, 117 N.C. App. 126, 128, 449 S.E.2d 762, 764 (1994).

Our Court has previously held, by analogy to the North Carolina Rules of Civil Procedure, Rule 58 (stating "a judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court"), that where a commissioner who concurred in the majority of a split decision left office prior to the filing of the Opinion and Award no majority existed at the time of the filing as a matter of law. *See Coppley v. PPG Indus., Inc.*, 142 N.C. App. 196, 198-99, 541 S.E.2d 743, 744 (2001). Thus, the dispositive issue is whether Commissioner Bolch was, at the time of filing, qualified to act on behalf of the office of Commissioner of the North Carolina Industrial Commission.

Our North Carolina State Constitution provides that "[i]n the absence of any contrary provision, all officers in this State, whether appointed or elected, shall hold their positions until other appointments are made or, if the offices are elective, until their successors are chosen and qualified." N.C. Const. art. VI § 10; *see also*, N.C. Gen. Stat. § 128-6 (2007) ("Any person who shall, by the proper authority, be admitted and sworn into any office, shall be held, deemed, and taken, by force of such admission, to be rightfully in such office until, by judicial sentence, upon a proper proceeding, he shall be ousted therefrom, or his admission thereto be, in due course of law, declared void."). Under North Carolina General Statute section 128-7, "[a]ll officers shall continue in their respective offices until their successors are elected or appointed, and duly qualified." N.C. Gen. Stat. § 128-7 (2007). Our North Carolina Supreme Court has held "[t]he appointment holds till the proper appointing powers concur in selecting his successor, and then expires." *Salisbury v. Board of Directors*, 167 N.C. 223, 228, 83 S.E. 354, 355 (1914) (citation omitted).

These hold-over provisions are in accord with "a sound public policy which is against vacancies in public offices and requir[es] that there should always be some one in position to rightfully perform these important official duties for the benefit of the public and of persons having especial interest therein." *Markham v. Simpson*, 175 N.C. 135, 137, 95 S.E. 106, 107 (1918). Consistent with that policy, our appellate courts have long acknowledged distinctions between the authority of de jure and de facto officers, as opposed to usurpers, with regard to third parties and the public.

"A de jure officer is one who is regularly and lawfully elected or appointed and inducted into office and exercises the duties as his right." *People ex rel. Norfleet v. Staton*, 73 N.C. 546, 550 (1875). In contrast, a de facto officer is "one who goes in under color of authority . . . ." *Id.*

> An officer de facto is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid, so far as they involve the interests of the public and third persons, where the duties of the office were exercised (1) without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be; (2) under color of a known and valid appointment or election, but where the offi-

> cer failed to conform to some precedent requirement or condition, as to take an oath, give a bond, or the like; (3) under color of a known election or appointment, void because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power or defect being unknown to the public; (4) under color of an election or appointment by or pursuant to a public unconstitutional law before the same is adjudged to be such.

State v. Lewis, 107 N.C. 967, 971, 12 S.E. 457, 458 (1890). "[A]n officer de facto . . . although irregular, . . . is not a mere usurper . . . ." *Commissioners of Trenton v. McDaniel*, 52 N.C. 107, 113 (1859) (*per curiam*). "[T]here is no difference between the acts of de facto and de jure officers so far as the public and third persons are concerned." *Staton*, 73 N.C. at 551. "A usurper is one who takes possession without authority. His acts are utterly void, unless he continues to act so long a time or under such circumstances as to afford presumption of his right to act." *Van Amringe v. Taylor*, 108 N.C. 201, 12 S.E. 1007 (1891); *see also Whitehead v. Pittman*, 165 N.C. 89, 90, 80 S.E. 976, ––– (1914) (after vacating his office, the commissioner's act of voting for the commission was not that of "one holding an office under color of title, and therefore a de facto officer . . . [h]e was a mere usurper, whose acts were utterly void.").

Here, Commissioner Bolch served as a commissioner in a hold-over capacity since 30 June 2004, when his commission expired. Pursuant to article IV, section 10 of our State Constitution and N.C.G.S. §§ 128-6 & 7, a hold-over provision allowed Commissioner Bolch to properly serve until he was reappointed or another person was appointed. *See* N.C. Const. art. IV § 10; N.C.G.S. § 128-6 & 7 (2007). Commissioner Bolch signed the Opinion and Award 2 February 2007, concurring in the majority, thereby creating a split decision. The same day, the Governor of the State of North Carolina issued a letter informing Commissioner Bolch his term as commissioner had ended and his successor had been appointed, effective immediately. The Opinion and Award was filed 5 February 2007.

On 5 February 2007, when the Opinion and Award was filed, Commissioner Bolch was not an officer de jure: his term as commissioner had ended and his successor had been appointed. Additionally, employee presents no argument, and upon our review of the record we see no indication, Commissioner Bolch had colorable title to the office of Commissioner of the North Carolina Industrial Commission

on 5 February 2007. As a result, we cannot hold the concurrence of Bolch in the Opinion and Award filed 5 February 2007 to be the concurrence of an officer de facto. Therefore, because Commissioner Bolch's appointment was void effective 2 February 2007, and because his concurrence in the opinion filed 5 February 2007 was not the act of a qualified officer—neither de jure nor de facto—we hold the concurrence a nullity.

As a result, the panel of the Industrial Commission was evenly split and no majority existed. *See Coppley*, 142 N.C. App. 196, 541 S.E.2d 743. For the reasons stated, we vacate the Opinion and Award and remand the case to the Industrial Commission.

Vacated and remanded.

Judges HUNTER and JACKSON concur.

BRANCH BANKING AND TRUST COMPANY, PLAINTIFF v. MARY T. MORRISON, LOUISE K. THOMAS, JAMES A. THOMAS, JR., MARY K. THOMAS, WILBERT STEWART, LILLIE F. STEWART, HARRY L. SOUTHERLAND, AND SHANNON SOUTHERLAND, DEFENDANTS

No. COA08-12

(Filed 17 June 2008)

Guaranty— part of debt transaction—consideration

Guaranty agreements were supported by consideration where they were executed as a part of the transaction which created the guaranteed debt. The extension of credit by the obligee under the guaranty contract supplies the consideration for both the principal debt and the guaranty.

Appeal by defendants James A. Thomas, Jr., Mary K. Thomas, Wilbert Stewart and Lillie F. Stewart from order entered 1 October 2007 by Judge Richard T. Brown in Hoke County Superior Court. Heard in the Court of Appeals 22 May 2008.

Helms Mulliss & Wicker, P.L.L.C., by J. Trevor Johnston, for plaintiff-appellee.

North Raleigh Law Group, by Robert L. Morton, for defendant-appellants James A. Thomas, Jr., Mary K. Thomas, Wilbert Stewart, and Lillie F. Stewart.

No brief filed by defendants Mary T. Morrison, Louise K. Thomas, Harry J. Southerland or Shannon Southerland.

TYSON, Judge.

James A. Thomas, Jr., Mary K. Thomas, Wilbert Stewart, and Lillie F. Stewart (collectively, "defendants") appeal from order entered, which granted Branch Banking and Trust Company's ("BB&T") motion for summary judgment. We affirm.

I. Background

On 5 March 2007, BB&T filed a complaint and alleged that defendants and four other individuals had "failed and refused to pay their indebtedness due under . . . [g]uaranty [a]greements." BB&T requested, *inter alia*: (1) "[t]hat it have and recover of the [d]efendants, jointly and severally, the sum of $530,407.98 in principal, plus $40,123.43 in interest, plus $7,373.32 in late fees, plus interest from June 23, 2006 until paid in full[]" and (2) "[t]hat it have and recover of the [d]efendants its attorneys' fees as provided for in the Guaranty Agreements and Section 6-21.2 of the General Statutes of North Carolina."

BB&T's complaint asserted: (1) Six Star Economic Development Group, LLC ("Six Star") executed a promissory note in favor of BB&T in an amount of $1,700,000.00 on or about 6 December 2002; (2) Six Star later defaulted under the terms of the promissory note; and (3) defendants and four other individuals had guaranteed the payment of the promissory note pursuant to guaranty agreements.

On 15 May 2007, defendants filed their "answer/motion to dismiss/cross-claim." Defendants' motion to dismiss alleged BB&T had failed to include the Small Business Administration, a co-signor/guarantor of the promissory note and a necessary and proper party to the action. Defendants' cross-claim alleged a claim for contribution/indemnification against Mary Morrison ("Morrison") and Harry Southerland ("Southerland"). Defendants' cross-claim asserted Morrison and Southerland, along with other members of Six Star, had agreed to "indemnify and hold harmless defendants from . . . any and all loss, damage, claim and/or liability . . . arising

from any claim . . . made against any of the defendants by virtue of their involvement . . . with Six Star . . . ."

On 21 May 2007, BB&T moved for summary judgment. On 27 September 2007, defendants filed a "motion to dismiss pursuant to Rule 12(b)(6)/affirmative defense[.]" Defendants alleged the guaranty agreements were void due to lack of consideration and "assert[ed] an [a]ffirmative [d]efense that the [g]uaranty [a]greements . . . lack[ed] consideration." On 1 October 2007, the trial court ruled "that there is no genuine issue as to any material fact and that [BB&T] is entitled to judgment in its favor as a matter of law." Defendants appeal.

II. Issue

Defendants argue the trial court erred when it granted BB&T's motion for summary judgment.

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*, ––– N.C. App. –––, –––, 649 S.E.2d 658, 661 (2007) (internal citation and quotation omitted).

IV. Motion for Summary Judgment

Defendants argue the trial court erred when it granted BB&T's motion for summary judgment because "there were genuine issues of material fact as to whether the [p]romissory [n]ote constituted a preexisting debt and whether the [g]uarant[y] [agreements] were want [sic] of consideration." We disagree.

"It is well-settled law in this State that in order for a contract to be enforceable it must be supported by consideration. A mere

promise, without more, is unenforceable." *Investment Properties v. Norburn*, 281 N.C. 191, 195, 188 S.E.2d 342, 345 (1972) (citation omitted). "It is unnecessary that the consideration be full or adequate. Any legal consideration will be sufficient to support the guaranty." *Gillespie v. DeWitt*, 53 N.C. App. 252, 259, 280 S.E.2d 736, 742 (citing *Cowan v. Roberts*, 134 N.C. 415, 46 S.E. 979 (1904)), *cert. denied*, 304 N.C. 390, 285 S.E.2d 832 (1981).

> When the guaranty contract is shown to have been executed as a part of a transaction which created the guaranteed debt, it is not essential to recovery on the guaranty that the guaranty shall have been supported by consideration other than the principal debt. The extension of credit by the obligee under the guaranty contract supplies consideration for both the principal debt and the guaranty. . . . When the guaranty is independent of the transaction in which the principal debt was created, it should be supported by consideration which is independent of the principal debt.

Id. at 260, 280 S.E.2d at 742 (citing 38 Am. Jur. 2d *Guaranty* §§ 44, 45 (1968)).

> Although the guaranty promise may have been made at a time subsequent to the creation of the principal obligation, the guaranty promise is founded upon a consideration if the promise was given as the result of previous arrangement, *the principal obligation having been induced by* or created on the faith of the guaranty.

38 Am. Jur. 2d *Guaranty* § 43 (1999) (citation omitted) (emphasis supplied).

Here, the record is clear that the guaranty agreements were "executed as a part of [the] transaction which created the guaranteed debt[.]" *Gillespie*, 53 N.C. App. at 260, 280 S.E.2d at 742. Undisputed evidence in the record shows Six Star executed the promissory note on 6 December 2002 and defendants executed the guaranty agreements between 9 December and 10 December 2002. The guaranty agreements executed by defendants expressly state they served as "an inducement to [BB&T] to extend credit to and to otherwise deal with Six Star" and "applie[d] to all indebtedness of [Six Star] evidenced by its promissory note . . . dated 12-6-02 (including all extensions, renewals, and modifications thereof) in the principal amount of $1,700,000.00."

Based on our Supreme Court's holding in *Cowan* and this Court's reasoning in *Gillespie*, we hold no genuine issues of material fact exist of whether the promissory note constituted a pre-existing debt and whether the guaranty agreements lacked consideration. *Cowan*, 134 N.C. at 421, 46 S.E. at 981; *Gillespie*, 53 N.C. App. at 260, 280 S.E.2d at 742. The guaranty agreements signed by defendants were "part of [the] transaction which created the guaranteed debt[.]" *Gillespie*, 53 N.C. App. at 260, 280 S.E.2d at 742. The trial court properly granted summary judgment for BB&T. This assignment of error is overruled.

V. Conclusion

Viewed in the light most favorable to defendants, no genuine issues of material fact exist and BB&T is entitled to judgment as a matter of law. *Summey*, 357 N.C. at 496, 586 S.E.2d at 249. The trial court correctly granted BB&T's motion for summary judgment and its order is affirmed.

Affirmed.

Judges BRYANT and STEPHENS concur.

PRICE AND PRICE MECHANICAL OF N.C., INC., A NORTH CAROLINA CORPORATION, PLAINTIFF v. THE MIKEN CORPORATION, DEFENDANT

No. COA07-932

(Filed 17 June 2008)

Contracts— forum selection clause—improvement to N.C. real property—void

The trial court erred by granting defendant's motion to dismiss for improper venue an action arising from cancellation of a contract for work on a retail outlet in Asheville, N.C. The contract contained a clause indicating that any action was to be brought in Florida, but, under N.C.G.S. § 22B-2, forum selection clauses contained within contracts involving improvements to real property located in North Carolina are void as a matter of public policy.

Appeal by plaintiff from an order entered 30 April 2007 by Judge Mark E. Powell in Buncombe County Superior Court. Heard in the Court of Appeals 6 February 2008.

Ferikes & Bleynat, PLLC, by Edward L. Bleynat, Jr. and Mary March Exum, for plaintiff-appellant.

Roberts & Stevens, P.A., by Ann-Patton Nelson and Wyatt S. Stevens, for defendant-appellee.

HUNTER, Judge.

This cause of action arose after Price and Price Mechanical of N.C., Inc. ("plaintiff") and The Miken Corporation ("defendant") entered into a contract for the improvement of real property in the state of North Carolina. The contract contained choice of law and forum selection clauses. Plaintiff sued defendant alleging breach of contract. Plaintiff appeals from an order dismissing its complaint for improper venue pursuant to Rule (12)(b)(3) of the North Carolina Rules of Civil Procedure. After careful consideration, we reverse.

Plaintiff is a mechanical subcontractor with an office and principal place of business in Buncombe County, North Carolina. Defendant is a Florida Corporation with its principal place of business in Tampa, Florida. Defendant is in the business of building shopping centers and other retail infrastructure.

On or about 21 October 2003, plaintiff, as a subcontractor, provided defendant with a proposal to perform mechanical and HVAC work during the construction of the "Ross Dress for Less" retail outlet in Overlook Village shopping center, Asheville, North Carolina. On or about 7 November 2003, plaintiff received a faxed subcontract work offer from defendant acknowledging the agreed-upon price and authorization for plaintiff to schedule work and order materials.

Defendant's president signed on the line provided for his signature under the heading "Subcontract Work Order" on 7 November 2003. On 14 November 2003, the vice president and project manager of plaintiff also signed the document.

Thereafter, defendant mailed a document titled "The Miken Corporation Contractor/Subcontractor Agreement" ("the agreement") to plaintiff. Paragraph 24 of the document reads: "GOVERNING LAW: This Agreement shall be interpreted under and its performance governed by the laws of the State of Florida. Any suit or action relating to or arising out of the Agreement shall be brought in the appropriate Florida State Court in and for Hillsborough County, Florida."

Four days after plaintiff's officers had signed the document, defendant's president sent a letter to plaintiff's project manager cancelling the agreement between the parties for the work order. Plaintiff then filed a complaint against defendant alleging breach of contract and seeking recovery in excess of $10,000.00. On 30 April 2007, the trial court granted defendant's motion to dismiss for improper venue. *See* N.C. Gen. Stat. § 1A-1, Rule 12(b)(3) (2007).

The issue in this case is whether N.C. Gen. Stat. § 22B-2 (2007) voids the contract's provisions providing for any suit regarding the contract to be brought in the State of Florida and to be interpreted under the laws of Florida. We hold that those provisions are void.

Questions regarding statutory interpretation are reviewed *de novo* under an error of law standard. *Best v. N.C. State Board of Dental Examiners*, 108 N.C. App. 158, 161, 423 S.E.2d 330, 332 (1992), *disc. review denied*, 333 N.C. 461, 428 S.E.2d 184 (1993). In addition, questions of contract interpretation are reviewed as a matter of law and the standard of review is *de novo*. *Harris v. Ray Johnson Constr. Co.*, 139 N.C. App. 827, 829, 534 S.E.2d 653, 654 (2000).

I.

Plaintiff argues that the trial court erred by dismissing plaintiff's complaint because defendant's choice of law and forum selections clauses are invalid. We agree.

N.C. Gen. Stat. § 22B-2 addresses how choice of law and choice of forum provisions are to be regarded when the subject matter of the contract involves improvement to realty located in North Carolina. N.C. Gen. Stat. § 22B-2 in pertinent part states:

> A provision in any contract, subcontract, or purchase order *for the improvement of real property in this State, or the providing of materials therefor, is void and against public policy* if it makes the contract, subcontract, or purchase order subject to the laws of another state, or provides that the exclusive forum for any litigation, arbitration, or other dispute resolution process is located in another state.

Id. (emphasis added).

Defendant, however, relies on case law interpreting N.C. Gen. Stat. § 22B-3 (2007). This statute contains the following language:

> *Except as otherwise provided in this section*, any provision in a contract entered into in North Carolina that requires the

> prosecution of any action or the arbitration of any dispute that arises from the contract to be instituted or heard in another state is against public policy and is void and unenforceable. This prohibition shall not apply to non-consumer loan transactions or to any action or arbitration of a dispute that is commenced in another state pursuant to a forum selection provision with the consent of all parties to the contract at the time that the dispute arises.

Id. (emphasis added).

Cases interpreting N.C. Gen. Stat. § 22B-3 have examined the place of execution of the contract to decide whether the statute applies. *See Hickox v. R&G Grp. Int'l, Inc.*, 161 N.C. App. 510, 513, 588 S.E.2d 566, 568-69 (2003). Section 22B-2, however, provides that the place of execution is irrelevant to contract interpretation when real property located in the state of North Carolina is the issue of the contract and the place of performance is of paramount concern. While both sections relate to contract interpretation, section 22B-2 applies in the instant case because it deals specifically with contracts relating to real property in North Carolina. *See Electric Service v. City of Rocky Mount*, 20 N.C. App. 347, 350, 201 S.E.2d 508, 510 (1974) (where two statutes could apply, the more specific statute is viewed as an exception to the general statute).

In this case, real property located in North Carolina is the subject matter of the contract. Specifically, the contract at issue pertains to: (1) the improvement of real property; (2) which is located in North Carolina; and (3) plaintiff contracted to provide labor and materials. Thus, section 22B-2 applies. *See Burgess v. Your House of Raleigh*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990) (where the language of a statute is clear and unambiguous, we apply its plain meaning).

Under section 22B-2, forum selection clauses contained within contracts involving improvements to real property located in North Carolina are voided as a matter of public policy. Thus, the contract provisions that Florida law applies and that contract litigation is to occur only in Hillsborough County, Florida, are void.

II.

In summary, we hold that the trial court erred by dismissing plaintiff's complaint because defendant's choice of law and forum selection clauses are invalid in light of N.C. Gen. Stat. § 22B-2, ren-

dering venue proper in Buncombe County, North Carolina. Accordingly, the ruling of the trial court is reversed and this case is remanded to the Superior Court of Buncombe County.

Reversed and remanded.

Judges BRYANT and JACKSON concur.

STATE OF NORTH CAROLINA v. THOMAS MARLAND VEAZEY

No. COA07-1569

(Filed 1 July 2008)

1. Motor Vehicles— driving while impaired—driver's license checkpoint—lawful purpose—reasonableness

The trial court erred in a driving while impaired case by concluding the pertinent driver's license checkpoint had a lawful purpose and was reasonable, and the case is remanded for new findings and conclusions regarding the primary programmatic purpose of the checkpoint, because: (1) where there is evidence in the record that could support a finding of either a lawful or unlawful purpose, a trial court cannot rely solely on an officer's bare statements as to a checkpoint's purpose, and the record contained conflicting evidence from the trooper's testimony regarding the State's primary purpose in conducting the checkpoint; (2) the trial court simply recited two of the trooper's stated purposes for the checkpoint and did not make an independent finding regarding the actual primary purpose, thus precluding an issuance of a conclusion of law regarding the lawfulness of the primary purpose; (3) the trial court failed to make adequate findings on the first two prongs under *Brown*, 443 U.S. 47 (1979), and its findings on the third *Brown* prong alone cannot support its oral conclusion that the checkpoint was not an unreasonable detention; and (4) the trial court was required to explain why it concluded that, on balance, the public interest in the checkpoint outweighed the intrusion on defendant's protected liberty interests since its written findings tend to weigh in favor of a conclusion that the checkpoint was an unreasonable detention. If on remand the trial court determines the State's primary purpose for

the checkpoint was lawful, it must also issue new findings and conclusions regarding the reasonableness of the checkpoint.

2. Motor Vehicles— driving while impaired—driver's license checkpoint—secondary checking station

The trial court did not err in a driving while impaired case by concluding that a trooper did not unreasonably detain defendant by directing him to a secondary checking station after an initial driver's license checkpoint stop and by admitting evidence gained as a result of this secondary stop because: (1) the trooper testified that when defendant presented his driver's license during the initial checkpoint detention, the trooper detected a strong odor of alcohol in the vehicle and also observed that defendant's eyes were red and glassy; and (2) these facts provided a sufficient basis for reasonable suspicion permitting the trooper to pursue further investigation and detention of defendant.

Judge STEELMAN concurring in result in separate opinion.

Appeal by Defendant from order entered 19 November 2007 by Judge L. Todd Burke in Superior Court, Stokes County. Heard in the Court of Appeals 21 May 2008.

Attorney General Roy Cooper, by Assistant Attorney General Tamara S. Zmuda, for the State.

The Dummit Law Firm, by E. Clarke Dummit, for Defendant.

MCGEE, Judge.

The record in this case shows that around 5:00 p.m. on 1 January 2006, Trooper F.K. Carroll (Trooper Carroll) of the North Carolina State Highway Patrol set up a drivers' license checkpoint on U.S. Highway 311 near Walnut Cove, North Carolina. Trooper Carroll set up the checkpoint with another trooper but could not remember the name of the second trooper. At approximately 5:40 p.m., a vehicle driven by Thomas Marland Veazey (Defendant) approached the checkpoint. Trooper Carroll asked Defendant for his driver's license and registration. Defendant produced an out-of-state driver's license, although his vehicle was registered in North Carolina. During this encounter, Trooper Carroll detected a strong odor of alcohol coming from Defendant's vehicle, and he saw that Defendant's eyes were red and glassy. Trooper Carroll instructed Defendant to drive his vehicle to the shoulder of the highway. Trooper Carroll then performed a

sobriety test on Defendant and, after determining that Defendant was impaired, arrested Defendant for driving while impaired. A chemical analysis later determined that Defendant's blood-alcohol level at the time of his arrest was 0.08.

Prior to trial, Defendant filed a motion to suppress all evidence obtained by Trooper Carroll as a result of the checkpoint. Defendant argued that the checkpoint violated his rights under the Fourth and Fourteenth Amendments to the United States Constitution.

The trial court heard Defendant's motion on 26 February 2007. Trooper Carroll was the sole witness who testified at the hearing. Following Trooper Carroll's testimony, the trial court made the following oral findings and conclusions:

> [The Court is] going to deny the Motion to Suppress, and finds that the license checkpoint was not an unreasonable detention; and therefore, was valid under the Fourth Amendment. The officers had complied with the necessities of setting up a checkpoint. There were two officers who participated in this checkpoint . . . . The trooper checked with his supervisor and verified that he was going to have a—set up a checkpoint. He's not met with any objection. Said the purpose of the checkpoint was to—for license checks, make sure persons were observing the motor vehicle statutes, State of North Carolina. It was set up in a safe place, systematically done. They chose to stop every vehicle. And that upon stopping [Defendant] in this case the officers, the officer observed a strong odor of alcohol. And he further investigated the matter to make a determination as to whether or not [Defendant] was operating a vehicle while impaired.
>
> Court finds those facts and finds as a matter of law that the license checkpoint was not an unreasonable detention, and was valid under the Fourth Amendment.

The trial court did not reduce its order to writing at that time.

Defendant pleaded no contest to driving while impaired on 5 June 2007, and he preserved his right to appeal the trial court's denial of his motion to suppress. The trial court then sentenced Defendant to a term of sixty days in prison, but suspended Defendant's sentence and placed him on probation for a period of twelve months. Defendant then gave oral notice of appeal from the trial court's denial of his motion to suppress.

The trial court issued a final written order denying Defendant's motion to suppress on 19 November 2007, more than five months after Defendant's plea and the trial court's entry of judgment. However, in contrast to the trial court's prior oral findings of fact, the trial court's written findings characterized Trooper Carroll's testimony as containing admissions that the checkpoint was a "generalized checking station," and that Trooper Carroll had significant discretion regarding the operation of the checkpoint. Despite these findings, however, the trial court concluded:

1. That Trooper Carroll complied with the requirements for conducting a checking station.

2. The evidence obtained need not be suppressed.

The trial court also voided Defendant's prior oral notice of appeal on the ground that it was entered prior to the trial court's entry of a final written order denying Defendant's motion to suppress. Defendant filed a new notice of appeal on 19 November 2007 from the trial court's final written order denying his motion to suppress.

I.

The United States Supreme Court has long held that the Fourth Amendment reasonableness standard usually requires that a search or seizure be based on either consent or individualized suspicion of the person to be searched or seized. *See, e.g.*, *Terry v. Ohio*, 392 U.S. 1, 20-21, 20 L. Ed. 2d 889, 905-06 & n.18 (1968). However, the Supreme Court also has held that "the Fourth Amendment imposes no irreducible requirement of such suspicion," and has recognized certain limited exceptions to the general rule requiring individualized suspicion. *United States v. Martinez-Fuerte*, 428 U.S. 543, 561, 49 L. Ed. 2d 1116, 1130 (1976). For example, police may briefly detain vehicles at a roadblock checkpoint without individualized suspicion, so long as the purpose of the checkpoint is legitimate and the checkpoint itself is reasonable. *See id.* at 561-62, 49 L. Ed. 2d at 1130-31 (upholding the constitutionality of a checkpoint located near the United States-Mexico border and designed to locate undocumented persons); *see also Illinois v. Lidster*, 540 U.S. 419, 427-28, 157 L. Ed. 2d 843, 852-53 (2004) (holding that police did not violate the Fourth Amendment by conducting a checkpoint aimed at gathering information regarding an earlier crime); *Michigan State Police v. Sitz*, 496 U.S. 444, 455, 110 L. Ed. 2d 412, 423 (1990) (holding that police complied with constitutional requirements in conducting a checkpoint designed to find intoxicated drivers).

When considering a challenge to a checkpoint, the reviewing court must undertake a two-part inquiry to determine whether the checkpoint meets constitutional requirements. First, the court must determine the primary programmatic purpose of the checkpoint. *City of Indianapolis v. Edmond*, 531 U.S. 32, 40-42, 148 L. Ed. 2d 333, 343 (2000). In *Edmond*, the United States Supreme Court distinguished between checkpoints with a primary purpose related to roadway safety and checkpoints with a primary purpose related to general crime control. According to the Court, checkpoints primarily aimed at addressing immediate highway safety threats can justify the intrusions on drivers' Fourth Amendment privacy interests occasioned by suspicionless stops. *Id.* at 41-43, 148 L. Ed. 2d at 343-44; *see, e.g., Sitz*, 496 U.S. at 455, 110 L. Ed. 2d at 423 (upholding a checkpoint with a primary purpose of finding intoxicated drivers); *Delaware v. Prouse*, 440 U.S. 648, 663, 59 L. Ed. 2d 660, 673-74 (1979) (suggesting that a checkpoint with a primary purpose of checking drivers' licenses and vehicle registrations would be permissible under the Fourth Amendment). However, the *Edmond* Court also held that police must have individualized suspicion to detain a vehicle for general crime control purposes, and therefore a checkpoint with a primary purpose of general crime control contravenes the Fourth Amendment. *Edmond*, 531 U.S. at 41-42, 148 L. Ed. 2d at 343-44 (finding unconstitutional a checkpoint with a primary purpose of interdicting illegal narcotics and stating that "[w]ithout drawing the line at roadblocks designed primarily to serve the general interest in crime control, the Fourth Amendment would do little to prevent such intrusions from becoming a routine part of American life").

The Supreme Court in *Edmond* also noted that a checkpoint with an invalid primary purpose, such as checking for illegal narcotics, cannot be saved by adding a lawful secondary purpose to the checkpoint, such as checking for intoxicated drivers. *Id.* at 46, 148 L. Ed. 2d at 346-47. Otherwise, according to the Court, "law enforcement authorities would be able to establish checkpoints for virtually any purpose so long as they also included a license or sobriety check. For this reason, [courts must] examine the available evidence to determine the primary purpose of the checkpoint program." *Id.* at 46, 148 L. Ed. 2d at 347.

Second, if a court finds that police had a legitimate primary programmatic purpose for conducting a checkpoint, "[t]hat does not mean the stop is automatically, or even presumptively, constitutional. It simply means that [the court] must judge its reasonableness, hence,

its constitutionality, on the basis of the individual circumstances." *Lidster*, 540 U.S. at 426, 157 L. Ed. 2d at 852. To determine whether a checkpoint was reasonable under the Fourth Amendment, a court must weigh the public's interest in the checkpoint against the individual's Fourth Amendment privacy interest. *See*, *e.g.*, *Martinez-Fuerte*, 428 U.S. at 555, 49 L. Ed. 2d at 1126. In *Brown v. Texas*, 443 U.S. 47, 61 L. Ed. 2d 357 (1979), the United States Supreme Court held that when conducting this balancing inquiry, a court must weigh "[(1)] the gravity of the public concerns served by the seizure, [(2)] the degree to which the seizure advances the public interest, and [(3)] the severity of the interference with individual liberty." *Id.* at 51, 61 L. Ed. 2d at 362. If, on balance, these factors weigh in favor of the public interest, the checkpoint is reasonable and therefore constitutional. *See*, *e.g.*, *Lidster*, 540 U.S. at 427-28, 157 L. Ed. 2d at 852-53.

A.

When reviewing a trial court's denial of a motion to suppress, we must first determine whether the trial court's findings of fact are supported by competent evidence. If so supported, the trial court's findings are binding on appeal. *State v. Rose*, 170 N.C. App. 284, 287, 612 S.E.2d 336, 338-39, *disc. review denied*, 359 N.C. 641, 617 S.E.2d 656 (2005). We must then determine whether the trial court's findings support its conclusions of law. *Id.* at 287-88, 612 S.E.2d at 339.

The State argues that when conducting our review, this Court should only consider the trial court's oral findings and conclusions made at the 26 February 2007 hearing on Defendant's motion to suppress. According to the State, once Defendant gave oral notice of appeal on 5 June 2007, the trial court no longer had jurisdiction to enter a written order containing findings of fact that differed from those it announced on 26 February 2007. *See State v. Davis*, 123 N.C. App. 240, 242-43, 472 S.E.2d 392, 393 (1996) (stating that "[t]he general rule is that the jurisdiction of the trial court is divested when notice of appeal is given, except that the trial court retains jurisdiction for matters ancillary to the appeal, including settling the record on appeal. In addition, a court of record has the inherent power to make its records speak the truth and, to that end, to amend its records to correct clerical mistakes or supply defects or omissions therein." (internal citation omitted)). The State argues that because the trial court was not correcting a clerical error in its records, and because the findings of fact in the written order did not reflect the truth of what the trial court had previously announced, the trial court's written order should be vacated for lack of jurisdiction. The

State further argues that the trial court's 26 February 2007 oral findings and conclusions should be reinstated.

Our Court has previously vacated a trial court's amended judgment and reinstated the original judgment where the amended judgment corrected non-clerical judicial errors and was issued after the appealing party gave notice of appeal. *See State v. Bullock*, 183 N.C. App. 594, 598, 645 S.E.2d 402, 407, *disc. review denied*, 361 N.C. 570, 650 S.E.2d 817 (2007); *Davis*, 123 N.C. App. at 243, 472 S.E.2d at 394. However, we have not previously determined whether a written order containing findings of fact, entered after the appealing party gave notice of appeal, must be vacated if the written findings differ from oral findings made by the trial court prior to the notice of appeal. We find it unnecessary to reach this question in the present case. As we discuss below, we reach the same holding whether we consider the trial court's 26 February 2007 oral findings and conclusions or the trial court's 19 November 2007 written findings and conclusions.

B.

[1] We begin our analysis by focusing on the primary programmatic purpose of the checkpoint. Our Court has previously held that where there is no evidence in the record to contradict the State's proffered purpose for a checkpoint, a trial court may rely on the testifying police officer's assertion of a legitimate primary purpose. *State v. Burroughs*, 185 N.C. App. 496, 499-500, 648 S.E.2d 561, 565-66 (2007). However, where there is evidence in the record that could support a finding of either a lawful or unlawful purpose, a trial court cannot rely solely on an officer's bare statements as to a checkpoint's purpose. *Id.* at 499, 648 S.E.2d at 565. In such cases, the trial court "may not 'simply accept the State's invocation' of a proper purpose, but instead must 'carr[y] out a close review of the scheme at issue.' " *Rose*, 170 N.C. App. at 289, 612 S.E.2d at 339 (quoting *Ferguson v. City of Charleston*, 532 U.S. 67, 81, 149 L. Ed. 2d 205, 218 (2001)). This type of searching inquiry is necessary to ensure that "an illegal multi-purpose checkpoint [is not] made legal by the simple device of assigning 'the primary purpose' to one objective instead of the other[.]" *Id.* at 290, 612 S.E.2d at 340 (quotation omitted); *see Edmond*, 531 U.S. at 46, 148 L. Ed. 2d at 346-47.

The record in this case contains conflicting evidence regarding the State's primary purpose in conducting the checkpoint. During the State's direct examination, the State questioned Trooper Carroll about the purpose of the checkpoint:

> [THE STATE]: And what was the purpose of that checkpoint?
>
> . . . .
>
> [TROOPER CARROLL]: To enforce any kind of motor vehicle law violations we come in contact with.
>
> [THE STATE]: And did you have a predetermined plan as to how the checkpoint would operate?
>
> [TROOPER CARROLL]: We did.
>
> [THE STATE]: What was that plan?
>
> [TROOPER CARROLL]: To check all vehicles that passed through, license, registration, insurance violations, any type of violation that [came] through, and to check every vehicle that passed through.

On cross-examination, defense counsel also questioned Trooper Carroll regarding the purpose of the checkpoint:

> [DEFENSE COUNSEL]: So your purpose was to find violations?
>
> [TROOPER CARROLL]: Motor vehicle violations.

Defense counsel then questioned Trooper Carroll regarding the scope of the checkpoint:

> [DEFENSE COUNSEL]: . . . I'm going to get very specific. The purpose of [the checkpoint] was to encourage people to abide by the law; is that your purpose out there?
>
> [TROOPER CARROLL]: No. It's to check every license, registration, insurance violation, or any type of motor vehicle violation that [came] through.
>
> [DEFENSE COUNSEL]: Did you limit it to motor vehicle violations?
>
> [TROOPER CARROLL]: What do you mean?
>
> [DEFENSE COUNSEL]: Were you looking for any criminal violations?
>
> [TROOPER CARROLL]: I was looking for all violations, any violation.
>
> . . . .

> [DEFENSE COUNSEL] This checking station was not tailored to fit some crucial ongoing investigation. This was a generalized checking station?
>
> [TROOPER CARROLL]: Yes.
>
> . . . .
>
> [DEFENSE COUNSEL]: Were you out there for any specific public safety reason having to do with that road, or was it the generalized—
>
> [TROOPER CARROLL]: Specifically, I was out there to enforce the laws and violations that [came] through the license check, which I think would be to the benefit of the public.

This record reveals that Trooper Carroll's initial explanation of the primary purpose of the checkpoint was that it was designed "[t]o enforce any kind of motor vehicle law violations." Trooper Carroll asserted this purpose multiple times throughout the hearing. On two occasions, however, Trooper Carroll suggested that the checkpoint's purpose was even more broad, including finding any and all criminal violations, even beyond motor vehicle law violations. Further, on other occasions, Trooper Carroll suggested that the checkpoint's primary purpose was limited to checking for drivers' license, registration, and insurance violations, rather than "all criminal violations" or "all motor vehicle violations."

The United States Supreme Court has previously suggested that checking for drivers' license and vehicle registration violations is a lawful primary purpose for a checkpoint. *See*, *e.g.*, *Edmond*, 531 U.S. at 37-38, 148 L. Ed. 2d at 341; *Prouse*, 440 U.S. at 663, 59 L. Ed. 2d at 673-74. North Carolina Courts have also upheld checkpoints designed to uncover drivers' license and vehicle registration violations. *See*, *e.g.*, *State v. Mitchell*, 358 N.C. 63, 592 S.E.2d 543 (2004); *State v. Tarlton*, 146 N.C. App. 417, 553 S.E.2d 50 (2001). However, it is also clear that a checkpoint whose primary purpose is to find any and all criminal violations is unlawful, even if police have secondary objectives related to highway safety. *See Edmond*, 531 U.S. at 41-42, 148 L. Ed. 2d at 343 (holding that a primary purpose of uncovering evidence of ordinary criminal activity contravenes the Fourth Amendment). Further, it is unclear whether a primary purpose of finding any and all *motor vehicle* violations is a lawful primary purpose. One reason that a checkpoint is an appropriate tool for helping police discover certain types of motor vehicle violations is that police

cannot discover such violations simply by observing a vehicle during normal road travel. *See, e.g.*, N.C. Gen. Stat. § 20-7(a) (2007) (driver must carry a license while driving a vehicle); N.C. Gen. Stat. § 20-57(c) (2007) (vehicle owner must carry a signed registration card in the vehicle); N.C. Gen. Stat. § 20-313(a) (2007) (vehicle owner must maintain an insurance policy). However, the United States Supreme Court has previously expressed concern with allowing suspicionless stops to enforce motor vehicle violations that are readily observable. *See Prouse*, 440 U.S. at 660, 59 L. Ed. 2d at 671-72. Many violations of North Carolina's motor vehicle laws are readily observable and can be adequately addressed by roving patrols when officers develop individualized suspicion of a certain vehicle. *See, e.g.*, N.C. Gen. Stat. § 20-63(e), (g) (2007) (license plate must be clean and unconcealed); N.C. Gen. Stat. § 20-126(a)-(b) (2007) (vehicle must have an inside rearview mirror and a driver's-side outside mirror); N.C. Gen. Stat. § 20-127(a)-(b) (2007) (vehicle must have a windshield wiper and a non-tinted windshield); N.C. Gen. Stat. § 20-129 (2007) (establishing requirements for headlights and rear lights); N.C. Gen. Stat. § 20-135.2B(a) (2007) (children may not be transported in an open truck bed); N.C. Gen. Stat. § 20-140.2 (2007) (vehicle cannot be overcrowded).

Given these concerns and the variations in Trooper Carroll's testimony, the trial court was required to make findings regarding the actual primary purpose of the checkpoint and it was required to reach a conclusion regarding whether this purpose was lawful. However, in its 26 February 2007 oral findings, the trial court merely found that "[Trooper Carroll] [s]aid the purpose of the checkpoint was to—for license checks, make sure persons were observing the motor vehicle statutes, State of North Carolina." This finding simply recites two of Trooper Carroll's stated purposes for the checkpoint and is not an independent finding regarding the actual primary purpose. Without such a finding, the trial court could not, and indeed did not, issue a conclusion regarding whether the primary purpose of the checkpoint was lawful. *See, e.g.*, *State v. Lang*, 309 N.C. 512, 520, 308 S.E.2d 317, 321 (1983) (stating that findings of fact that merely recite trial testimony "do not resolve conflicts in the evidence but are merely statements of what a particular witness said. Although such recitations of testimony may properly be included in an order denying suppression, they cannot substitute for findings of fact resolving material conflicts."). Similarly, the findings in the trial court's 19 November 2007 written order simply recite Trooper Carroll's testimony regarding the checkpoint's purpose. The written order contains no independent

finding regarding the primary purpose of the checkpoint, and it contains no conclusion addressing the lawfulness of the primary purpose. We therefore remand this case to the trial court to issue new findings and conclusions regarding the primary programmatic purpose of the checkpoint.

C.

Even if the trial court had determined that the primary programmatic purpose of the checkpoint was lawful, it then was required to apply the three-prong inquiry set out in *Brown* to determine whether the checkpoint itself was reasonable. *Rose*, 170 N.C. App. at 293, 612 S.E.2d at 342.

Under the first *Brown* prong, the trial court was required to assess "the gravity of the public concerns served by the seizure." *Brown*, 443 U.S. at 51, 61 L. Ed. 2d at 362. Both the United States Supreme Court as well as our Courts have suggested that "license and registration checkpoints advance an important purpose[.]" *Rose*, 170 N.C. App. at 294, 612 S.E.2d at 342. The United States Supreme Court has also noted that states have a "vital interest" in ensuring compliance with other types of motor vehicle laws that promote public safety on the roads. *Prouse*, 440 U.S. at 658, 59 L. Ed. 2d at 670-71. However, without determining the primary programmatic purpose of the checkpoint, the trial court could not have adequately assessed the strength of the State's interest in conducting the checkpoint. Indeed, neither the trial court's 26 February 2007 oral findings nor its 19 November 2007 written order specifically addresses the strength of the public interest in the particular checkpoint at issue.

After assessing the public interest, the trial court was required to assess "the degree to which the seizure advance[d] the public interest." *Brown*, 443 U.S. at 51, 61 L. Ed. 2d at 362. In other words, the trial court should have determined whether "[t]he police appropriately tailored their checkpoint stops" to fit their primary purpose. *Lidster*, 540 U.S. at 427, 157 L. Ed. 2d at 852. Our Court has previously identified a number of non-exclusive factors that courts should consider when determining whether a checkpoint is appropriately tailored, including: whether police spontaneously decided to set up the checkpoint on a whim; whether police offered any reason why a particular road or stretch of road was chosen for the checkpoint; whether the checkpoint had a predetermined starting or ending time; and whether police offered any reason why that particular time span was selected. *See Rose*, 170 N.C. App. at 295, 612 S.E.2d at 342-43.

In this case, the trial court made no findings concerning tailoring in its 26 February 2007 oral findings, but did conclude that the checkpoint "was not an unreasonable detention." Without the requisite findings on the second *Brown* prong, the trial court's findings cannot support its conclusion that the checkpoint was reasonable. The trial court did, however, make the following written findings in its 19 November 2007 order:

> 4. The checking station was set up in a safe location, however[,] [Trooper Carroll] was unaware of any specific problems with unlicensed drivers or motor vehicle law violations at this location.
>
> . . . .
>
> 22. Trooper Carroll testified that . . . he used his training and experience and exercised his discretion regarding: the location of this checking station, . . . when the checking station should start, [and] how long it should last or when it should end[.]

(Citations omitted.) While the trial court did make certain written findings with respect to tailoring, the written order gives no indication that the trial court balanced these findings against the other *Brown* factors to determine whether the checkpoint was reasonable. The trial court merely concluded "[t]hat Trooper Carroll complied with the requirements for conducting a checking station," and that "[t]he evidence obtained need not be suppressed." These statements alone do not explain why the trial court concluded that the checkpoint was reasonable, especially given that the trial court's written findings on the second *Brown* prong raise concerns regarding whether the checkpoint was tailored to achieve its purported objectives.

Finally, the trial court was required to assess "the severity of the interference with individual liberty" occasioned by the checkpoint. *Brown*, 443 U.S. at 51, 61 L. Ed. 2d at 362. In general, " '[t]he circumstances surrounding a checkpoint stop and search are far less intrusive than those attending a roving-patrol stop.' " *Martinez-Fuerte*, 428 U.S. at 558, 49 L. Ed. 2d at 1128 (quoting *United States v. Ortiz*, 422 U.S. 891, 894, 45 L. Ed. 2d 623, 628 (1975)). However, courts have consistently required restrictions on the discretion of the officers conducting the checkpoint to ensure that the intrusion on individual liberty is no greater than is necessary to achieve the checkpoint's objectives. *See*, *e.g.*, *Brown*, 443 U.S. at 51, 61 L. Ed. 2d at 362 (stat-

ing that "[a] central concern . . . has been to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field. . . . [T]he seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers."); *Prouse*, 440 U.S. at 661, 59 L. Ed. 2d at 672 (stating that "standardless and unconstrained discretion is [an] evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent").

Courts have previously identified a number of non-exclusive factors relevant to officer discretion and individual privacy, including: the checkpoint's potential interference with legitimate traffic, *see Martinez-Fuerte*, 428 U.S. at 559, 49 L. Ed. 2d at 1129; whether police took steps to put drivers on notice of an approaching checkpoint, *see id.*; whether the location of the checkpoint was selected by a supervising official, rather than by officers in the field, *see id.*; whether police stopped every vehicle that passed through the checkpoint, or stopped vehicles pursuant to a set pattern, *see Lidster*, 540 U.S. at 428, 157 L. Ed. 2d at 853; *Sitz*, 496 U.S. at 453, 110 L. Ed. 2d at 422; whether drivers could see visible signs of the officers' authority, *see id.*; whether police operated the checkpoint pursuant to any oral or written guidelines, *see Rose*, 170 N.C. App. at 296, 612 S.E.2d at 344; whether the officers were subject to any form of supervision, *see id.*; and whether the officers received permission from their supervising officer to conduct the checkpoint, *see Mitchell*, 358 N.C. at 68, 592 S.E.2d at 546. Our Court has held that these and other factors are not " 'lynchpin[s],' but instead [are] circumstance[s] to be considered as part of the totality of the circumstances in examining the reasonableness of a checkpoint." *Rose*, 170 N.C. App. at 298, 612 S.E.2d at 345.

In this case, the trial court made oral findings on 26 February 2007 that "[Trooper Carroll] checked with his supervisor and verified that he was going to have a—set up a checkpoint. He's not met with any objection. . . . It was set up in a safe place, systematically done. They chose to stop every vehicle." These findings demonstrate that the trial court did consider some of the relevant factors under the third *Brown* prong. However, given that the trial court did not make adequate findings on the first two *Brown* prongs, the trial court's findings on the third *Brown* prong alone cannot support its oral conclusion that the checkpoint "was not an unreasonable detention."

The trial court's 19 November 2007 written findings on the third *Brown* prong differed substantially from its earlier oral findings:

> 3. Trooper Carroll testified that he did not have to get permission to set up the checking station, however[,] he did think that he called a supervisor to advise the supervisor that he was setting up a checking station.
>
> 4. The checking station was set up in a safe location[.] . . .
>
> 5. Trooper Carroll relied on his vast training to decide when the traffic flow was too congested[, and] then he would allow cars [to] go by unchecked to allow traffic to move forward, and resume detaining people when he determined it appropriate.
>
> . . . .
>
> 7. Trooper Carroll had full discretion over the duration of the stop and the extent of the investigation, and he used his training and experience to determine how to proceed.
>
> . . . .
>
> 17. On [c]ross-[e]xamination[,] [Trooper Carroll] testified that he knew of no directives which restricted his activity at the checking station, [and] no supervisor came out to give any direction to the length and scope of the detentions at the checking stations[.] . . .
>
> . . . .
>
> 22. Trooper Carroll testified that there were no restrictions placed upon him by any supervisor, but he used his training and experience and exercised his discretion regarding: the location of this checking station, how long the traffic must wait, when the checking station should start, how long it should last or when it should end, when he could stop someone for not entering the checking station even without an infraction of the law, and how many question[s] to ask and how long to detain a person when the person produces a facially valid driver[s'] license.

(Citations omitted.) As noted above, these findings alone cannot support a conclusion that the checkpoint was reasonable because the trial court did not make adequate findings on the first two *Brown* prongs. Further, the trial court's written findings tend to weigh in favor of a conclusion that the checkpoint was an unreasonable detention. The trial court therefore was required to explain why it con-

cluded that, on balance, the public interest in the checkpoint outweighed the intrusion on Defendant's protected liberty interests. The trial court's written order, however, contains no such explanation. Therefore, if the trial court determines on remand that the State's primary purpose for the checkpoint was lawful, it must also issue new findings and conclusions regarding the reasonableness of the checkpoint.

II.

[2] Defendant next argues that even if the initial checkpoint stop was constitutional, Trooper Carroll unreasonably detained Defendant by directing him to a secondary checking station. Defendant argues that the trial court erred by admitting evidence gained as a result of this secondary stop. We address Defendant's argument in the event that, on remand, the trial court determines that the initial stop of Defendant at the checkpoint was constitutional.

Defendant argues that if the primary purpose of the checkpoint was to check for a valid driver's license, Defendant should have been allowed to proceed through the checkpoint after he presented a valid driver's license to Trooper Carroll, even though his driver's license was issued in a different state from that in which his vehicle was registered. According to Defendant, Trooper Carroll's decision to further detain Defendant was merely a "fishing expedition" that allowed Trooper Carroll to investigate for evidence of any general criminal activity. Defendant argues that this secondary detention was unreasonable, in violation of the Fourth and Fourteenth Amendments.

While individualized suspicion is not required for police to briefly detain a driver at a lawful checkpoint, any further detention or search must be based on either consent or individualized suspicion of criminal wrongdoing. *Martinez-Fuerte*, 428 U.S. at 567, 49 L. Ed. 2d at 1133-34. In this case, Trooper Carroll testified that when Defendant presented his driver's license during the initial checkpoint detention, Trooper Carroll detected a strong odor of alcohol in the vehicle and also observed that Defendant's eyes were red and glassy. These facts provided a sufficient basis for reasonable suspicion permitting Trooper Carroll to pursue further investigation and detention of Defendant. Defendant's assignment of error is overruled.

Remanded.

Judge GEER concurs.

Judge STEELMAN concurs in the result with a separate opinion.

STEELMAN, Judge, concurring in the result.

I concur with the holding of the majority remanding this matter for further findings of fact by the trial court.

I am concerned by the substantial discrepancies between the order dictated by the trial judge in open court and the final written order. It is the duty of the trial judge to ensure that a written order accurately reflects his or her rulings before it is signed, and to modify the order if it is not correct. It is also the duty of counsel preparing the order to ensure that it accurately reflects the trial court's findings and rulings.

ROSSETTO USA, INC., Plaintiff v. GREENSKY FINANCIAL, LLC, FURNITURE RETAILERS, LLC, and ECLECTICGLOBAL, LLC, Defendants

No. COA07-1529

(Filed 1 July 2008)

1. Jurisdiction— personal jurisdiction—minimum contacts—consistent and continuous interaction

The trial court did not err in a breach of contract or quasi-contract and conversion case by denying defendant Greensky's motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(2) based on lack of personal jurisdiction because defendant had sufficient minimum contacts to purposefully avail itself of the privilege of conducting activities within North Carolina, thus subjecting itself to personal jurisdiction, including: (1) defendant's consistent and continuous two-year interaction with plaintiff in reference to the sale of furniture from plaintiff to Eclectic; (2) numerous communications; (3) frequent payments for the furniture purchased by Eclectic; and (4) the alleged attempted sale of plaintiff's furniture without payment.

2. Jurisdiction— personal jurisdiction—minimum contacts—passive receipt of shipment

The trial court erred in a breach of contract or quasi-contract and conversion case by denying defendant Furniture Retailers's motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(2) based on

lack of personal jurisdiction because: (1) there was no specific act by which defendant purposefully availed itself of the privilege of conducting activities within North Carolina; and (2) defendant's passive receipt of the shipment of furniture from plaintiff intended for Eclectic, its one phone call to plaintiff in North Carolina, and its attempt to sell furniture on eBay was insufficient to establish minimum contacts with North Carolina.

Judge TYSON dissenting.

Appeal by Defendants Greensky Financial, LLC, and Furniture Retailers, LLC, from order entered 1 October 2007 by Judge L. Todd Burke in Guilford County Superior Court. Heard in the Court of Appeals 1 May 2008.

Forman Rossabi Black, P.A., by Amiel J. Rossabi and Emily J. Meister, for Plaintiff-Appellee.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Clinton R. Pinyan and John S. Buford, for Defendants-Appellants.

ARROWOOD, Judge.

Greensky Financial, LLC (Greensky), and Furniture Retailers, LLC (Furniture Retailers) (together, Defendants), appeal from order entered 1 October 2007 denying Defendants' N.C. Gen. Stat. § 1A-1, Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction. EclecticGlobal, LLC (Eclectic), did not challenge the jurisdiction of the court. Defendants appeal pursuant to N.C. Gen. Stat. § 1-277(b). We affirm in part and reverse in part.

The evidence of record tends to show that Greensky and Furniture Retailers are Limited Liability Companies with their principal places of business in Atlanta, Georgia. Eclectic also operated with its principal place of business in Georgia. Rossetto USA, Inc. (Rossetto), operates with its principal place of business in Guilford County, North Carolina, selling and distributing furniture. In 2004, Rossetto entered into a contract to sell furniture to Eclectic, and Rossetto shipped furniture from North Carolina to Georgia. Greensky, a financing company, had a contractual relationship with Eclectic, and pursuant thereto, Greensky made "frequent" payments on behalf of Eclectic to Plaintiff between 2004 and 2006, either by mailing checks to Rossetto at Rossetto's office in North Carolina or

by wiring payments to Rossetto's account in North Carolina. Rossetto also received numerous communications and phone calls from Greensky in North Carolina.

In November 2006, Eclectic placed an order for various items of furniture with Rossetto. While the items were in transit, Rossetto learned from Greensky that Furniture Retailers had "[begun] to operate, control or assume the business of Eclectic." Rossetto immediately issued a revised invoice to Furniture Retailers, who took possession of the furniture upon delivery. Rossetto also received a call in their office in North Carolina from a man named, "Dean,"—an employee of Furniture Retailers, who had questions about the furniture. Rossetto learned that Furniture Retailers advertised Rossetto furniture online through eBay. Rossetto received an email from a customer, which was "issued or sent by Greensky." The email "shows that Greensky [attempted] to sell Rossetto's furniture even though it has not paid Rossetto for such furniture."

On 25 April 2007, Rossetto filed a complaint against Greensky, Furniture Retailers and Eclectic, alleging breach of contract or quasi-contract and conversion.

On 2 July 2007, Greensky and Furniture Retailers filed a motion to dismiss for lack of personal jurisdiction, contending that Greensky and Furniture Retailers had no "local presence or status" in North Carolina and that they "did not make a promise to Plaintiff[,]" with regard to an exchange of goods or services in North Carolina. Defendants submitted the affidavit of David Zalik (Zalik), managing member of both Greensky and Furniture Retailers, and Plaintiffs submitted the affidavit of Andrea Verardo (Verardo), an employee of Rossetto. Eclectic did not challenge the jurisdiction of the court.

On 1 October 2007, the trial court entered an order denying Defendants' motion to dismiss for lack of personal jurisdiction. From this order, and pursuant to N.C. Gen. Stat. § 1-277(b) (2007), which provides for "the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant[,]" Defendants appeal.

Personal Jurisdiction

The dispositive issues here are whether Greensky and Furniture Retailers had the requisite "minimum contacts" with North Carolina such that the exercise of personal jurisdiction over Greensky and Furniture Retailers did not violate their right to due process under

the U.S. Constitution. When addressing a question of personal jurisdiction, the court engages in a two-step inquiry.

> "First, the court must determine whether the applicable long-arm statute permits the exercise of jurisdiction over the defendant. Next, the court determines whether the exercise of jurisdiction comports with due process under the Fourteenth Amendment. North Carolina's long-arm statute, N.C. Gen. Stat. § 1-75.4, was enacted to make available to the North Carolina courts the full jurisdictional powers permissible under federal due process. Since the North Carolina legislature designed the long-arm statute to extend personal jurisdiction to the limits permitted by due process, the two-step inquiry merges into one question: whether the exercise of jurisdiction comports with due process."

Lang v. Lang, 157 N.C. App. 703, 707-08, 579 S.E.2d 919, 922 (2003) (quoting *Regent Lighting Corp. v. Galaxy Elec. Mfg., Inc.*, 933 F. Supp. 507, 509-10 (1996)) (internal quotation marks omitted).

Generally, our " 'standard of review of an order determining jurisdiction is whether the findings of fact by the trial court are supported by competent evidence in the record; if so, this Court must affirm the order of the trial court.' " *Tejal Vyas, LLC v. Carriage Park Ltd. P'ship*, 166 N.C. App. 34, 37, 600 S.E.2d 881, 884 (2004) (quoting *Better Business Forms, Inc. v. Davis*, 120 N.C. App. 498, 500, 462 S.E.2d 832, 833 (1995)), *aff'd*, 359 N.C. 315, 608 S.E.2d 751 (2005). "The standard of review to be applied by a trial court in deciding a motion under Rule 12(b)(2) depends upon the procedural context confronting the court." *Eaker v. Gower*, 189 N.C. App. 770, 772, ––– S.E.2d –––, ––– (2008); *see also Banc of Am. Secs. LLC v. Evergreen Int'l Aviation, Inc.*, 169 N.C. App. 690, 693, 611 S.E.2d 179, 182-83 (2005). When parties "submit dueling affidavits . . . the court may hear the matter on affidavits presented by the respective parties, or the court may direct that the matter be heard wholly or partly on oral testimony or depositions." *Eaker*, 189 N.C. App. at 773, ––– S.E.2d at –––. "If the trial court chooses to decide the motion based on affidavits, the trial judge must determine the weight and sufficiency of the evidence presented in the affidavits much as a juror." *Id.*

Here, the trial court did not make findings of fact in its order. However, absent a request by the parties, which does not appear in the record, the trial court is not required to find the facts upon which its ruling is based. N.C. Gen. Stat. § 1A-1, Rule 52(a)(2) (2007). " 'In such case, it will be presumed that the judge, upon proper evidence,

found facts sufficient to support his judgment.' " *A.R. Haire, Inc. v. St. Denis*, 176 N.C. App. 255, 258, 625 S.E.2d 894, 898 (2006) (quoting *City of Salisbury v. Kirk Realty Co., Inc.*, 48 N.C. App. 427, 429, 268 S.E.2d 873, 875 (1980)) (internal quotation marks omitted). Defendants and Plaintiff submitted dueling affidavits addressing personal jurisdiction. Therefore, we review the record to determine whether it contains competent evidence to support the trial court's presumed findings to support its ruling that Defendants were subject to personal jurisdiction in the courts of this state.

"To establish in personam jurisdiction over non-resident defendants, there must be 'certain minimum contacts [between the non-resident defendant and the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.' " *A.R. Haire*, 176 N.C. App. at 255, 625 S.E.2d at 897 (quoting *Tom Togs, Inc. v. Ben Elias Indus. Corp.*, 318 N.C. 361, 365, 348 S.E.2d 782, 786 (1986)).

> "Application of the minimum contacts rule 'will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.' "

Skinner v. Preferred Credit, 361 N.C. 114, 123, 638 S.E.2d 203, 210-211 (2006) (quoting *Chadbourn, Inc. v. Katz*, 285 N.C. 700, 705, 208 S.E.2d 676, 679 (1974)).

> In determining minimum contacts, the court looks at several factors, including: (1) the quantity of the contacts; (2) the nature and quality of the contacts; (3) the source and connection of the cause of action with those contacts; (4) the interest of the forum state; and (5) the convenience to the parties.

A.R. Haire, 176 N.C. App. at 260, 625 S.E.2d at 899. No single factor controls, but all factors "must be weighed in light of fundamental fairness and the circumstances of the case." *B.F. Goodrich Co. v. Tire King and Smith v. Hill*, 80 N.C. App. 129, 132, 341 S.E.2d 65, 67 (1986). "Whether minimum contacts are present is determined not by using a mechanical formula or rule of thumb but by ascertaining what is fair and reasonable under the circumstances." *Better Business Forms, Inc.*, 120 N.C. App. at 500, 462 S.E.2d at 833-34. "In light of modern business practices, the quantity, or even the absence, of actual physical contacts with the forum state merely constitutes a

factor to be considered and is not controlling in determining whether minimum contacts exists." *Starco, Inc. v. AMG Bonding and Ins. Services*, 124 N.C. App. 332, 340, 477 S.E.2d 211, 216 (1996).

[1] We first examine whether the exercise of personal jurisdiction of the court with regard to Greensky comports with due process. We conclude Greensky had minimum contacts in this State.

The affidavits submitted by Zalik and Verardo provided the following evidence to support the trial court's presumed findings of fact regarding jurisdiction as to Greensky. "Rossetto sold furniture to EclecticGlobal, LLC[, and i]n connection with such sales, Rossetto would ship furniture from North Carolina to the State of Georgia." "Payment(s) for such furniture were frequently made by Greensky Financial, LLC . . . through either a check mailed to Rossetto at our office in the State of North Carolina or by wire to our account in the State of North Carolina." Verardo stated that Greensky made payments "frequently" since 2004. Specifically, the record reveals that on 8 December 2006 and 13 December 2006, Greensky wired payments to Rossetto. "Rossetto received numerous communications and phone calls from Greensky directed to its office in the State of North Carolina." Greensky also informed Rossetto that Furniture Retailers had assumed control of Eclectic, and an email from one of Rossetto's customers revealed that Greensky attempted to sell Rossetto furniture for which payment had not been made by either Greensky, Eclectic or Furniture Retailers.

We conclude that the foregoing evidence, regarding Greensky's consistent and continuous two-year interaction with Rossetto in reference to the sale of furniture from Rossetto to Eclectic, which included numerous communications, "frequent" payments for the furniture purchased by Eclectic, and the alleged attempted sale of Rossetto furniture without payment, is sufficient to support "minimum contacts" in that Greensky "purposefully avail[ed] [it]self of the privilege of conducting activities within [North Carolina]," thus subjecting itself to personal jurisdiction here. *Havey v. Valentine*, 172 N.C. App. 812, 814, 616 S.E.2d 642, 646 (2005) (internal quotation marks omitted) (stating that "[p]urposeful availment is shown if the defendant has taken deliberate action within the forum state or if he has created continuing obligations to forum residents"). *See also Brickman v. Codella*, 83 N.C. App. 377, 382, 350 S.E.2d 164, 267 (1986) (quoting *Burger King v. Rudzewicz*, 471 U.S. 462, 472, 85 L. Ed. 2d 528, 540 (1985)) (stating that "due process requires that individuals have 'fair warning that a particular activity may subject

[them] to the jurisdiction of a foreign sovereign[,]' [and t]he fair warning requirement is satisfied if the defendant has purposefully directed his activities at residents of the forum, and the litigation results from alleged injuries that arise out of or relate to those activities"). This assignment of error is overruled.

[2] We next examine whether the exercise of personal jurisdiction of the court with regard to Furniture Retailers comports with due process. We conclude that Furniture Retailers did not maintain minimum contacts with this State.

The affidavits submitted by Zalik and Verardo provide the following evidence to support the trial court's presumed findings of fact with regard to jurisdiction as to Furniture Retailers. Furniture Retailers took over or assumed control of Ecletic in November 2006, and Furniture Retailers was allegedly controlled by Greensky; however, Zalik's opposing affidavit states that the two corporations were two distinctly different corporate entities. Furniture Retailers received the November 2006 shipment of furniture from Rossetto. "Dean," an employee of Furniture Retailers, called Rossetto and asked questions about the furniture, and Furniture Retailers allegedly advertised Rossetto furniture online through eBay.

Unlike Greensky, we can find no specific " 'act by which [Furniture Retailers] purposefully avail[ed] itself of the privilege of conducting activities within the forum State[.]' " *Skinner*, 361 N.C. at 123, 638 S.E.2d at 210-11 (quoting *Chadbourn*, 285 N.C. at 705, 208 S.E.2d at 679). The evidence tends to show that Furniture Retailers passively received the shipment of furniture from Rossetto, intended for Eclectic. Furniture Retailers allegedly made one phone call to Rossetto in North Carolina and attempted to sell the furniture on eBay. We conclude that the foregoing is insufficient to establish minimum contacts with North Carolina. *See Stallings v. Hahn*, 99 N.C. App. 213, 216, 392 S.E.2d 632, 633 (1990) (concluding that the defendant did not have "minimum contacts" with the forum state when "[t]he only contacts between defendant and the forum State . . . [were] the advertisement placed in *Hemmings Motor News*, the telephone calls between plaintiff and defendant, and the cashier's check sent by plaintiff to defendant"); *see also A.R. Haire*, 176 N.C. App. 255, 625 S.E.2d 894 (holding that because Defendants performed no act which would purposefully avail themselves of the privilege of conducting activities within this State, the finding of in personam jurisdiction violated Defendants' due process rights); *Havey*, 172 N.C.

App. at 817, 616 S.E.2d at 648 (quoting *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 714 (4th Cir. Md. 2002)) (stating that "a person who simply places information on the Internet does not subject himself to jurisdiction in each State into which the electronic signal is transmitted and received").

For the foregoing reasons, we affirm the portion of the order of the trial court denying Greensky's motion to dismiss for lack of personal jurisdiction, and reverse the portion of the order denying Furniture Retailers motion to dismiss for lack of personal jurisdiction.

Affirmed in Part and Reversed in Part.

Judge McCULLOUGH concurs.

Judge TYSON dissents with separate opinion.

TYSON, Judge dissenting.

The majority's opinion erroneously affirms the trial court's order against GreenSky Financial, LLC ("GreenSky") and also erroneously reverses the trial court's order against Furniture Retailers, LLC ("Furniture Retailers"). I disagree and respectfully dissent.

I. Standard of Review

When the trial court ruled on GreenSky's and Furniture Retailers's Rule 12(b)(2) motion to dismiss, it entered no findings of fact. Absent a request by one of the parties, the trial court is not required to make findings of fact when ruling on a motion. N.C. Gen. Stat. § 1A-1, Rule 52(a)(2) (2007). "Where no findings are made, proper findings are presumed, and our role on appeal is to review the record for competent evidence to support these presumed findings." *Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 615, 532 S.E.2d 215, 217-18 (citation omitted), *disc. rev. denied*, 353 N.C. 261, 546 S.E.2d 90 (2000).

II. *In Personam* Jurisdiction

A two-step analysis is required to determine whether a court may exercise *in personam* jurisdiction over a non-resident defendant. *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 675, 231 S.E.2d 629, 630 (1977). "First, do the statutes of North Carolina permit the

courts of this jurisdiction to entertain this action against defendant. If so, does the exercise of this power by the North Carolina courts violate due process of law." *Id.* (citation omitted).

A. N.C. Gen. Stat. § 1-75.4(5)

N.C. Gen. Stat. § 1-75.4(5) (2007), the long-arm statute, confers jurisdiction in a court in this State having subject matter jurisdiction over the allegations, in any action that:

> c. Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to deliver or receive within this State, or to ship from this State goods, documents of title, or other things of value; or
>
> d. Relates to goods, documents of title, or other things of value shipped from this State by the plaintiff to the defendant on his order or direction . . . .

1. GreenSky

The record on appeal contains an affidavit provided by David Zalik ("Zalik"), a managing member of GreenSky and Furniture Retailers. Zalik's affidavit states, "[p]ursuant to certain agreements between GreenSky and Eclectic [Global, LLC ("Eclectic")], GreenSky made various payments to [Rossetto USA, Inc. ("Rossetto")] on behalf of Eclectic from approximately September 2006 through and including December 2006." These "agreements between GreenSky and Eclectic . . . ." are sufficient to bring GreenSky under the jurisdiction of the trial court pursuant to N.C. Gen. Stat. § 1-75.4(5)(c). *See Pope v. Pope*, 38 N.C. App. 328, 331, 248 S.E.2d 260, 262 (1978) ("Money payments are clearly a thing of value within the meaning of [N.C. Gen. Stat. §] 1-75.4(5)(c)."); *compare Bank v. Funding Corp.*, 30 N.C. App. 172, 176, 226 S.E.2d 527, 530 (1976) (citations omitted) ("The mere mailing of a payment from outside the State by a nonresident to a party in this State under a contract made outside the State is not sufficient 'contacts' within this State to sustain *in personam* jurisdiction in the forum State.").

2. Furniture Retailers

The record on appeal also contains an affidavit provided by Andrea Verardo ("Verardo"), an employee of Rossetto "familiar with the accounts, sales, orders and billings of Rossetto." Verardo's affidavit states:

> In or about November 2006, Eclectic placed an order for various items of furniture with Rossetto. While such items were in transit, *Rossetto learned from Greensky* that Furniture Retailers . . . had taken over or otherwise began to operate, control or assume the business of Eclectic. As a result, *Rossetto immediately issued a revised invoice to Furniture Retailers, who took possession of the furniture upon delivery.*

(Emphasis supplied). Eclectic's November 2006 order, Rossetto's acceptance and shipment of that order, and Furniture Retailers's acceptance of delivery of the goods after it "t[ook] over or otherwise began to operate, control or assume the business of Eclectic[]" were actions sufficient to bring Furniture Retailers within the jurisdiction of the trial court pursuant to N.C. Gen. Stat. § 1-75.4(5)(d).

Because I would hold both GreenSky's and Furniture Retailers's actions were sufficient to bring them within the jurisdiction of the trial court pursuant to N.C. Gen. Stat. § 1-75.4(5)(c) and (d), respectively, I turn to the second step of the jurisdictional analysis: "whether due process of law would be violated by permitting the courts of this jurisdiction to exercise [*in personam* jurisdiction] over defendant[s]." *Dillon*, 291 N.C. at 676, 231 S.E.2d at 631.

B. Due Process

"[T]he test to determine if a corporation may be subjected to *in personam* jurisdiction in a foreign forum depends upon whether maintenance of the suit in the forum offends 'traditional notions of fair play and substantial justice.' " *Id.* at 678, 231 S.E.2d at 632 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 2d 95, 102 (1945)).

> In each case, there must be some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws; the unilateral activity within the forum state of others who claim some relationship with a non-resident defendant will not suffice. *This relationship between the defendant and the forum must be such that he should reasonably anticipate being haled into court there.*

Tom Togs, Inc. v. Ben Elias Industries Corp., 318 N.C. 361, 365, 348 S.E.2d 782, 786 (1986) (internal citation and quotation omitted) (emphasis supplied).

1. GreenSky

Here, the record on appeal shows that GreenSky sent payments to Rossetto on behalf of Eclectic and contacted Rossetto by telephone on several occasions. This evidence, standing alone, is insufficient "competent evidence to support [the trial court's] presumed finding[]" that GreenSky "purposefully avail[ed] [itself] of the privilege of conducting activities within [North Carolina] . . . ." *Bruggeman*, 138 N.C. App. at 615, 532 S.E.2d at 218; *Tom Togs*, *Inc.*, 318 N.C. at 365, 348 S.E.2d at 786; *see also Tejal Vyas*, *LLC v. Carriage Park Ltd. P'ship*, 166 N.C. App. 34, 40, 600 S.E.2d 881, 887 (2004) (affirmed trial court's grant of the defendants' motions to dismiss for lack of personal jurisdiction when the "[d]efendants' contacts were to mail [a] brochure and place a telephone call to [the] plaintiffs' attorney in North Carolina, at [the] plaintiffs' request[]"), *aff'd per curium*, 359 N.C. 315, 608 S.E.2d 751 (2005); *Corbin Russwin*, *Inc. v. Alexander's HDWE.*, *Inc.*, 147 N.C. App. 722, 728, 556 S.E.2d 592, 597 (2001) ("Other than [four] payments [sent to North Carolina], we find nothing else to indicate that [the defendant] purposely availed itself of the benefits and protections of the laws of North Carolina. This contact is too tenuous to avoid offending 'traditional notions of fair play and substantial justice.' "); *Bank*, 30 N.C. App. at 176, 226 S.E.2d at 530 (citations omitted) ("The mere mailing of a payment from outside the State by a nonresident to a party in this State under a contract made outside the State is not sufficient 'contacts' within this State to sustain *in personam* jurisdiction in the forum State.").

Following the precedents above, GreenSky's payments and telephone communications alone are insufficient to hale GreenSky into court in North Carolina. *Tom Togs*, *Inc.*, 318 N.C. at 365, 348 S.E.2d at 786. GreenSky has committed no act to "purposefully avail[] [itself] of the privilege of conducting activities within [North Carolina] . . . ." *Id.* I would hold that the trial court erred when it denied GreenSky's motion to dismiss pursuant to Rule 12(b)(2) of the North Carolina Rules of Civil Procedure for lack of *in personam* jurisdiction. *Dillon*, 291 N.C. at 676, 231 S.E.2d at 631.

2. Furniture Retailers

Here, evidence before the trial court and in the record on appeal shows: (1) Furniture Retailers "had taken over or otherwise began to operate, control or assume the business of Eclectic[]" when it "took possession of the furniture upon delivery[]" and (2) Rossetto invoiced

Furniture Retailers for the goods prior to Furniture Retailers's acceptance of delivery. This evidence constitutes "competent evidence to support [the trial court's] presumed finding[]" that Furniture Retailers "purposefully avail[ed] [itself] of the privilege of conducting activities within [North Carolina] . . . ." *Bruggeman*, 138 N.C. App. at 615, 532 S.E.2d at 218; *Tom Togs*, *Inc.*, 318 N.C. at 365, 348 S.E.2d at 786; N.C. Gen. Stat. § 1-75.4(5)(d). Furniture Retailers could "reasonably anticipate being haled into court . . . ." in North Carolina once it accepted delivery of furniture shipped and invoiced to it by Rossetto from North Carolina after it "t[ook] over or otherwise began to operate, control or assume the business of Eclectic." *Tom Togs*, *Inc.*, 318 N.C. at 365, 348 S.E.2d at 786.

The trial court properly denied Furniture Retailers's motion to dismiss pursuant to Rule 12(b)(2) of the North Carolina Rules of Civil Procedure. The majority's opinion reversing the trial court's ruling is erroneous. *Id.*

III. Conclusion

Under the first step of the jurisdictional analysis, both GreenSky's and Furniture Retailers's actions were sufficient for the trial court to exercise jurisdiction pursuant to N.C. Gen. Stat. § 1-75.4(5)(c) and (d), respectively. The record on appeal does not contain "competent evidence to support [the trial court's] presumed findings[]" to deny GreenSky's Rule 12(b)(2) motion to dismiss for lack of *in personam* jurisdiction. *Bruggeman*, 138 N.C. App. at 615, 532 S.E.2d at 218; *see Tejal Vyas*, *LLC*, 166 N.C. App. at 40, 600 S.E.2d at 887; *Corbin Russwin*, *Inc.*, 147 N.C. App. at 728, 556 S.E.2d at 597; *Bank*, 30 N.C. App. at 176, 226 S.E.2d at 530. The trial court's denial of GreenSky's motion to dismiss should be reversed.

The record on appeal contains "competent evidence to support [the trial court's] presumed findings[]" to deny Furniture Retailers's Rule 12(b)(2) motion to dismiss. *Bruggeman*, 138 N.C. App. at 615, 532 S.E.2d at 218; *see Tom Togs*, *Inc.*, 318 N.C. at 365, 348 S.E.2d at 786. The trial court's denial of Furniture Retailers's motion to dismiss should be affirmed. The majority's opinion is erroneous on both rulings. I respectfully dissent.

KRISTEN (MILLER) DEVANEY, PLAINTIFF v. WILLIAM B. MILLER, DEFENDANT

No. COA07-788

(Filed 1 July 2008)

1. Child Support, Custody, and Visitation— child support—motion to modify—summary procedure

Dismissal of a motion to modify child support is a summary procedure similar to judgment on the pleadings when only the allegations in the motion and the court file are considered by the trial court. The factual allegations of a motion to modify need not be detailed, but they must be legally sufficient to satisfy the elements of at least some legally recognized claim. On appeal, the dismissal is subject to de novo review.

2. Child Support, Custody, and Visitation— change of circumstances—previously modified order

The starting point from which a change of circumstances could be shown in a motion to modify child support was a 2005 modification order that addressed all aspects of the child support obligation on the merits where the original order was from 1993 and there had been other modifications in the interim. Neither party disputes that a determination on the merits was made by the original order, the 1996 modification, and the 2000 modification, with none of the orders indicating that they were interim or temporary. The 2000 and 2005 modification orders both state that provisions of the prior orders which were not modified would remain in full force and effect.

3. Child Support, Custody, and Visitation— motion to modify—allegations of reduced income—information and belief

The allegations in a motion to modify child support were not sufficient to survive a motion to dismiss where the only allegation was that, on information and belief, the parties' incomes had changed. Even assuming that the allegation is true, that alone is not sufficient; only a substantial and involuntary decrease in the noncustodial parent's income can justify a decrease in the child support obligation absent a showing of a change in the needs of the child.

Appeal by defendant from order entered 19 April 2007 by Judge Joseph E. Turner in District Court, Guilford County. Heard in the Court of Appeals 9 January 2008.

Hatfield & Hatfield, by Kathryn Hatfield, for plaintiff-appellee.

Rebecca Perry, PLLC, by Rebecca Perry for defendant-appellant.

STROUD, Judge.

Defendant appeals from an order dismissing his motion to modify child support. This appeal presents two legal questions: (1) whether, when an order for child support has previously been modified by subsequent orders, the changes in circumstances necessary to support a new motion for modification should be determined from the date of the original order or from the date of a subsequent modification, and (2) whether an allegation of a change in the parents' income, without more, is sufficient to support a motion to modify child support.

For the reasons that follow, we hold that: (1) the changes in circumstances necessary to support a modification should be determined from the date of the most recent child support order which addresses the obligation in question, and (2) an allegation of a change to the parties' income, without more, is not sufficient to support a motion to modify child support. Accordingly, we affirm the trial court's order dismissing defendant's motion to modify child support.

I. Background

On or about 20 April 1993, the parties' marriage was dissolved by a judgment of divorce entered in the Commonwealth of Massachusetts. The divorce judgment contained provisions regarding child custody and child support (hereinafter, "original child support order"). The original child support order was modified by a judgment entered 2 January 1996 in Probate and Family Court, Worcester County (hereinafter, "1996 modification order").[1] The original child support order and the 1996 modification order were further modified by consent of the parties in a judgment entered on or about 22 May 2000 (hereinafter, "2000 modification order"). The 2000 modification order provided that plaintiff would be able to relocate to North Carolina with the children, established a visitation schedule for the children with defendant, and obligated defendant to pay child support twice monthly to plaintiff in the amount of $1,083.33. It further stipulated "[i]n all other respects the prior judgments of the court shall remain in full force and effect."

1. The original child support order and the 1996 modification order were not included in the record, but they are referenced by later modification orders appearing in the record, and neither party has disputed their existence or terms.

On or about 14 April 2005, plaintiff filed a complaint[2] (hereinafter, "2005 motion") in Worcester, Massachusetts. The 2005 motion requested modification of the original child support order, alleging that the incomes earned by the parties had changed and that two of the children were of college age. The 2005 motion requested "redetermining child support in accordance with the Mass[.] Child Support Guidelines," and college expenses. The trial court entered a judgment by consent of the parties on or about 4 October 2005[3] (hereinafter, "2005 modification order"), modifying the original child support order to include defendant's obligation for fifty percent (50%) of each child's college expenses up to an agreed maximum and allocating responsibility for payment of various medical and transportation expenses for the children. The 2005 modification order did not change the monthly child support obligation which had been stated in the 2000 modification order.

On 4 January 2006, defendant registered the 2000 modification order and filed a verified Motion for Modification of Child Support in Guilford County District Court. The motion alleged:

> Since the entry of the May 22, 2000 order, there has been a substantial and material change of circumstances affecting the welfare of the minor children as follows:
>
> a. The Plaintiff has relocated to the State of North Carolina;
>
> b. The Defendant has relocated to the State of Florida;
>
> c. Two of the parties' minor children have reached the age of eighteen and have graduated from high school and are currently enrolled in college;
>
> d. Defendant has two (2) additional children from his subsequent marriage;
>
> e. On information and belief, the parties' incomes have changed significantly since the entry of the order.

On the basis of the allegation of changed circumstances, defendant requested "[t]hat the Court enter an order modifying Defendant's

2. The "complaint" for modification, as it was entitled in Massachusetts, was filed in the same court file as the original child support order and the modification orders. Under North Carolina practice, the "complaint" would have been referred to as a motion in the cause to modify child support.

3. Plaintiff referred to this order as the "October 5, 2005" order and the trial court referred to it as the "October 7, 2005" order.

child support obligation in accordance with the North Carolina Child Support Guidelines[.]"[4]

On 6 February 2006, plaintiff filed a verified Objection to Registration, alleging that the original child support order, a "Consent Order of May 21, 2001"[5] and the 2005 modification order should also be registered with the 2000 modification order. On 26 April 2006, defendant amended his motion for modification of child support to include a request for the District Court, Guilford County to "assume jurisdiction of this matter[.]" On 17 October 2006, plaintiff moved to dismiss defendant's motion for modification alleging that the relevant date from which to determine if material changes had occurred was 4 October 2005, and that none of the changes alleged by defendant had occurred after that date. On 24 October 2006, the trial court issued a pre-trial order amending the court file to include the 2005 modification motion as well as the 2005 modification order as the most recent support order.

The trial court heard the motion to modify on 10 April 2007. The trial court dismissed defendant's motion for modification by order entered 19 April 2007, on the grounds that the 2005 modification order was the relevant starting point for determining a material change in circumstances, and that defendant had alleged no material changes which had occurred since that date. Defendant appeals.

II. Standard of Review

[1] As an initial matter we must determine the standard of review. We note that defendant did not include a standard of review in his brief as required by Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure. Though we could impose a monetary penalty for this oversight, we elect instead to admonish defendant's counsel to exercise care when preparing briefs submitted to this Court. *See State v. Parker*, 187 N.C. App. 131, 135, 653 S.E.2d 6, 8 (2007).

Defendant contends that his motion to modify alleges sufficient facts to survive a motion to dismiss for failure to state a claim under

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4. We note that "[a] tribunal of this State may not modify any aspect of a child support order that may not be modified under the law of the issuing state." N.C. Gen. Stat. § 52C-6-611(c) (2005). However, because defendant did not show changed circumstances in his motion to modify, the trial court did not reach this question. *See McGee v. McGee*, 118 N.C. App. 19, 26-27, 453 S.E.2d 531, 535-36, *disc. review denied*, 340 N.C. 359, 458 S.E.2d 189 (1995).

5. The existence of this order is uncertain as it does not appear in the record, nor is reference made to it by any order or judgment appearing in the record.

the current rules of notice pleading. Defendant also contends that the trial court treated his motion as a motion for summary judgment, except that the trial court improperly failed to give the parties the opportunity to present pertinent material as required by N.C. Gen. Stat. § 1A-1, Rule 12(b) and the trial court improperly viewed the evidence in the light most favorable to the moving party.

Though the order appealed from contains written "findings of fact," there is no indication in the record that the trial judge heard testimony or received any affidavits or other evidence in the cause.[6] Generally, findings of fact are inappropriate where testimony is not heard and evidence is not received, or where the facts are not in dispute. *Craddock v. Craddock*, 188 N.C. App. 806, 813, 656 S.E.2d 716, 720-21 (2008); *Atlantic Coast Mech., Inc. v. Arcadis, Geraghty & Miller of N.C., Inc.*, 175 N.C. App. 339, 345, 623 S.E.2d 334, 339 (2006) (discussing similarities between a motion to dismiss and summary judgment). However, in the case *sub judice*, "[i]t is apparent from a careful review of the record that the trial judge took judicial notice of previous orders in the cause[,]" *In re M.N.C.*, 176 N.C. App. 114, 120, 625 S.E.2d 627, 632 (2006), which he outlined, along with the main points of plaintiff's motion to dismiss, under the heading "Findings of Fact." It is also apparent from the record that the trial judge summarily dismissed defendant's motion purely as a matter of law based on the allegations in the motion to modify and judicial notice of the previous orders in the court file.

Dismissal of a motion to modify child support when only the allegations in the motion and the court file are considered by the trial court is a summary procedure similar to judgment on the pleadings. *See George Shinn Sports, Inc. v. Bahakel Sports, Inc.*, 99 N.C. App. 481, 486, 393 S.E.2d 580, 583-84 (1990) ("A motion for judgment on the pleadings is a summary procedure . . . which allows a trial court to enter judgment when all the material allegations of fact are admitted in the pleadings and only questions of law remain."), *disc. review denied*, 328 N.C. 571, 403 S.E.2d 511 (1991); *Wilson v. Development*

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6. We note that the record before us does not contain an Affidavit of Income, Assets, and Expenses for either party, as required by Rule 29 of the Case Management Rules for the District Court of the Eighteenth Judicial District ("CMR"). This affidavit is required by those rules to be attached to the pleading for modification of child support. The record also contains no indication that either party ever served or filed any of the financial documentation as required for motions to modify child support by CMR 29.2. Thus, the trial court did not have the opportunity to consider even this basic financial information which might be expected in a case regarding modification of child support.

Co., 276 N.C. 198, 206, 171 S.E.2d 873, 878-79 (1970) (Judgment on the pleadings is "limited to the facts properly pleaded in the pleadings before [the court], inferences reasonably to be drawn from such facts and matters of which the court may take judicial notice."). Like judgment on the pleadings, dismissal of a motion to modify child support is generally disfavored because it deprives the non-moving party of an opportunity to present evidence and be heard in support of its motion. *See Groves v. Community Hous. Corp.*, 144 N.C. App. 79, 87, 548 S.E.2d 535, 540 (2001) ("Judgments on the pleadings are disfavored in law[.]"); *see also Frank v. Funkhouser*, 169 N.C. App. 108, 112-13, 609 S.E.2d 788, 792-93 (2005) (summary judgment should be used sparingly because it deprives a party of a trial on the merits). However, dismissal is appropriate where the motion to modify is not supported by factual allegations which, if true, would entitle the moving party to relief. *See Murrow v. Henson*, 172 N.C. App. 792, 794, 616 S.E.2d 664, 665 (2005) (discussing a 12(b)(6) motion to dismiss). The factual allegations of a motion to modify need not be detailed, but they must be "legally sufficient to satisfy the elements of at least some legally recognized claim." *Atlantic Coast Mech.*, 175 N.C. App. at 345, 623 S.E.2d at 339 (citation and quotation marks omitted).

On appeal, dismissal of a motion to modify child support which is based on the insufficiency of its allegations as a matter of law without the weighing of facts is subject to *de novo* review. *State ex rel. Lively v. Berry*, 187 N.C. App. 459, 462, 653 S.E.2d 192, 194 (2007). The allegations in the motion to modify are taken as true and reasonable inferences from the allegations are drawn in favor of the party seeking to modify child support. *See George Shinn Sports*, 99 N.C. App. at 486, 393 S.E.2d at 584 ("In ruling on a motion [for judgment on the pleadings], the trial court must view the facts and all permissible inferences therefrom in the light most favorable to the nonmovant.")

III. Analysis

Defendant contends the trial court erred in two ways: (1) finding that the 2005 modification order was a modification of child support and therefore the relevant starting point from which a change in circumstances should be determined, and (2) failing to find that the motion "lists certain events which would support a finding of a change in circumstances." We disagree.

A. Relevant Order

[2] Defendant cites *Sikes v. Sikes*, 98 N.C. App. 610, 391 S.E.2d 855 (1990), *aff'd*, 330 N.C. 595, 411 S.E.2d 588 (1992), to contend that "an order with regard to the parties' children that does not fully address the particulars of child support cannot be characterized as a prior child support order." Therefore, defendant argues, the order of 4 October 2005 which addressed only college education and medical and transportation expenses cannot be characterized as a prior child support order, and therefore cannot be used as the starting point to determine changed circumstances on a motion for modification.

However, we do not find defendant's case apposite to *Sikes*. In *Sikes*, the defendant-appellant contended that the plaintiff-appellee had not met her burden of showing changed circumstances from the prior order, so that the trial court erred in granting her an increase in child support. 98 N.C. App. at 614, 391 S.E.2d at 857. This Court overruled the defendant-appellant's assignment of error, concluding that the prior order had been an

> [i]nterim [o]rder clearly and unequivocally. intended to facilitate the transfer of custody to plaintiff pending an agreement between the parties or a determination by the trial court as to an appropriate level of support. The [later] order . . . was manifestly the first time a determination on the merits of the issue of child support was made, and thus no findings relating to a change in circumstances were required.

Id. (citation and internal quotation marks deleted).

The case *sub judice* is manifestly different from *Sikes*. In this case, neither party disputes that a determination on the merits on the issue of child support was made by the original child support order, the 1996 modification order, and the 2000 modification order. None of the orders in the record which were issued prior to the motion for modification *sub judice* indicate that they were interim or temporary orders. Further, the allegations of the 2005 motion, which resulted in the 2005 modification order, were not limited to college, medical, and travel expenses but specifically raised the issue of "re-determining child support in accordance with the Mass[.] Child Support Guidelines." The "re-determination" of monthly child support was not reserved for later adjudication in the 2005 modification order but instead the monthly child support was reaffirmed by implication. The 1996 modification order was not included in the record, but the 2000 and 2005 modification orders both state that provisions of the

prior orders which were not modified would remain in full force and effect. On this record, we hold that the 2005 modification order addressed all aspects of the child support obligation on the merits and was therefore the starting point from which a showing of a change in circumstances was necessary. The trial court did not err in so concluding.

B. Allegations of a Change in Circumstances

[3] Neither defendant's motion to modify nor his appellate brief expressly state what type of modification in child support he is seeking, whether an increase or a decrease, so we must assume that as the child support obligor, defendant was moving for a decrease in his obligation. In his brief, defendant argues that an increase or decrease in the income of either parent is a substantial change sufficient for the trial court to recalculate child support, and that "it is quite possible that the income of either or both parties has increased or decreased significantly since entry of the last relevant order, whether that is the May 22, 2000 order or the October 4, 2005 order."[7] We disagree.

A order of child support can be modified only by "a showing of changed circumstances[.]"[8] N.C. Gen. Stat. § 50-13.7 (2005). The burden of showing a change in circumstances is on the party seeking to modify the order. *Wolf v. Wolf*, 151 N.C. App. 523, 526, 566 S.E.2d 516, 518 (2002). If the trial court determines that a substantial change in circumstances has occurred, it should proceed to determine the

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7. Defendant's brief does not argue for any other of the changed circumstances alleged in his motion to modify. In any event, the mother's move to North Carolina was addressed in the 2000 modification order, and the children's graduation from high school and enrollment in college was addressed in the 2005 modification order, so even if those circumstances could provide a legal basis to modify child support, those changes could not possibly have occurred between the 2005 modification order and defendant's motion to modify filed 4 January 2006.

8. The trial court's order incorrectly stated "any modification since [the 2005 modification order] must be based upon a material change in circumstances test in that three years have not elapsed since the entry of that Judgment." However, *any* modifications to child support must be based on a showing of changed circumstances. N.C. Gen. Stat. § 50-13.7(a). A "showing that the application of the [Child Support] Guidelines would result in a change in the child support obligation of fifteen percent or more" creates a presumption of a change in circumstances, but does not obviate the required statutory showing of a change in circumstances. *Lewis v. Lewis*, 181 N.C. App. 114, 120, 638 S.E.2d 628, 632 (2007). However, "[i]f the correct result has been reached, the judgment will not be disturbed even though the trial court may not have assigned the correct reason for the judgment entered." *Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989).

correct amount of support. *McGee v. McGee*, 118 N.C. App. 19, 26-27, 453 S.E.2d 531, 535-36, *disc. review denied*, 340 N.C. 359, 458 S.E.2d 189 (1995).

Defendant cites no authority and we find none for the proposition that a bare allegation of a significant change in the parties' incomes is sufficient to support a motion to decrease child support. To the contrary, absent a showing of a change in the needs of the child, only a substantial and *involuntary decrease* in the non-custodial parent's income can justify a decrease in the child support obligation. *Wiggs v. Wiggs*, 128 N.C. App. 512, 515, 495 S.E.2d 401, 403, *disapproved of on other grounds*, *Pulliam v. Smith*, 348 N.C. 616, 620, 501 S.E.2d 898, 900 (1998). All other changes in income must be accompanied by facts showing that the needs of the child have changed. *Mittendorff v. Mittendorff*, 133 N.C. App. 343, 344, 515 S.E.2d 464, 466 (1999) ("A *voluntary* and substantial decrease in a parent's income can constitute a changed circumstance only if accompanied by a substantial decrease in the needs of the child." (Emphasis in original.)); *Thomas v. Thomas*, 134 N.C. App. 591, 595-96, 518 S.E.2d 513, 516 (1999) ("[A]n increase in income alone is not enough to prove a change of circumstances to support [modification of] a child support obligation."); *Greer v. Greer*, 101 N.C. App. 351, 355, 399 S.E.2d 399, 402 (1991) ("Without evidence of any change of circumstances affecting the welfare of the child or an increase in need, however, an increase for support based solely on the ground that the support payor's income has increased is improper."). Although the allegations of a motion to modify child support need not include detailed factual allegations regarding the changes in circumstances to survive a motion to dismiss, we stress that in this case, the only allegation was, in its entirety, that "on information and belief, the parties' incomes have changed significantly since the entry of the order."[9] Even if we assume that this allegation is entirely true, this fact alone cannot survive a motion to dismiss.

We conclude that defendant's motion to modify failed to allege facts which would support a finding of a substantial change in circumstances which would have allowed the trial court to proceed to modify child support. The trial court did not err when it dismissed the motion. Accordingly, the 19 April 2007 order of the trial court is affirmed.

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9. Again, because defendant did not file an Affidavit of Income, Assets, and Expenses or any other information related to his financial status with his motion, we can rely only upon the allegations of his motion.

Affirmed.

Judges HUNTER and CALABRIA concur.

NORTH CAROLINA COUNTIES LIABILITY AND PROPERTY JOINT RISK MANAGEMENT AGENCY, Plaintiff v. ERNEST M. CURRY, JR., Defendant

No. COA06-1664

(Filed 1 July 2008)

Insurance— policy covering sheriff's department—set-off provision—ambiguous

The structure and language of a county sheriff's department's insurance policy supported a deputy's interpretation of set-off provisions applicable to underinsured motorist coverage as requiring a deduction for third party payments from total damages rather than policy limits. Plaintiff's (the insurer's) view is also reasonable, which means that the policy is ambiguous and the construction that favors the insured will be accepted.

Appeal by defendant from order entered 22 September 2006 by Judge Paul L. Jones in New Hanover County Superior Court. Heard in the Court of Appeals 22 August 2007.

Teague, Campbell, Dennis & Gorham, LLP, by Courtney C. Britt, William A. Bulfer and George H. Pender, for plaintiff-appellee.

Baker & Slaughter, P.A., by H. Mitchell Baker, III and M. Troy Slaughter, for defendant-appellant.

GEER, Judge.

Defendant Ernest M. Curry, Jr. appeals from a summary judgment order entered in favor of plaintiff, the North Carolina Association of County Commissioners' North Carolina Counties Liability and Property Joint Risk Management Agency ("NCACC/LPP"). The sole question presented by this appeal is whether the set-off provisions applicable to underinsured motorist coverage under the NCACC/LPP policy require that sums received by Curry from other sources be deducted from Curry's total damages or from the policy's

limits of liability. Because the policy is ambiguous on this point, we are required to construe the policy in favor of Curry, as the insured, and, therefore, we hold that the set-off provisions require deduction from Curry's total damages and not from the policy's liability limits. Consequently, we reverse the trial court's entry of summary judgment in favor of NCACC/LPP.

Facts

On 16 April 2003, Curry, a deputy sheriff for New Hanover County, was riding in a patrol car owned by New Hanover County and operated by another deputy sheriff, Stanley B. Taylor. While on patrol, Taylor pursued a car operated by Joseph E. Hanible. Taylor and Hanible were traveling in opposite directions when Taylor turned the patrol car diagonally across the street in an attempt to block Hanible's car. Hanible's car collided with the patrol car, seriously injuring Curry.

Curry filed a workers' compensation claim as well as a motor vehicle negligence action against Hanible. NCACC/LPP answered Curry's negligence complaint as an unnamed defendant on 2 May 2005. At the time of the accident, NCACC/LPP, under contract with New Hanover County, provided insurance coverage to the New Hanover County Sheriff's Department under NCACC/LPP's Insurance Pool Fund. This policy included uninsured ("UM") and underinsured ("UIM") motorist coverage with a limit of $100,000.00 for UIM coverage.

Curry ultimately received $114,295.28 in workers' compensation benefits, and Hanible's liability carrier tendered its policy limits of $30,000.00. The parties have stipulated in this action that Curry's damages as a result of the 2003 accident are $300,000.00.

On 17 June 2005, NCACC/LPP filed this declaratory judgment action seeking a determination that the set-off provisions in the New Hanover County policy had exhausted all available UIM coverage. On 26 July 2005, Curry filed an answer and counterclaim contending that he should receive $100,000.00 in UIM coverage. Shortly thereafter, the parties filed cross motions for summary judgment.

On 22 September 2006, the trial court entered an order concluding: (1) the set-off provisions of the policy had exhausted all available coverage under the policy, and (2) no remaining coverage was available to Curry under the applicable contract. The court accordingly granted NCACC/LPP's motion for summary judgment and denied

Curry's motion for summary judgment. Curry timely appealed to this Court.

Discussion

In this case, there is no dispute regarding the relevant facts. The sole issue is the proper construction of the NCACC/LPP policy and its UM/UIM coverage provisions. Both parties agree that North Carolina's Motor Vehicle Safety and Financial Responsibility Act is inapplicable to New Hanover County's insurance policy as a result of N.C. Gen. Stat. § 20-279.32 (2007), which states: "This Article does not apply to . . . the operator of a vehicle owned by a county . . . who becomes involved in an accident while operating such vehicle in the course of the operator's employment as an employee or officer of the county . . . ."

As a result, the terms of the New Hanover policy control regarding what UIM coverage is available to Curry. "The interpretation of language used in an insurance policy is a question of law, governed by well-established rules of construction." *N.C. Farm Bureau Mut. Ins. Co. v. Mizell*, 138 N.C. App. 530, 532, 530 S.E.2d 93, 95, *disc. review denied*, 352 N.C. 590, 544 S.E.2d 783 (2000). *See also Certain Underwriters at Lloyd's London v. Hogan*, 147 N.C. App. 715, 718, 556 S.E.2d 662, 664 (2001) ("The construction and application of insurance policy provisions to undisputed facts is a question of law, properly committed to the province of the trial judge for a summary judgment determination."), *disc. review denied*, 356 N.C. 159, 568 S.E.2d 188 (2002).

Nevertheless, a policy "is subject to judicial construction only where the language used in the policy is ambiguous . . . ." *Mizell*, 138 N.C. App. at 532, 530 S.E.2d at 95. An ambiguity exists when " 'the language of the policy is fairly and reasonably susceptible to either of the constructions asserted by the parties.' " *Digh v. Nationwide Mut. Fire Ins. Co.*, 187 N.C. App. 725, 728, 654 S.E.2d 37, 39 (2007) (quoting *Maddox v. Colonial Life & Acc. Ins. Co.*, 303 N.C. 648, 650, 280 S.E.2d 907, 908 (1981)).

If the language is clear and unambiguous, then the court must enforce the policy as it is written. *Mizell*, 138 N.C. App. at 532, 530 S.E.2d at 95. In cases of ambiguity, however, "the policy must be construed in favor of coverage and against the insurer[.]" *Id.* Although "[a]mbiguity in the terms of the policy is not established simply because the parties contend for differing meanings to be given to the language," *id.*, " '[t]he fact that a dispute has arisen as to the parties'

interpretation of the contract is some indication that the language of the contract is, at best, ambiguous[,]' " *Digh*, 187 N.C. App. at 728, 654 S.E.2d at 39 (quoting *St. Paul Fire & Marine Ins. Co. v. Freeman-White Assocs.*, 322 N.C. 77, 83, 366 S.E.2d 480, 484 (1988)).

The provisions in dispute in this case fall within section III of the New Hanover policy, relating to Business Auto Coverage. They state as follows:

E. Uninsured/Underinsured Motorist Coverage

. . . .

2. Coverage

a. *The Fund will pay all sums the Covered Person is legally entitled to recover as damages from the owner or driver of an Uninsured Motor Vehicle.* The damages must result from Bodily Injury sustained by the Participant or Property Damage, caused by an Accident. The owner's or driver's liability for these damages must result from the ownership, maintenance, or use of the Uninsured Motor Vehicle.

. . . .

5. Limit of Liability for Section III Uninsured/Underinsured Motorists Coverage.

a. *Regardless of the number of Covered Auto's, Covered Persons, claims made, or vehicles involved in the accident, the most the Fund will pay for all damages resulting from any one accident is the limit of Uninsured/Underinsured Motorist Coverage of this Section III shown in the Declarations Page.*

b. *Any amount payable under Section III, E. Uninsured/Underinsured Motorist Coverage shall be reduced by:*

(1) all sums paid or payable under any workers' compensation, disability benefits, or similar law exclusive of non-occupational disability benefits; and

(2) all sums paid by or for anyone who is legally responsible, including all sums paid under the Contract's liability coverage; and

(3) all sums paid or payable under any policy of property insurance.

c. Any amount paid under this coverage will reduce any amount a Participant may be paid under the Contract's liability coverage.

(Emphasis added.)

The parties have stipulated that the amount Curry "is legally entitled to recover as damages," within the meaning of section III(E)(2), is $300,000.00. The limit of liability for UIM coverage under the New Hanover policy, provided for in section III(E)(5)(a), is $100,000.00. The parties further agree that NCACC/LPP is entitled to a set off of $114,295.28 under section III(E)(5)(b)(1) and of $30,000.00 under section III(E)(5)(b)(2). The total amount of the set off is, therefore, $144,295.28.

Curry contends that the amount of $144,295.28 should be deducted from his damages of $300,000.00, leaving an amount of $155,704.72. According to Curry, section III(E)(5)(a) then sets a limit of $100,000.00, so that Curry is entitled to recover $100,000.00 from NCACC/LPP. NCACC/LPP, on the other hand, contends that the set-off amount of $144,295.28 must be deducted from the $100,000.00 limit of liability, with the result that the limits have been exhausted, and NCACC/LPP owes Curry nothing.

The parties agree that no North Carolina court has addressed the issue in this case. The issue has, however, been litigated across the country, although, curiously, neither party cites any of those cases. In some instances, courts have adopted the position taken, in this case, by NCACC/LPP and held that the language of the policy is unambiguous, and the amounts should be deducted from the policy limits. *See, e.g.*, *McGreehan v. Cal. State Auto. Ass'n*, 235 Cal. App. 3d 997, 1005, 1 Cal. Rptr. 2d 235, 240 (1991), *review denied*, 1992 Cal. LEXIS 866 (Feb. 19, 1992); *State Farm Mut. Auto. Ins. Co. v. Coe*, 367 Ill. App. 3d 604, 611-12, 855 N.E.2d 173, 180 (2006). Other courts have also concluded that the language is unambiguous, but require that the amounts be deducted from the total damages—the position taken by Curry in this case. *See*, *e.g.*, *Victor v. State Farm Fire & Cas. Co.*, 908 P.2d 1043, 1045-46 (Alaska 1996); *Beam v. Wausau Ins. Co.*, 765 N.E.2d 524, 530-31 (Ind. 2002). A third group has concluded that the policy is ambiguous, both constructions are reasonable, and, therefore, the policy must be construed in favor of the insured with the result that the amounts are deducted from total damages and not the

policy limits. *See*, *e.g.*, *McKoy v. Aetna Cas. & Sur. Co.*, 281 Md. 26, 30, 374 A.2d 1170, 1172-73 (1977); *Am. Ins. Co. v. Tutt*, 314 A.2d 481, 485-86 (D.C. 1974); *Krombach v. Mayflower Ins. Co.*, 827 S.W.2d 208, 211 (Mo. 1992) (en banc).

If courts, construing almost identical language, cannot agree on how the relevant provisions should be construed, then it seems likely that the language is ambiguous. Certainly, we would be hard pressed to consider unreasonable Curry's proposed interpretation of the language when the highest courts of other states have embraced that construction. Regardless, upon our review of the language at issue, we believe that the policy is reasonably susceptible to the construction urged by Curry and that the policy is, therefore, ambiguous.

The key question in construing the New Hanover policy is: To what does the language "[a]ny amount payable under Section III, E. Uninsured/Underinsured Motorist Coverage," set out in section III(E)(5)(b), refer? The reductions for workers' compensation benefits and other recoveries are taken from this "amount payable."

While NCACC/LPP contends that the policy is referring to "any amount payable" under section III(E)(5)(a), specifying the policy limits for UIM claims, Curry contends that the phrase refers back to section III(E)(2)(a), stating that "[t]he Fund will pay all sums the Covered Person is legally entitled to recover as damages from the owner or driver of an Uninsured Motor Vehicle." Based upon the language of the policy and the policy's structure, we believe Curry's proposed construction is just as reasonable as NCACC/LPP's. *See DeMent v. Nationwide Mut. Ins. Co.*, 142 N.C. App. 598, 602, 544 S.E.2d 797, 800 (2001) ("Since the objective of construing an insurance policy is to ascertain the intent of the parties, the courts should resist piecemeal constructions and should, instead, examine each provision in the context of the policy as a whole.").

The reduction is taken from "[a]ny amount payable *under Section III, E. Uninsured/Underinsured Motorist Coverage*." (Emphasis added.) The provision thus refers generally to the policy's UM/UIM coverage and does not refer specifically to payments made in accordance with section III(E)(5)(a), the policy limits. *See Beam*, 765 N.E.2d at 530-31 ("The following phrase, 'under this coverage,' is a general phrase contained in insurance agreements that refers to the scope of the initial insuring agreement, not the dollar amount of the policy limit.").

Subsection (2) of Section III(E) is entitled "Coverage." A reasonable reader of the policy could conclude that section III(E)(5)(b)—which mentions "coverage" rather than policy limits—is in fact referring to section III(E)(2). Section III(E)(2)(a), in turn, states: "The Fund will pay all sums the Covered Person is legally entitled to recover as damages from the owner or driver of an Uninsured Motor Vehicle."[1] Thus, section III(E)(5)(b) can reasonably be read as providing that the sums specified in that section shall reduce the "sums the Covered Person is legally entitled to recover as damages," as set out in section III(E)(2)(a).

Significantly, subsections III(E)(5)(a) and III(E)(5)(b) do not reference each other at all. The provisions appear co-equal and nothing specifically indicates that subsection (5)(b) is supposed to be a further limit on subsection (5)(a), as opposed to the subdivisions each being a separate limit on the amounts to be paid by NCACC/LPP when an uninsured or underinsured motorist is involved. *See McKoy*, 281 Md. at 30, 374 A.2d at 1173 (observing that "[t]here is no indication that [the set-off provision] is in any way subordinated to [the limit-on-liability provision]. Both clauses stand on equal footing, and both must therefore be understood as independently modifying the primary liability of Section I").

Indeed, elsewhere in the policy, provisions explicitly distinguish between "coverage" and "liability limit." *See Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 355, 172 S.E.2d 518, 522 (1970) ("Where the immediate context in which words are used is not clearly indicative of the meaning intended, resort may be had to other portions of the policy and all clauses of it are to be construed, if possible, so as to bring them into harmony."). The definitions section of the policy states that " 'Liability Coverage' means as described in Section III B. Liability Coverage," while " 'Liability Limit' means as described in Section III, C. Fund's Liability Limit." These definitions corroborate Curry's reasoning that the reference in subsection (5)(b) to "Uninsured/Underinsured Motorist Coverage" refers back to the provision regarding "Coverage" in subsection (2) and not the limit on UM/UIM coverage in subsection (5)(a).

In sum, the structure and language of the policy support Curry's interpretation of the set-off provisions as requiring a deduction from the total damages rather than a deduction from the policy limits.

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1. The policy defines "Uninsured Motor Vehicle" to include underinsured motor vehicles.

Even though NCACC/LPP's view is also reasonable, the existence of two reasonable constructions means that the policy's reference in subsection (5)(b) to "[a]ny amount payable" is ambiguous. Under well-established principles, this ambiguity requires that we accept the construction that favors the insured. *Williams v. Nationwide Mut. Ins. Co*, 269 N.C. 235, 238, 152 S.E.2d 102, 105 (1967).

NCACC/LPP, as the drafter of the policy, had the ability to make plain any contrary intention. For example, in *Rodriguez v. Gen. Acc. Ins. Co. of Am.*, 808 S.W.2d 379, 381 (Mo. 1991) (en banc), the policy stated: " '[T]he limit of liability shall be reduced by all sums paid . . . by or on behalf of persons or organizations who may be legally responsible.' " (Emphasis omitted.) *See also Victor*, 908 P.2d at 1048 ("If the reduction clause were meant to apply to the policy limits rather than total damages, it would state, 'limits of liability shall be reduced.' "). Since NCACC/LPP did not remove the ambiguity, we must hold that the trial court erred in construing the policy in the manner proposed by NCACC/LPP.

We note that the purpose of set-off provisions is to prevent double recoveries. *Id.* at 1049 ("The general purpose of a reduction clause is to prevent double recoveries."). The construction that we adopt here does not intrude on that purpose—Curry will not receive duplicative awards, but rather will simply receive compensation for more, although not all, of his total damages. We, therefore, reverse the trial court's order and remand for entry of judgment in favor of Curry.

Reversed.

Judges CALABRIA and JACKSON concur.

STATE OF NORTH CAROLINA v. TROY DAVID SIMMONS, DEFENDANT

No. COA07-1131

(Filed 1 July 2008)

1. Criminal Law— victim's outburst—denial of mistrial—curative instruction

The trial court did not abuse its discretion in a first-degree sex offense, first-degree kidnapping, and first-degree burglary case by failing to declare a mistrial based on the victim's outburst

during her testimony at trial given the rapidity with which the trial court removed the jury and gave it a curative instruction.

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

Although defendant contends the trial court abused its discretion in a first-degree sex offense, first-degree kidnapping, and first-degree burglary case by failing to declare a mistrial based on testimony of two SBI agents who blurted out that defendant was incarcerated in the presence of the jury, this assignment of error is dismissed because defendant failed to demonstrate by specific argument or authority that the testimony was highly prejudicial and deprived him of a trial by an impartial jury.

3. Constitutional Law— effective assistance of counsel—failure to object

Defendant did not receive ineffective assistance of counsel in a first-degree sex offense, first-degree kidnapping, and first-degree burglary case based on his trial counsel's failure to object to the admission of a witness's testimony as to the general reactions and characteristics of sexual assault victims because: (1) defendant failed to show trial counsel's failure to object fell below a standard of reasonableness; and (2) defendant failed to show there was a reasonable probability that the trial result would have been different absent the alleged error.

4. Evidence— prior crimes or bad acts—multiple sexual assaults

The trial court did not commit plain error in a first-degree sex offense, first-degree kidnapping, and first-degree burglary case by admitting under N.C.G.S. § 8C-1, Rule 404(b) testimony of three prosecution witnesses stating that they were also sexually assaulted by defendant because the incidents were sufficiently similar and not so remote in time as to be more probative than prejudicial under the balancing test of N.C.G.S. § 8C-1, Rule 403 including that: (1) each of the witnesses testified that the alleged assault against her took place within one year of the attack on the victim; (2) each woman testified that defendant used substantially the same method of restraining her during the attack by employing his greater size and strength, limiting her breathing, and making dire threats against her; and (3) defendant called each woman after the attack.

5. Kidnapping— first-degree—sufficiency of evidence—separate confinement, restraint, or removal beyond rape

The trial court erred by denying defendant's motion to dismiss the charge of first-degree kidnapping, and the conviction is vacated based on insufficient evidence showing a separate asportation of a victim during the commission of the separate felony offense of rape, because: (1) defendant raped the victim in the guest bedroom; and (2) there was no evidence of confinement, restraint, or removal other that than that which was inherent to the offense of rape itself.

6. Sentencing— consolidated—conviction vacated

A first-degree sex offense, first-degree kidnapping, and first-degree burglary case is remanded for resentencing because: (1) the trial court consolidated defendant's sexual offense and kidnapping charges for sentencing, and defendant's kidnapping conviction was vacated; and (2) it was probable that defendant's conviction for two or more offenses adversely influenced the trial court's judgment on the length of the sentence to be imposed when the offenses were consolidated for judgment.

Appeal by defendant from judgments entered 9 May 2007 by Judge Kenneth F. Crow in New Hannover County Superior Court. Heard in the Court of Appeals 5 March 2008.

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

Paul F. Herzog, for defendant.

ELMORE, Judge.

On 11 May 2002, P.F. went to a club with Isaac "Bud" Sparrow and other friends. She stayed later than they, and at the end of the night, around 1:30 a.m., she took a cab to Sparrow's home. When P.F. retrieved the key from under a doormat and opened the door, Sparrow's dog greeted her by bounding outside. P.F. grabbed the dog and forced her back into the house, closing the door behind her. In the commotion, she neglected to take the key out of the lock.

P.F. then retired to the guest bedroom, where she fell asleep fully dressed. She heard a noise and checked the bedroom door. Discovering no one outside, she returned to bed and dozed off once again. After an indeterminate amount of time, however, she saw a

light and observed the doorknob to the bedroom turning. P.F. called out for the dog, but an unknown man jumped on top of her, pinning her to the bed.

P.F.'s assailant held a knife to her throat and cut off her air supply by covering her mouth and nose with his hand. He repeatedly threatened to kill her if she did not cooperate. He removed a condom from his pocket, but was unable to get it on because his hands were occupied with restraining P.F. Rather than engage in coitus, he instead forced himself into P.F.'s mouth and ejaculated.

P.F. engaged the man in conversation, and when he asked for her phone number she informed him that she was in the telephone directory. After a brief discussion, the assailant zipped up his pants and exited the room.

P.F. waited a few minutes before going to Sparrow's room, where she slept inside next to the locked door. She was too ashamed to wake him or call the police, and left before Sparrow awoke the next morning. Although she did not plan to file a formal report with the police, she chose to do so after Sparrow found a piece of the condom wrapper. Defendant called P.F. about four times after the attack, beginning the day after it occurred.

Defendant was eventually indicted on 5 September 2006 for one count of first degree sex offense, one count of first degree kidnapping, and one count of first degree burglary. A jury found him guilty of all counts on 8 May 2007, and on 9 May 2007, the trial court entered judgment against him. The trial court consolidated defendant's convictions for the first degree sex offense and kidnapping offense, sentencing defendant to 421 months' to 513 months' imprisonment, and sentenced defendant to 129 months' to 164 months' imprisonment for the first degree burglary offense, with the sentences to run consecutively. Defendant now appeals.

[1] In his first argument on appeal, defendant claims that the trial court erred in failing to declare a mistrial based on P.F.'s outburst during her testimony at trial. We find no error.

Our standard of review when examining a trial court's denial of a motion for mistrial is abuse of discretion. *State v. Allen*, 141 N.C. App. 610, 617, 541 S.E.2d 490, 496 (2000). It is clear that P.F.'s outburst, alone, does not necessarily entitle defendant to a mistrial: "N.C. Gen. Stat. § 15A-1061 provides in part that the judge may declare a mistrial if conduct inside or outside the courtroom results in substantial or

irreparable prejudice to the defendant's case. Not every disruptive event which occurs during trial automatically requires the court to declare a mistrial." *Id.*

In this case, P.F. suffered an "emotional breakdown" while on the stand. She began to cry while testifying and screamed, "How dare you do that to me! How dare you! How dare you put me through this, too, again!" The trial judge had the jury removed from the courtroom as P.F. continued her outburst, shouting, "I hate you, you son of a bitch!" When the jury returned, the trial judge instructed them, in part:

> I do need to give you what's called a limiting instruction or another cautionary instruction which is the fact that [P.F.] might have had an emotional breakdown here in the courtroom, it's not to reflect on her or this defendant in any way, not to base your decision on it. You are not to allow that to prejudice this defendant in any way. You are not to draw any conclusions from it. You are to base your decision at the end of this case on the evidence that's been presented but you are not to draw any prejudicial conclusions of this defendant [sic] because [P.F.] happened to have an emotional breakdown.

Given the rapidity with which the trial court removed the jury and gave it a curative instruction, we decline to hold that the trial court abused its discretion by refusing to grant a mistrial.

[2] In a similar argument, defendant avers that the trial court ought to have declared a mistrial based on the testimony of two State Bureau of Investigation (SBI) agents, who "blurted out" that defendant was incarcerated in the presence of the jury. Defendant goes so far as to suggest that the second agent's testimony was "probably a deliberate attempt to prejudice [defendant] in the eyes of the jury." We disagree. Although defendant makes the assertion that the testimony was "highly prejudicial, and deprived [him] of a trial by an impartial jury," he makes no attempt to demonstrate to this Court why that is so. Instead, he relies only upon the arguments that he made with respect to P.F.'s outbursts. In the absence of specific arguments and authority on this issue, we will not find that the SBI agents' testimony resulted "in substantial or irreparable prejudice to the defendant's case." *Allen*, 141 N.C. App. at 617, 541 S.E.2d at 496; *see also* N.C.R. App. P. 28(b)(6) (2007) ("Assignments of error . . . in support of which no reason or argument is stated or authority cited, will be taken as abandoned.").

[3] Defendant next argues that his trial counsel's failure to object to the admission of certain testimony constitutes ineffective assistance of counsel. The testimony at issue was from Amy Feath, director of the "Rape Crisis Center at the Coastal Horizon Center," who testified as to the general reactions and characteristics of sexual assault victims.[1]

> To successfully assert an ineffective assistance of counsel claim, defendant must satisfy a two-prong test. . . . First, he must show that counsel's performance fell below an objective standard of reasonableness. . . . Second, once defendant satisfies the first prong, he must show that the error committed was so serious that a reasonable probability exists that the trial result would have been different absent the error.

State v. Langley, 173 N.C. App. 194, 199-200, 618 S.E.2d 253, 257 (2005) (quoting *State v. Blakeney*, 352 N.C. 287, 307-08, 531 S.E.2d 799, 814-15 (2000)). In our view, defendant satisfies neither prong.

"Counsel is given wide latitude in matters of strategy, and the burden to show that counsel's performance fell short of the required standard is a heavy one for defendant to bear." *Id.* at 200, 618 S.E.2d at 257 (quoting *State v. Fletcher*, 354 N.C. 455, 482, 555 S.E.2d 534, 551 (2001)). Defendant's only argument regarding the first prong is that "[i]t should have been obvious to counsel of reasonable level of competence [sic] that almost all of the testimony given by Ms. Feath was irrelevant to whether [defendant] assaulted [P.F.], and, therefore, inadmissible." This is insufficient to convince this Court that trial counsel's failure to object fell below a standard of reasonableness.

Moreover, though defendant cites *Blakeney* and claims that the admission of the testimony constituted error "so serious that a reasonable probability exists that the trial result would have been different absent the error," *Blakeney*, 352 N.C. at 307-08, 531 S.E.2d at 815, he neglects entirely to establish why that is so. Accordingly, defendant also fails under the second prong of the test.

[4] Defendant next contends that the admission of testimony offered by three prosecution witnesses stating that they, too, were sexually assaulted by defendant constitutes plain error. We disagree.

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1. We note the State's assertion that defendant did not properly preserve the issue of the admissibility of the testimony. Though we agree with the State that this issue was not preserved, we acknowledge that defendant's argument is not that the trial court erred by admitting the testimony; rather, defendant argues that his trial level counsel's failure to object to its admission constituted ineffective assistance of counsel.

We note that defendant failed to properly object to the admission of the testimony at issue. Accordingly, our review is limited to plain error. "In criminal cases, a question which was not preserved by objection noted at trial . . . may be made the basis of an assignment of error where the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C.R. App. P. 10(c)(4) (2007). "Plain error is error 'so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached.' " *State v. Leyva*, 181 N.C. App. 491, 499, 640 S.E.2d 394, 399 (2007) (quoting *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987)).

The first witness to whose testimony defendant objects testified that defendant attacked her in 2001 while serving as her supervisor at a naval medical hospital in Jacksonville. The second testified that she was married to defendant and that he raped her in 2002, after their separation. The last witness at issue testified that defendant attacked her outside of a club in 2002.

We note that the admission of all of the testimony at issue is governed by Rule 404(b) of our Rules of Evidence. Rule 404(b) states, in pertinent part,

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

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2007). "The prevailing test for determining the admissibility of evidence of prior conduct is whether the incidents are sufficiently similar and not so remote in time as to be more probative than prejudicial under the balancing test of N.C. Gen. Stat. § 8C-1, Rule 403." *State v. Carpenter*, 179 N.C. App. 79, 84, 632 S.E.2d 538, 541 (2006) (citation omitted). "The determination of similarity and remoteness is made on a case-by-case basis," with the degree of similarity required being that which would lead the jury to the "reasonable inference that the defendant committed both the prior and present acts." *Id.* (quotations and citations omitted).

In this case, each of the witnesses testified that the alleged assault against her took place within one year of the attack on P.F., a fairly short time period. Additionally, each woman testified that

defendant used substantially the same method of restraining her during the attack, employing his greater size and strength, limiting her breathing, and making dire threats against her. Defendant also called each woman after the attack. In light of these similarities, we hold that admission of the witnesses' testimony was appropriate and that the trial court did not err.

[5] Finally, defendant argues that there was insufficient evidence against him on the kidnapping charge, and that the trial court therefore erred in refusing to dismiss it. We agree, and vacate defendant's kidnapping conviction.

"In ruling on a defendant's motion to dismiss, the trial court should consider if the state has presented substantial evidence on each element of the crime and substantial evidence that the defendant is the perpetrator." *State v. Replogle*, 181 N.C. App. 579, 580-81, 640 S.E.2d 757, 759 (2007) (quotations and citations omitted). Our statutes state:

> (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 . . . 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 . . . .

N.C. Gen. Stat. § 14-39(a) (2007). "The evidence should be viewed in the light most favorable to the state, with all conflicts resolved in the state's favor. . . . If substantial evidence exists supporting defendant's guilt, the jury should be allowed to decide if the defendant is guilty beyond a reasonable doubt." *Replogle*, 181 N.C. App. at 581, 640 S.E.2d at 759 (quotations and citations omitted) (alteration in original).

We note that our Supreme Court has recently set down additional requirements when dealing with cases involving kidnapping:

> [A] trial court, in determining whether a defendant's asportation of a victim during the commission of a separate felony offense constitutes kidnapping, must consider whether the asportation was an inherent part of the separate felony offense, that is,

> whether the movement was "a mere technical asportation." If the asportation is a separate act independent of the originally committed criminal act, a trial court must consider additional factors such as whether the asportation facilitated the defendant's ability to commit a felony offense, or whether the asportation exposed the victim to a greater degree of danger than that which is inherent in the concurrently committed felony offense.

State v. Ripley, 360 N.C. 333, 340, 626 S.E.2d 289, 293-94 (2006). We find a recent decision of this Court, *State v. Cartwright*, 177 N.C. App. 531, 629 S.E.2d 318 (2006), to be particularly on point. In *Cartwright*, the defendant "began and concluded [his rape of the victim] in the den. Because the crime of rape occurred wholly in the den, we [found] that there was insufficient evidence of confinement, restraint, or removal. Accordingly, we vacate[d] the conviction of kidnapping." *Id.* at 537, 629 S.E.2d at 323. In this case, defendant raped P.F. wholly in the guest bedroom. There was no evidence of confinement, restraint, or removal, other than that which is inherent to the offense of rape itself. Accordingly, we vacate defendant's kidnapping conviction.

[6] We note that the trial court consolidated defendant's rape and sex offense charges. In accordance with our Supreme Court's instructions, we therefore remand this case for resentencing.

> Since it is probable that a defendant's conviction for two or more offenses influences adversely to him the trial court's judgment on the length of the sentence to be imposed when these offenses are consolidated for judgment, we think the better procedure is to remand for resentencing when one or more but not all of the convictions consolidated for judgment has been vacated.

State v. Mueller, 184 N.C. App. 553, 562, 647 S.E.2d 440, 447-48 (quoting *State v. Wortham*, 318 N.C. 669, 674, 351 S.E.2d 294, 297 (1987)).

No error in part and vacated and remanded for resentencing in part.

Judges HUNTER and STROUD concur.

HARRY WHISNANT, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, PETITIONER-PLAINTIFF v. TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, A CORPORATION; BOARD OF TRUSTEES OF THE TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, A BODY POLITIC AND CORPORATE; DEPARTMENT OF STATE TREASURER, RETIREMENT SYSTEMS DIVISION, RICHARD H. MOORE, TREASURER OF THE STATE OF NORTH CAROLINA AND CHAIRMAN OF THE BOARD OF TRUSTEES TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA (IN HIS INDIVIDUAL AND OFFICIAL CAPACITIES); AND THE STATE OF NORTH CAROLINA, RESPONDENTS-DEFENDANTS

No. COA07-1433

(Filed 1 July 2008)

Public Officers and Employees— disability—Social Security offset—vesting of benefits

In an action arising from the State's attempt to collect an overpayment of disability benefits that resulted from a failure to offset Social Security payments, the trial court properly dismissed petitioner's class action for failure to state a claim, and properly ruled against petitioner on the whole record test. Although there was no setoff provision when petitioner began work, his benefits did not vest until after the legislature altered the statute governing those benefits.

Appeal by petitioner from judgment entered 25 June 2007 by Judge J.B. Allen, Jr., in Wake County Superior Court. Heard in the Court of Appeals 30 April 2008.

Schiller & Schiller, PLLC, by Marvin Schiller, David G. Schiller, and Kathryn H. Schiller, for petitioner.

Attorney General Roy Cooper, by Assistant Attorney General Robert M. Curran, for respondents.

ELMORE, Judge.

Harry Whisnant (petitioner) began employment with the State Department of Corrections in 1985. He worked continuously until 1999, when he suffered an on-the-job injury rendering him disabled and unable to perform his work duties. In April of 2000, petitioner began to receive both long-term disability income through the State and Social Security disability benefits from the federal government.

On or about 28 October 2005, Thomas G. Causey, the chief of the Benefits Section of the North Carolina Retirement Systems Division,

notified petitioner that although petitioner's long-term disability benefits should have been offset by the amount that he received from Social Security, the system had failed to do so. The retirement system therefore contended that petitioner owed $30,561.39 in overpayments.[1] The retirement system reduced petitioner's monthly payments by $359.00 for eighty-four months in order to recoup the overpaid amount.

On 31 March 2006, petitioner filed a petition against the Teachers' and State Employees' Retirement System of North Carolina; the Board of Trustees of the Teachers' and State Employees' Retirement System of North Carolina; the Department of State Treasurer, Retirement Systems Division; and the State of North Carolina (collectively, respondents) contesting respondents' decision to reduce the amount of long-term disability benefits paid to him. Each side filed a motion for summary judgment, and on 19 September 2006, Administrative Law Judge (ALJ) Beecher R. Gray dismissed petitioner's actions against the Teachers' and State Employees' Retirement System of North Carolina, the Board of Trustees of the Teachers' and State Employees' Retirement System of North Carolina, and the State of North Carolina for failure to state a claim, and granted respondents' motion for summary judgment with regard to the Department of State Treasurer, Retirement Systems Division. On 24 January 2007, the Board of Trustees of the Teachers' and State Employees' Retirement System issued a final agency decision adopting the ALJ's decision in its entirety.

On 23 February 2007, petitioner filed a petition for judicial review. At that time, he also added State Treasurer Richard H. Moore and filed a class action complaint. Respondents filed several documents, including a response to the request for judicial review, a motion to sever petitioner's claims, a motion to dismiss all respondents but the Department of State Treasurer, Retirement Systems Division, and a motion to dismiss the class action complaint for failure to state a claim upon which relief can be granted.

On 25 June 2007, the trial court granted respondents' motions to sever and to dismiss all respondents other than the Department of State Treasurer, Retirement Systems Division. The trial court also affirmed the final decision of the Board of Trustees of the Teachers'

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1. The Retirement System originally sought repayment of $48,260.64. However, upon the realization that petitioner disclosed the fact that he was receiving Social Security payments as early as May of 2002, the Retirement System reduced the amount owed to $30,561.39 and extended the repayment period to seven years.

and State Employees' Retirement System and dismissed the class action complaint. Petitioner now appeals.

On appeal, petitioner first argues that the trial court erred in dismissing the class action complaint for failure to state a claim. We disagree.

The thrust of petitioner's argument is that because the statute governing employee benefits had no setoff when he began work, he is entitled to receive the benefits as they were under that scheme. Respondents counter, and the trial court agreed, that because petitioner was not vested in the earlier plan, respondents were free to change it. The statute in effect at the time petitioner began employment was N.C. Gen. Stat. § 135-5(d4) (1985), which stated:

> Allowance on Disability Retirement of Persons Retiring on or after July 1, 1982.—Upon retirement for disability, in accordance with subsection (c) of this section on or after July 1, 1982, a member shall receive a service retirement allowance if he has qualified for an unreduced service retirement allowance; otherwise the allowance shall be equal to a service retirement allowance calculated on the member's average final compensation prior to his disability retirement and the creditable service he would have had had he continued in service until the earliest date on which he would have qualified for an unreduced service retirement allowance.

N.C. Gen. Stat. § 135-5(d4) (1985). Our legislature changed this scheme in 1988, when it adopted a new policy under which disabled workers received disability benefits in lieu of retirement, which were offset by any payments received in the form of Social Security benefits.

Petitioner undertakes an exhaustive analysis of our case law, focusing heavily on *Faulkenbury v. Teachers' & State Employees Ret. Sys.*, 345 N.C. 683, 483 S.E.2d 422 (1997). In support of his cause, petitioner represents to this Court that "*Faulkenbury's* pivotal *ratio decidendi* is that the disability retirement statutes in existence at the time the employees began their public service are contractual offers which are binding obligations of the Retirement Systems for determining the formula for calculating the disability compensation due the now disabled employees." Petitioner relies on the following language from *Faulkenbury*: "at the time the plaintiffs started working for the state or local government, the statutes provided what the plaintiffs' com-

pensation in the way of retirement benefits would be. The plaintiffs accepted these offers when they took the jobs. This created a contract." *Id.* at 690, 483 S.E.2d at 427. However, the Supreme Court expanded on this statement later in its opinion:

> We believe that when the General Assembly enacted laws which provided for certain benefits to those persons who were to be employed by the state and local governments and *who fulfilled certain conditions*, this could reasonably be considered by those persons as offers by the state or local government to guarantee the benefits *if those persons fulfilled the conditions*. When they did so, the contract was formed. . . . [P]ursuant to the plaintiffs' contracts, they were promised that *if they worked for five years*, they would receive certain benefits if they became disabled.

Id. at 691-92, 483 S.E.2d at 427-28 (emphases added). It is clear to this Court that the terms of the contract are established at the time the benefits vest, *i.e.*, five years after petitioner began employment.

Indeed, our recent cases make it clear that such is the case:

> The relationship between State employees and the Retirement System is contractual in nature. In North Carolina, contractual rights vest in the Retirement System after five years of membership. The contract is embodied in state statute and governed by statutory provisions as they existed at the time the employee's contractual rights vested. [Members of the Retirement System] had a contractual right to rely on the terms of the retirement plan *as these terms existed at the moment their retirement rights became vested.*

Wells v. Consolidated Jud'l Ret. Sys. of N.C., 136 N.C. App. 671, 673, 526 S.E.2d 486, 488-89 (2000) (quotations and citations omitted) (emphasis added) (alteration in original). Likewise, in a case decided this year, we stated unequivocally that "[i]n the context of retirement benefits, a contractual obligation exists once the employee's rights have vested." *Tripp v. City of Winston-Salem*, 188 N.C. App. 577, 583, 655 S.E.2d 890, 894 (2008) (quotations and citation omitted). Petitioner's entire argument is therefore without merit. Because petitioner's benefits did not vest prior to the time that the legislature altered the statutory benefit scheme, he failed to state any complaint upon which relief could be granted.

Petitioner's only other argument on appeal is that the trial court erred in ruling against him on the basis of the whole record test. In

this argument, petitioner states that the Board's findings of fact did not support its conclusions of law, rendering its decision arbitrary, capricious, and erroneous as a matter of law. As petitioner acknowledges, however, "[t]he primary legal issue in the Administrative Appeal is identical to the legal issue that was before the Superior Court on the Retirement System's Motion to Dismiss." We have already held that the trial court's holding on that issue was correct. Accordingly, this contention, too, lacks merit. Based on the uncontroverted evidence that petitioner's rights in benefits did not vest until after the legislature altered the statute governing those benefits, we hold that the trial court properly held in respondents' favor.

Affirmed.

Judges McGEE and STEPHENS concur.

JEFFREY LYNN WALDRON, Plaintiff v. CHRISTOPHER L. BATTEN, COLUMBUS COUNTY SHERIFF, Defendant

No. COA07-1225

(Filed 1 July 2008)

Firearms and Other Weapons— permit denial—involuntary commitment—statutory requirements not met

Plaintiff should not have been denied a hand-gun permit based on a commitment to a mental institution where the statutory requirements for involuntary commitment were not met. Ten years earlier, when plaintiff was twenty-one years old, he did not eat or sleep for several days and was depressed after a traumatic break-up with a girlfriend. His mother filed a petition for involuntary commitment, but the doctor did not recommend commitment and the petition was dismissed.

Appeal by plaintiff from order entered 8 May 2007 by Judge Jerry Jolly in Columbus County District Court. Heard in the Court of Appeals 29 April 2008.

The Odom Firm, PLLC, by Thomas L. Odom, Jr., for plaintiff-appellant.

Steven W. Fowler, Columbus County Attorney, for defendant-appellee.

CALABRIA, Judge.

Jeffrey Lynn Waldron ("plaintiff") appeals from an order of the trial court affirming Columbus County Sheriff Christopher L. Batten's ("defendant") denial of plaintiff's application for a hand gun permit. We reverse.

On 6 March 2006, plaintiff submitted an application for a hand gun permit to the Columbus County Sheriff's Office. On 14 March 2006, defendant denied plaintiff's application. Subsequently, plaintiff filed a verified petition in Columbus County District Court on 21 March 2007 requesting judicial review of the denial of his permit. Defendant filed a motion to dismiss and motion for summary judgment pursuant to, *inter alia*, N.C. Gen. Stat. § 14-404(c) (2005). According to N.C. Gen. Stat. § 14-404(c), a permit for a hand gun may not be issued to certain individuals including: "[o]ne who has been adjudicated mentally incompetent or has been committed to any mental institution."

In June of 1996, at the age of twenty-one years old, plaintiff experienced a traumatic breakup with his girlfriend. As a result, plaintiff's mother filed an affidavit and petition for involuntary commitment pursuant to N.C. Gen. Stat. §§ 122C-261 and 281 (1996). Based upon plaintiff's mother's affidavit, the magistrate entered a "Findings and Custody Order Involuntary Commitment" and ordered law enforcement officers to take plaintiff into custody and transfer plaintiff to a facility for examination by a physician or eligible psychologist. Based upon the magistrate's order placing plaintiff in a facility to be examined, defendant determined plaintiff was involuntarily committed pursuant to N.C. Gen. Stat. § 14-404(c) and denied plaintiff's application for a permit. On 8 May 2007, the trial judge found defendant's denial of the permit was reasonable and entered an "order of dismissal." From the order of dismissal, plaintiff appeals.

On appeal, the dispositive issue is whether the trial court erred by ruling plaintiff was involuntarily committed to a mental institution. Plaintiff argues the trial court erred in denying his petition because he was never committed to a mental institution. We agree.

I. Standard of Review

We first determine the appropriate standard of review. Plaintiff argues because the trial court's order was a dismissal, the standard of review is *de novo*. Defendant argues the standard of review is abuse of discretion notwithstanding the caption entitled "Order of Dismissal."

In the instant case, the trial judge made seven findings of fact, a conclusion of law, and ordered and decreed "that a hand gun permit shall not issue to the [plaintiff]." Therefore, we determine the trial judge based his decision on the merits of the case and his decision was in fact an "order" rather than a dismissal. Since the chief district court judge was the fact finder rather than a jury, the standard of review normally is "whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment." *Sessler v. Marsh*, 144 N.C. App. 623, 628, 551 S.E.2d 160, 163 (2001). However, in the instant case, pursuant to N.C. Gen. Stat. § 14-404(b):

> [a]n appeal from the refusal [of the sheriff] shall lie by way of petition to the chief judge of the district court for the district in which the application was filed. The determination by the court, on appeal, shall be upon the facts, the law, and the reasonableness of the sheriff's refusal, and shall be final.

Id.

Thus, the chief district court judge must exercise his judgment and render an order on a case-by-case basis. When a trial court exercises its own judgment in rendering a decision, the abuse of discretion standard and not *de novo* review is applied. *Appliance Sales & Service v. Command Electronics Corp.*, 115 N.C. App. 14, 21, 443 S.E.2d 784, 789 (1994). We now determine whether the trial court abused its discretion by determining the sheriff's denial of plaintiff's application for a hand gun permit was reasonable.

II. Commitment To A Mental Institution

The record reflects that plaintiff applied for a permit to purchase a hand gun pursuant to N.C. Gen. Stat. § 14-403 (2005), which required a county sheriff to issue hand gun licenses or permits. Pursuant to N.C. Gen. Stat. § 14-404(c)(4), a hand gun permit may not be issued to an individual "who has been adjudicated mentally incompetent or has been committed to any mental institution." The record shows no indication plaintiff voluntarily committed himself to a mental institution. Therefore, if plaintiff was not involuntarily committed to a mental institution, then plaintiff's admittance to a facility for examination by a physician or eligible psychologist would not come under the purview of N.C. Gen. Stat. § 14-404(c)(4). We now determine whether plaintiff was involuntarily committed and thus comes under the purview of N.C. Gen. Stat. § 14-404(c)(4).

In 1996, the requirements for involuntary commitment included taking the individual into custody, then providing transportation "to an area facility for examination by a physician or eligible psychologist" within twenty-four hours of the individual's arrival at an approved facility. N.C. Gen. Stat. § 122C-263 (1996). If the physician or eligible psychologist determined that the individual was mentally ill and a danger to self or others, according to the statute, the physician or eligible psychologist "shall recommend inpatient commitment, and shall so show on the examination report." *Id.* If inpatient commitment was recommended, the individual was then transferred to a twenty-four hour facility. *Id.*

Moreover, within twenty-four hours of the individual's arrival at a twenty-four hour facility, the individual must have another examination by a physician who was not the same physician as the one who completed the initial examination under the provisions of G.S. 122C-262 or G.S. 122C-263. N.C. Gen. Stat. § 122C-266 (1996). After the second examination, if the doctor determined the individual was mentally ill and a danger to self or others, the individual must be detained at the twenty-four hour facility pending a district court hearing. *Id.* Therefore, the prerequisites for an involuntary commitment to a mental institution include an examination by two different physicians, and both physicians must determine that the individual was mentally ill and a danger to self or others. Finally, pursuant to N.C. Gen. Stat. § 122C-268 (1996), "[a] hearing shall be held [by a judge] in district court within 10 days of the day the respondent is taken into custody pursuant to G.S. 122C-261(e) or G.S. 122C-262."

In the case *sub judice*, in June of 1996, when plaintiff was twenty-one years old, he experienced a traumatic breakup with his girlfriend. On 22 June 1996, plaintiff's mother filed an affidavit and petition for involuntary commitment pursuant to N.C. Gen. Stat. §§ 122C-261 and 281. On the petition, plaintiff's mother noted that after the breakup with his girlfriend, plaintiff did not eat or sleep for several days and was depressed. Based upon the petition, the magistrate entered a "Findings and Custody Order Involuntary Commitment" under N.C. Gen. Stat. §§ 122C-261 and 281, and ordered that plaintiff be placed in custody and taken for an "examination by a physician or eligible psychologist." Also on 22 June 1996, plaintiff was placed into custody and transported for an examination to Southeastern Regional Medical Center ("Southeastern") in Lumberton, North Carolina.

Plaintiff's medical records at Southeastern state that plaintiff was admitted on 22 June 1996 for *observation.* On 23 June 1996,

plaintiff was examined by Dr. A. Siddiqui ("Dr. Siddiqui"), who diagnosed plaintiff with adjustment disorder and emotional disturbance. Plaintiff also was diagnosed as having low potassium levels. However, Dr. Siddiqui did not recommend plaintiff as a candidate for either an inpatient or an outpatient commitment. On 25 June 1996, plaintiff was discharged from Southeastern and Dr. Siddiqui recommended outpatient counseling and therapy. On 2 August 1996, the petition for involuntary commitment was dismissed. According to the record, plaintiff was never readmitted or (I) recommended for either an inpatient or an outpatient commitment by a psychologist or physician; (II) never transferred from Southeastern to any other twenty-four hour facility; (III) never examined by a second psychologist or physician at a twenty-four hour facility nor recommended for inpatient or outpatient commitment; and (IV) never given an opportunity to be heard before a district court judge within ten days of being placed in custody. Therefore, we conclude the requisite statutory requirements for plaintiff's involuntary commitment to a mental institution were never met. Furthermore, the record does not show that plaintiff voluntarily committed himself to a mental institution. Since plaintiff was neither involuntarily nor voluntarily committed to a mental institution, he does not fall under the purview of N.C. Gen. Stat. § 14-404(c)(4). As such, we hold the trial court abused its discretion in ruling that defendant was reasonable in denying plaintiff's application for a permit. Accordingly, we reverse the trial court's order.

Reversed.

Judges WYNN and GEER concur.

STATE OF NORTH CAROLINA, PLAINTIFF v. BRIAN DEAN SOLES, DEFENDANT

No. COA07-1076

(Filed 1 July 2008)

Weapons and Other Firearms— concealed weapon—evidence not sufficient—firearm in backpack in van—no evidence of location in van

The trial court should have granted defendant's motion to dismiss a charge of carrying a concealed weapon where the weapon was found in a backpack in a van from which the rear

seats had been removed. There must be evidence that the weapon was within the reach and control of the defendant, but the State did not present evidence about where the backpack was found in the van.

Appeal by defendant from judgment entered on or about 10 May 2007 by Judge W. Robert Bell in Superior Court, Mecklenburg County. Heard in the Court of Appeals 2 April 2008.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Martin T. McCracken, for the State.

William B. Gibson, for defendant-appellant.

STROUD, Judge.

Defendant was convicted by a jury of possession of a firearm by a felon and carrying a concealed weapon. Defendant appeals. The dispositive question before this Court is whether the trial court erred in denying defendant's motions to dismiss because there was insufficient evidence to prove the charge of carrying a concealed weapon. For the following reasons, we reverse and remand.

I. Background

On 18 December 2005, Officer David Jones ("Officer Jones") with the Charlotte-Mecklenburg Police Department was on patrol on the east side of Charlotte. At approximately 8:45 p.m., Officer Jones stopped defendant for an expired tag. Defendant was driving a gray '92 Ford Aero Star mini van ("van") and was the only person in the van. Officer Jones noticed two movie DVDs on the passenger seat of the van because of "the packaging, and that they were not out on DVD yet." Officer Jones asked defendant to step out of his van and patted him down. Officer Jones found nothing illegal from the pat down of defendant. Officer Jones then had defendant sit in the back of his patrol car for "investigative detention." After receiving defendant's consent, Officer Jones went back to the van and noticed there were no seats in the back of the van, but there were two suitcases and a black backpack. Officer Jones then searched the van and found several CDs and DVDs in the suitcases. Officer Jones unzipped the backpack and found various articles of clothing and a loaded pistol.

On or about 9 January 2006, defendant was indicted for possession of a firearm by a felon and carrying a concealed weapon. On or about 10 May 2007, trial began. At the close of the State's evidence

and of all of the evidence defendant made a motion to dismiss the charge of carrying a concealed weapon based on the insufficiency of the evidence. A jury found defendant guilty of possession of a firearm by a felon and carrying a concealed weapon. The trial judge determined that defendant had a prior record level of three and sentenced him to 16 to 20 months imprisonment. Defendant appeals. The dispositive question before this Court is whether the trial court erred in denying defendant's motions to dismiss because there was insufficient evidence to prove the charge of carrying a concealed weapon. For the following reasons, we reverse and remand.

II. Carrying a Concealed Weapon

N.C. Gen. Stat. § 14-269(a) provides, "It shall be unlawful for any person willfully and intentionally to carry concealed about his person any bowie knife, dirk, dagger, slung shot, loaded cane, metallic knuckles, razor, shurikin, stun gun, or other deadly weapon of like kind, except when the person is on the person's own premises." N.C. Gen. Stat. § 14-269(a) (2005). Defendant argues that there was insufficient evidence to prove the weapon was "concealed about his person[.]" *See id.* For the following reasons, we agree.

> The proper standard of review on a motion to dismiss based on insufficiency of the evidence is the substantial evidence test. The substantial evidence test requires a determination that 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 such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. If there is substantial evidence of each element of the charged offense, the motion should be denied.

State v. Key, 182 N.C. App. 624, 628-29, 643 S.E.2d 444, 448 (internal citations and internal quotation marks omitted) (quoting *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990)) (citing *State v. Bullard*, 312 N.C. 129, 160, 322 S.E.2d 370, 387 (1984)), *disc. rev. denied*, 649 S.E.2d 398 (2007).

"As to the charge of carrying a concealed weapon, the elements of the offense are: (1) The accused must be off his own premises; (2) he must carry a deadly weapon; and (3) the weapon must be concealed about his person." *State v. Gayton*, 185 N.C. App. 122, 127, 648 S.E.2d 275, 279 (2007) (internal quotation marks and brackets omitted) (quoting *State v. Williamson*, 238 N.C. 652, 654, 78 S.E.2d 763,

765 (1953)). The State must prove that the weapon is concealed "not necessarily on the person of the accused, but in such position as gives him ready access to it." *State v. Gainey*, 273 N.C. 620, 622, 160 S.E.2d 685, 686 (1968). In *Gainey*, one of three defendants, Ford, was convicted of carrying a concealed weapon when "[h]e was in the driver's seat" and the weapon "was under the back seat." *Id.* at 623, 160 S.E.2d at 686-87. This Court found there was insufficient evidence to convict Ford and reversed his conviction and judgment because

> [t]he language is not "concealed on his person," but "concealed about his person"; that is, concealed near, in close proximity to him, and within his convenient control and easy reach, so that he could promptly use it, if prompted to do so by any violent motive. It makes no difference how it is concealed, so it is on or near to and within the reach and control of the person charged.

Id. at 623, 160 S.E.2d at 687 (quoting *State v. McManus*, 89 N.C. 555 (1883)) (quotation marks and ellipses omitted).

Cases which have addressed the requirement that the weapon be "about" the person of the defendant in various contexts have focused on the ready accessibility of the weapon, such that it was "within the *reach* and control of the person charged." *See id.* (emphasis added). For example, in *Gayton* this Court found no prejudicial error where

> [a]ccording to Detective Clark's unchallenged testimony, when he approached the passenger side of the car where defendant sat, defendant had his right arm extended down between his legs, with his hand stuck under his left leg. After pulling defendant from the passenger seat, the detective discovered a loaded handgun on the passenger seat in the area where defendant's leg and hand would have been.

Gayton at 127, 648 S.E.2d at 279 (internal quotation marks and brackets omitted). In *State v. Brooks*,

> the evidence supported the trial court's findings that Kennedy approached the defendant's car and, using his flashlight, looked into the interior. Upon viewing the empty holster next to the defendant, Kennedy asked the defendant where his gun was and was told by the defendant that the defendant was sitting on the gun. Kennedy then had probable cause to arrest the defendant for carrying a concealed weapon.

337 N.C. 132, 145, 446 S.E.2d 579, 588 (1994). In *State v. Jordan*, this Court found no prejudicial error for the defendant's conviction of carrying a concealed weapon where defendant

> was the driver of the car; the witnesses to the accident who prevented defendant's escape, as they advised the patrolman, saw him reach under the driver's seat as though placing something there, and that is where the patrolman found the gun.

75 N.C. App. 637, 640, 331 S.E.2d 232, 234, *disc. rev. denied*, 314 N.C. 544, 335 S.E.2d 23 (1985). In *State v. White*,

> [d]efendant reached to the back seat and withdrew a .44 Magnum revolver from the bag. [This Court noted that defendant was] properly arrested . . . without a warrant inasmuch as [the police] had reasonable ground to believe defendant was committing a misdemeanor—carrying a concealed weapon in violation of G.S. § 14-269[.]

18 N.C. App. 31, 32-33, 195 S.E.2d 576, 577-78, *cert. denied and appeal dismissed*, 283 N.C. 587, 196 S.E.2d 811 (1973). Although the cases cited above had different procedural postures and legal issues than the case before us, we nonetheless find these cases to support the proposition that in order to convict an individual of carrying a concealed weapon, there must be evidence that "the weapon was within the reach and control of the person charged." *See Gainey* at 623, 160 S.E.2d at 687.

The State did not present any evidence regarding where in the van Officer Jones found the backpack in which the gun was concealed. The State's own brief reads,

> Officer Jones testified that the rear seats had been removed from the mini-van so there would have been no apparent impediment to defendant leaping into the rear of the vehicle to retrieve his weapon. Although the record is silent on this point, the backpack may well have been sitting within arm's reach of defendant while he sat in the driver's seat.

The State concedes "the record is silent on this point[,]" so that there was no evidence that the weapon was concealed "in such position as gives [defendant] ready access to it." *Gainey* at 622, 160 S.E.2d at 686. We cannot make an assumption that the backpack might have been "within the reach" of the driver's seat, as the State suggests, as the State has the burden to prove each element of the crime beyond a rea-

sonable doubt. *See Gainey* at 623, 160 S.E.2d at 687. The State failed to present any evidence the gun was "concealed near, in close proximity to [defendant], and within his convenient control and easy reach, so that he could promptly use it, if prompted to do so by any violent motive." *Id.* at 623, 160 S.E.2d at 687. Therefore, the trial court should have granted defendant's motion to dismiss the charge of carrying a concealed weapon.

III. Conclusion

As the State failed to present evidence of all of the elements of carrying a concealed weapon defendant's motion to dismiss should have been granted. We reverse defendant's conviction and judgment on carrying a concealed weapon and remand to the trial court with instructions to dismiss the charge of carrying a concealed weapon and to re-sentence defendant only upon his conviction for possession of a firearm by a felon.

REVERSED AND REMANDED.

Judges HUNTER and ELMORE concur.

IN RE: D.C.

No. COA07-1186

(Filed 1 July 2008)

Juveniles— delinquency—admission of guilt—factual basis required

The trial court erred in a juvenile delinquency case arising out of felony larceny and attempted felony larceny of a vehicle by accepting a juvenile's admission of guilt because: (1) the State failed to follow the mandate of N.C.G.S. § 7B-2407(c) to establish a factual basis for admitting a juvenile's plea; (2) the prosecutor's statement of facts does not contain any statement or evidence that the pertinent pickup truck was worth more than $1,000, nor did the record include a written statement of the juvenile, sworn testimony, or a statement by the juvenile's attorney that the truck was valued at more than $1,000; and (3) while the juvenile petition lists the value of the pickup truck as $5,000,

the statute does not provide that a juvenile petition may serve as information for determining that there is a factual basis for admitting a juvenile's plea.

Judge JACKSON concurring.

Appeal by defendant from order entered 4 June 2007 by Judge Hugh Lewis in District Court, Mecklenburg County. Heard in the Court of Appeals 18 March 2008.

Attorney General Roy Cooper, by Assistant Attorney General Tracy J. Hayes, for the State.

Russell J. Hollers, III, for defendant-juvenile.

WYNN, Judge.

Under N.C. Gen. Stat. § 7B-2407(c) (2005), a "court may accept an admission from a juvenile only after determining that there is a factual basis for the admission." Here, the Juvenile argues that the State failed to provide sufficient information to establish a factual basis for his admission of guilt to felony larceny and attempted felony larceny of a vehicle valued at more than $1,000. Because the State failed to provide information in accordance with § 7B-2407 to establish that the stolen vehicle was valued at more than $1,000, we must vacate the Juvenile's admission.

The Juvenile in this matter does not dispute that he stole a pickup truck; instead, the only issue on appeal is whether the State followed the mandate of section 7B-2407(c) to establish a factual basis for admitting the Juvenile's plea.[1] Under section 7B-2407(c), a "court may accept an admission only after determining that there is a factual basis for the admission." *Id.* § 7B-2407(c). Significant to this appeal, that section further provides that: "This determination may be based upon any of the following information: a statement of the facts by the prosecutor; a written statement of the juvenile; sworn testimony which may include reliable hearsay; or a statement of facts by the juvenile's attorney." *Id.*

Here, the Juvenile offered an admission of guilt to the crimes of felony larceny and attempted felony larceny, which require proof that the stolen goods were valued at more than $1,000. *Id.* § 14-72(a). The trial court then adjudicated the Juvenile delinquent and entered a dis-

1. The State's motion to dismiss the appeal for lack of jurisdiction is denied.

position and commitment order committing him to a youth development center for an indefinite commitment not to exceed his eighteenth birthday. Under section 7B-2407(c), the State was required to establish a factual basis that the truck was valued at more than $1,000 by providing "a statement of the facts by the prosecutor; a written statement of the juvenile; sworn testimony which may include reliable hearsay; or a statement of facts by the juvenile's attorney." *Id.* § 7B-2407(c); *see also id.* § 14-72(a).

However, the prosecutor's statement of facts does not contain any statement or evidence that the pickup truck was worth more than $1,000. Moreover, the record includes no "written statement of the juvenile; sworn testimony . . . or a statement of facts by the juvenile's attorney" that indicates that the truck was valued at more than $1,000. Indeed, while the juvenile petition lists the value of the pickup truck as $5,000, the statute does not provide that a juvenile petition may serve as information for determining that there is a factual basis for admitting a juvenile's plea.

Since the State failed to provide information in compliance with section 7B-2407 to establish a factual basis for admitting the Juvenile's plea, we must vacate the Juvenile's admission of guilt in this matter. In vacating the Juvenile's admission, we are guided by our Supreme Court's decision in *State v. Weathers*. 339 N.C. 441, 451 S.E.2d 266 (1994). In *Weathers*, the Supreme Court held that the trial court failed to comply with N.C.G.S. § 15A-1022(c) in determining there was a factual basis for defendant's guilty plea. *Id.* at 453, 451 S.E.2d at 273; *see also In re Johnson*, 32 N.C. App. 492, 493, 232 S.E.2d 486, 487-88 (1977) (stating that an admission by a juvenile "is the equivalent to a plea of guilty by an adult in a criminal prosecution."). Instructively, our Supreme Court stated: "There was no factual basis for defendant's guilty plea to the charge of failure to appear for trial; thus, it was error for the trial court to accept defendant's guilty plea. The guilty plea and the judgment based thereon are hereby vacated." *Weathers*, 339 N.C. at 453, 451 S.E.2d at 273. Following *Weathers*, we vacate the Juvenile's admission to felony larceny and the disposition and commitment order based thereon.

Vacated.

Judge BRYANT concurs.

Judge JACKSON concurs in the result only by separate opinion.

JACKSON, J., concurring.

Although I concur with the result reached by the majority opinion, I write separately to clarify my analysis in reaching this conclusion.

The majority is correct that an admission in a juvenile delinquency case is equivalent to a plea of guilty by an adult in a criminal prosecution. *In re Johnson*, 32 N.C. App. 492, 493, 232 S.E.2d 486, 487-88 (1977). However, "in a juvenile proceeding, as opposed to an adult criminal proceeding, 'the burden upon the State to see that the child's rights [are] protected' is increased rather than decreased." *In re T.E.F.*, 167 N.C. App. 1, 4, 604 S.E.2d 348, 350 (2004) (alteration in original), *aff'd*, 359 N.C. 570, 614 S.E.2d 296 (2005) (quoting *In re Meyers*, 25 N.C. App. 555, 558, 214 S.E.2d 268, 270 (1975)).

North Carolina General Statutes, section 15A-1022—governing guilty pleas—and section 7B-2407—governing juvenile admissions—are almost identical. However, with respect to what may be considered in determining the factual basis of the plea or admission, section 15A-1022 provides that "[t]his determination may be based upon information *including but not limited to*" (1) the prosecutor's statement of the facts; (2) the defendant's written statement; (3) the presentence report; (4) sworn testimony, including reliable hearsay; and (5) defense counsel's statement of facts. N.C. Gen. Stat. § 15A-1022(c) (2007) (emphasis added). In contrast, section 7B-2407 states that "[t]his determination may be based upon *any of the following information*:" (1) the prosecutor's statement of the facts; (2) the juvenile's written statement; (3) sworn testimony, including reliable hearsay; and (4) a statement of facts by the juvenile's attorney. N.C. Gen. Stat. § 7B-2407(c) (2007) (emphasis added). Section 15A-1022 is an inclusive list which could permit the use of the indictment to establish the factual basis supporting a guilty plea. In contrast, section 7B-2407 is an exclusive list which does not include the use of the petition to establish the factual basis supporting a juvenile admission.

Just as there was no factual basis for the guilty plea in *Weathers*, cited by the majority, there was no factual basis for the juvenile's admission in the case *sub judice*. Therefore, I concur in vacating the admission.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

Filed 17 June and 1 July 2008

Case	County	Disposition
ANDERSON v. CROUCH No. 07-1319	New Hanover (07CVS1275)	Affirmed
CLINE v. OWENS No. 07-1354	Rowan (06CVS1947)	Affirmed
ESTATE OF HAWKINS v. WISEMAN No. 07-1149	Forsyth (07CVD1819)	Reversed and remanded with instructions
GRANDY v. MIDGETT No. 07-1332	Dare (03CVD497)	Affirmed
HAMMOND v. WRAY No. 07-1323	Wake (05CVS9669)	Reversed
HARDY v. MASTERBRAND CABINETS, INC. No. 07-1195	Ind. Comm. (I.C. No. 392500)	Affirmed
HATMAKER v. HATMAKER No. 07-1291	Harnett (05CVD1416)	Dismissed
HUGHES v. FRITO LAY, INC. No. 07-1510	Ind. Comm. (I.C. NO. 207477)	Affirmed
IN RE B.C. No. 07-1487	Rockingham (06JT199)	Reversed
IN RE C.B., E.B. No. 08-41	Scotland (06J112-13)	Affirmed in part, reversed in part and remanded for further proceedings in conformance with this opinion
IN RE C.T.H.-C., C.T.H.-C., K.C.C., D.C.C.H., D.T.Q.C. No. 08-206	New Hanover (00J116-20) (04J493)	Affirmed
IN RE C.T.J. No. 08-75	Harnett (07J89)	Affirmed
IN RE H.N.B. No. 08-62	Haywood (07JT12) (05J38)	Affirmed
IN RE I.P. No. 07-1430	Gaston (07JB154)	Affirmed

IN RE J.C.D. No. 08-116	Forsyth (05JT203)	Affirmed
IN RE J.W.S. No. 08-185	Carteret (06JA51)	Affirmed
IN RE K.D.A. No. 07-1173	Rowan (06JB223)	Remanded
IN RE K.L.K. No. 07-1169 `	Mecklenburg (06J1180)	Affirmed in part, vacated in part, remanded in part
IN RE M.T.T. No. 08-234	Richmond (07JT54)	Vacated
IN RE N.R. & Z.R. No. 08-114	Harnett (06J214-15)	Affirmed in part, reversed and remanded in part
IN RE R.C.J. No. 08-7	Onslow (07J140)	Vacated
IN RE S.F.P. No. 08-131	Pasquotank (07JT51)	Affirmed
IN RE V.S.W. No. 08-126	Iredell (07JT07)	Vacated
KAYLOR v. FOX No. 07-1272	Caldwell (06CVD1802)	Affirmed
McNEILL v. McNEILL No. 07-679	Randolph (07CVD3)	Affirmed
PARKER v. SCOTT No. 07-935	Davie (05CVD376)	Affirmed
POWERS v. GOODYEAR TIRE & RUBBER CO. No. 07-1218	Ind. Comm. (I.C. No. 268384)	Affirmed
RADCLIFF v. ORDERS DISTRIB. CO. No. 07-1041	Guilford (06CVS7834)	Affirmed
REINHARDT v. GLENDALE COS. No. 07-936	Jackson (06CVS05)	Affirmed
REINHARDT v. GLENDALE COS. No. 07-1123	Jackson (06CVS05)	Dismissed

STATE v. ANDERSON No. 07-1473	Wake (06CRS101057)	No error
STATE v. BEASLEY No. 07-1157	Forsyth (96CRS25622) (96CRS25756)	No prejudicial error
STATE v. BLACKWELL No. 08-289	Mecklenburg (04CRS206240)	No error
STATE v. CALDWELL No. 07-1463	Forsyth (06CRS24110) (06CRS57002)	No error
STATE v. CALHOUN No. 07-1223	Buncombe (05CRS5942-43) (05CRS52758) (05CRS52760-63) (06CRS11447)	No error
STATE v. CANNON No. 07-1396	Henderson (06CR57665)	No error
STATE v. CARTER No. 07-1415	Guilford (03CRS70954) (03CRS70952) (03CRS70956)	Affirmed in part, remanded in part
STATE v. CHANCE No. 07-1491	Moore (07CRS853) (07CRS2201) (06CRS55135)	Misdemeanor larceny-judgment vacated. Common law robbery—no error. Remanded for resentencing.
STATE v. CHANDLER No. 07-1254	Madison (06CRS50397-98)	No error
STATE v. CHATMAN No. 07-1499	Randolph (07CRS17)	Appeal dismissed
STATE v. COLLIER No. 07-1556	Guilford (06CRS77586-88)	No error in part, remanded in part for correction of clerical error
STATE v. COLON No. 07-1418	Columbus (05CRS2530)	Remanded
STATE v. CURRY No. 07-1064	Cleveland (07CRS208)	No error
STATE v. FOSKEY No. 07-1296	Onslow (07CRS1427)	No error

STATE v. FREEMAN No. 07-1334	Wayne (07CRS51607)	Remanded
STATE v. GILBERT No. 07-1533	Cabarrus (06CRS53583) (06CRS15211) (06CRS53581)	No error
STATE v. GREENHILL No. 07-1378	Durham (06CRS50330)	No error
STATE v. HERRING No. 07-1506	Wake (06CRS52651-53) (06CRS25722)	No error in part; vacated and remanded in part
STATE v. HICKSON No. 07-321	Forsyth (03CRS57035) (03CRS7129)	No error
STATE v. JONES No. 07-420	Mecklenburg (05CRS225342-43)	No error
STATE v. LYVERS No. 07-1400	Wilkes (07CRS1060)	Affirmed
STATE v. MANN No. 07-1395	Hyde (06CRS50073)	No error
STATE v. McARTHUR No. 07-1348	Randolph (05CRS125)	No prejudicial error
STATE v. McCRAY No. 07-1255	Nash (06CRS52946)	No prejudicial error
STATE v. McHONE No. 07-1097	Stokes (05CRS52910)	Affirmed
STATE v. McLEAN No. 07-1513	Wake (06CRS37197)	No error
STATE v. MENDOZA No. 07-1410	Durham (06CRS55084) (06CRS55089)	No error
STATE v. MOORE No. 07-1184	Mecklenburg (05CRS200143-44) (05CRS200146-48)	No error
STATE v. MORROW No. 07-1428	Transylvania (05CRS52842)	No error
STATE v. PARKS No. 07-1178	Mecklenburg (06CRS216778-79) (07CRS31415)	No error

STATE v. PEARSON No. 07-1526	Mecklenburg (04CRS217009) (05CRS69302)	No error
STATE v. PINDER No. 07-1413	Wake (06CRS85336)	Remanded for resentencing
STATE v. RAVIT No. 07-1553	Guilford (05CRS24220-21)	Affirmed
STATE v. REED No. 07-1382	New Hanover (05CRS65231)	Affirmed in part, vacated in part
STATE v. SALAZAR No. 07-893	Guilford (04CRS85511)	No error
STATE v. SAYAVONG No. 08-64	Catawba (05CRS56774-75)	No error
STATE v. SHOFFNER No. 08-120	Durham (05CRS49407)	No error
STATE v. SINK No. 07-1407	Forsyth (05CRS60139-40)	No error
STATE v. SMITH No. 07-1243	Hertford (06CRS50515-17) (06CRS50519-22) (06CRS50525)	No prejudicial error
STATE v. STAFFORD No. 07-1124	Forsyth (06CRS57383)	No error
STATE v. SUGGS No. 07-1366	Granville (06CRS52872-73)	No error
STATE v. SWINTON No. 08-22	Buncombe (06CRS63459-60)	No error
STATE v. THOMAS No. 08-209	Mecklenburg (06CRS255496)	No error
STATE v. VALENCIA No. 07-1367	Alleghany (05CRS50370-72) (05CRS50376)	No error
STATE v. WHITE No. 07-1231	Mecklenburg (06CRS201955)	No error
STATE v. WILLIAMS No. 07-1117	Gaston (03CRS50595) (03CRS50598-99)	No error
STATE v. WILLIAMS No. 07-1155	Brunswick (05CRS57170) (06CRS878) (06CRS4421)	No prejudicial error

STATE v. WILSON No. 07-1465	Carteret (06CRS51020) (06CRS6058)	No error
TAYLOR v. BATTS No. 07-1362	Wilson (06CVS2107)	Dismissed

WILLIAM MOODY, JR., ON BEHALF OF HIMSELF AND OTHERS SIMILARLY SITUATED, PLAINTIFF v. SEARS ROEBUCK AND CO., DEFENDANT

No. COA07-1089

(Filed 15 July 2008)

1. Class Actions— standing—after settlement of another suit

Plaintiff Moody was not a party aggrieved by the trial court's actions and lacked standing to appeal in a class action arising from defendant's vehicle alignment services. Plaintiff had presumably received his settlement from defendant in an Illinois action and is now in compliance with the Illinois judge's order directing him to dismiss his North Carolina lawsuit. However, defendant's appeal presents essentially the same issues.

2. Class Actions— voluntary dismissal—judicial approval—precertification

The trial court erred by concluding that plaintiff Moody was required to obtain judicial approval under N.C.G.S. § 1A-1, Rule 23(c) before obtaining a voluntary dismissal of his class-action complaint where the class had not yet been certified. Plaintiff Moody sought the dismissal after participation in an Illinois class-action on the same subject, but the North Carolina judge had concerns about the fairness of the settlement.

3. Class Actions— voluntary dismissal—court's authority—precertification—settlement in another state

Although a trial court does not derive any precertification supervisory authority under N.C.G.S. § 1A-1, Rule 23(c), this does not imply that a trial court wholly lacks authority to review a motion for precertification dismissal of a class-action complaint. When a plaintiff seeks voluntary dismissal of a precertification class action complaint, the trial court should engage in a limited inquiry to determine whether the parties have abused the class-action mechanism for personal gain, and whether dismissal will prejudice absent putative class members. If neither concern is present, plaintiff is entitled to a voluntary dismissal, but if either or both are present, the trial court retains jurisdiction.

4. Class Actions— settlement in another state—full faith and credit

The trial court erred by refusing to accord full faith and credit to an Illinois settlement of a class action suit where the jurisdic-

tional and due process concerns of the North Carolina court were fully and fairly litigated and finally decided by the Illinois court.

Appeal by Plaintiff and Defendant from orders entered 6 January 2005, 25 January 2005, 3 February 2005, 4 March 2005, and 27 April 2005, and from order and opinion dated 7 May 2007, by Judge Ben F. Tennille in Special Superior Court for Complex Business Cases. Heard in the Court of Appeals 5 March 2008.

Shipman & Wright, L.L.P., by Gary K. Shipman and William G. Wright, for Plaintiff.

Womble Carlyle Sandridge & Rice, PLLC, by Pressly M. Millen and Sean E. Andrussier; McCarter & English, LLP, by Edward J. Fanning, Jr., pro hac vice, for Defendant.

McGEE, Judge.

The record in this case shows that William Moody, Jr. (Plaintiff Moody) filed a class-action complaint on 20 December 2002 against Sears Roebuck and Co. (Defendant). Plaintiff Moody's complaint alleged that Defendant committed unfair and deceptive trade practices when marketing and performing vehicle wheel alignment services at Sears Auto Centers. Specifically, Plaintiff Moody alleged that Defendant deceptively marketed and sold a four-wheel alignment service to customers whose vehicles only required a two-wheel alignment, and did not offer a less expensive two-wheel alignment service. Plaintiff Moody further alleged that he had been deceived into purchasing an unnecessary and expensive four-wheel alignment for his vehicle, and purported to bring the action on behalf of similarly situated persons. Plaintiff Moody sought certification of the action as a class action under N.C. Gen. Stat. § 1A-1, Rule 23. The Chief Justice of the North Carolina Supreme Court designated the case as a complex business case on 14 July 2003 and assigned Special Superior Court Judge Ben F. Tennille (Judge Tennille) to preside over the case.

Meanwhile, four days after Plaintiff Moody filed his class-action complaint in North Carolina, Michelle Wrobel (the *Wrobel* plaintiff) filed a similar class-action complaint captioned *Wrobel v. Sears Roebuck and Co.* against Defendant in Illinois Circuit Court.[1] Defendant and the *Wrobel* plaintiff began a lengthy mediation process in December 2003 with a retired Illinois judge serving as mediator.

1. Counsel for Plaintiff Moody in the case before us also represented the *Wrobel* plaintiff.

The parties eventually reached a settlement and filed a motion in Illinois Circuit Court on 10 September 2004 seeking preliminary approval of their proposed settlement agreement. The proposed settlement agreement established two classes of plaintiffs, one whose members would be eligible to receive a $10.00 check, and one whose members would be eligible to receive a $4.00 transferable Sears coupon. Notice would be provided to class members through publication in Parade Magazine, USA Today Weekend, and newspapers in each of Defendant's top twenty-five markets. Defendant would also maintain a website and a toll-free telephone line that customers could use to access information regarding the settlement. Class members would be required to complete and submit a claim form in order to receive their check or coupon. Class members who wished to opt out of the settlement were permitted to file an opt-out request. Defendant would pay attorneys' fees and costs in the amount of $1,050,000.00 in cash and $50,000.00 in coupons to the various class attorneys. Defendant would also pay each named class representative, including Plaintiff Moody in the North Carolina litigation, a $500.00 payment in recognition of their efforts. The parties also stated in the settlement agreement that the settlement was fair, the *Wrobel* plaintiff would adequately represent the class, the settlement did not overcompensate class counsel, and the proposed notice plan satisfied state and federal due process requirements.

Judge Julia M. Nowicki (Judge Nowicki) entered an order in Illinois Circuit Court on 14 September 2004 granting preliminary approval to the *Wrobel* parties' settlement agreement. In her order, Judge Nowicki conditionally certified the two settlement classes, found the *Wrobel* plaintiff to be an adequate class representative, found class counsel to be adequate, and approved the parties' proposed notice plan. Judge Nowicki also scheduled a fairness hearing to take place on 17 November 2004.

At the time Judge Nowicki granted preliminary approval to the parties' settlement agreement in *Wrobel*, Plaintiff Moody's case in North Carolina Business Court effectively had been stayed pending the outcome of the *Wrobel* mediation. Judge Tennille requested a status report from the parties on 22 October 2004. Counsel for Defendant submitted a status report to Judge Tennille on 3 November 2004 informing Judge Tennille that Judge Nowicki had granted preliminary approval in Illinois Circuit Court to a nationwide class-action settlement that encompassed the claims Plaintiff Moody asserted in the North Carolina action. The status report further stated

that the parties expected Judge Nowicki to grant final approval to the settlement on 17 November 2004, and counsel for Defendant would keep Judge Tennille apprised of any further developments in the case. Counsel for Defendant also provided Judge Tennille with a copy of Judge Nowicki's 14 September 2004 order granting preliminary approval of the proposed settlement in *Wrobel*.

Judge Tennille sent Judge Nowicki a letter on 5 November 2004 expressing concern with multiple aspects of the *Wrobel* settlement. First, Judge Tennille questioned the sufficiency of the notice provided to class members:

> Did [Defendant] not have any records which would have permitted direct notice to those who actually paid for the contested alignments? Why was there no notice posted or provided for in Sears Automotive Centers—the most likely place for Sears customers to be found? Having the notice prominently displayed and claim forms available at the checkout counter seems easy and inexpensive. What about notice to those people who held Sears credit cards or had accounts? An addition to the monthly billing could not have been too expensive. There is at least the appearance that the notice provided was not the most effective means available.

Judge Tennille pointed out that although Defendant published notice in some North Carolina newspapers, there were many large metropolitan areas of North Carolina whose newspapers did not carry notice of the class-action settlement. Second, Judge Tennille expressed concern that the low dollar amount of each class member's individual recovery, coupled with use of coupons and lack of adequate notice, might cause a low claim rate resulting in only minimal benefit to the class. Finally, Judge Tennille worried that "[i]f the claim rate is abysmal—as I believe it will be based on the notice given—the [attorneys'] fee will vastly exceed the class benefit, thus . . . fueling public outrage."

Judge Nowicki held a fairness hearing on 17 November 2004 for final approval of the *Wrobel* parties' proposed settlement. During the hearing, the *Wrobel* parties specifically addressed Judge Tennille's letter to Judge Nowicki and the concerns raised therein. The parties also represented to Judge Nowicki that they estimated the size of the class to be 750,000 to 1.5 million members, and further estimated that thirty percent of class members would file claims. Class counsel further stated to Judge Nowicki:

> As of [12 November 2004], there were roughly 1,900 people that had already made claims with literally thousands more inquiries in terms of website, calls, et cetera, but there had already been roughly 1,900 or so people that had already submitted claims, and the claim period has only been running roughly three weeks.

Judge Nowicki issued an order and judgment on 16 December 2004 granting final approval of the *Wrobel* settlement. In her order, Judge Nowicki specifically stated that the notice plan "was the best notice practicable, and complied fully with the requirements of due process, the Constitution of the United States, the laws of the State of Illinois and any other applicable law." Judge Nowicki also stated that there was no evidence of collusion between the *Wrobel* parties, that the settlement did not overcompensate class counsel, and that the settlement was fair, adequate, and reasonable. Finally, Judge Nowicki ordered:

> [T]he Court shall retain exclusive and continuing jurisdiction of the Action, all Parties, and Settlement Class Members, to interpret and enforce the terms, conditions and obligations of this Settlement Agreement.
>
> . . . . Any and all Class members who have not timely filed a Request for Exclusion from the Class, and their attorneys, are permanently barred and enjoined from commencing and/or prosecuting in any forum any class action against the Defendant . . . for any claims or potential claims described in the Settlement Agreement. Counsel for members of the Class hereby stipulate to dismissal of any existing suits asserting a Settled Claim and shall execute appropriate stipulations of dismissal with prejudice in said suits.

Pursuant to the *Wrobel* settlement and N.C. Gen. Stat. § 1A-1, Rule 41(a)(1), Plaintiff Moody and Defendant filed a stipulation of voluntary dismissal with prejudice in North Carolina Superior Court on 29 December 2004. Judge Tennille issued an order on 6 January 2005 informing the parties that under N.C.G.S. § 1A-1, Rule 23(c), they could not receive a voluntary dismissal of a class-action complaint without court approval. Judge Tennille filed another order on 25 January 2005 tentatively approving the parties' voluntary dismissal. However, Judge Tennille ordered that such approval was subject to the following conditions:

> Counsel for [Plaintiff Moody] and [D]efendant shall file with this Court a final accounting which shall contain the total number of

> claims filed, the total number of claims paid in cash and by coupon (stated separately), the total benefit actually distributed to the class, the total benefit actually distributed to claimants in North Carolina, the administrative costs and the total payment of fees and expenses to [Plaintiff Moody's] counsel.

Judge Tennille directed the parties to file this accounting within thirty days of the close of the claims period, and stated that "[t]he Court retains jurisdiction of this case [pending] compliance with this order and any further order of the Court."

Counsel for Plaintiff Moody wrote a letter to Judge Tennille on 28 January 2005 in response to Judge Tennille's order requesting a final accounting. Counsel asserted that Judge Nowicki's final order in *Wrobel* was entitled to full faith and credit in North Carolina, and also claimed that Judge Tennille lacked jurisdiction to proceed in the *Moody* case. Counsel therefore asked that Judge Tennille close the court's file on the *Moody* case and require nothing further from the parties. Defendant likewise filed a motion to dismiss the *Moody* case and to vacate all orders entered by Judge Tennille following Judge Nowicki's 16 December 2004 order granting final approval of the *Wrobel* settlement. Judge Tennille scheduled a hearing on Defendant's motion for 17 March 2005.

Prior to this hearing, Plaintiff Moody filed a petition for writ of mandamus, writ of prohibition, writ of supersedeas, and a motion for a temporary stay with this Court on 10 March 2005 to prevent Judge Tennille from taking further action with respect to the *Moody* case. Our Court issued an order on 11 March 2005 granting a temporary stay and directing Judge Tennille to file a response to Plaintiff Moody's writ petition. Judge Tennille filed a response to Plaintiff Moody's petition on 23 March 2005. Our Court issued an order on 5 April 2005 denying Plaintiff Moody's petition and dissolving the temporary stay.

Judge Tennille held a hearing on 29 April 2005 to address all pending matters related to the *Moody* case, including his request for a final accounting. The parties submitted the final accounting to Judge Tennille at this hearing. The accounting reflected that during the entire claims period, only 1,015 claims were filed with respect to the settlement. Of those claims, 317 were valid. Of the 317 valid claims, 189 claimants were entitled to a $10.00 check, and 128 claimants were entitled to a $4.00 coupon, for a total nationwide settlement payout of $2,402.00. Forty claims were filed from North Carolina claimants.

Nine of those claims were valid, and included five claimants entitled to a $10.00 check and four claimants entitled to a $4.00 coupon, for a total payout of $66.00 to North Carolina class members.

Upon receipt of this information, Judge Tennille sent a letter to Judge Nowicki on 3 May 2005 stating that the result of the *Wrobel* settlement was "simply unjust" and that "[t]he public will rightly be outraged at the result." Judge Tennille also expressed his concern that class counsel in *Wrobel* had obtained Judge Nowicki's approval for the settlement by misrepresenting to her at the 17 November 2004 hearing that 1,900 claims had already been filed by that date, when in fact, the parties' final accounting to Judge Tennille disclosed that approximately 339 claims had been filed at that time, most of which were invalid. Class counsel and counsel for Defendant both sent letters to Judge Nowicki on 6 May 2005 responding to Judge Tennille's concerns and allegations. Judge Nowicki held a hearing on the matter and issued an order on 10 August 2005 finding that the misstatement by counsel for the *Wrobel* plaintiff "was inadvertent and . . . the settlement in this case was not procured by fraud or misrepresentation to the Court."

Judge Tennille issued a final order and opinion in the *Moody* case on 7 May 2007. In the order, Judge Tennille concluded that "(1) the [*Wrobel*] settlement was approved based upon erroneous information supplied by counsel, (2) the notice procedures in the *Wrobel* case did not meet constitutionally mandated due process, and (3) representation of the class was inadequate[.]" Judge Tennille therefore "refuse[d] to extend full faith and credit to Judge Nowicki's [16 December 2004] Approval Order." Judge Tennille then dismissed Plaintiff Moody's individual claim against Defendant with prejudice, and dismissed the class action allegations without prejudice. Plaintiff Moody and Defendant both appeal from each of the various orders entered by Judge Tennille subsequent to Judge Nowicki's 16 December 2004 order granting final approval of the *Wrobel* settlement.

I.

[1] Before we consider the merits of the parties' appeals, we address, *sua sponte*, the issue of Plaintiff Moody's standing to bring his appeal. Under N.C.R. App. P. 3(a), "[a]ny party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding may take appeal[.]" Further, N.C. Gen. Stat. § 1-271 (2007) provides that "[a]ny party aggrieved" is entitled to

appeal in a civil action. A "party aggrieved" is "one whose rights have been directly or injuriously affected by the action of the [trial] court." *Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000).

In their 29 December 2004 stipulation of voluntary dismissal, Plaintiff Moody and Defendant sought a voluntary dismissal of Plaintiff Moody's complaint, with prejudice. The trial court in fact dismissed Plaintiff Moody's individual claims, with prejudice, in its 7 May 2007 order. Plaintiff Moody thus received the relief he requested, albeit some twenty-eight months after his request. Counsel for Plaintiff Moody argues that while Plaintiff Moody is not "aggrieved" with respect to his personal claims, Plaintiff Moody was injuriously affected by the trial court's actions because the trial court refused to accord full faith and credit to the *Wrobel* settlement, and Plaintiff Moody was a member of the plaintiff class in *Wrobel*.

We hold that Plaintiff Moody is not a "party aggrieved" by the trial court's actions, and therefore lacks standing to bring his appeal. Plaintiff Moody presumably received his settlement from Defendant in *Wrobel*, and is now in compliance with Judge Nowicki's 16 December 2004 order directing him to dismiss his North Carolina lawsuit. The trial court's 7 May 2007 order, if it remains in effect, would allow other North Carolina residents to sue Defendant on claims encompassed by the *Wrobel* settlement. Plaintiff Moody's rights are not "directly or injuriously affected" merely because Defendant remains open to such claims. We therefore dismiss Plaintiff Moody's appeal.[2]

II.

[2] Defendant first argues in its appeal that the trial court lost jurisdiction over Plaintiff Moody's claims upon Judge Nowicki's 16 December 2004 entry of a final order approving the *Wrobel* settlement. Defendant notes that "[j]urisdiction in North Carolina depends on the existence of a justiciable case or controversy." *Creek Pointe Homeowner's Ass'n v. Happ*, 146 N.C. App. 159, 164, 552 S.E.2d 220, 225 (2001), *disc. review denied*, 356 N.C. 161, 568 S.E.2d 191 (2002). According to Defendant, Plaintiff Moody had no justiciable claim to prosecute as of 16 December 2004 because he agreed, pursuant to the

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2. Our dismissal of Plaintiff Moody's appeal has no practical effect on our review of the trial court's orders because Defendant's appeal presents essentially the same issues and arguments as does Plaintiff Moody's appeal. Further, Plaintiff Moody remains a party to Defendant's appeal, and both parties agree on all issues material to Defendant's appeal.

Wrobel settlement, to release his claim and dismiss the North Carolina action. Therefore, the trial court was required to grant Plaintiff Moody's Rule 41(a)(1) motion for a voluntary dismissal. *See Simeon v. Hardin*, 339 N.C. 358, 370, 451 S.E.2d 858, 866 (1994) (stating that "[w]henever during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed"). The trial court, however, asserted that even following the resolution of *Wrobel*, the trial court retained jurisdiction under N.C.G.S. § 1A-1, Rule 23(c) to approve or deny Plaintiff Moody's request for a voluntary dismissal.

Whether a trial court had jurisdiction to enter an order is a question of law that we review *de novo*. *See, e.g.*, *Childress v. Fluor Daniel, Inc.*, 172 N.C. App. 166, 167, 615 S.E.2d 868, 869 (2005). A question of statutory construction is also a question of law that we review *de novo*. *See, e.g.*, *Goodson v. P.H. Glatfelter Co.*, 171 N.C. App. 596, 605, 615 S.E.2d 350, 357, *disc. review denied*, 360 N.C. 63, 623 S.E.2d 582 (2005).

A.

N.C.G.S. § 1A-1, Rule 23(c) provides:

> *Dismissal or compromise.*—A class action shall not be dismissed or compromised without the approval of the judge. In an action under this rule, notice of a proposed dismissal or compromise shall be given to all members of the class in such manner as the judge directs.

Defendant argues that Rule 23(c) only applies to cases in which the trial court has certified a class, thereby creating a "class action." Plaintiff Moody's lawsuit, while it contained both individual and class claims, never proceeded to the class-certification stage. Therefore, according to Defendant, the trial court had no jurisdiction under Rule 23(c) to approve the parties' motion for a voluntary dismissal.

Our State's Rule 23(c) is similar to the pre-2003 version of the analogous federal rule. *See* Fed. R. Civ. P. 23(e) (2002) ("A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."). Prior to 2003, there existed a split in authority concerning whether Federal Rule 23(e) applied prior to class certification. A majority of federal circuits considering the issue held that

former Federal Rule 23(e) did apply both pre-certification and post-certification. *See Diaz v. Trust Territory of Pacific Islands*, 876 F.2d 1401, 1408 (9th Cir. 1989); *Glidden v. Chromalloy American Corp.*, 808 F.2d 621, 625-27 (7th Cir. 1986); *Kahan v. Rosenstiel*, 424 F.2d 161, 169 (3d Cir. 1970), *cert. denied*, 398 U.S. 950, 26 L. Ed. 2d 290 (1970). The United States Court of Appeals for the Fourth Circuit, however, held that a "class action" only exists after a class has been certified, and therefore former Federal Rule 23(e) only applied post-certification. *See Shelton v. Pargo*, 582 F.2d 1298, 1302-04 (4th Cir. 1978).[3] North Carolina Courts have not previously determined whether our own Rule 23(c) applies pre-certification.[4]

The North Carolina Supreme Court has noted that

> "[t]he primary goal of statutory construction is to effectuate the purpose of the legislature in enacting the statute." The first step in determining a statute's purpose is to examine the statute's plain language. "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. Hooper, 358 N.C. 122, 125, 591 S.E.2d 514, 516 (2004) (citation omitted) (quoting *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 574, 573 S.E.2d 118, 121 (2002); *Burgess v. Your House of Raleigh*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990)). Black's Law Dictionary defines a "class action" as "[a] lawsuit in which *the court authorizes* a single person or a small group of people to represent the interests of a larger group." Black's Law Dictionary 267 (8th ed. 2004) (emphasis added). This definition suggests that a lawsuit containing class allegations must receive judicial authorization, or class certification, before it can be considered a "class action." Our Supreme Court has also suggested that a lawsuit cannot acquire "class action" status until the named plaintiffs have undergone the class-certification procedure. *See Crow v. Citicorp Acceptance Co.*, 319 N.C. 274, 282-84, 354 S.E.2d 459, 465-66 (1987) (noting that even when a complaint contains class allegations, the named plaintiffs "may maintain th[e] action as a

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3. Congress amended Federal Rule 23(e) in 2003 to resolve this discrepancy in favor of the Fourth Circuit's view. *See* Fed. R. Civ. P. 23(e) (2004) ("The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a *certified class*." (emphasis added)).

4. The appellant in *Alexander v. DaimlerChrysler Corp.*, 158 N.C. App. 637, 582 S.E.2d 57 (2003) did argue that Rule 23(c) only applied post-certification. However, our Court held that the appellant was not entitled to appellate review of that issue, and we therefore declined to address the appellant's statutory argument. *See id.* at 641-42, 582 S.E.2d at 60.

class action" only if they demonstrate to the trial court that they have satisfied the various requirements for using the class-action procedure, and if the trial court then decides in its discretion to permit the lawsuit to proceed as a class action).

In addition to North Carolina case law, "since the [F]ederal . . . [R]ules [of Civil Procedure] are the source of [the North Carolina Rules of Civil Procedure], we will look to the decisions of [federal courts] for enlightenment and guidance" in determining the meaning of "class action." *Sutton v. Duke*, 277 N.C. 94, 101, 176 S.E.2d 161, 165 (1970). While the United States Supreme Court has not explicitly determined the meaning of "class action" under former Federal Rule 23(e), a number of that Court's decisions contain language suggesting that class certification was a prerequisite for application of that rule. *See Sosna v. Iowa*, 419 U.S. 393, 399 n.8, 42 L. Ed. 2d 532, 540 n.8 (1975) (stating that "[*o*]*nce* [*a*] *suit is certified as a class action*, it may not be settled or dismissed without the approval of the court [under] Rule 23 (e)" (emphasis added)); *cf. Pasadena City Bd. of Education v. Spangler*, 427 U.S. 424, 430, 49 L. Ed. 2d 599, 605 (1976) (rejecting the argument that actual certification of a class is a "meaningless 'verbal recital' " that has no effect on whether a lawsuit is a class action); *Baxter v. Palmigiano*, 425 U.S. 308, 310 n.1, 47 L. Ed. 2d 810, 817 n.1 (1976) (stating that "[w]ithout . . . certification and identification of the class, [an] action is not properly a class action").

The Fourth Circuit in *Shelton* relied on this language to hold that former Federal Rule 23(e) unambiguously applied to only post-certification class-action lawsuits. In *Shelton*, the plaintiff sought to dismiss her class-action complaint after reaching a settlement with the defendant. *Shelton*, 582 F.2d at 1301. The trial court approved the dismissal with qualifications and directed that notice be provided to all putative class members pursuant to former Federal Rule 23(e). *Id.* Relying on *Sosna* and *Baxter*, the Fourth Circuit rejected the trial court's interpretation of former Federal Rule 23(e):

> [Former Federal] Rule 23(e) does not apply to any action simply because it was begun as a class action. By its explicit language, [former Federal] Rule 23(e) is confined in operation to the settlement and dismissal of a "class action."
>
> . . . . It is the actual certification of the action as a class action . . . which alone gives birth to "the class as a jurisprudential entity," changes the action from a mere individual suit with class

> allegations into a true class action . . . , and provides that sharp line of demarcation between an individual action seeking to become a class action and an actual class action.

Id. at 1303-04 (citation and footnotes omitted).

We find the Fourth Circuit's reasoning in *Shelton* persuasive, and hold that the requirements of our own Rule 23(c) do not apply to pre-certification class-action complaints. Therefore, we hold that the trial court erred in concluding that Plaintiff Moody was required to obtain judicial approval under Rule 23(c) before obtaining a voluntary dismissal of his class-action complaint.[5]

B.

[3] While we hold that a trial court does not derive any pre-certification supervisory authority under Rule 23(c), our holding does not imply that a trial court wholly lacks authority to review a motion for pre-certification dismissal of a class-action complaint.

Although the Fourth Circuit in *Shelton* found former Federal Rule 23(e) inapplicable pre-certification, the Court also recognized the danger in allowing named plaintiffs to settle their individual claims for hefty sums and then dismiss their class-action complaint with no judicial oversight:

> [B]y asserting a representative role on behalf of the alleged class, [the named plaintiffs] voluntarily accept[] a fiduciary obligation towards the members of the putative class they thus have undertaken to represent. They may not abandon the fiduciary role they assumed . . . if prejudice to the members of the class they claimed to represent would result or if they have improperly used the class[-]action procedure for their personal aggrandizement.

Shelton, 582 F.2d at 1305 (footnote omitted). The Court noted that Fed. R. Civ. P. 23(d) grants federal courts broad powers to conduct class-action litigation. *Id.* at 1306; *see* Fed. R. Civ. P. 23(d) (2008) (granting trial courts broad powers in class-action litigation to control the trial proceedings, require notice to class members, impose

5. We acknowledge that the North Carolina Business Court has previously held that Rule 23(c) applies pre-certification. *See Lupton v. Blue Cross and Blue Shield of N.C.*, 1999 NCBC LEXIS 3, *20 (1999). The *Lupton* Court, however, reached this conclusion not by interpreting the plain language of N.C.G.S. § 1A-1, Rule 23(c), but rather by weighing the policy considerations in favor of that specific construction of the statute. *See id.* at *5-*20. Because we find that the language of Rule 23(c) unambiguously applies only to post-certification class-action lawsuits, we decline to adopt *Lupton* as persuasive authority in this case.

conditions on the representative parties, and handle various other procedural matters). The Court then held that in order to curb abuse and to protect absent class members, the trial court

> should have both the power and the duty, in view of its supervisory power over and its special responsibility in actions brought as class actions, as set forth in [Federal Rule] 23(d), to see that the representative party does nothing . . . in derogation of the fiduciary responsibility he has assumed, which will prejudice unfairly the members of the class he seeks to represent. Apart, then, from . . . [former Federal Rule] 23(e) . . . the [trial court] would appear to have an ample arsenal to checkmate any abuse of the class action procedure[.]

Shelton, 582 F.2d at 1306 (footnotes omitted). The Court concluded that before allowing voluntary dismissal of a pre-certification class-action complaint, a trial court should "determine whether the proposed settlement and dismissal are tainted by collusion or will prejudice absent putative [class] members," in which case the trial court could take appropriate action. *Id.* at 1315-16.

North Carolina does not have a counterpart to Federal Rule 23(d). However, our case law establishes a clear judicial policy of allowing trial courts broad discretion in matters pertaining to class-action lawsuits. *See, e.g.*, *Frost v. Mazda Motors of Am.*, *Inc.*, 353 N.C. 188, 198, 540 S.E.2d 324, 331 (2000) (stating that "the touchstone for appellate review of a Rule 23 order, whether it emanates from a federal or a North Carolina court, is to honor the 'broad discretion' allowed the trial court in all matters pertaining to class certification"); *Crow*, 319 N.C. at 284, 354 S.E.2d at 466 (noting that even if a plaintiff meets the requirements for class certification, the decision whether to certify the class "continues to be a matter left to the trial court's discretion. . . . [T]he trial court has broad discretion in this regard and is not limited to consideration of matters expressly set forth in Rule 23."); *Gibbons v. Cit Group/Sales Financing*, 101 N.C. App. 502, 507, 400 S.E.2d 104, 107, *disc. review denied*, 329 N.C. 496, 407 S.E.2d 856 (1991) (noting that trial courts have a "duty to maintain control over [class-action] litigation," a "responsibility to control the way in which [a] case proceeds," and discretion to determine "how best to proceed with the litigation").

Further, although Federal Rule 23(d) has no counterpart in our State, our Courts have relied on federal case law interpreting that rule when discussing the breadth of trial court discretion in North

Carolina class-action litigation. *See id.* at 506, 400 S.E.2d at 106 (finding persuasive the logic of federal case law concerning trial court discretion under Federal Rule 23(d)); *see also Frost*, 353 N.C. at 196-97, 540 S.E.2d at 329-30 (citing *Gibbons* for the proposition that although North Carolina has no analogue to Federal Rule 23(d), our Courts may nonetheless treat federal case law concerning Federal Rule 23(d) as persuasive authority where appropriate).

We find the Fourth Circuit's reasoning in *Shelton* persuasive in the present case. Without some level of pre-certification court supervision, there is an unacceptable risk that parties may abuse the class-action mechanism in myriad ways. For example,

> defendants faced with a class action may be encouraged to try to avoid class resolution of claims by buying off individual named plaintiffs. These defendants could settle with strong class plaintiffs, and proceed with a class action when faced with weak or ineffectual named plaintiffs. In some situations, the defendants may be able to forum shop settling claims brought in undesirable forums. The other side of the coin is that plaintiffs with small claims may try to use class allegations to coerce unusually generous individual settlements from defendants.

5 Moore's Federal Practice § 23.64[2][a] (3d. ed 2008). Parties with such motives will be less likely to abuse the class-action mechanism if they know that a voluntary dismissal will be subject to the trial court's review. Further, when a plaintiff files a class-action complaint, the plaintiff has set out to the world a willingness to assume the role of a representative in a class-action lawsuit. Although the class is not yet certified, putative class members may rely on the named plaintiff's stated intentions to represent the class. Under such circumstances, trial courts have a duty to assure that putative class members will not be prejudiced, procedurally or otherwise, by voluntary dismissal of the class-action complaint.

We therefore hold that when a plaintiff seeks voluntary dismissal of a pre-certification class-action complaint, the trial court should engage in a limited inquiry to determine (a) whether the parties have abused the class-action mechanism for personal gain, and (b) whether dismissal will prejudice absent putative class members.[6] If

6. Because Rule 23(c) does not apply to the trial court's inquiry at this stage of the litigation, this approach allows the trial court to conduct pre-certification review "without imposing on the [trial] court the laborious duty in such a case to conduct a certification determination or to give notice to absentee class members." *Shelton*, 582 F.2d at 1311.

the trial court finds that neither of these concerns are present, the plaintiff is entitled to a voluntary dismissal. However, if the trial court finds that one or both of these concerns are present, it retains discretion to address the issues.[7] *See Shelton*, 582 F.2d at 1314, 1315-16. To the extent the trial court's post-16 December 2004 orders encompassed this type of limited inquiry, the trial court did not err by issuing such orders.

III.

[4] In its 7 May 2007 order, the trial court found that the parties had indeed abused the class-action mechanism for their personal gain. According to the trial court, "[t]he shocking incongruity between class benefit and the fees afforded counsel and [the named plaintiffs] leave the appearance of collusion[.]" The trial court further charged, *inter alia*, that the *Wrobel* settlement "was based on erroneous information supplied to the Illinois court by counsel for [the *Wrobel* plaintiff] and acquiesced in by Defendant's nationwide counsel." In addition to its findings on abuse of the class-action mechanism, the trial court found that recognition of the *Wrobel* settlement as binding on North Carolina class members, and dismissal of Plaintiff Moody's class allegations with prejudice, would prejudice North Carolina class members due to various due process concerns with the *Wrobel* settlement. Specifically, the trial court found that the entire notice plan in *Wrobel* fell short of constitutional requirements, and that the representation provided by class counsel in *Wrobel* was wholly inadequate.

As discussed in Part II above, trial courts generally have authority to conduct a limited inquiry when reviewing a pre-certification motion to dismiss a class-action complaint. Defendant argues, however, that this inquiry is largely circumscribed where, as in the present case, a foreign court has already issued findings and conclusions addressing those same questions.

A.

The United States Constitution provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. Const. art. IV, § 1. Congress has further provided that "[t]he records and judicial pro-

7. For example, the trial court may hold a certification hearing, certify the class if appropriate, and order that notice be given to class members. *See Shelton*, 582 F.2d at 1316. The parties may then again seek dismissal subject to the trial court's approval under Rule 23(c).

ceedings of any court of any . . . State . . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken." 28 U.S.C. § 1738 (2007). Full faith and credit principles extend to class-action litigation. *See Matsushita Elec. Indus. v. Epstein*, 516 U.S. 367, 374, 134 L. Ed. 2d 6, 17 (1996) (holding that "a judgment entered in a class action, like any other judgment entered in a state judicial proceeding, is presumptively entitled to full faith and credit under the express terms of [28 U.S.C. § 1738]").

A state's duty to accord full faith and credit to an out-of-state judgment is, however, subject to certain limitations. For example, a state is not required to give full faith and credit to a constitutionally infirm foreign judgment. *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 482, 72 L. Ed. 2d 262, 281 (1982). Further, a state is not required to give full faith and credit to a foreign judgment if the foreign court lacked jurisdiction to render the judgment. *Underwriters Assur. v. North Carolina Life*, 455 U.S. 691, 704, 71 L. Ed. 2d 558, 570 (1982). In light of these exceptions, the reviewing court may inquire as to the legitimacy of the foreign court's judgment. *See*, *e.g.*, *id.* at 705, 71 L. Ed. 2d at 570-71 (stating that "before a court is bound by [a] judgment rendered in another State, it may inquire into the jurisdictional basis of the foreign court's decree").

Courts differ, however, as to the scope of collateral review of a foreign court's conclusions regarding due process issues such as sufficiency of notice and adequacy of representation in class-action lawsuits. Some courts hold that the reviewing court may not "reconsider[] . . . the merits of the claim or issue," but rather may only consider whether absent class members' due process rights were "protected by the adoption of the appropriate *procedures* by the certifying court," in which case the original judgment is entitled to full faith and credit. *Epstein v. MCA*, *Inc.*, 179 F.2d 641, 648-49 (9th Cir. 1999), *cert. denied*, 528 U.S. 1004, 145 L. Ed. 2d 384 (1999); *see also*, *e.g.*, *Fine v. Am. Online*, *Inc.*, 743 N.E.2d 416, 420-24 (Ohio App. 2000), *review denied*, 736 N.E.2d 24 (Ohio 2000), *cert. denied*, 532 U.S. 942, 149 L. Ed. 2d 346 (2001); *Lamarque v. Fairbanks Capital Corp.*, 927 A.2d 753, 760-65 (R.I. 2007); *Hospitality Management v. Shell Oil Co.*, 591 S.E.2d 611, 619 (S.C. 2004), *cert. denied*, 543 U.S. 916, 160 L. Ed. 2d 200 (2004). Other courts allow broader collateral review of the merits of the rendering court's due process determinations. *See*, *e.g.*, *Stephenson v. Dow Chemical Co.*, 273 F.3d 249, 257-59 (2d Cir. 2001), *aff'd in pertinent part by equally divided*

Court, 539 U.S. 111, 156 L. Ed. 2d 106 (2003) (per curiam) (Stevens, J., not participating); *State v. Homeside Lending, Inc.*, 826 A.2d 997, 1016-17 (2003).

North Carolina Courts have adopted a "very limited" scope of review of foreign courts' determinations of jurisdictional questions. *Boyles v. Boyles*, 308 N.C. 488, 491, 302 S.E.2d 790, 793 (1983). Where the foreign judgment contains only mere recitals regarding the foreign court's jurisdiction over the parties and claims, our Courts have allowed an "independent inquiry into the jurisdiction of the court which rendered the judgment." *Hosiery Mills v. Burlington Industries*, 285 N.C. 344, 352-53, 204 S.E.2d 834, 840 (1974). However, our Courts are bound by the foreign judgment where the record reveals that the jurisdictional issues were "fully litigated in, and determined by, the court which rendered the judgment." *Id.* at 353, 204 S.E.2d at 840; *see* also Boyles, 308 N.C. at 491, 302 S.E.2d at 793 (stating that "a judgment is entitled to full faith and credit . . . when the second court's inquiry discloses that [the questions at issue] have been fully and fairly litigated and finally decided in the court which rendered the judgment" (quoting *Underwriters*, 455 U.S. at 706, 71 L. Ed. 2d at 571-72 (quotation omitted))).[8]

Our Court has applied a similarly limited review when considering due process conclusions in foreign class-action judgments. In *Freeman v. Pacific Life Ins. Co.*, 156 N.C. App. 583, 577 S.E.2d 184 (2003), for example, the plaintiffs filed a complaint against the

8. The trial court correctly noted in its 7 May 2007 order that in both *Boyles* and *Hosiery Mills*, our Supreme Court ultimately conducted a *de novo* review of the foreign courts' jurisdiction over the North Carolina parties, determined in each case that the foreign court lacked such jurisdiction, and therefore refused to accord full faith and credit to those courts' orders. *See Boyles*, 308 N.C. at 494-500, 302 S.E.2d at 795-98; *Hosiery Mills*, 285 N.C. at 355-57, 204 S.E.2d at 841-43. However, the Supreme Court determined that broad collateral review was appropriate in those cases specifically because the North Carolina parties were absent from and not represented in the prior litigation, and therefore never actually litigated the jurisdictional or notice questions at issue. *See Boyles*, 308 N.C. at 492, 302 S.E.2d at 793 (allowing broader collateral review when "a party against whom a *default judgment* was entered subsequently challenges the validity of the original proceeding on the grounds that he did not receive adequate notice" (emphasis added)); *Hosiery Mills*, 285 N.C. at 355, 204 S.E.2d at 841 (allowing broader collateral review where the challenging party did not appear or participate in, and was not represented in, the foreign proceedings). In contrast, the North Carolina class members in the present case were represented by class counsel in *Wrobel*. Further, as discussed below, class counsel in *Wrobel* did actually litigate all relevant jurisdictional and due process issues on behalf of the *Wrobel* class. Therefore, neither *Boyles* nor *Hosiery Mills* support broad collateral review of the *Wrobel* judgment in this case.

defendant life insurance company alleging breach of contract and unfair and deceptive trade practices. *Id.* at 585, 577 S.E.2d at 186. The plaintiffs' claims were encompassed in a prior class-action settlement in Kentucky, and the plaintiffs' life insurance policy had received a credit as a result of the Kentucky settlement. *Id.* at 584-85, 577 S.E.2d at 185. However, the plaintiffs argued that the Kentucky settlement was not entitled to full faith and credit in North Carolina because the plaintiffs never received actual notice of the proposed settlement, the fairness hearing, or their right to opt out of the settlement. *Id.* at 585, 587, 577 S.E.2d at 185-86, 187. The plaintiffs further alleged that the notice given in the Kentucky litigation did not meet due process standards. *Id.* at 586, 577 S.E.2d at 186. On appeal, our Court rejected the plaintiffs' contention that "the issue of notice is for North Carolina courts[.]" *Id.* at 587, 577 S.E.2d at 187. Rather, we limited our inquiry to whether the due process and jurisdictional issues had already been litigated in and determined by the Kentucky court. The record revealed that "[t]he Kentucky court . . . specifically found as fact that jurisdiction was proper and that [the] defendant had provided the required notice [under Kentucky law]." *Id.* at 588, 577 S.E.2d at 187. Therefore, our Court held that the Kentucky judgment was entitled to full faith and credit, thus barring the plaintiffs' claims. *Id.* at 590, 177 S.E.2d at 189.

Our Courts' "limited review" approach is consistent with United States Supreme Court case law. *See*, *e.g.*, *Matsushita*, 516 U.S. at 378-79, 134 L. Ed. 2d at 20-21 (finding that a foreign judgment met due process requirements by referencing the foreign court's findings on those issues, rather than by conducting an independent review). This type of limited review serves important judicial interests in the efficiency and finality of class-action litigation, and ensures that no "waste of judicial resources" occurs by reason of "reviewing courts . . . conduct[ing] an extensive substantive review when one has already been undertaken in a sister state." *Hospitality Management*, 591 S.E.2d at 619. Further, "second-guessing the fully [-]litigated decisions of our sister courts would violate the spirit of full faith and credit," *id.*, and could make North Carolina the jurisdiction of choice for plaintiffs wishing to launch collateral challenges to other states' judicial proceedings. *See also Fine*, 743 N.E.2d at 420-22 (discussing policy considerations that weigh in favor of limited collateral review). While North Carolina courts surely have an important interest in not enforcing constitutionally infirm foreign judgments, the appropriate manner of correcting foreign trial court errors is "by

appeal within the [foreign] state system and by direct review in the United States Supreme Court." *Epstein*, 179 F.3d at 648.

B.

Defendant argues that, based on the principles outlined above, the trial court erred by undertaking a broad collateral review of Judge Nowicki's 16 December 2004 order and by refusing to accord full faith and credit to that order. We agree.

The record in the current case reveals that the due process and jurisdictional questions addressed in the trial court's 7 May 2007 order had already been heard and answered in Illinois Circuit Court. Moreover, the record reveals that Judge Nowicki's various conclusions were more than mere recitals regarding the rendering court's jurisdiction, *see Hosiery Mills*, 285 N.C. at 352-53, 204 S.E.2d at 840, and that Judge Nowicki reached these conclusions after following procedures designed to protect absent class members' due process rights. *See Epstein*, 179 F.2d at 648.

To begin, the *Wrobel* parties engaged in approximately eight months of settlement negotiations mediated by a retired Illinois judge. The parties then submitted a proposed settlement to the Illinois Circuit Court that included substantial legal analysis of the relevant due process issues. Judge Nowicki reviewed the proposal, entered an order on 14 September 2004 granting preliminary approval to the *Wrobel* settlement agreement, and scheduled a fairness hearing. Prior to the fairness hearing, the parties filed additional documents with the Illinois Court that addressed the due process aspects of the proposed settlement. Further, Judge Nowicki received a letter from Judge Tennille on 5 November 2004 expressing concern regarding jurisdictional and due process issues related to the *Wrobel* settlement. Two weeks later at the 17 November 2004 fairness hearing, Judge Nowicki questioned the parties extensively regarding the settlement negotiations, notice plan, potential class benefit, and attorneys' fees. Judge Nowicki also discussed Judge Tennille's letter with the parties and asked the parties to respond to Judge Tennille's concerns. Further, the retired Illinois judge who mediated the *Wrobel* settlement spoke at the fairness hearing regarding the validity of the settlement negotiations and the adequacy of class benefit, class counsel, and attorneys' fees.

After considering all the relevant information, Judge Nowicki entered an order and judgment on 16 December 2004 granting final

approval to the *Wrobel* settlement. After reviewing the proposed notice plan, Judge Nowicki found that the plan "constituted valid, due and sufficient notice to all members of the Settlement Class, was the best notice practicable, and complied fully with the requirements of due process, the Constitution of the United States, the laws of the State of Illinois and any other applicable law." Judge Nowicki also discussed the *Wrobel* parties' settlement negotiations, found "no evidence of collusion between Sears and Class Counsel," and concluded that "[t]he Settlement Agreement [was] the product of informed and non-collusive negotiations[.]" Judge Nowicki likewise examined the potential class benefit, class representative fees, and attorneys' fees, and after a lengthy analysis, found them all to be satisfactory.

Finally, Judge Nowicki continued to consider and address these and other due process issues even following her final approval of the *Wrobel* settlement. Judge Nowicki received a letter from Judge Tennille on 3 May 2005 expressing concern with the final accounting in the *Wrobel* litigation as well as potential misrepresentations made to Judge Nowicki by class counsel. Judge Nowicki wrote a letter to Judge Tennille the following day stating that she appreciated the information and would consider whether to take corrective action. After considering Judge Tennille's concerns, Judge Nowicki held a hearing and entered an order on 10 August 2005 stating that "[t]he Court remains satisfied that [class counsel's] misstatement was inadvertent and that the settlement in [*Wrobel*] was not procured by fraud or misrepresentation to the Court."

Based on this record, we find that the jurisdictional and due process conclusions contained in the trial court's 7 May 2007 order were "fully and fairly litigated and finally decided" in Illinois Circuit Court. *Boyles*, 308 at 491, 302 S.E.2d at 793 (quoting *Underwriters*, 455 U.S. at 706, 71 L. Ed. 2d at 572 (quotation omitted)). This finding concludes our review and forecloses any reconsideration of the merits of the legal issues decided by the Illinois Circuit Court in *Wrobel*. While we share the trial court's serious concerns regarding the final accounting in the *Wrobel* settlement, we are constrained to hold that the trial court erred by refusing to accord full faith and credit to the *Wrobel* settlement. We therefore reverse the trial court's 7 May 2007 order and remand this case to the trial court with instructions to dismiss the class-action allegations with prejudice.

In Plaintiff's appeal we dismiss.

In Defendant's appeal we reverse and remand.

Judges TYSON and STEPHENS concur.

STATE OF NORTH CAROLINA v. DARRELL LUGENE GARRIS

No. COA07-1388

(Filed 15 July 2008)

1. Evidence— officers' service weapons—SBI's chain of custody procedures

In a prosecution for attempted murder of a police officer, communicating threats to officers and other crimes, the trial court did not abuse its discretion by allowing testimony establishing the chain of custody of the arresting officers' service weapons, which had been fired in pursuit of defendant and collected as evidence, because: (1) the nature of the testimony did not suggest that the officers had been cleared of any wrongdoing, including unlawfully using excessive force against defendant, even though their service weapons had been returned to them; (2) the testimony referred to all items collected for evidence and was allowed only to show the SBI's general procedures regarding evidence; and (3) by allowing the testimony to show a procedural rule of the SBI, the jury was not led to believe that the officers had done no wrong.

2. Firearms and Other Weapons— possession of firearm by felon—simultaneous possession of multiple firearms—single conviction and sentence

A defendant may be convicted and sentenced only once for possession of a firearm by a felon based upon his simultaneous possession of multiple firearms. The rule of lenity forbids a court to interpret a statute so as to increase the penalty that it places on an individual when the legislature has not clearly stated such an intention, and a review of N.C.G.S. § 14-415.1(a) shows no indication that the legislature intended for the statute to impose multiple penalties for a defendant's simultaneous possession of multiple firearms.

3. Constitutional Law— attempted murder—assault with deadly weapon with intent to kill—double jeopardy inapplicable—arrest of judgment on less serious offense—not abuse of discretion

Although the offenses of attempted murder and assault with a deadly weapon with intent to kill arose out of the same factual basis, they were distinct offenses because each had an element not present in the other, and the trial court could sentence defendant for both of those offenses without subjecting defendant to double jeopardy and was not required to arrest judgment entered on either offense. Therefore, the trial court did not abuse its discretion by arresting judgment on the less serious offense of assault with a deadly weapon with intent to kill and entering a sentence based on the more serious attempted murder conviction.

4. Criminal Law— failure to instruct on perfect or imperfect self-defense—plain error analysis

The trial court did not commit plain error in a prosecution for attempted first-degree murder of a police officer and assault with a deadly weapon with intent to kill by failing to instruct the jury on defendant's availability of perfect or imperfect self-defense because: (1) within reasonable limits, an officer has discretion to determine the amount of force required under the circumstances as they appeared to him at the time he acted; (2) it is not incumbent upon the State to prove the officer did not use excessive force; (3) the evidence showed that defendant threatened he would shoot, the officer had reason to believe that defendant had weapons on his person or within the bag he carried with him, and the trial court could reasonably find the officer acted within his discretion when he fired at defendant given the danger of the circumstances and the risk of great bodily harm if defendant carried out his threat to shoot; and (4) defendant failed to present substantial evidence showing the officer acted with unusual force given the circumstances.

Appeal by defendant from judgments entered 1 June 2007 by Judge John L. Holshouser, Jr., in Davidson County Superior Court. Heard in the Court of Appeals 17 April 2008.

Attorney General Roy Cooper, by Special Deputy Attorney General R. Marcus Lodge, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Charlesena Elliott Walker, for defendant appellant.

McCULLOUGH, Judge.

Darrell Lugene Garris ("defendant") appeals judgments entered after a jury verdict of guilty of one count of attempted first-degree murder, one count of assault with a deadly weapon with intent to kill, two counts of possession of a firearm by a felon, one count of communicating threats to police officers, and possession of marijuana with intent to sell or distribute. We affirm in part and reverse in part.

FACTS

Late at night on 29 March 2006, Thomasville Police Officers Rusty Fritz ("Officer Fritz") and Timothy Adams ("Officer Adams") stopped a speeding car with no tag lights and a taillight out. Following this stop, the officers searched defendant, who had been sitting in the vehicle's front passenger seat, and then told defendant he was "free to go." Defendant was given permission to retrieve a CD from the car, but instead he took out a black plastic bag from the car. When defendant was questioned about the contents of the bag, he opened it enough so that Officer Fritz could see a bag of marijuana inside the black plastic bag. Defendant then began to run away from the officers.

During Officer Fritz's pursuit, defendant threatened, "back up or I'll shoot." Defendant did not follow through with his threat at that time. Officer Fritz saw no weapon in defendant's possession when the threat was made, although defendant's hand was inside the black plastic bag. Officer Fritz struck defendant in the leg with his baton, and then defendant continued to run.

Officer Fritz testified that defendant fired multiple times at him. Officer Fritz fired his weapon at defendant eight times, while defendant attempted to run away. Officer Fritz testified that defendant was first to fire a weapon. Officer Steven Currie ("Officer Currie"), who later arrived on the scene, shot at defendant twice while he was within twenty feet. Defendant was hit twice as he was being pursued, once in the abdomen and once in the leg.

Officers found a Bryco Arms brand nine millimeter semi-automatic gun in a black plastic bag located at the corner of a house, near where defendant was shot. On 29 March 2006, officers also found a nine millimeter .380 FEG brand semi-automatic pistol by a trash can behind a residence, along the route defendant ran while being chased. Officers also recovered two spent shell casings matching the .380 pistol.

Defendant was charged with attempted murder, assault with a deadly weapon with intent to kill, two counts of possession of a firearm by a felon, possession with intent to sell or distribute marijuana, communicating threats, and possession of stolen property. On 28 May 2007, defendant was tried in Davidson County's Superior Court. At the close of the State's evidence, Judge Holshouser dismissed the possession of stolen property charge. The jury returned verdicts finding defendant guilty of the remaining charges.

The trial court arrested the assault sentence pursuant to the State's contention that it was based upon the same facts as the attempted first-degree murder conviction, and sentenced defendant to consecutive terms of 220-273 months and 15-18 months of imprisonment for the attempted murder conviction and one count of possession of a firearm by a felon, respectively. The trial court consolidated the second possession of a firearm conviction with the convictions for possession with intent to sell or distribute marijuana and communicating threats, and sentenced defendant to a suspended sentence of 15-18 months. Defendant appeals.

I.

[1] On appeal, defendant contends that the trial court erred by allowing the introduction of certain testimony referring to the chain of custody procedures followed by the State Bureau of Investigation ("SBI"). Specifically, defendant objects to SBI testimony stating that evidence collected at the crime scene is transferred back to the local police department once the District Attorney "clears the [police] officer of any wrongdoing." We disagree with defendant, and hold that the trial court did not err.

Relevant evidence is that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2007). Furthermore, "[e]vidence is 'relevant when it reveals a circumstance surrounding

one of the parties and is necessary to understand properly their conduct or motives or if [the evidence] allows the jury to draw a reasonable inference as to a disputed fact.' " *State v. Fleming*, 350 N.C. 109, 130, 512 S.E.2d 720, 735, *cert. denied*, 528 U.S. 941, 145 L. Ed. 2d 274 (1999) (citation omitted).

The trial court's ruling on the relevance of evidence is generally given great deference. *See State v. Godley*, 140 N.C. App. 15, 25, 535 S.E.2d 566, 574 (2000), *disc. review denied*, 353 N.C. 387, 547 S.E.2d 25, *cert. denied*, 532 U.S. 964, 149 L. Ed. 2d 384 (2001). Even when evidence is determined to be relevant, the trial court may exclude it if its probative value is substantially outweighed by the potential for unfair prejudice, confusion, or misleading the jury. *See* N.C. Gen. Stat. § 8C-1, Rule 403 (2007); *see also State v. Wallace*, 351 N.C. 481, 523, 528 S.E.2d 326, 352-53, *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000), *reh'g denied*, 531 U.S. 1120, 148 L. Ed. 2d 784 (2001), *cert. denied*, 360 N.C. 76 (2005). "A trial judge's decision under Rule 403 regarding the relative balance of probative weight and potential for prejudice will only be overturned for an abuse of discretion." *State v. Hyman*, 153 N.C. App. 396, 401-02, 570 S.E.2d 745, 749 (2002), *cert. denied*, 357 N.C. 253, 583 S.E.2d 41 (2003).

Defendant has the burden of showing that prejudice existed, such that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443(a) (2007). Furthermore, even admission of irrelevant evidence "will be treated as harmless unless the defendant shows that he was so prejudiced by the erroneous admission that a different result would have ensued if the evidence had been excluded." *State v. Harper*, 96 N.C. App. 36, 42, 384 S.E.2d 297, 300 (1989).

Before an item may be received into evidence, the party offering the evidence must establish both that the item offered is identified as the same object involved in the incident and that the object has undergone no material change. *See State v. Campbell*, 311 N.C. 386, 388, 317 S.E.2d 391, 392 (1984). A detailed chain of custody of the evidence need only be established 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." *Id.* at 389, 317 S.E.2d at 392. "Determining the standard of certainty required to show that the item offered is the same as the item involved in the incident and that it is in an unchanged condition lies within the trial court's sound discre-

tion." *Fleming*, 350 N.C. at 131, 512 S.E.2d at 736. Any weak links in the chain of custody affect only the weight given to the evidence and not its admissibility. *See id.* After reviewing the record in the instant case, we conclude that defendant has not met his burden of showing that the introduction of a statement establishing the chain of custody of the officers' service weapons was unduly prejudicial.

During trial, Special Agent Patrick Daly ("Agent Daly") testified that the police officers' service weapons, which had been fired in pursuit of defendant and collected as evidence, were later returned into the custody and control of the Thomasville Police Department. In reference to multiple items collected for evidence, including a blood-stained T-shirt and tennis shoes, Agent Daly stated that

> [o]nce the items have been completely analyzed at the lab, they come back to me. I maintain custody of those in our evidence locker in our office. Once the District Attorney rules on the case and clears the officer of any wrongdoing, then the items are transferred back to the local departments.

Defense counsel objected to this statement on the grounds that it implied the officers had done no wrong. The objection by the defense counsel regarding the characterization of wrongdoing was sustained as it may have reflected upon defendant, but the evidence was allowed to show SBI procedure.

Defendant argues that the trial court committed prejudicial error because the testimony suggested that the prosecutor had already determined the officers were without fault. Furthermore, defendant contends the testimony's only purpose was to implicitly suggest to jurors that there was no need for them to concern themselves with the question of whether the officers were acting unlawfully, which, if answered in the affirmative, may have permitted defendant to act in self-defense.

Defendant also contends that evidence of the department rule that police officers' service weapons are returned "[o]nce the District Attorney rules on the case and clears the officer of any wrongdoing" was not relevant because the officers' service weapons were not then introduced into evidence after their chain of custody was established.

The nature of the testimony does not suggest that because the officers' service weapons had been returned to them, they had been cleared of any wrongdoing, including unlawfully using excessive force against defendant. The testimony referred to all items collected

for evidence, and was allowed only to show the SBI's general procedure regarding evidence. "We 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 them.' " *State v. Jennings*, 333 N.C. 579, 618, 430 S.E.2d 188, 208, *cert. denied*, 510 U.S. 1028, 126 L. Ed. 2d 602 (1993) (quoting *Francis v. Franklin*, 471 U.S. 307, 324 n.9, 85 L. Ed. 2d 344, 360 n.9 (1985)). Accordingly, the jury presumably only considered the agent's testimony as clarification of a procedural rule, and not to determine whether actions by either party were lawful. Whether the officers in fact used excessive force by firing their weapons at defendant, and whether defendant was able to lawfully defend himself, were questions of fact for the jury to decide. By allowing the testimony solely to show the procedural rule of the SBI, the jury was not led to believe that the officers had done no wrong. In allowing the testimony regarding SBI procedure, the trial court was acting within its sound discretion in determining that any items subsequently offered for evidence were the same as the objects involved in the incident and that the objects would have undergone no material change. *See Campbell*, 311 N.C. at 388, 317 S.E.2d at 392.

The testimony conflicts as to whether defendant fired first or only after Officer Fritz fired at defendant. Defendant's evidence tends to show that defendant fired only after the officers first shot at him. In contrast, the State's evidence tends to show that defendant fired at the officers first. In the present case, we find that defendant has not shown there is a reasonable possibility that, had the testimony regarding the procedural rule of the SBI not been allowed, the trial court would have reached a different result. *See* N.C. Gen. Stat. § 15A-1443(a). Accordingly, defendant has not met his burden of proof.

After reviewing the record, we hold that the trial judge did not abuse his discretion in finding that the probative value of the testimony outweighed the possibility of unfair prejudice to defendant. Furthermore, we find defendant's argument was insufficient to establish the evidence would have resulted in a different outcome at trial. Accordingly, the trial court did not err in allowing Agent Daly's testimony regarding the chain of evidence.

II.

[2] The next issue on appeal is whether the trial court erred by entering two felony convictions for possession of a firearm by a felon

instead of one felony conviction. Defendant argues that the statute prohibiting the possession of firearms by those convicted of felonies does not provide for multiple convictions when several weapons are possessed simultaneously. We agree.

North Carolina's Felony Firearms Act provides that it is "unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control *any firearm* or any weapon of mass death and destruction" as defined in N.C. Gen. Stat. § 14-288.8(c). N.C. Gen. Stat. § 14-415.1(a) (2007) (emphasis added). The use of "any firearm" in North Carolina's statute is ambiguous in that it could be construed as referring to a single firearm or multiple firearms. If construed as any single firearm, the statute would allow for multiple convictions for possession if multiple firearms were possessed, even if they were possessed simultaneously. Alternatively, if construed as any group of firearms, the statute would allow for only one conviction where multiple firearms were possessed simultaneously. Thus, under this statute it is unclear whether a defendant may be convicted for each firearm he possesses if he possesses multiple firearms simultaneously. The issue of how to construe North Carolina's Felony Firearms Act when a felon possessed multiple firearms simultaneously is one of first impression for North Carolina. Accordingly, it is helpful in our own analysis to look to interpretation of the federal felony firearms statute.

Under federal law, it is unlawful for any member of a disqualified class, such as a felon, "to . . . possess . . . any firearm or ammunition." 18 U.S.C. § 922(g) (2000). This statute, much like North Carolina's statute, is ambiguous as to whether "any" is singular or plural. The Fourth Circuit has held that "[t]hrough a literal construction of the statute, [the Fourth Circuit] could conclude that when 'any' is used in context of the singular noun 'firearm,' 'any' means a single firearm." *United States v. Dunford*, 148 F.3d 385, 389 (4th Cir. 1998). A conviction for possession of any firearm by a felon could arguably then occur every time a felon picks up a firearm "even though it is the same firearm or every time that person picks up a different firearm." *Id.* "The [United States] Supreme Court has cautioned, however, that the question of what constitutes the allowable unit of prosecution 'cannot be answered merely by a literal reading' of the statute." *Id.* at 390 (quoting *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221, 97 L. Ed. 260, 264 (1952)). The United States Supreme Court holds that ambiguity in the statute should be resolved in favor of lenity, and doubt must be resolved against turning a single transac-

tion into multiple offenses. *See Bell v. United States*, 349 U.S. 81, 83-84, 99 L. Ed. 905, 910-11 (1955).

The Fourth Circuit has previously held that six firearms and ammunition seized from a defendant's home, all at the same time, supported only one conviction under 18 U.S.C. § 922(g). *See Dunford*, 148 F.3d at 390. "In so holding, we join the majority of circuits which have reached a similar conclusion." *Id.*; *see*, *e.g.*, *United States v. Keen*, 104 F.3d 1111, 1119-20 (9th Cir. 1996) (holding that Congress did not intend to authorize multiple convictions or punishments for a simultaneous act of possession under 18 U.S.C. § 922(g)); *United States v. Hutching*, 75 F.3d 1453, 1459 (10th Cir. 1996) (holding "[t]he simultaneous possession of multiple firearms generally 'constitutes only . . . one offense' unless there is evidence that the weapons were stored in different places or acquired at different times") (citation omitted), *cert. denied*, 517 U.S. 1246, 135 L. Ed. 2d 193 (1996); *United States v. Berry*, 977 F.2d 915, 917 (5th Cir. 1992) (holding that convictions and sentences for the same criminal act of multiple firearms possessed simultaneously violates the double jeopardy clause); *United States v. Grinkiewicz*, 873 F.2d 253, 255 (11th Cir. 1989) (holding that the possession of several different firearms housed in closely proximate areas at the same time is but one violation).

This interpretation of the word "any" is further supported by the case law of our state. In the context of other crimes, such as the possession of controlled substances, we have held that the possession of several items constituted a single act of possession where those items were possessed simultaneously. *See*, *e.g. State v. Rozier*, 69 N.C. App. 38, 54, 316 S.E.2d 893, 904 (1984) (reasoning that the circumstances of each case will determine whether separate possession offenses may properly be charged. If separate vials of cocaine had been found on defendants' persons at the same time, only one offense could be charged); *State v. Smith*, 99 N.C. App. 67, 74, 392 S.E.2d 642, 647 (1990) (holding that possession of separate containers of cocaine in two locations within one bedroom constituted one act of possession).

Likewise, we note that our case law favors the imposition of a single punishment unless otherwise clearly provided by statute. "In construing a criminal statute, the presumption is against multiple punishments in the absence of a contrary legislative intent." *State v. Boykin*, 78 N.C. App. 572, 576-77, 337 S.E.2d 678, 681 (1985). The rule of lenity "forbids a court to interpret a statute so as to increase the penalty that it places on an individual when the Legislature has not clearly stated such an intention." *Id.* at 577, 337 S.E.2d at 681.

Furthermore, the imposition of a single punishment for illegally possessing multiple firearms is consistent with the punishment we impose for other crimes, such as larceny, in North Carolina. Specifically, N.C. Gen. Stat. § 14-72(b)(4) states that the larceny "[o]f any firearm" is a felony. N.C. Gen. Stat. § 14-72(b)(4) (2007). In regard to larceny, this Court has held that the Legislature, by enacting N.C. Gen. Stat. § 14-72(b)(4) with the language of "any," did not intend to create a separate unit of prosecution for each firearm stolen nor to allow multiple punishments for the theft of multiple firearms. *See Boykin*, 78 N.C. App. at 575-76, 337 S.E.2d at 681.

In the instant case, a review of the applicable firearms statute shows no indication that the North Carolina Legislature intended for N.C. Gen. Stat. § 14-415.1(a) to impose multiple penalties for a defendant's simultaneous possession of multiple firearms. Here, defendant was not only convicted twice for possession of a firearm by a felon but was also sentenced twice, evidenced by File Numbers 06CRS053058 and 06CRS053059. The two firearms, both entered into evidence, originated out of the same act of possession. The firearms were possessed simultaneously because as defendant ran from the vehicle they were both on his person, either in his clothing or inside the black plastic bag he removed from the vehicle. Upon review, we hold that defendant should be convicted and sentenced only once for possession of a firearm by a felon based on his simultaneous possession of both firearms. Therefore, we find error with the trial court's decision to enter two convictions against defendant for possession of a firearm by a felon and to sentence defendant twice based on these convictions. We uphold the trial court's first conviction for possession of a firearm by a felon (06CRS053058) but reverse the second conviction (06CRS053059). Accordingly, we remand for re-sentencing the consolidated sentence of possession of a firearm by a felon and possession of marijuana with intent to sell or distribute.

III.

[3] Defendant further argues that the trial court erred by arresting his judgment for assault with a deadly weapon with intent to kill, due to double jeopardy concerns, rather than his judgment for attempted first-degree murder. Specifically, defendant claims the decision to arrest judgment on the less serious conviction was arbitrary and was an abuse of discretion. We determine there was no error.

Here, the State moved the trial court to arrest judgment on the conviction of assault with a deadly weapon with intent to kill. This

motion was granted, but because defense counsel did not object to the motion at the time, the issue was not preserved for appellate review. *See* N.C. R. App. P. 10(b)(1) (2008). Assuming *arguendo* that defendant's argument was preserved, we review it and determine it is without merit.

"The disposition of a motion for appropriate relief is subject to the sentencing judge's discretion and will not be overturned absent a showing of abuse of discretion." *State v. Haywood*, 144 N.C. App. 223, 236, 550 S.E.2d 38, 46, *appeal dismissed*, *disc. review denied*, 354 N.C. 72, 553 S.E.2d 206 (2001). Therefore, a trial court's decision to arrest judgment will be reviewed for an abuse of discretion. *Id.* The test for abuse of discretion requires the reviewing court to determine whether a decision " ' "is manifestly unsupported by reason," or "so arbitrary that it could not have been the result of a reasoned decision." ' " *State v. Locklear*, 331 N.C. 239, 248, 415 S.E.2d 726, 732 (1992) (citations omitted).

"In any case, until the expiration of the term the orders and judgments of the court are *in fieri*, and the judge has the power, in his discretion, to make such changes and modifications in them as he may deem wise and appropriate for the administration of justice." *State v. Hill*, 294 N.C. 320, 329, 240 S.E.2d 794, 801 (1978); *see also State v. Abbott*, 320 N.C. 475, 485, 358 S.E.2d 365, 371 (1987) (holding that where there are multiple convictions and the trial court must arrest one judgment to avoid subjecting the defendant to double jeopardy, the decision as to which judgment to arrest is discretionary).

By convicting or punishing a defendant of two offenses that have at least one element not included in the other, a defendant has not been subjected to double jeopardy. *See State v. Tirado*, 358 N.C. 551, 579, 599 S.E.2d 515, 534 (2004), *cert. denied*, 544 U.S. 909, 161 L. Ed. 2d 285 (2005). " '[D]ouble jeopardy does not occur unless the evidence required to support the two convictions is identical.' " *Id.* (quoting *State v. Murray*, 310 N.C. 541, 548, 313 S.E.2d 523, 529 (1984), *overruled on other grounds*, *State v. White*, 322 N.C. 506, 518, 369 S.E.2d 813, 819 (1988). Because a defendant may be convicted and sentenced for two distinct offenses, a trial court would not need to arrest one of the sentences in order to ensure defendant is not subjected to double jeopardy. *See id.* at 591, 599 S.E.2d at 541-42.

The elements of attempted first-degree murder are: "(1) a specific intent to kill another person unlawfully; (2) an overt act calculated to carry out that intent, going beyond mere preparation; (3) the exist-

ence of malice, premeditation, and deliberation accompanying the act; and (4) a failure to complete the intended killing." *State v. Peoples*, 141 N.C. App. 115, 117, 539 S.E.2d 25, 28 (2000). In contrast, the elements of assault with a deadly weapon with intent to kill are: "(1) an assault; (2) with a deadly weapon; (3) with the intent to kill[.]" *State v. Coria*, 131 N.C. App. 449, 456, 508 S.E.2d 1, 5 (1998); *see also* N.C. Gen. Stat. § 14-32(c) (2007). Thus, "[a]ssault with a deadly weapon with intent to kill requires proof of an element not required for attempted first-degree murder: the use of a deadly weapon. It is not a lesser-included offense of attempted first-degree murder." *State v. Cozart*, 131 N.C. App. 199, 204, 505 S.E.2d 906, 910 (1998); *disc. review denied*, 350 N.C. 311, 534 S.E.2d 600 (1999), *appeal dismissed*, *cert. denied*, ––– N.C. –––, 651 S.E.2d 225 (2007). Furthermore, attempted first-degree murder includes premeditation and deliberation, which are not elements of assault with a deadly weapon with intent to kill.

Here, defendant was found guilty of two offenses, attempted murder and assault with a deadly weapon with intent to kill. While the trial court noted that the two offenses arose out of the same factual basis, they are distinct because they do not have identical elements. Because a trial court may convict and sentence a defendant of both attempted first-degree murder and assault with a deadly weapon with intent to kill without subjecting defendant to double jeopardy, we find that the trial court did not need to arrest either of defendant's convictions. The trial court, however, acted within its discretion in deciding to arrest judgment and in deciding which judgment to arrest. The trial court chose to arrest the less serious offense of assault with a deadly weapon with intent to kill and enter a sentence based on the more serious conviction of attempted murder. Defendant has failed to show the trial court abused its discretion by imposing judgment based on the more serious conviction. Therefore, the trial court did not err by arresting judgment on the lesser conviction of assault.

IV.

[4] Defendant finally argues that the trial court erred by failing to instruct the jury on defendant's availability of perfect or imperfect self-defense, even though no objection was made at trial. We disagree.

When defendant failed to object to the instructions at trial but claims on appeal of improper jury instructions, the instructions are reviewed for plain error. *See State v. Greene*, 351 N.C. 562, 566, 528 S.E.2d 575, 578, *cert. denied*, 531 U.S. 1041, 148 L. Ed. 2d 543 (2000).

The defendant has the heavy burden of showing that the error constituted plain error, "that is, (i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial." *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997). Furthermore, a defendant is entitled to a new trial "only if the error was so fundamental that, absent the error, the jury probably would have reached a different result." *State v. Jones*, 355 N.C. 117, 125, 558 S.E.2d 97, 103 (2002).

In the case *sub judice*, defendant argues a jury could have found that he acted in self-defense when resisting arrest. According to defendant, because the officers' actions were unlawful, defendant had the right to defend himself. We now address the law that applies to a defendant's actions and the resulting jury instructions.

A trial court is not required to instruct on either perfect or imperfect self-defense with regard to a charge of murder "unless evidence was introduced tending to show that at the time of the killing the defendant reasonably believed" it necessary to kill the victim in order to save himself from imminent death or great bodily harm. *State v. Norman*, 324 N.C. 253, 260, 378 S.E.2d 8, 12 (1989). Where there is evidence tending to show the use of excessive force by the law officer, "the trial court should instruct the jury that the assault by the defendant upon the law officer was justified or excused if the assault was limited to the use of reasonable force by the defendant in defending himself from that excessive force." *State v. Mensch*, 34 N.C. App. 572, 575, 239 S.E.2d 297, 299 (1977), *cert. denied*, 294 N.C. 443, 241 S.E.2d 845 (1978).

"[E]very person has the right to resist an unlawful arrest[]" by using only such force as reasonably appears to be necessary to prevent the unlawful restraint of his liberty. *State v. Mobley*, 240 N.C. 476, 478-79, 83 S.E.2d 100, 102 (1954). Where excessive force is exerted against an officer, however, "the person seeking to avoid arrest may be convicted of assault, or even homicide if death ensues[.]" *Id.* at 479, 83 S.E.2d at 102.

Within reasonable limits, an officer "has discretion to determine the amount of force required under the circumstances as they appeared to him at the time he acted." *Todd v. Creech*, 23 N.C. App. 537, 539, 209 S.E.2d 293, 295, *cert. denied*, 286 N.C. 341, 211 S.E.2d 216 (1974). When there is substantial evidence of unusual force it is

for the jury to decide whether the officer acted arbitrarily or maliciously. *See id.* Furthermore, "[i]t is not incumbent upon the State to prove that the law officer did not use excessive force[.]" *Mensch*, 34 N.C. App. at 575, 239 S.E.2d at 299.

A law enforcement officer is justified in using deadly physical force upon another person when it is or appears to be reasonably necessary

> [t]o effect an arrest or to prevent the escape from custody of a person who he reasonably believes is attempting to escape by means of a deadly weapon, or who by his conduct or any other means indicates that he presents an imminent threat of death or serious physical injury to others unless apprehended without delay[.]

N.C. Gen. Stat. § 15A-401(d)(2)(b) (2007).

Here, Officer Fritz testified that he saw defendant with a gun and that defendant began firing at him before Officer Fritz returned fire. Defendant attempted to escape by running away from Officer Fritz. Defendant threatened he would shoot, and Officer Fritz had reason to believe that defendant had weapons on his person or within the bag he carried with him. The trial court could reasonably find that when Officer Fritz fired at defendant, he acted within his discretion given the danger of the circumstances and the risk of great bodily harm if defendant carried out his threat to shoot. Defendant failed to present substantial evidence showing that Officer Fritz acted with unusual force, given the circumstances. The trial court was therefore under no duty to instruct the jury that the assault by defendant upon Officer Fritz was justified or excused because of self-defense. We hold that defendant did not meet his burden and that the jury would not have reached a different result on the attempted murder or assault conviction had it been instructed on self-defense. The trial court's decision not to instruct on perfect or imperfect self-defense was not plain error. For the foregoing reasons, we find no error.

No error in part, reversed and remanded in part.

Judges TYSON and STROUD concur.

ALLEN THOMAS LORD, PLAINTIFF-APPELLANT v. PAUL J. BEERMAN, M.D.; YADKIN RIVER RADIOLOGY, P.A.; HUGH CHATHAM MEMORIAL HOSPITAL, INC.; WAKE FOREST UNIVERSITY; WAKE FOREST UNIVERSITY BAPTIST MEDICAL CENTER; WAKE FOREST UNIVERSITY HEALTH SCIENCES; AND NORTH CAROLINA BAPTIST HOSPITAL, DEFENDANTS-APPELLEES

No. COA07-1550

(Filed 15 July 2008)

Medical Malpractice— failure to diagnose or treat sooner—proximate cause—sufficiency of evidence—summary judgment

The trial court did not err in a medical malpractice case by granting summary judgment in favor of defendants because: (1) to survive a motion for summary judgment in a medical malpractice action, plaintiff must forecast evidence demonstrating that the treatment administered by defendant was in negligent violation of the accepted standard of medical care in the community and that defendant's treatment proximately caused the injury; (2) where plaintiff alleges that he was injured due to a physician's negligent failure to diagnose or treat plaintiff's medical condition sooner, plaintiff must present at least some evidence of a causal connection between defendant's failure to intervene and plaintiff's inability to achieve a better ultimate medical outcome; (3) the connection or causation between the negligence and injury must be probable and not merely a remote possibility; (4) plaintiff's evidence was insufficient to establish the requisite causal connection between defendants' alleged negligence and plaintiff's blindness when neither of plaintiff's expert witnesses were able to testify that plaintiff's vision would be better today had defendants initiated steroid treatment sooner, nor were they able to testify that plaintiff's vision probably would be better; and (5) while plaintiff stresses that proximate cause is normally a question best answered by the jury, plaintiff must nevertheless provide a sufficient forecast of evidence to justify presentment to the jury.

Appeal by Plaintiff from orders entered 2 August 2007 by Judge Ronald E. Spivey in Superior Court, Surry County. Heard in the Court of Appeals 21 May 2008.

The Law Offices of Robert O. Jenkins, by Robert O. Jenkins, for Plaintiff.

McGuireWoods, L.L.P., by Mark E. Anderson and Andrew H. Nelson, for Defendants Wake Forest University, Wake Forest University Baptist Medical Center, Wake Forest University Health Sciences, and North Carolina Baptist Hospital.

Wilson & Coffey, LLP, by Linda L. Helms and G. Gray Wilson, for Defendants Paul J. Beerman, M.D. and Yadkin River Radiology, P.A.

McGEE, Judge.

The record in this case shows that on or about 18 December 2002, Allen Thomas Lord (Plaintiff) began to experience cloudy and blurred vision. Plaintiff made an appointment on 20 December 2002 to see his ophthalmologist, Dr. Wells Stewart (Dr. Stewart). Dr. Stewart could not determine the reason for Plaintiff's decreasing vision, and he sent Plaintiff to have a magnetic resonance imaging (MRI) scan of his brain and optic region at Hugh Chatham Memorial Hospital (Hugh Chatham Hospital). Plaintiff underwent an MRI scan at Hugh Chatham Hospital on the afternoon of 20 December 2002.

Dr. Paul J. Beerman (Dr. Beerman) is an employee of Yadkin River Radiology. Dr. Beerman regularly reads radiology images at Hugh Chatham Hospital. Dr. Beerman read Plaintiff's MRI images and found no abnormality to account for Plaintiff's symptoms. Dr. Beerman sent a copy of his findings to Dr. Stewart. Dr. Stewart contacted Plaintiff on the evening of 20 December 2002 and informed Plaintiff that his MRI results were normal.

Despite Plaintiff's test results, Plaintiff's vision continued to deteriorate rapidly. Dr. Stewart examined Plaintiff again on 22 December 2002 and arranged for Plaintiff to see neuro-ophthalmologist Dr. Timothy Martin (Dr. Martin) the following day at North Carolina Baptist Hospital (Baptist Hospital). However, when Plaintiff arrived at Baptist Hospital on 23 December 2002, he learned that Dr. Martin was on vacation. Plaintiff instead was seen by first-year ophthalmology resident Dr. David Gilbert (Dr. Gilbert), and third-year ophthalmology resident Dr. Gautam Mishra (Dr. Mishra). Doctors Gilbert and Mishra performed a number of tests on Plaintiff and noted that Plaintiff's previous MRI results were normal. Neither Dr. Gilbert nor Dr. Mishra could determine the cause of Plaintiff's symptoms. Dr. Mishra gave Plaintiff some eye drops and told Plaintiff that he would discuss Plaintiff's symptoms with Dr. Martin when Dr. Martin returned from vacation the following week.

Dr. Martin testified in his deposition that when he returned from vacation on 30 December 2002, he examined Plaintiff's MRI images:

> [I]n this case I wanted to look at the [optic] chiasm. That was the area that was called into question by the patient's presentation.
>
> . . . [T]here were some abnormalities in the [optic] chiasm.
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> . . . . [T]here was certainly enough to convince me that there was some mild chiasmal enhancement, which suggests that there was a real and organic and demonstrable basis for the patient's visual field loss.

Dr. Martin immediately contacted Plaintiff and asked him to return to Baptist Hospital as soon as possible. Plaintiff returned to Baptist Hospital on 30 December 2002. Dr. Martin immediately gave Plaintiff intravenous steroids and admitted Plaintiff to Baptist Hospital for further testing. Dr. Martin ultimately diagnosed Plaintiff as having "an autoimmune demyelinating chiasmopathy," which Dr. Martin described as "an unusual problem, an unusual presentation," and "so unusual and very[,] very strange."

Dr. Martin continued to treat Plaintiff with steroids over the following weeks. Plaintiff's vision improved slightly from the treatment and eventually stabilized. At present, Plaintiff is able to see some light and color, but he continues to suffer from substantial visual impairment.

Plaintiff filed a complaint on 19 April 2006 against Dr. Beerman, Yadkin River Radiology (together, the Beerman Defendants), Baptist Hospital, Wake Forest University Baptist Medical Center, Wake Forest University, and Wake Forest University Health Sciences (together, the Wake Forest Defendants).[1] Plaintiff first alleged that the Beerman Defendants were negligent in that on 20 December 2002, Dr. Beerman negligently misread Plaintiff's MRI images, failed to detect abnormalities in Plaintiff's optic chiasm, and reported to Dr. Stewart that Plaintiff's MRI scans were normal. Plaintiff next alleged that the Wake Forest Defendants were negligent in that on 22 December 2002, their employees failed to admit Plaintiff to the hospital or provide him steroid treatment, failed to diagnose the cause of Plaintiff's vision loss, failed to have Plaintiff examined by an ophthalmologist, and released Plaintiff without appropriate treatment

1. Plaintiff also filed suit against Hugh Chatham Hospital, which is not a party to this appeal.

or instructions.[2] Plaintiff further alleged that the Beerman Defendants' negligence and the Wake Forest Defendants' negligence were both direct and proximate causes of his blindness. The Beerman and Wake Forest Defendants filed answers denying the allegations in Plaintiff's complaint.

The Beerman Defendants filed a motion for summary judgment on 18 June 2007 arguing, *inter alia*, that Plaintiff "failed to produce competent evidence from a qualified witness that any alleged negligence by [the Beerman Defendants] proximately caused any injury to [P]laintiff." The Wake Forest Defendants filed a motion for summary judgment on 25 June 2007 also arguing, *inter alia*, that "Plaintiff has failed to produce competent evidence from a qualified witness that any alleged negligence by [the Wake Forest Defendants] proximately caused any injury to Plaintiff." The trial court entered orders on 2 August 2007 granting the Beerman and Wake Forest Defendants' motions, finding in each case that "there are no genuine issues of material fact and that [the respective defendants] are entitled to judgment as a matter of law[.]" Plaintiff appeals.

A trial court should grant a motion for summary judgment only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2007). The moving party carries the burden of establishing the lack of any triable issue. *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 62-63, 414 S.E.2d 339, 341-42 (1992). The movant may meet his or her burden "by proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim[.]" *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). All inferences of fact must be drawn against the movant and in favor of the nonmovant. *Id.* We review a trial court's grant of summary judgment *de novo*. *Falk Integrated Tech., Inc. v. Stack*, 132 N.C. App. 807, 809, 513 S.E.2d 572, 574 (1999).

A.

To survive a motion for summary judgment in a medical malpractice action, a plaintiff must forecast evidence demonstrating "that the

2. While Plaintiff's complaint alleges that these events occurred on 22 December 2002, the record reveals that Plaintiff actually first sought treatment with the Wake Forest Defendants on 23 December 2002.

treatment administered by [the] defendant was in negligent violation of the accepted standard of medical care in the community[,] and that [the] defendant's treatment proximately caused the injury." *Ballenger v. Crowell*, 38 N.C. App. 50, 54, 247 S.E.2d 287, 291 (1978). "Proximate cause is a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and without which the injuries would not have occurred[.]" *Hairston v. Alexander Tank & Equipment Co.*, 310 N.C. 227, 233, 311 S.E.2d 559, 565 (1984).

Our Court's prior decisions demonstrate that where a plaintiff alleges that he or she was injured due to a physician's negligent failure to diagnose or treat the plaintiff's medical condition sooner, the plaintiff must present at least some evidence of a causal connection between the defendant's failure to intervene and the plaintiff's inability to achieve a better ultimate medical outcome. In *Lindsey v. The Clinic for Women*, 40 N.C. App. 456, 253 S.E.2d 304 (1979), for example, the plaintiff began to experience sharp pains, fluid leakage, and a bloody discharge in the late stages of her pregnancy. *Id.* at 457-58, 253 S.E.2d at 305. The defendant physicians examined the plaintiff multiple times, determined that she was having false labor, and told her to return to the clinic in one week. *Id.* at 458, 253 S.E.2d at 306. Plaintiff's child was later stillborn, and physicians determined the child's cause of death to be severe amnionitis and a prolapsed umbilical cord. *Id.* at 459, 253 S.E.2d at 306. At trial, the plaintiff's expert witness testified that "the course pursued by [the] defendant doctors . . . did not conform with approved medical practices[.]" *Id.* at 459-60, 253 S.E.2d at 306. Our Court held that the trial court erred in denying the defendants' motion for a directed verdict:

> [Plaintiff introduced] no evidence that anything which [the] defendants did or failed to do . . . either caused or could have prevented the amnionitis, which [the] plaintiff contends caused the death of her child and her own prolonged suffering. [The plaintiff's] expert witness . . . . never testified that had what he considered to be "approved medical practices" been followed by the defendants in their treatment of the plaintiff in this case, [the plaintiff's] child would not have been stillborn and her own recovery would not have been prolonged by amnionitis. . . . The evidence . . . simply fails to show that anything [the] defendants did or failed to do caused [the plaintiff's] injuries.

Id. at 462, 253 S.E.2d at 308; *see also Bridges v. Shelby Women's Clinic, P.A.*, 72 N.C. App. 15, 323 S.E.2d 372 (1984), *disc. review*

denied, 313 N.C. 596, 330 S.E.2d 605 (1985) (holding that where the defendant physicians negligently misdiagnosed the plaintiff's premature labor, but the plaintiff's evidence failed to establish that the defendants could have suppressed her premature labor had they correctly diagnosed the plaintiff sooner, the trial court properly granted a directed verdict against the plaintiff).

Even where a plaintiff has introduced some evidence of a causal connection between the defendant's failure to diagnose or intervene sooner and the plaintiff's poor ultimate medical outcome, our Court has held that such evidence is insufficient if it merely speculates that a causal connection is possible. In *White v. Hunsinger*, 88 N.C. App. 382, 363 S.E.2d 203 (1988), for example, the plaintiff's decedent was injured in an automobile accident. *Id.* at 383, 363 S.E.2d at 204. The defendant physician kept the decedent at the hospital overnight and transferred him to a neurosurgeon at a different hospital the following day. The decedent died shortly thereafter. *Id.* The plaintiff's expert stated in an affidavit that "[the decedent]'s chances of survival would have been increased if he had been transferred to a neurosurgeon earlier." *Id.* at 384, 363 S.E.2d at 205. Our Court affirmed summary judgment for the defendant, holding that the plaintiff's evidence was speculative and insufficient to establish causation:

> [The] plaintiff could not prevail at trial by merely showing that a different course of action would have improved [the decedent]'s chances of survival. Proof of proximate cause in a malpractice case requires more than a showing that a different treatment would have improved the patient's chances of recovery.
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> . . . .
>
> . . . [The] plaintiff has failed . . . to forecast any evidence showing that had [the defendant] referred [the decedent] to a neurosurgeon when [the decedent] was first brought to the hospital, [the decedent] would not have died. *The connection or causation between the negligence and [injury] must be probable, not merely a remote possibility.*

Id. at 386-87, 363 S.E.2d at 206 (emphasis added).

In contrast, our Courts have allowed a plaintiff's evidence to go to a jury where the plaintiff can establish a probable causal connection between the defendant's failure to diagnose or intervene sooner and the plaintiff's poor ultimate medical outcome. In *Turner v. Duke University*, 325 N.C. 152, 381 S.E.2d 706 (1989), for example, the

plaintiff's decedent was admitted to the hospital complaining of constipation, cramping, nausea, and vomiting. *Id.* at 155-56, 381 S.E.2d at 708-09. The defendant physician could not determine the cause of the decedent's symptoms, and treated her for constipation. *Id.* The decedent's condition worsened over the following day, but doctors failed to examine her for a number of hours, at which point she was unresponsive. *Id.* at 156, 381 S.E.2d at 709. Exploratory surgery revealed that the decedent's colon was perforated, and the decedent died of a bacterial infection the following morning. *Id.* at 156-57, 381 S.E.2d at 709. The plaintiff's expert testified at trial that the defendant physician should have examined the decedent sooner, and that his failure to do so was the proximate cause of the decedent's death. *Id.* at 159-60, 381 S.E.2d at 711. The plaintiff's expert explained that if an examination had been performed earlier, the defendant physician should have discovered the decedent's perforated colon and could have performed a life-saving colostomy. *Id.* at 160, 381 S.E.2d at 711. Our Court stated that "[s]uch evidence is the essence of proximate cause," *id.*, and held that the trial court erred in granting a directed verdict against the plaintiff. *Id.* at 162, 381 S.E.2d at 712; *see also Largent v. Acuff*, 69 N.C. App. 439, 443, 317 S.E.2d 111, 113, *disc. review denied*, 312 N.C. 83, 321 S.E.2d 896 (1984) (holding that the plaintiff introduced sufficient causation evidence where the plaintiff's expert testified that if the defendant physician had called a neurosurgeon to examine the plaintiff three days earlier, " 'it is *quite likely* that the patient may have suffered less permanent damage' " (emphasis added)).[3]

B.

Plaintiff's causation evidence in this case consisted of the deposition testimony of two of Plaintiff's proffered expert witnesses, Dr. Larry Frohman (Dr. Frohman) and Dr. John Leo Grady (Dr. Grady). Both experts offered opinions as to whether Plaintiff would have reached a better ultimate visual outcome had the Beerman and Wake Forest Defendants diagnosed Plaintiff earlier and initiated steroid treatment sooner.

3. Defendants have also cited *Sharpe v. Pugh*, 21 N.C. App. 110, 203 S.E.2d 330 (1974) as controlling authority in this case. The North Carolina Supreme Court affirmed our Court's decision in *Sharpe* by an equally divided vote, with one justice not participating. *See Sharpe v. Pugh*, 286 N.C. 209, 209 S.E.2d 456 (1974) (per curiam) (Bobbitt, C.J., not participating). The Supreme Court's split vote "require[d] that the decision of the Court of Appeals be affirmed without becoming a precedent." *Id.* at 210, 209 S.E.2d at 456-57. Therefore, while *Sharpe* may be persuasive authority in this case, it does not control our decision.

Dr. Frohman testified in his deposition regarding medical research on the effect of steroid therapy on various optical diseases. According to Dr. Frohman, studies have shown that steroid therapy does have some effect on patients who suffer from "typical demyelinating optic neuritis." Specifically, Dr. Frohman testified that early steroid therapy may hasten a patient's recovery, but that steroid therapy has no effect on a patient's ultimate visual outcome. In other words, while a patient who undergoes steroid therapy may reach his or her ultimate visual outcome sooner, that outcome itself remains the same regardless of whether the patient receives steroids.

Dr. Frohman also testified, however, that Plaintiff did not have typical demyelinating optic neuritis, but rather suffered from autoimmune optic neuropathy. According to Dr. Frohman, autoimmune optic neuropathy is "a different disease process" than demyelinating optic neuritis, and is extremely rare. In fact, Dr. Frohman testified that due to the rarity of Plaintiff's disease, researchers had not been able to develop a statistical analysis regarding the effect of steroid treatment on similar patients. Dr. Frohman testified that although any treating ophthalmologist would initiate steroid treatment as soon as possible in the hopes of reaching a better or faster outcome, he was unable to determine whether immediate treatment would affect a patient's long-term prognosis.

With regard to Plaintiff's specific case, Dr. Frohman testified as follows:

> [DEFENSE COUNSEL]: Do you intend to offer any testimony in this case that [Plaintiff]'s ability to use his eyes in day-to-day life . . . would have been improved in any way had he been started on treatment a day earlier, a week earlier[,] or two weeks earlier?
>
> [DR. FROHMAN]: . . . . I think that had [Plaintiff] been treated earlier, his outcome in this particular disease could have been better. I can't say that with any measure of statistical significance, because there is no series of this rare disease that can really address that question. Do I think it was standard to treat him earlier, yes. Could I say his outcome would have been better, No.

Dr. Frohman reiterated a number of times throughout his deposition that he could not determine whether earlier steroid treatment would have made a difference in Plaintiff's case, or what type of difference it would have made.

Plaintiff correctly notes that Dr. Frohman did testify in his deposition that "starting [patients] on day one, day two, day three, day four, day five makes a difference." It is true that Dr. Frohman's statement, taken in isolation, appears to suggest that a causal connection exists between early steroid treatment and a patient's ultimate visual outcome. However, it is clear from the full context of Dr. Frohman's testimony that Plaintiff has misinterpreted Dr. Frohman's remarks:

> [DEFENSE COUNSEL]: [Is there] data which would allow [experts] to offer an opinion as to what difference, if any, treatment would have made?
>
> . . . .
>
> [DR. FROHMAN]: . . . [T]he disease is too small in number, too rare, for anyone to develop a series that [is] large enough to do the study and develop statistical analysis. . . . [H]ow [should we] do such a study[?] The patient is blind, in this case, in both eyes. What we're going to do is randomize a group that doesn't get sham therapy or sham studies[?] [It is] [a]n unethical study to do. When you're faced with someone who is seriously blind in both eyes, you have to treat them with what you think is best.
>
> [DEFENSE COUNSEL]: And some of them get better and some of them do not?
>
> [DR. FROHMAN]: Right. And there is not enough data to see who will.
>
> [DEFENSE COUNSEL]: Who will or who won't?
>
> [DR. FROHMAN]: And starting them on day one, day two, day three, day four, day five makes a difference.
>
> [DEFENSE COUNSEL]: No further questions.

The full text of Dr. Frohman's testimony demonstrates that Dr. Frohman was merely stating that in order to develop statistics regarding the effect of early steroid treatment, physicians involved in such research would have to administer steroid treatment to different patients at different stages of disease development. In other words, for the purposes of conducting a research study, starting treatment "on day one, day two, day three, day four, day five makes a difference" in terms of gathering helpful data on the efficacy of early treatment. However, according to Dr. Frohman, this type of data does not exist because the disease at issue is so rare, and because a study pro-

ducing such research would be unethical. Such testimony does not establish a causal connection between early treatment and better ultimate visual outcome.

Like Dr. Frohman, Dr. Grady also testified in his deposition that had Plaintiff been treated earlier, there is "no scientific basis to say that the long-term outcome for [Plaintiff] would be any different[.]" Dr. Grady did believe that, as with typical demyelinating optic neuritis, patients with autoimmune optic neuropathy may achieve a faster recovery when treated with steroids. However, Dr. Grady also maintained that he was unable to determine whether and to what extent earlier treatment would have affected Plaintiff's final visual outcome:

> [DEFENSE COUNSEL]: In [Plaintiff]'s case, do you intend to offer any opinion that as of December 20, 2002, that there was treatment that would have influenced the outcome, had it been provided on that date?
>
> . . . .
>
> [DR. GRADY]: Well, given what we know now, probably, yeah.
>
> [DEFENSE COUNSEL]: You say—
>
> [DR. GRADY]: Well, influence the outcome at least in terms of the rapidity of any improvement that may have occurred.
>
> [DEFENSE COUNSEL]: . . . [E]ven had treatment been rendered on December 20, 2002 . . . [Plaintiff]'s condition today, several years out, would not be substantially different; correct?
>
> [DR. GRADY]: Well, I don't think we can say that. We can't know what the outcome might have been. That is not knowable. . . .
>
> [DEFENSE COUNSEL]: And that's because there's no scientific proof that had [Plaintiff been treated] on December 20, 2002, that the long-term outcome would be any different than nontreatment; correct?
>
> [DR. GRADY]: That's correct. There's no scientific proof that treatment at that time would have made a difference in the final outcome.

Dr. Grady repeatedly stated throughout his deposition that while earlier initiation of steroid treatment may have hastened Plaintiff's recovery, there was no way to determine whether it would have improved Plaintiff's ultimate visual outcome. Dr. Grady did testify

that earlier steroid intervention "perhaps" could have led to "a fuller recovery," and that Plaintiff's eyesight "may have been improved to a better outcome." However, Dr. Grady quickly qualified his statement by admitting that "any attempt to testify [as to] what improvement might have been obtained[,] and when[,] would amount to sheer speculation[.]"

We hold that Plaintiff's evidence was insufficient to establish the requisite causal connection between Defendants' alleged negligence and Plaintiff's blindness. Neither of Plaintiff's expert witnesses were able to testify that Plaintiff's vision would be better today had Defendants initiated steroid treatment sooner, nor were they able to testify that Plaintiff's vision *probably* would be better. *Cf. Acuff*, 69 N.C. App. at 443, 317 S.E.2d at 113 (finding sufficient evidence of proximate cause where the plaintiff's expert testified that earlier intervention "quite likely" would have improved the plaintiff's ultimate outcome). Rather, Plaintiff's expert witnesses consistently testified that they were unable to determine whether earlier treatment would have had any effect on Plaintiff's ultimate visual outcome, or what that effect might have been. Such testimony is insufficient to establish proximate cause in a medical malpractice case. *See Lindsey*, 40 N.C. App. at 462, 253 S.E.2d at 308 (finding insufficient evidence of proximate cause where the plaintiff introduced no evidence showing that if the defendants had intervened earlier, the plaintiff would have achieved a different ultimate medical outcome).

At best, Plaintiff can point to Dr. Frohman's testimony that with earlier treatment, Plaintiff's "outcome in this particular disease could have been better," and Dr. Grady's testimony that earlier steroid intervention "perhaps" could have led to "a fuller recovery." Such evidence does not establish that "[t]he connection or causation between [Defendants' alleged] negligence and [Plaintiff's injury was] *probable*, not merely a remote possibility." *White*, 88 N.C. App. at 387, 363 S.E.2d at 206 (emphasis added). This is especially true given that both Dr. Frohman and Dr. Grady qualified their statements by stressing that while a different outcome might have been possible, it would be speculative to offer an opinion as to whether a different outcome could have been achieved in Plaintiff's case and what that outcome might have been. *See Young v. Hickory Bus. Furn.*, 353 N.C. 227, 233, 538 S.E.2d 912, 916 (2000) (stating that " 'could' or 'might' expert testimony [is] insufficient to support a causal connection when there is additional evidence or testimony showing the expert's opinion to be a guess or mere speculation").

Plaintiff stresses that "proximate cause is normally a question best answered by the jury." *Leatherwood v. Ehlinger*, 151 N.C. App. 15, 24, 564 S.E.2d 883, 889 (2002), *disc. review denied*, 357 N.C. 164, 580 S.E.2d 368 (2003). While we agree with Plaintiff's contention, "[P]laintiff must nevertheless provide a sufficient forecast of evidence to justify presentment to the jury." *Kenyon v. Gehrig*, 183 N.C. App. 455, 457-58, 645 S.E.2d 125, 127 (2007), *disc. review denied*, 362 N.C. 176, 658 S.E.2d 272 (2008). Plaintiff has not met his burden in this case. We therefore hold that the trial court did not err in granting the Beerman and Wake Forest Defendants' motions for summary judgment.

Given our holding on the issues discussed above, we need not address Plaintiff's remaining assignments of error.

Affirmed.

Judges STEELMAN and GEER concur.

JAMES R. STARR, EMPLOYEE, PLAINTIFF-APPELLEE v. GASTON COUNTY BOARD OF EDUCATION, EMPLOYER, AND KEY RISK INSURANCE COMPANY, CARRIER, DEFENDANT-APPELLEES, AND NORTH CAROLINA SCHOOL BOARDS TRUST, THIRD-PARTY ADMINISTRATOR, DEFENDANT-APPELLANT

No. COA07-732

(Filed 15 July 2008)

1. Workers' Compensation— back and neck injury—sustained improvement

In a workers' compensation case involving an initial back injury and subsequent neck injury, defendant's contention about plaintiff's sustained improvement after surgery was contradicted by unchallenged findings, by medical testimony, and by testimony from the human resources representative of the employer.

2. Workers' Compensation— neck injury—findings—supported by evidence

In a workers' compensation case involving an initial back injury and subsequent neck injury, the Commission's finding about the nature and duration of the neck injury in 2002 was supported by competent medical testimony.

3. Workers' Compensation— two injuries—admission of liability by second insurance company—admission limited to second injury

In a workers' compensation case involving an initial back injury and subsequent neck injury, there was competent evidence in the forms filed with the Commission and the medical testimony that the insurance company at the time of the second injury admitted plaintiff's right to compensation. Furthermore, as fact finder, the Commission acted within its authority to infer from Key Risk's Form 60 and plaintiff's Form 18 that the admission was limited to the cervical injury and its symptoms.

4. Workers' Compensation— back injury—subsequent neck injury—findings regarding change in back injury

In a workers' compensation case involving an initial back injury and subsequent neck injury, there was competent evidence in the record to support Industrial Commission findings that plaintiff's back condition did not substantially change as a result of the second accident and that the second accident did not materially aggravate or accelerate the low back injury.

5. Workers' Compensation— initial injury not aggravated by second—reimbursement of compensation

In a workers' compensation case involving an initial back injury and subsequent neck injury, the findings supported conclusions that the second accident did not materially aggravate or accelerate the initial injury, that the greater weight of the evidence establishes that plaintiff's lower back and leg pain after the second accident was not caused by that accident, and that defendant-appellees are entitled to reimbursement for compensation paid after that accident.

6. Workers' Compensation— two injuries—partial repayment of compensation for second—authority of Commission

An appeal from the Industrial Commission is permitted only in matters of law, not equity, and the Industrial Commission in a workers' compensation case involving two accidents acted within its inherent authority and N.C.G.S. § 97-86.1(d) when it ordered defendant-appellant NCSBT (which provided self-insurance at the time of the first accident) to make partial repayment to defendant-appellees (the insurer at the time of the second accident).

Appeal by third-party administrator-defendant from an opinion and award entered 2 February 2007 by the North Carolina Industrial Commission. Heard in the Court of Appeals 14 January 2008.

The Sumwalt Law Firm, by Mark T. Sumwalt and Vernon Sumwalt, for plaintiff-appellee.

Hedrick, Eatman, Gardner & Kinchloe, L.L.P., by Margaret M. Kingston and Allen C. Smith, for defendant-appellant, North Carolina School Boards Trust.

Stiles, Byrum & Horne, L.L.P., by Henry C. Byrum, Jr. for defendant-appellees Gaston County Board of Education and Key Risk Insurance Company.

STEELMAN, Judge.

This Court may not re-weigh evidence when the findings of fact of the Industrial Commission are supported by competent evidence in the record. Where those findings support the Commission's conclusions of law, its award must be affirmed. Because compensation payments pursuant to a Form 60 are not a final award, the Commission acted within its authority to order appellant to reimburse the appellee insurance carrier.

I. Factual and Procedural Background

This matter involves two separate and distinct compensable injuries to James Starr (hereinafter "plaintiff"), who was employed by the Gaston County Board of Education ("employer") as a groundskeeper on 17 April 2001 and on 6 August 2002.

On 17 April 2001, plaintiff injured his lower back while performing routine job duties. At that time, employer was self-insured with the North Carolina School Boards Trust ("NCSBT"). NCSBT filed a Form 60 in May 2001, admitting plaintiff's right to compensation for his back injury ("2001 injury"). Following lumbar surgery to repair a herniated disc, plaintiff was released to return to work in October 2001. Between March and July 2002, plaintiff was treated for low back pain, radiating into his right leg, by Dr. Herman Gore. During this time, plaintiff missed work and collected disability on three separate occasions because of continuing pain.

On 6 August 2002, in the course and scope of plaintiff's employment, his truck was rear-ended by another vehicle. The day following this accident, plaintiff reported an injury to his neck and right shoul-

der to employer. At the time of this accident, employer was insured for worker's compensation by Key Risk Insurance Company ("Key Risk"). On 7 August 2002, defendant filed a Form 19 reporting the accident and listing injuries to plaintiff's "neck & shoulder on right side." On 13 September 2002, Key Risk filed a Form 60 describing the accident but not specifying the nature of plaintiff's injury. On 24 September 2002, plaintiff filed a Form 18 listing injury to his "neck, right shoulder, mid back."

At a follow-up visit with Dr. Gore shortly after the August 2002 accident, plaintiff reported pain in both legs. While a clinical examination revealed his condition to be no different than that found in a 15 July 2002 clinical exam, Dr. Gore referred plaintiff to Dr. Petty, a neurosurgeon who had previously treated him in 1997 for a cervical spine injury. Under Dr. Petty's care, plaintiff was released to return to work "with restrictions" on 11 February 2003. Despite Dr. Petty's release, plaintiff has not returned to work since August 2002 and has continued to see Dr. Gore for pain management. Key Risk continued to pay temporary total disability ("TTD").

On 29 July 2003, Key Risk filed a Form 33 with the North Carolina Industrial Commission, seeking (1) a determination that plaintiff's disability since 11 March 2003 was related to the 17 April 2001 back injury, (2) reimbursement for TTD compensation paid by Key Risk since that date, and (3) to end TTD compensation for the August 2002 injury. On 2 February 2007, the Full Commission entered an Opinion and Award, holding that plaintiff's disability related to the August 2002 accident lasted only until 11 February 2003 and that any subsequent disability was related to the April 2001 accident. It further ordered that NCSBT reimburse Key Risk for all TTD compensation payments since 11 February 2003, to reimburse plaintiff for any underpayments during that period of time, and to pay plaintiff TTD compensation until further order of the Commission. NCSBT appeals.

II. Standard of Review

"Appellate review of an award from the Industrial Commission is generally limited to two issues: (1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are justified by the findings of fact. *Clark v. Wal-Mart*, 360 N.C. 41, 43, 619 S.E.2d 491, 492 (2005) (citing *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 186, 345 S.E.2d 374, 379 (1986)). Where there is competent evidence to support the Commission's findings, they are binding on appeal even in light of evidence to support contrary find-

ings. *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 700 (2004). The Commission's conclusions of law are reviewed *de novo*. *Ramsey v. Southern Indus. Constructors, Inc.*, 178 N.C. App. 25, 30, 630 S.E.2d 681, 685 (2006).

It is the duty of the Commission to decide the matters in controversy and not the role of this Court to re-weigh the evidence. *See Crump v. Independence Nissan*, 112 N.C. App. 587, 589, 436 S.E.2d 589, 592 (1993) ("[T]he full Commission has the duty and responsibility to decide all matters in controversy between the parties[.]"); *Trivette v. Mid-South Mgmt., Inc.*, 154 N.C. App. 140, 144, 571 S.E.2d 692, 695 (2002) ("The Full Commission is the 'sole judge of the weight and credibility of the evidence.' ").

"Rule 28(b)(6) of the Rules of Appellate Procedure restricts our review to questions that are supported by the arguments made in the brief. Where a party fails to bring forward any argument or authority in their brief to support their assignments of error, those assignments of error are deemed abandoned." *Williams v. N.C. Dep't of Env't & Natural Res.*, 166 N.C. App. 86, 95, 601 S.E.2d 231, 236-37 (2004) (citations omitted), *rev. denied*, 359 N.C. 643, 614 S.E.2d 925 (2005); N.C.R. App. P. 28(b)(6) (2007).

III. Evidentiary and Ultimate Findings of Fact

We note at the outset that the Commission's findings of fact include both evidentiary and ultimate findings of fact.

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

Woodard v. Mordecai, 234 N.C. 463, 470, 67 S.E.2d 639, 644 (1951) (internal citations omitted); *see also In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (stating that determinations requiring the exercise of judgment or the application of legal principles are more properly classified as conclusions of law, while those reached through logical reasoning are more properly classified as findings of fact).

IV. Material Aggravation of Pre-Existing Condition

In its first argument, NCSBT contends that the Full Commission erred in concluding that the August 2002 injury did not materially

aggravate or accelerate plaintiff's pre-existing back condition caused by the 2001 accident. We disagree.

A. Evidentiary Findings of Fact

[1] NCSBT asserts that many of the Commission's findings of fact are unsupported by the competent medical evidence in the record and that conclusions of law 2, 3, and 5 were erroneous as a matter of law. However, rather than bringing forward its assignments of error challenging certain findings of fact, NCSBT makes a series of broad sweeping statements to the effect that the Industrial Commission's decision was incorrect. To the extent that NCSBT has failed to argue specific assignments of error regarding the Industrial Commission's findings of fact, they are deemed abandoned. *Williams*, 166 N.C. App. at 95, 601 S.E.2d at 236-37. We further note that findings of fact 30-31 and 33-36, to which NCSBT assigns error, require the application of legal principles and are more properly classified as conclusions of law. *Helms*, 127 N.C. App. at 510, 491 S.E.2d at 675. We thus defer consideration of arguments involving these findings, and limit our analysis in this section to the Commission's evidentiary findings.

Within this argument, NCSBT contends that plaintiff's 2001 disk injury improved significantly following September 2001 surgery, and that clinical findings regarding symptoms of left leg pain following the August 2002 motor vehicle accident establish a material aggravation of his 2001 lumbar condition. Specifically, NCSBT contends that the Commission's findings of fact related to the issue of material aggravation of his pre-existing back condition (evidentiary findings 7, 8, 10, 12, 14, 20-22, and 28) are contrary to all competent evidence of record, because all competent medical evidence demonstrates that plaintiff experienced significant improvement following back surgery in 2001 and sustained a new lumbar injury from the motor vehicle accident that caused persistent symptoms of back and bilateral leg pain. NCSBT further asserts that the Commission applied the wrong standard for determining causation.

The Commission considered testimony from plaintiff, his supervisor, the Director of Facility Services of the Gaston County Schools, and a human resources representative. Depositions from three physicians and a rehabilitation specialist, and associated medical records, were also considered.

Findings Regarding Plaintiff's Back Surgery

Citing findings of fact 10 and 12, NCSBT contends that the competent evidence showed that plaintiff reached "sustained improve-

ment" of his low back condition following surgery and was back at work full-time and full duty as of 29 October 2001, and that there is no competent medical evidence showing otherwise. To the contrary, in findings of fact 9, 11, and 13, unchallenged by NCSBT, the Commission found that plaintiff's pain did not resolve following surgery, that improvement was "slow," and that Dr. Doute continued to recommend a lumbar fusion in July 2002 to address the degeneration in plaintiff's low back. Employer's human resource officer testified to plaintiff's work record, which included multiple absences in the months between the surgery and the August 2002 motor vehicle accident. Finally, Dr. Doute testified that plaintiff's postoperative improvement was "pretty slow," that decreases in pain medication led to increased pain, and that the postoperative pain was due to a "structural problem with the disk." We hold that findings of fact 10 and 12 are supported by plaintiff's testimony, testimony from the human resources representative for employer, the testimony of Drs. Doute and Gore, and other findings of fact by the Commission.

Findings Regarding the Nature and Duration of the 2002 Injury

[2] NCSBT challenges finding of fact 28, which states that:

> After giving careful consideration to the competent credible evidence in its entirety, it is determined that the greater weight of the evidence at most shows a temporary aggravation of Plaintiff's pre-existing neck condition following his August 6, 2002 injury by accident. From the evidence of record, this temporary aggravation resulted in disability to Plaintiff from August 7, 2002 and lasted only until February 11, 2003, when Dr. Petty determined Plaintiff was capable of work and his only restriction being to avoid placing his head in an unusual position.

Having reviewed the deposition testimony of the treating physicians, we conclude that this finding is supported by competent medical testimony from the neurologist who treated plaintiff for complaints of neck and shoulder pain following the 2002 accident.

Neurologist J. M. Petty, M.D., testified that plaintiff's 2002 neurological and clinical exams were normal. He further testified that plaintiff's reported pain and 2002 MRI scan were similar to those in Dr. Petty's 1997 records, and that the only basis for relating plaintiff's neck pain to the 2002 motor vehicle accident was plaintiff's history, rather than clinical or diagnostic findings. Plaintiff testified that he had had neck surgery in 1983. During plaintiff's course of treatment,

Dr. Petty released him to work on 11 February 2003, 11 March 2003, and 2 September 2004. These three work releases included limited restrictions based only upon plaintiff's complaints of pain, for which Dr. Petty recommended physical therapy. Moreover, finding of fact 23, unchallenged by NCSBT, states that:

> Dr. Gore acknowledged that plaintiff's low back pain continued at the same level as prior to the motor vehicle accident. Dr. Gore never made an assessment of whether there was a material aggravation of plaintiff's low back condition as a result of his motor vehicle accident. He deferred to the physician who treated plaintiff for his neck injury on any disability associated with that condition.

Finding of fact 23 is binding on this Court. *See Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) (unchallenged findings of fact are binding on appeal). We hold that Dr. Petty's deposition testimony and finding of fact 23 are competent evidence supporting the Commission's conclusion that any aggravation to plaintiff's pre-existing neck condition was temporary.

Having determined that there was competent evidence supporting finding of fact 28, we need not address NCSBT's challenge to findings of fact 7, 8, 20, and 22. We decline to address NCSBT's argument that finding of fact 28 "omits salient facts" and is contrary to the competent evidence of record and to the law. *McRae*, 358 N.C. at 496, 597 S.E.2d at 700; *Trivette*, 154 N.C. App. at 144, 571 S.E.2d at 695.

Key Risk's Form 60

[3] Regarding finding of fact 14, NCSBT asserts that this finding "modifies" Key Risk's Form 60 and is an unauthorized limitation on Key Risk's liability for the 2002 injury. Finding of fact 14 states:

> 14. Plaintiff sustained a second admittedly compensable injury by accident [a]rising out of and in the course of his employment with the Defendant-employer on August 6, 2002, when he was involved in a motor vehicle accident. The Defendant-employer and Key Risk admitted compensability for a neck injury with a Form 60 dated September 6, 2002. Plaintiff filed a Form 18 on September 5, 2002, alleging injuries to his neck, right shoulder and mid-back. These Defendants stipulated that they have continued to pay Plaintiff temporally [sic] total disability since August 6, 2002.

We have reviewed the record and conclude that finding of fact 14 is supported by competent evidence.

The record clearly reflects that none of the Industrial Commission Forms filed by any party in conjunction with the 2002 accident specified an injury to the lumbar region of the back. The Form 60 filed by Key Risk in September 2002 describes the August 2002 accident as being a rear-end collision, but in no way describes the nature of plaintiff's injury. Plaintiff's 2002 Form 18 described his injuries from the motor vehicle accident as being to his "Neck, right shoulder, mid back." While finding of fact 14, as stated, may not be technically correct, any deficiency is immaterial when viewed in light of the medical testimony. Appellees' Forms 18 and 60, coupled with the medical testimony, provide competent evidence before the Commission that the Form 60 filed by Key Risk admitted plaintiff's right to compensation from a cervical injury, as articulated in finding of fact 14.

Furthermore, we disagree with NCSBT's characterization of this finding as a "modification" to Key Risk's Form 60. The Form 60 clearly admitted plaintiff's right to compensation for injuries of 6 August 2002. NCSBT's own Form 60 just as clearly admitted compensability for the 2001 lower back injury. As factfinder, the Commission acted within its authority to infer from Key Risk's Form 60 and plaintiff's Form 18 that the admission was "limited" to the cervical injury and its resulting symptoms. *Trivette*, 154 N.C. App. at 144, 571 S.E.2d at 695.

We conclude that the record contains competent evidence supporting findings of fact 10, 12, 14, and 28.

B. Ultimate Findings of Fact

[4] NCSBT next contends that the Commission erred in its findings of fact (nos. 30, 31, 33, 34, and 36) that: (1) the evidence failed to establish that the 2002 accident materially aggravated or accelerated plaintiff's preexisting low back condition; (2) the greater weight of the evidence established that plaintiff's disability since 11 February 2003 resulted from the 17 April 2001 low back injury; (3) Key Risk was entitled to reimbursement from NCSBT for compensation paid since 11 February 2003; and (4) plaintiff was entitled to have NCSBT pay for medical treatment necessitated by the 17 April 2001 injury. Each of these is an ultimate finding of fact, required to establish the plaintiff's cause of action. *Woodard*, 234 N.C. at 470, 67 S.E.2d at 644.

NCSBT contends that, because the medical records indicated bilateral leg pain in the time period following the August 2002 motor vehicle accident, the Commission erred in finding that plaintiff's back

condition did not substantially change as a result of that accident, nor did the accident materially aggravate or accelerate the low back injury. Findings of fact nos. 4, 6, 9, 11, 13, 16-19, 21, 23-24, and 29, uncontested on appeal, support findings of fact 30, 31, 33, 34, and 36, as do findings of fact nos. 10, 12, and 28, discussed *supra*. Where there is competent evidence to support the Commission's findings, we will not re-weigh the evidence even though there may be evidence to support contrary findings. *Clark v. Wal-Mart*, 360 N.C. at 43, 619 S.E.2d at 492; *Trivette*, 154 N.C. App. at 144, 571 S.E.2d at 695.

NCSBT further contends that the Commission applied the wrong causation standard to the evidence, erroneously relying upon the "absence of MRI evidence" to conclude that the 2002 accident did not materially aggravate or accelerate plaintiff's lumbar injury. Because the cases cited by NCSBT dealt with different facts and circumstances than those before us in this matter, they are not controlling and we do not reach this argument.

We conclude that the record contains competent evidence supporting findings of fact 30, 31, 33, 34, and 36.

C. Conclusions of Law

[5] Finally, NCSBT contends that the Commission erred in its conclusions of law (nos. 2, 3, and 5) that: (1) the 2002 accident did not materially aggravate or accelerate plaintiff's 2001 injury; (2) the greater weight of the evidence establishes that plaintiff's lower back and leg pain after the 2002 accident was not caused by that accident; and (3) defendant-appellees are entitled to reimbursement from NCSBT for compensation paid since 11 February 2003. We review the Commission's conclusions of law *de novo*, but this review is limited to whether the findings of fact support the Commission's conclusions of law. *Ramsey*, 178 N.C. App. at 30, 630 S.E.2d at 685.

All three of these conclusions are supported by the findings discussed *supra*. Conclusions of law 2 and 3 are specifically supported by finding of fact 33, which states that "the greater weight of the evidence shows that Plaintiff's disability since February 11, 2003, has resulted from his low back injury on April 17, 2001." Conclusion of law 5, which held that Key Risk paid compensation to plaintiff on the good faith belief that plaintiff's disability was due to a neck injury, is specifically supported by findings of fact 14 and 34, which establish appellees' record of payment and right to reimbursement, respectively.

We thus hold that competent evidence supports the Commission's findings, and the Commission's conclusions and Award are justified by those findings. *Clark*, 360 N.C. at 43, 619 S.E.2d at 492. This argument is without merit.

V. Equitable Arguments

[6] In its remaining arguments, NCSBT argues that Key Risk's claims are barred by equitable principles of waiver and estoppel. We disagree.

NCSBT asserts that Key Risk waived its right to contest liability on the 2002 claim because it paid TTD for two years without limiting its liability through the filing of an Industrial Commission Form 33. NCSBT further asserts that principles of estoppel bar reimbursement of those payments. As discussed in IV.A. above, at no time was the injury resulting from the August 2002 accident described by any party as being to plaintiff's low back. Industrial Commission Forms 18 and 60, filed by the parties, established that the 2001 accident caused the injury to plaintiff's low back.

"Equity will not lend its aid in any case where the party seeking it has a full and complete remedy at law." *Jefferson Standard Life Ins. Co. v. Guilford County*, 225 N.C. 293, 300, 34 S.E.2d 430, 434 (1945) (citations omitted). An appeal from the Industrial Commission is permitted only as to matters of law. *Fox v. Cramerton Mills*, 225 N.C. 580, 583, 35 S.E.2d 869, 870-71 (1945). We have already established that the Commission acted within its authority when it limited Key Risk's liability to the cervical injury. Consequently, we limit our analysis to NCSBT's contention that payments prior to the 11 October 2004 filing of the Form 33 are non-reimbursable within the meaning of N.C. Gen. Stat. § 97-86.1(d).

The relevant provision of the Workers' Compensation statute reads:

> In any claim under the provisions of this Chapter wherein one employer or carrier has made payments to the employee or his dependents pending a final disposition of the claim and it is determined that different or additional employers or carriers are liable, the Commission may order any employers or carriers determined liable to make repayment in full or in part to any employer or carrier which has made payments to the employee or his dependents.

N.C. Gen. Stat. § 97-86.1(d) (2005). Contending that there was "no claim" under N.C. Gen. Stat. § 97-86.1(d) until the date that the Form 33 was filed, NCSBT argues that a plain reading of the statute limits reimbursement to payments made "pending a final disposition of the claim," or between 11 October 2004 and the date of the Award.

This Court has ruled that payment of compensation pursuant to a Form 60 is not a final award of the Commission. *Perez v. American Airlines/AMR Corp.*, 174 N.C. App. 128, 131-32, 620 S.E.2d 288, 290-91 (2005) (analyzing such payments within the context of N.C.G.S. § 97-47), *disc. review improv. allowed*, 360 N.C. 587, 634 S.E.2d 887 (2006). Such payments are within the inherent powers of the Commission to amend, *see Ward v. Wake Cty. Bd. of Educ.*, 166 N.C. App. 726, 731, 603 S.E.2d 896, 900 (2004), and the Commission acted within the provisions of N.C. Gen. Stat. § 97-86.1(d) when it ordered NCSBT to make partial repayment to defendant-appellees. We hold that the Commission's Opinion and Award is the final disposition of plaintiff's claim as established by the filing of the Form 60, not the Form 33.

This argument is without merit.

IV. Conclusion

We hold that the Commission did not err in its findings of fact, conclusions of law, or in its Award. Consequently, we affirm the 2 February 2007 Opinion and Award.

We deem abandoned those assignments of error not addressed in defendant-appellant's brief. N.C. R. App. P. 28(b)(6).

AFFIRMED.

Chief Judge MARTIN and Judge STEPHENS concur.

IN THE MATTER OF: APPEAL OF: ROM B. PARKER, JR. FROM THE ORDER OF THE HALIFAX COUNTY BOARD OF COUNTY COMMISSIONERS ADOPTING THE SCHEDULE OF VALUES, STANDARDS AND RULES FOR THE 2007 GENERAL REAPPRAISAL

No. COA07-635

(Filed 15 July 2008)

1. Taxation— ad valorem—present use schedule—soil type key

The Property Tax Commission did not err when it concluded that there was no deficiency in a present-use schedule because of the absence of a soil type key. The information in the schedule of values provided sufficient detail to enable those making appraisals to adhere to the schedule; the burden is on the taxpayer to show the class of land in which his property fits and to obtain the soil values for his particular land from the department of agriculture.

2. Taxation— ad valorem—value schedule—sufficiently detailed

The Property Tax Commission did not err by concluding that a true value schedule contained enough detail to comply with N.C.G.S. § 105-317(b). Although the taxpayer contended that a schedule of values, standards and rules must contain all of the statutory factors listed in N.C.G.S. § 105-317(b)(1), the cases on which the taxpayer relied did not overrule prior cases and did not hold that each of the statutory factors must be considered. While the schedule of values here did not reveal specific mention of water power, water rights, or mineral deposits, taxpayer made no showing that those factors actually influenced the value of land in that county.

3. Taxation— ad valorem—schedule of value—legal restrictions—sufficiently detailed

A county schedule of values for property tax valuation was not required to include an adjustment for certain governmental restrictions, including The Clean Water Act, The Food Security Act, and The N.C. Sedimentation Pollution Control Act. When a county's schedule of values, standards and rules includes a general reference to legal restrictions on land use, it need not list every type of restriction in order to be sufficiently detailed.

4. Taxation— ad valorem—valuation—shared ownership—no adjustment

Property tax valuations in North Carolina are governed by the Machinery Act, not by the Internal Revenue Code, and there is no provision in the Machinery Act or the cases under it for the valuation of property to be adjusted for shared ownership, including tenancy in common.

5. Taxation— ad valorem—valuation schedules—neighborhood information—sufficient for those making appraisal

The detail in a county's schedule of values for property taxes contained sufficient information about neighborhoods for those making the appraisals to adhere to them in making appraisals.

6. Taxation— ad valorem—valuation schedules—lot size

A county schedule of values for property tax valuation was not insufficient because it did not contain a table of incremental and decremental rates for use in calculating valuations for properties of greater or lesser size than the base size listed in the tables in the schedule. Tract or lot size was not mentioned in N.C.G.S. § 105-317(a)(1) as a factor in determining the value of land, and it was not error for the county's schedule of values to not include incremental and decremental rates; however, lot size may be relevant in valuing property.

7. Taxation— ad valorem—evidence before Commission—not prejudicial—review de novo

There was no prejudice in a proceeding before the Property Tax Commission in the admission of testimony about the legal sufficieny of a county's schedule of values. The taxpayer's appeal was based strictly on the facial validity of the schedule and de novo review was conducted accordingly.

Appeal by taxpayer from Final Decision entered 22 March 2007 by the North Carolina Property Tax Commission. Heard in the Court of Appeals 28 November 2007.

Rom B. Parker, Jr., pro se.

Parker Poe Adams & Bernstein LLP, by Charles C. Meeker, for appellee, Halifax County.

STROUD, Judge.

Taxpayer Rom B. Parker, Jr., appeals from the Final Decision of the North Carolina Property Tax Commission which confirmed the 2007 Halifax County Schedule of Values adopted by the Halifax County Board of Commissioners to appraise real property for the purpose of levying property taxes.

I. Background

On 19 September 2006, the Halifax County Board of Commissioners approved the 2007 Halifax County Schedule of Values ("HCSV") at its regular meeting. Taxpayer filed a notice of appeal with the North Carolina Property Tax Commission ("PTC") pursuant to N.C. Gen. Stat. § 105-290(c) on 16 October 2006, contending that the HCSV was unlawful because it did not conform to the statutory requirements of N.C. Gen. Stat. § 105-317. The PTC heard the appeal on 14 December 2006. The PTC issued a Final Decision on 22 March 2007, confirming the HCSV. Taxpayer timely appealed to this Court pursuant to N.C. Gen. Stat. § 105-345.

On appeal, taxpayer contends that the 2007 Halifax County Schedule of Values is insufficient as a matter of law because (1) the present use value schedule does not contain a definition of the soil types ("soil type key") used for valuation, and (2) the true value schedule does not contain: (i) reference to each and every one of the statutory factors listed in N.C. Gen. Stat. § 105-317(a), (ii) a valuation adjustment for governmental restrictions on the land, (iii) a valuation adjustment for shared ownership of land, (iv) definition, delineation or maps of valuation neighborhoods, and (v) a table of incremental and decremental rates. Taxpayer also contends that the Property Tax Commission erred in the admission of the expert testimony of Charles M. Graham and Joe Hunt.

II. Standard of Review

Taxpayer acknowledges that he is not challenging a specific property valuation, but rather appeals solely on the basis that the HCSV is inadequate on its face as a matter of law, pursuant to N.C. Gen. Stat. § 105-290(c)(1).[1]

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1. A property owner of the county who, either separately or in conjunction with other property owners of the county, asserts that the schedules of values, standards, and rules adopted by order of the board of county commissioners do not meet the true value or present-use value appraisal standards established by G.S. 105-283 and G.S. 105-277.2(5), respectively, may appeal the

> We review decisions of the [Property Tax] Commission pursuant to N.C.G.S. § 105-345.2. Questions of law receive *de novo* review, while issues such as sufficiency of the evidence to support the Commission's decision are reviewed under the whole-record test. Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the Commission.

In re Appeal of the Greens of Pine Glen Ltd. P'ship, 356 N.C. 642, 646-47, 576 S.E.2d 316, 319 (2003). Because taxpayer's appeal to the PTC challenged only the sufficiency of the HCSV as a matter of law pursuant to N.C. Gen. Stat. § 105-290(c), we will review the PTC's decision *de novo*.

On appeal of a property tax matter to this Court, as on appeal to the PTC, "the good faith of tax assessors and the validity of their actions are presumed[.]" *In re McElwee*, 304 N.C. 68, 75, 283 S.E.2d 115, 120 (1981). The taxpayer bears the burden of overcoming this presumption by showing the illegality or arbitrariness of the schedule of values, standards and rules through "competent, material and substantial evidence." *Id.* (citation and quotation marks omitted).

III. Present-Use Value Schedule

[1] Taxpayer first argues that the Property Tax Commission erred when it concluded, as a matter of law, that "there is no deficiency in the present-use [value] schedule simply because the present-use value schedule does not contain a soil type key."[2] Taxpayer argues that the absence of a soil type key renders the schedule of present-use values, which is largely based on soil type, meaningless. We disagree.

North Carolina law directs tax assessors to prepare "[u]niform schedules of values, standards, and rules to be used in appraising real property at its true value and at its present-use value [which] are sufficiently detailed to enable those making appraisals to adhere to them in appraising real property." N.C. Gen. Stat. § 105-317(b)(1) (2005).

> order to the Property Tax Commission within 30 days of the date when the order adopting the schedules, standards, and rules was first published, as required by G.S. 105-317(c).

N.C. Gen. Stat. § 105-290(c)(1) (2005).

2. The PTC incorrectly labeled this legal conclusion as a finding of fact. *See Estate of Gainey v. Southern Flooring*, 184 N.C. App. 497, 503, 646 S.E.2d 604, 608 (2007) (a legal conclusion mislabeled as a finding of fact is reviewed according to its substance not its label).

Generally, real property subject to taxation is appraised for taxation according to its true value.[3] N.C. Gen. Stat. § 105-283 (2005); *In re Appeal of Whiteside Estates, Inc.*, 136 N.C. App. 360, 364, 525 S.E.2d 196, 198, *cert. denied*, 351 N.C. 473, 543 S.E.2d 511 (2000). However, real property may be taxed at its present-use value, an amount typically lower than its true value, if a taxpayer is able to show that the property qualifies for present-use valuation. N.C. Gen. Stat. § 105-277.4(a) (2005); *Whiteside*, 136 N.C. App. at 364, 525 S.E.2d at 198. The present-use value of qualifying land is "[t]he value of land in its *current use* as agricultural land, horticultural land, or forestland, based solely on its ability to produce income and assuming an average level of management." N.C. Gen. Stat. § 105-277.2(5) (2005) (emphasis added). When a taxpayer wants his property valued at the lower present-use value, the burden is on the taxpayer to "clearly show that the property comes within one of the classes" eligible for present-use value, N.C. Gen. Stat. § 105-277.4(a), and to provide "*any other relevant information required by the assessor to properly appraise the property at its present-use value.*" *Id.* (emphasis added).

The HCSV includes a table showing the estimated net income, capitalization rate, and use value per acre for different classes of agricultural land and refers users of the HCSV to the soil values determined by the North Carolina Department of Agriculture ("NCDOA"). The HCSV also includes a brief discussion, presumed made in good faith until rebutted by the taxpayer, *McElwee*, 304 N.C. at 75, 283 S.E.2d at 120, on the limitations of using soil type to value land by the soil productivity method and the method's dependence on available soil maps. These inclusions in the HCSV provided "sufficient[] detail[] to enable those making appraisals to adhere" to the HCSV "in appraising real property." N.C. Gen. Stat. § 105-317(b)(1). The burden is on the taxpayer to show the class of agricultural, horticultural, or forested land in which his property fits, and to obtain the soil values for his particular land from the NCDOA. N.C. Gen. Stat. § 105-277.4(a); *McElwee*, 304 N.C. at 77, 283 S.E.2d at 121 ("In every case, the burden of establishing entitlement to present use valuation

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3. When used in this Subchapter, the words "true value" shall be interpreted as meaning market value, that is, the price estimated in terms of money at which the property would change hands between a willing and financially able buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of all the uses to which the property is adapted and for which it is capable of being used.

N.C. Gen. Stat. § 105-283 (2005).

is on the property owner."). Accordingly, we hold that the Property Tax Commission did not err in concluding that "there is no deficiency in the present-use [value] schedule simply because the present-use value schedule does not contain a soil type key."

IV. True Value Schedule

[2] Taxpayer next contends the PTC erred when it concluded that the true value schedule in the HCSV contained sufficient detail to comply with N.C. Gen. Stat. § 105-317(b). Specifically, he contends that the HCSV lacked five elements of detail which must appear in a legally sufficient schedule of true values: (i) reference to each and every one of the statutory factors listed in N.C. Gen. Stat. § 105-317(a), (ii) a valuation adjustment for governmental restrictions on the land, (iii) a valuation adjustment for shared ownership of land, (iv) definition, delineation or maps of valuation neighborhoods, and (v) a table of incremental and decremental rates. We disagree.

We reiterate that a schedule of values, standards and rules ("SVSR") may only be appealed on the basis that it "do[es] not meet the true value . . . appraisal standards established by G.S. 105-283 . . . ." N.C. Gen. Stat. § 105-290(c)(1). In order for an SVSR to meet the true value appraisal standards of N.C. Gen. Stat. § 105-283, the SVSR should be "[u]niform [and] sufficiently detailed to enable those making appraisals to adhere to them in appraising real property." N.C. Gen. Stat. § 105-317(b)(1). Further, the assessor preparing an SVSR for land should

> consider as to each tract, parcel, or lot separately listed at least its advantages and disadvantages as to location; zoning; quality of soil; waterpower; water privileges; dedication as a nature preserve; conservation or preservation agreements; mineral, quarry, or other valuable deposits; fertility; adaptability for agricultural, timber-producing, commercial, industrial, or other uses; past income; probable future income; and any other factors that may affect its value except growing crops of a seasonal or annual nature.

N.C. Gen. Stat. § 105-317(a)(1) (2005). However, in applying the personal property appraisal statute, N.C. Gen. Stat. § 105-317.1, this Court held that "[i]t would be meaningless to construe literally the applicable appraisal statutes of the Machinery Act. These statutes must be interpreted in the light of tax history and legislative purpose in formulating laws to guide local authority in the difficult

and complex problem of appraising property for tax purposes." *In re Appeal of Bosley*, 29 N.C. App. 468, 472-73, 224 S.E.2d 686, 689 (holding that an equitable and reasonably uniform and accurate method of valuation which reflects market values "does not violate the applicable appraisal statutes" for personal property even though the method does not consider every single factor listed in N.C. Gen. Stat. § 105-317.1(a)), *disc. review denied*, 290 N.C. 551, 226 S.E.2d 509 (1976). This Court has also held that "G.S. 105-317(a)(1) is directory and failure to consider each and every *indicia* of values recited in the statute does not vitiate the appraisal." *In re Appeal of Highlands Dev. Corp.*, 80 N.C. App. 544, 546, 342 S.E.2d 588, 589 (1986) (citing *In re Appeal of Broadcasting Corp.*, 273 N.C. 571, 160 S.E.2d 728 (1968)).

Taxpayer contends that *McElwee*, 304 N.C. 68, 283 S.E.2d 115 (1981), and *In re Allred*, 351 N.C. 1, 519 S.E.2d 52 (1999), both held that a schedule of values, standards and rules must contain all of the statutory factors listed in N.C. Gen. Stat. § 105-317(b)(1) to be legally sufficient, citing to language in *Allred* that stated, "petitioners have not taken the position that the . . . valuations resulted from any failure by the County or its appraiser to provide for a method by which each of the valuation factors designated in subsections 105-317(a)(1) and (2) could be considered and valued through the use of the uniform schedules of values, standards and rules[.]" 351 N.C. at 11, 519 S.E.2d at 58. We do not agree with taxpayer that a statement by the North Carolina Supreme Court that a particular issue was not presented for review served to overrule *Broadcasting*, *Bosley* and *Highlands*. To the contrary, in *Allred* the Court determined that the PTC erred when it ignored the County's schedule of standards and rules and based its decision on an expert's evaluation. 351 N.C. at 12, 519 S.E.2d at 59. Similarly, in *McElwee* the Court determined that the County's valuation was arbitrary because, *inter alia*, there was no evidence in the record that the County Commissioners had approved a schedule of values, standards and rules. 304 N.C. at 85, 283 S.E.2d at 125. Neither of those cases held that *each* of the statutory factors found in N.C. Gen. Stat. § 105-317(a) was required to be considered in a schedule of values, standards and rules. In fact, *McElwee* selectively quoted only those land valuation factors which were relevant to that particular case: "[t]he record does not demonstrate, and in no way can we imagine, that such factors as 'quality of soil . . . ; fertility; adaptability for agricultural, timber-producing, commercial, industrial, or other uses; past income; probable future income . . . ,' G.S. § 105-317(a)(1), could have received any consideration whatsoever[.]" 304 N.C. at 83, 283 S.E.2d at 124 (omissions and ellipses in

original); *see also In re Appeal of Broadcasting Corp.*, 273 N.C. 571, 578, 160 S.E.2d 728, 733 (1968) ("In appraising a vacant lot on Main Street, for example, an assessor would not likely give attention to mineral deposits or water power.").

The Land Pricing Schedule in the HCSV divides land into three categories—residential, commercial/industrial, and agricultural. This categorization expressly considers the adaptability for agricultural, commercial, industrial or other uses, as directed by N.C. Gen. Stat. § 105-317(a)(1). The HCSV also includes reference to the following additional factors, which apply across the categories of land: topography; shape or size, which expressly includes zoning restrictions; economic, including location; restrictions, including zoning and other legal restrictions; corner influence, which is a specific location factor; view, another location factor; economic misimprovement; and frequent flooding. Consistent with the liberal construction of the appraisal statutes set forth in *Bosley*, 29 N.C. App. at 472-73, 224 S.E.2d at 689, the HCSV expressly declined to use quality or fertility of the soil to determine true value because:

> Comparable sales in any area of the county will typically include a cross-section of the same soil characteristics, topography and water features as the parcels being appraised within that general area. Sales analysis of agricultural land sold in Halifax County during the past three years indicates that *buyers give little or no consideration to soil productivity or other soil features*. Location and price seem to be the only determining factors.

(Emphasis added.) Our review of the HCSV also does not reveal any specific mention of water power or water rights, other than the general reference to "water features" quoted above, or any mention of mineral, quarry, or other valuable deposits, but taxpayer has made no showing that those factors actually influence the value of land in Halifax County, and are therefore necessary details "to enable those making appraisals to adhere to them in appraising real property." N.C. Gen. Stat. § 105-317(b)(1).

[3] Taxpayer next contends that the HCSV was required to include a valuation adjustment for certain governmental restrictions on a tract of land, including The Clean Water Act, The Food Security Act, and The N.C. Sedimentation Pollution Control Act. We disagree.

Restrictions on land use, including governmental restrictions, while not specifically included in N.C. Gen. Stat. § 105-317(a)(1), cer-

tainly fall within the catch-all category of "any other factors that may affect its value except growing crops of a seasonal or annual nature[,]" N.C. Gen. Stat. § 105-317(a)(1). The HCSV does in fact expressly include restrictions on the use of land as a valuation factor. Though the example restrictions noted in the HCSV do not specifically mention governmental restrictions, this does not render the HCSV legally insufficient. The scope of legal restrictions is simply too broad to mention every conceivable type in a general use guideline like an SVSR. In so concluding, we emphasize that we do not hold that governmental restrictions on land are irrelevant to valuation of property for tax purposes. In fact, taxpayer correctly points out that in some cases governmental restrictions would be the most important valuation factor of all. We simply hold that when a County's SVSR includes a general reference to legal restrictions on land use, it need not list every type of restriction in order to be "sufficiently detailed to enable those making appraisals to adhere to them in appraising real property." N.C. Gen. Stat. § 105-317(b)(1).

[4] Taxpayer next contends that an SVSR must include a valuation adjustment for shared ownership of land, such as a tenancy in common. He cites cases from the United States Tax Court and pronouncements from the Internal Revenue Service which interpret the meaning of "fair market value" in the Internal Revenue Code. Taxpayer's reliance on these cases and pronouncements is misplaced. Property tax valuations in North Carolina are governed by the Machinery Act (N.C. Gen. Stat. §§ 105-271 *et seq.*), not by the Internal Revenue Code and the cases and pronouncements interpreting it. Taxpayer has cited no provision in the Machinery Act or in the cases interpreting it, and we find none, that the valuation of real property is to be adjusted for taxpayers who hold the property as tenants in common or another form of shared ownership. In fact, N.C. Gen. Stat. § 105-271 refers to valuation of tracts, parcels and lots of land but makes no mention of valuation of ownership shares of land.

[5] Taxpayer next argues that the "valuation 'neighborhoods' " listed in the HCSV are legally insufficient because they are completely "undefined, undelineated, and unmapped." Again, we disagree.

Taxpayer contends that "[t]his is in direct violation of G.S. 105-317(b)(1),(3) and (4) which requires that the Schedule of Values, Standards and Rules be in sufficient detail to enable both appraisers and property owners to understand the method, rules and standards of value by which property is appraised[.]" A careful review of the

statute subdivisions taxpayer relies on reveals that he has misapprehended them. N.C. Gen. Stat. § 105-317(b)(1) requires that "[u]niform schedules of values, standards, and rules to be used in appraising real property at its true value and at its present-use value are prepared and are sufficiently detailed to *enable those making appraisals* to adhere to them in appraising real property." *Id.* (emphasis added). On the other hand, N.C. Gen. Stat. § 105-317(b)(3) "require[s] that individual property records be maintained in sufficient detail to *enable property owners* to ascertain the method, rules, and standards of value by which property is appraised[,]" and N.C. Gen. Stat. § 105-317(b)(4) requires property characteristics relevant to tax valuation to be included in the individual property record.

The HCSV contains a list of neighborhoods with valuation amounts for residential, commercial/industrial and agricultural properties. This detail contained therein is sufficient to enable those making appraisals to adhere to those valuation amounts for each neighborhood to appraise the real property to be valued.[4]

[6] Next taxpayer argues that the HCSV is legally insufficient because it does not contain a table of incremental and decremental rates for use in calculating valuations for properties of greater or lesser size than the base size listed in the tables within the HCSV. Again, we disagree.

It is elementary that the size of a tract or lot of land affects its value. It is so elementary, in fact, the General Assembly did not mention it in N.C. Gen. Stat. § 105-317(a)(1) when it listed the factors which should be considered in determining the value of land. Because the General Assembly did not mention tract or lot size in N.C. Gen. Stat. § 105-317(a)(1) as a factor for determining true value, it was not error for the HCSV to fail to include a table of incremental and decremental rates for applying the base rate to individual properties of varying sizes. We are not holding that tract or lot size is not relevant in valuing property; surely it is relevant. We hold only that N.C. Gen. Stat. § 105-317(a) does not require a table of incremental and decremental values to be included in an SVSR.

4. We acknowledge that careful review of the sample of individual property records included as a supplement to the HCSV shows that it would be difficult for a property owner to ascertain the standard of value by which each individual parcel of land is valued, but that is not a proper subject of an appeal under N.C. Gen. Stat. § 105-290(c)(1). This decision does not estop taxpayer from raising the sufficiency of individual property records if he chooses to appeal the specific valuation of his property at a later time, but N.C. Gen. Stat. § 105-290(c)(1) does not allow him to raise issues based on N.C. Gen. Stat. § 105-317(b)(3) and (4) in this appeal.

[7] Finally, taxpayer argues that the PTC erred when it allowed expert testimony from Charles Graham, the Halifax County Tax Assessor, and from Joe Hunt as to the legal sufficiency of the HCSV. Assuming *arguendo* that the admission of testimony from these experts was error, taxpayer can show no prejudice because taxpayer's appeal was strictly based on the facial validity of the HCSV and our *de novo* review was conducted accordingly.

For the foregoing reasons, we conclude that taxpayer has not meet his burden of showing that the HCSV fails to comply with the statutory directives of the Machinery Act. The PTC did not err when it confirmed the 2007 Halifax County Schedule of Values. Accordingly, we affirm the Final Decision of the Property Tax Commission.

Affirmed.

Judges HUNTER and CALABRIA concur.

JEFFREY B. FOSTER, GUARDIAN *AD LITEM* FOR RICHARD TYLER SPOOR, A MINOR, PLAINTIFF v. NASH-ROCKY MOUNT COUNTY BOARD OF EDUCATION A/K/A NASH-ROCKY MOUNT SCHOOLS; GEORGE NORRIS, FORMER SUPERINTENDENT OF NASH-ROCKY MOUNT BOARD OF EDUCATION, IN HIS OFFICIAL CAPACITY; VICKI WELLS, FORMER PRINCIPAL OF BENVENUE ELEMENTARY SCHOOL, IN HER OFFICIAL CAPACITY; AND HARRIETT BROWN, SPECIAL EDUCATION TEACHER AT BENVENUE ELEMENTARY SCHOOL IN BOTH HER INDIVIDUAL AND OFFICIAL CAPACITIES, DEFENDANTS

No. COA07-1233

(Filed 15 July 2008)

1. Schools and Education— special education student—fall—summary judgment for teacher

The trial court did not show that summary judgment was improperly granted for a special education teacher (defendant Brown) in an action arising from a fall by a special needs student. Plaintiff did not show a genuine issue of material fact as to how defendant Brown's actions constituted a failure to exercise ordinary prudence to prevent foreseeable harm and thus a breach of her duty to supervise plaintiff.

2. Schools and Education— special education student—fall—summary judgment for school board

Summary judgment was correctly granted for defendant school board on a claim of negligent supervision in an action arising from a fall by a special education student. Summary judgment was affirmed for the special education teacher supervising the child and therefore plaintiff could not show a negligent act.

3. Judges— failure to recuse ex mero motu—no duty

A judge was under no duty to recuse himself on his own motion from a summary judgment hearing on a negligence claim by a special needs student who fell at school because the judge made comments indicating that he did not think that plaintiff should have been in a regular school. The issue was not preserved for appellate review where plaintiff made no motion for recusal in the lower court.

Appeal by plaintiff from judgment entered 29 May 2007 by Judge William Griffin in Nash County Superior Court. Heard in the Court of Appeals 19 March 2008.

Stacey B. Bawtinhimer for plaintiff-appellant.

The Valentine Law Firm, by Lewis W. Lamar, Jr. and Ernie K. Murray, for defendant-appellees Nash-Rocky Mount Board of Education, George Norris and Vicki Wells in their official capacities.

Cranfill Sumner & Hartzog, LLP, by Ann S. Estridge, Alycia S. Levy, and Meredith Taylor Berard, for defendant-appellee Harriett Brown.

HUNTER, Judge.

Jeffrey B. Foster, as guardian *ad litem* for Richard Tyler Spoor ("plaintiff"), appeals the order granting a motion for summary judgment by the Nash-Rocky Mount County Board of Education ("defendant Board") and Harriet Brown ("defendant Brown"). After careful review, we affirm.

I.

On 18 October 1999, plaintiff was attending Benvenue Elementary School in Rocky Mount. At that time, plaintiff was seven years old and had, among other conditions, the following disabilities, which quali-

fied him as a special needs child: cerebral palsy, hydrocephalus, and seizure disorder. As a result of the hydrocephalus, plaintiff required the placement of a shunt in his brain since infancy. The shunt comprises a catheter inserted into plaintiff's brain, a tube through which fluid drains from the catheter into his abdomen, and a valve connecting the two.

Plaintiff had been attending public schools in Nash County since 1994, and had been attended since infancy by Jeanna Johnson, the school's physical therapist. She testified that, as of September 1999, the month before the incident at issue, plaintiff was able "to stand without hand support easily" and was capable of communicating his needs and wants.

As a special education student, plaintiff had an Individualized Education Program ("IEP") addressing his physical needs and abilities. For the 1999-2000 school year, plaintiff's IEP contained no requirements or information on his toileting procedures or needs.

When plaintiff needed to visit the bathroom, either defendant Brown or one of the teaching assistants would take plaintiff. According to defendant Brown, the procedure consisted of walking plaintiff forward until he faced the toilet, pulling down plaintiff's pants as he held on to his walker, turning him around, placing him on the toilet seat, and pushing plaintiff's walker directly up to him. Defendant Brown would then close the door enough for privacy, but ajar enough that she could monitor him. Johnson, plaintiff's physical therapist, testified that this procedure was appropriate, and that plaintiff did not need someone "close[ly] guarding [him] with their hands" while in the bathroom. Defendant Brown testified that they had followed the same procedure for the previous three years plaintiff was in her classroom, for a total of more than 1,455 times, without incident.

Defendant Brown testified that she followed this procedure on 18 October 1999. She testified that she was sitting outside the bathroom door reading to plaintiff for approximately five to ten minutes when plaintiff, without saying anything to defendant Brown, attempted to stand up. Per defendant Brown's testimony, plaintiff grasped his walker, but when his feet hit the floor, they slipped out from under him in urine that was on the floor. Defendant Brown testified that she immediately reached for plaintiff but was unable to get to him in time. Plaintiff fell off the toilet seat, hitting the back of his head on the front of the toilet seat.

Within an hour of the fall, plaintiff was examined by a physician, Dr. Kinnaird, who saw a scratch on the back of plaintiff's head that was "[v]ery superficial[,]" but no other injuries. Dr. Kinnaird performed a neurological examination of plaintiff at that time and found plaintiff to be normal. Plaintiff's mother stated that plaintiff acted normally after the fall. Two weeks later, plaintiff began vomiting; on 3 November 1999, Dr. Timothy George, a neurosurgeon, determined that the shunt in plaintiff's head had malfunctioned. Plaintiff filed suit against defendants for damages arising from the accident.[1] Defendants filed motions for summary judgment which were granted by the court on 29 May 2007. Plaintiff appeals.

II.

Summary judgment is only appropriate when there are no genuine issues of material fact and any party is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56 (2007). "The moving party has the burden of establishing the lack of any triable issue," and "[a]ll inferences of fact from the proof offered at the hearing must be looked at in the light most favorable to the nonmoving party." *Gregory v. Floyd*, 112 N.C. App. 470, 473, 435 S.E.2d 808, 810 (1993).

A. Defendant Brown

[1] Plaintiff alleges that genuine issues of material fact exist as to whether defendant Brown was negligent in her supervision of him.

> In order to recover for negligence, plaintiff must establish (1) a legal duty, (2) a breach thereof, and (3) proximate cause of the injury. In addition, North Carolina case law has stated that a teacher has a duty to abide by that standard of care "which a person of ordinary prudence, charged with his duties, would exercise under the same circumstances."

Izard v. Hickory City Schools Bd. of Education, 68 N.C. App. 625, 626-27, 315 S.E.2d 756, 757 (1984) (citations omitted).

As to the duty owed a student by his teacher, it is well settled that "a teacher is held to the same standard of care which a person of ordinary prudence, charged with the teacher's duties, would exercise in the same circumstances." *Payne v. N.C. Dept. of Human Resources*, 95 N.C. App. 309, 313, 382 S.E.2d 449, 451 (1989). In *Payne*, where the

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1. The original suit also named two individual members of defendant Board—George Norris and Vicki Wells—but the claims against them were disposed of prior to the summary judgment order.

plaintiff was a deaf child who had injured himself while at school, this Court elaborated on the duty owed by teachers to students:

> It is true that the amount of care due a student increases with the student's immaturity, inexperience, and relevant physical limitations. The standard, however, remains that of the exercise of ordinary prudence given the particular circumstances of the situation. Plaintiff's characteristics are relevant, along with the other conditions present in the situation, in determining whether [defendant teacher] exercised ordinary prudence in that situation.

Payne, 95 N.C. App. at 314, 382 S.E.2d at 452 (citations omitted; emphasis omitted).

The predominant issue as to duty and breach thereof is whether the harm suffered was foreseeable. *James v. Board of Education*, 60 N.C. App. 642, 648, 300 S.E.2d 21, 24 (1983); *Payne*, 95 N.C. App. at 313, 382 S.E.2d at 452. Thus, defendant Brown's duty was to exercise ordinary prudence, taking into consideration plaintiff's particular characteristics, to protect him from foreseeable harm; breach of that duty would be failing to exercise that ordinary prudence.

The final element—the question of whether plaintiff's fall was the proximate cause of his injuries—is the matter of some debate between the parties; however, because plaintiff cannot show that any issue of material fact as to breach exists, this issue is moot.

Plaintiff contends that there is an issue of material fact as to whether defendant Brown acted negligently—that is, breached her duty—because discrepancies exist in the evidence. Specifically, plaintiff points to discrepancies in two general categories: First, the toileting procedure, and second, various details of the accident.

i.

Plaintiff states that defendant Brown's testimony as to the toileting procedure is contradicted by the testimony of others. At the summary judgment hearing, defendant Brown's attorney stated that, on the day of the accident, defendant Brown took plaintiff to the bathroom "like she did every other time in the three years that he was in her classroom[,]" following the same toileting procedure she had followed 1,455 times before. Plaintiff first states that defendant Brown "offered no evidence to prove that she and her assistants used the exact same procedure over 1455 times" (emphasis omitted), then

notes the testimony from four other witnesses—Jeanna Johnson, the school's physical therapist; teaching assistants Susan Harrison Alston and Pauline Renee Harrison; and Vicki Wells, school principal—that he claims are evidence that "the toileting procedure varied."

Plaintiff mischaracterizes the testimony of two witnesses. First, he states that Johnson testified in her deposition that she observed defendant Brown putting the stool underneath plaintiff's feet. The portion of Johnson's testimony to which plaintiff points is clearly a description of *Johnson* taking plaintiff to the bathroom "the one time" she actually did so. Johnson states that she put "the stool underneath his feet[,]" but that "[she] only remember[s] [toileting him] once." Second, plaintiff states that Alston admitted in her deposition they would "sometimes . . . leave [plaintiff] while he was in the bathroom." However, Alston's actual statement in response to a question as to whether she or defendant Brown would walk away while plaintiff was on the toilet was: "We may have. I don't know."

Plaintiff accurately states the remaining testimony. We thus resolve in plaintiff's favor and take as true all of these legitimate discrepancies, giving us these statements as to toileting procedure: Per the teaching assistants who sometimes took plaintiff to the toilet, there was not always a stool under plaintiff's feet when he was taken to the toilet; per the principal, who did not take plaintiff to the toilet, plaintiff's walker was "usually pushed to the side of the door" while plaintiff was on the toilet; and per Harrison, the teaching assistant attending plaintiff might have to "run across the hall" while plaintiff was on the toilet.

ii.

As to the incident itself, plaintiff asserts that defendant Brown's credibility is at issue because of the certain contradictions. Two of plaintiff's statements are, again, mischaracterizations of the testimony concerned.

First, in her deposition, Wells stated that defendant Brown told her that one of the teaching assistants, not defendant Brown herself, was with plaintiff when he fell off the toilet. However, the conversation Wells recalls during which this information was shared took place in the spring of 2006, seven years after the incident occurred. Next, plaintiff argues that defendant Brown's deposition testimony conflicted with her counsel's argument to the court at the summary judgment hearing. Specifically, defendant Brown's counsel stated

that, on the day of the incident, "for the first time ever, the first and only time, in the three years that she had him in the classroom, [plaintiff] suddenly and without warning stood up." However, in her deposition, when asked about plaintiff's impulsivity, defendant Brown stated that she did not remember a time when plaintiff tried to get off the toilet himself, but "I guess that's possible."

Again, construing all legitimate discrepancies in plaintiff's favor and taking them as true, we are left with these statements: Per Alston and Harrison, plaintiff was impatient in the bathroom and would want whoever was attending him to help him off the toilet immediately once he told them he was finished; defendant Brown had, at some time previous to the incident at hand, witnessed plaintiff fall;[2] and defendant Brown may have been as far away from plaintiff as two feet when he was on the toilet.

iii.

At no point, however, does plaintiff explain how these discrepancies show that a genuine issue of material fact exists in this case. The sum total of the evidence above, taken in the light most favorable to plaintiff, is this: On some days, but not specifically the date in question, a footstool might not have been provided for plaintiff, the person attending him might have had to leave her seat by the bathroom door for a moment, plaintiff might have acted impulsively, and defendant Brown might have been as far as two feet away from plaintiff. Also, defendant Brown had witnessed plaintiff fall—again, not on the date in question, but at some unidentified point in the past. Plaintiff does not explain how such information about general procedures and conduct not specific to the date the incident occurred creates a genuine issue of material fact as to defendant Brown's breach of her duty.

Plaintiff concludes that, for summary judgment purposes, the trial court "must believe the testimony of [plaintiff's mother] that [defendant] Brown, on the day of the accident, shut the door and left him alone which was admittedly a breach of the standard of care." However, this again is general information, as plaintiff's mother certainly was not present when plaintiff fell. We do not agree with plaintiff that the trial court was required to take as true a version of the incident given by someone who did not witness it.

2. Defendant Brown admitted in her answer that she had witnessed plaintiff fall prior to the incident in question. Plaintiff states that defendant Brown also admitted this fact in her deposition, but as he points to no specific page in the 189-page transcription of that deposition, we cannot verify that statement.

Thus, plaintiff has not shown how, looking at all the facts in the light most favorable to him, a genuine issue of material fact exists as to how defendant Brown's actions constituted a failure to exercise ordinary prudence to prevent foreseeable harm, and thus a breach of her duty to supervise plaintiff. As such, plaintiff cannot show that summary judgment was improperly granted.

B. Defendant Board

[2] As to defendant Board, plaintiff argues that it should be held liable in one of three ways: First, indirectly liable under a theory of *respondeat superior*; second, directly liable because it failed to warn the student of known hazards; or third, directly liable because of its failure to adequately supervise its students and defendant Brown. As mentioned above, by the time of the hearing on summary judgment, four of the six claims instituted by plaintiff had been dismissed either by order of the trial court or via voluntary dismissal by plaintiff; the summary judgment order at issue therefore resolved only the above-discussed claim against defendant Brown and the last cause of action against defendant Board: That concerning negligent supervision. As such, we address only the final argument.[3]

Specifically, plaintiff's argument on this point is that defendant Board is responsible for foreseeable injuries resulting from negligent supervision by defendant Brown, a teacher in its employ. The elements that a plaintiff must prove to show a claim for negligent hiring, supervision, and retention are:

> "(1) the specific negligent act on which the action is founded . . . (2) incompetency, by inherent unfitness or previous specific acts of negligence, from which incompetency may be inferred; and (3) either actual notice to the master of such unfitness or bad habits, or constructive notice, by showing that the master could have known the facts had he used ordinary care in 'oversight and supervision,' . . .; and (4) that the injury complained of resulted from the incompetency proved."

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3. As a result, plaintiff's repeated insistence that defendant Brown was acting within the scope of her employment for defendant Board is irrelevant. Further, even were we to address the theory of *respondeat superior*, defendant Board would only be liable for torts committed by defendant Brown, its agent. *See, e.g.*, *Snow v. DeButts*, 212 N.C. 120, 122, 193 S.E. 224, 226 (1937). Because we affirm summary judgment in favor of defendant Brown on the torts in question, no liability can devolve on defendant Board via this theory.

Medlin v. Bass, 327 N.C. 587, 591, 398 S.E.2d 460, 462 (1990) (emphasis omitted; alteration in original).

Because we have affirmed above the grant of summary judgment to defendant Brown on the claim of negligence against her, plaintiff cannot prove the first element of this claim: That defendant Brown committed a negligent act. As such, one of the essential elements of this claim cannot be proven. This argument is without merit, and the order granting summary judgment to defendant Board is therefore affirmed.

III.

[3] Plaintiff's next argument is that Judge Griffin, the judge who presided over the hearing, should have recused himself *ex mero motu* because a series of comments he made during the hearing revealed his prejudice against plaintiff's position. This argument is without merit.

Among the comments by Judge Griffin that plaintiff mentions in his argument were: "why [is plaintiff] in public school?"; in reply to plaintiff's counsel's remark that the public schools are obligated to educate students with disabilities, "[w]ell we have lost our way, haven't we? Common sense has gone out the window completely"; and "the tax payers were saddled with providing all this[,] is that right?"

While these comments and the others mentioned by plaintiff were irrelevant and show clearly that the judge thought plaintiff, as a matter of principle, should not be in a regular school, plaintiff's argument that he should have recused himself *ex mero motu* is without merit. A judge is under no duty to recuse himself on his own motion, and plaintiff did not make a motion for recusal at the lower court, meaning this issue is not preserved for our review. *See In re Key*, 182 N.C. App. 714, 719, 643 S.E.2d 452, 456 (2007).

IV.

Because plaintiff has not shown that a genuine issue of material fact exists, we affirm the trial court's finding of summary judgment.

Affirmed.

Judges McCULLOUGH and ELMORE concur.

STATE OF NORTH CAROLINA v. JOHN FITZGERALD RANKIN

No. COA07-1386

(Filed 15 July 2008)

1. Robbery— felony murder—felony of robbery—intent to steal—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of robbery with a dangerous weapon and felony murder based upon the robbery because: (1) although defendant correctly asserts that the gist of robbery with a dangerous weapon is not the taking but the taking by force or putting in fear, our Supreme Court has repeatedly held that it was immaterial whether the intent was formed before or after force was used upon the victim, provided that the theft and force are aspects of a single transaction; and (2) taking the facts in the light most favorable to the State, the jury could have concluded that defendant entered the house intending to steal firearms and, once having obtained them and after killing the defendant, left without conducting a more rigorous search of the house for hidden cash that would have delayed his escape.

2. Evidence— calling witness who would invoke Fifth Amendment privilege—notice

The trial court did not commit plain error in a first-degree murder and robbery with a dangerous weapon case by allowing the State to call defendant's son as a witness even though the State knew the witness would invoke his Fifth Amendment privilege against self-incrimination because: (1) the State provided notice to the Attorney General the day before trial and presented proof of that notice to the trial court the day trial began; (2) the jury heard evidence that a named second person was involved in the crime, and failure to call that person as a witness would have prejudiced the State's case against defendant; and (3) defendant cited no law suggesting that there existed an obligation to provide prior notice to either the court or the attorney representing a witness that he would be offered use immunity.

3. Criminal Law— instruction—acting in concert

The trial court did not err in a first-degree murder and robbery with a dangerous weapon case by instructing the jury on acting in concert because: (1) the evidence revealed that the wounds

on the victim's front and back suggested that he might have been attacked by two different weapons simultaneously; and (2) without presenting the jury with these instructions, the jury might have decided it could not determine whether defendant or another individual struck the blow that killed the victim, and as such acquitted defendant.

4. Evidence— defendant and witness Muslim—religion used as mechanism to get witness to testify—alibi

The trial court did not err in a first-degree murder and robbery with a dangerous weapon case by allowing the State to present evidence identifying defendant and a witness as Muslim because: (1) evidence that defendant attempted to procure a false alibi from the witness is relevant; (2) defendant simply argued the jury probably had an anti-Islamic bias, and aside from the fact that a Bible was in the jury room, defendant presented no evidence to support this statement; (3) the witness testified that, per her religious beliefs, when defendant asked her to provide an alibi for him, she felt obligated to do so, which is why she initially testified that he had been with her at the time of the murder; (4) the fact that defendant was using his religion as a mechanism to try to get the witness to testify on his behalf and actually commit perjury was relevant for that purpose, and it was not being offered as a means of showing credibility; and (5) the court went through the pertinent phone calls between defendant and the witness, told the State which portions of each call could be played for the jury, and this process eliminated significant portions of each call that the court considered discussions of faith and nothing to do with trying to influence the witness.

Appeal by defendant from judgments entered 8 December 2006 by Judge Michael E. Beale in Rowan County Superior Court. Heard in the Court of Appeals 14 May 2008.

Attorney General Roy A. Cooper, III, by Solicitor General Christopher G. Browning, Jr., for the State.

Parish & Cooke, by James R. Parish, for defendant-appellant.

HUNTER, Judge.

John Fitzgerald Rankin ("defendant") appeals from judgments entered on 8 December 2006 pursuant to a jury verdict of guilty on

charges of first degree murder and robbery with a dangerous weapon. After careful review, we find no error.

I.

The evidence offered at trial tended to show as follows: Defendant spent the weekend of 13 August 2004 with his cousin James Rankin ("Junior") and his son Cedric Hawkins. On Monday, 16 August 2004, defendant and Hawkins left the apartment, telling Junior that they were going to "make a lick[,]" which Hawkins explained at trial meant commit a robbery. Defendant borrowed a car from his girlfriend in the morning; Hawkins returned it at 2:00 p.m. so that she could pick her children up from school, then borrowed it again afterward.

At 3:15 p.m. on 16 August 2004, Kevin Ritchie ("the victim") was found stabbed to death in his home. The fatal stab wound was found to be a particularly deep wound in his chest; other smaller sharp trauma injuries were found on his back. Approximately twenty to thirty firearms were later determined to be missing from his home.

Various witnesses at trial testified that the victim was very careful about personal security, always keeping the multiple locks on the doors to his home locked and only allowing in persons he knew well. The victim and defendant went to school together and, according to testimony and telephone records, had been in close communication prior to the victim's death.

Within a week of the victim's death, two of his rifles were pawned by Junior and his friend Timothy Allison; a third rifle was later found in the trunk of Allison's car. Upon questioning by the police, Junior testified that he received the weapons from defendant shortly after the victim's death; defendant had transferred the weapons to Allison's trunk in the presence of both Allison and Junior, removing them from his own car trunk wrapped in a sheet later determined to have come from the victim's home.

Defendant was charged with first degree murder on 17 September 2004. He was indicted in separate proceedings for first degree murder and robbery with a dangerous weapon. The charges were joined, and the jury returned a verdict of guilty of first degree murder under a theory of felony murder as well as guilty of robbery with a dangerous weapon. Defendant was sentenced to life imprisonment without parole for first degree murder. The judgment as to robbery with a dangerous weapon was arrested. Defendant now appeals his conviction.

II.

A.

[1] Defendant first argues that the trial court incorrectly denied his motion to dismiss the charges of robbery with a dangerous weapon and first degree murder because the State presented insufficient evidence that defendant committed each charge. However, he only addresses the robbery charge in his brief, implying that because insufficient evidence supports that charge, the felony murder charge that relies on it as the underlying felony also fails.

> [T]he true test of whether to grant a motion to dismiss is whether the evidence, considered in the light most favorable to the State, is "existing and real, not just seeming or imaginary." If the evidence will permit a reasonable inference that the defendant is guilty of the crime charged, the trial judge should allow the case to go to the jury.

State v. Faison, 330 N.C. 347, 358, 411 S.E.2d 143, 149 (1991) (citation omitted).

Defendant likens the facts of this case to those in *State v. Powell*, 299 N.C. 95, 100, 261 S.E.2d 114, 118 (1980), where the defendant was found in possession of the murder victim's television and knife. The Supreme Court overturned defendant's conviction for robbery, stating that the property had been taken "as an afterthought once the victim had died"; there, however, the victim's body was found in her bed with copious physical evidence that she had been raped, then murdered. *Id.* at 102, 261 S.E.2d at 119.

In the case at hand, the evidence, taken in the light most favorable to the State, shows that the victim was killed without a struggle; that defendant and the victim knew each other and were in close communication; that defendant told his cousin he and his son were leaving to commit a robbery; that defendant told his cousin he could obtain firearms; and that, after the murder, defendant was in possession of certain firearms stolen from the victim's house. Further, the $1,000.00 in cash left in the gun safe that defendant makes much of—arguing that it shows stealing the guns was an afterthought, since if defendant were there to steal he would have taken the money—was hidden in the safe, and hidden well enough that it was not discovered until the police's second day of searching the house. Indeed, the officer who finally found the money said he looked in the safe a half dozen times without seeing it.

Defendant is correct that "[t]he gist of [robbery with a dangerous weapon] is not the taking but the taking by force or putting in fear." *Powell*, 299 N.C. at 102, 261 S.E.2d at 119; *see* N.C. Gen. Stat. § 14-87(a) (2007). However, our Supreme Court has repeatedly held that "it is immaterial whether the intent was formed before or after force was used upon the victim, provided that the theft and force are aspects of a single transaction." *Faison*, 330 N.C. at 359, 411 S.E.2d at 150; *see also State v. Green*, 321 N.C. 594, 605, 365 S.E.2d 587, 594, *cert. denied*, 488 U.S. 900, 102 L. Ed. 2d 235 (1988); *State v. Fields*, 315 N.C. 191, 203, 337 S.E.2d 518, 525 (1985).

Taking these facts in the light most favorable to the State, the jury could well have concluded that defendant entered the house intending to steal the firearms and, once having obtained them and killed defendant, left without conducting a more rigorous search of the house that would have delayed his escape. As such, defendant's argument is without merit.

B.

[2] Defendant next argues that the trial court erred in calling defendant's son as a witness because the State knew that he would invoke his Fifth Amendment privilege against self-incrimination. Requiring him to take the stand and invoke that privilege, defendant argues, prejudiced the defendant because it could have been taken by the jury to imply his own guilt and defendant's guilt as well. Because defendant did not object at trial, we review this assignment of error for plain error.

> "[T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a '*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done,' or 'where [the error] is grave error which amounts to a denial of a fundamental right of the accused,' or the error has ' "resulted in a miscarriage of justice or in the denial to appellant of a fair trial" ' or where the error is such as to 'seriously affect the fairness, integrity or public reputation of judicial proceedings' or where it can be fairly said 'the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.' "

State v. Lemons, 352 N.C. 87, 96-97, 530 S.E.2d 542, 548 (2000) (alterations in original; citations omitted), *cert. denied*, 531 U.S. 1091, 148 L. Ed. 2d 698 (2001).

The State called Cedric Hawkins, defendant's twenty-two-year-old son, to the stand during its case in chief on a Friday morning. The State elicited his name, age, and relationship to defendant before Hawkins asserted his Fifth Amendment privilege not to incriminate himself and refused to answer any further questions. The State then offered Hawkins use immunity per N.C. Gen. Stat. §§ 15A-1051 and -1052 (2007). The court allowed Hawkins and his attorney to confer regarding the offer, but Hawkins still refused to testify. The court then heard from the State and Hawkins's attorney as to a material witness order, and finally ordered that Hawkins appear on Monday at 2:00 p.m., when court would be back in session.

Defendant argues that the State put Hawkins on the stand knowing that he would assert his Fifth Amendment privilege not to testify, and that refusal to testify improperly prejudiced the jury against his client. This argument is without merit.

Per N.C. Gen. Stat. § 15A-1052(b),

> [t]he application [for immunity] may be made whenever, in the judgment of the district attorney, the witness has asserted or is likely to assert his privilege against self-incrimination and his testimony or other information is or will be necessary to the public interest. Before making application to the judge, the district attorney must inform the Attorney General, or a deputy or assistant attorney general designated by him, of the circumstances and his intent to make an application.

The State here provided notice to the Attorney General the day before trial and presented proof of that notice to the trial court the day trial began.

A very similar situation occurred in *State v. Thompson*, 332 N.C. 204, 420 S.E.2d 395 (1992). There, Jose Sanchez had admitted to police that he had killed the victim, but that he had done so at the behest of the defendant. *Id.* at 213, 420 S.E.2d at 400. On appeal, the Court analyzed Sanchez's being called as a witness as follows:

> At the time of defendant's trial, Sanchez was awaiting appeal on his first-degree murder conviction. Through his appellate counsel, Sanchez informed the trial court and the State that he would not answer any questions and would invoke the Fifth Amendment. The trial court nonetheless allowed the State to call Sanchez to the witness stand in the presence of the jury to require him to give his name and invoke his rights. We believe that this

> was permissible because the prosecutor's case would be "seriously prejudiced" by failure to offer Sanchez as a witness in light of Sanchez' role in the murder.

Id. at 223, 420 S.E.2d at 406 (citation omitted). There, as here, the jury heard evidence that a named second person was involved in the crime. Failure to call that person as a witness would have seriously prejudiced the State's case against defendant. Further, defendant can cite to no law suggesting that there exists an obligation to provide prior notice to either the court or the attorney representing a witness that he will be offered use immunity. Certainly defendant has not shown how the State's action might amount to plain error. As such, this assignment of error is overruled.

C.

[3] Defendant next argues that the trial court erred in instructing the jury on acting in concert because the instruction was not supported by the evidence presented at trial. This argument is without merit.

The instruction given by the court was as follows:

> For a person to be guilty of a crime, it is not necessary that he personally do all of the acts necessary to constitute the crime. If two or more persons join in a common purpose to commit a crime, each of them, if actually or constructively present, is not only guilty of that crime if the other person commits the crime, but also guilty of any other crime committed by the other in the pursuance of the common purpose to commit the original crime, or as a natural or probable consequence thereof.

"The trial court must give a requested instruction that is supported by both the law and the facts." *State v. Nicholson*, 355 N.C. 1, 67, 558 S.E.2d 109, 152, *cert. denied*, 537 U.S. 845, 154 L. Ed. 2d 71 (2002).

> An instruction on the doctrine of acting in concert is proper when the State presents evidence tending to show the defendant was present at the scene of the crime and "acted together with another who did acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime."

State v. Cody, 135 N.C. App. 722, 728, 522 S.E.2d 777, 781 (1999) (citation omitted). Among the evidence presented by the State at trial is the following: Defendant told his cousin he and his son were leaving the house that morning to commit a robbery; defendant borrowed a

car from his girlfriend the morning of the murder, but Hawkins returned it; and the wounds on the victim's front and back suggested that he might have been attacked by two different weapons simultaneously. Further, although Hawkins refused to testify at trial, shortly after the murder he made a statement to police in which he stated that he drove with defendant to the victim's house. As the State notes, without presenting the jury with instructions on acting in concert, the jury might have decided it could not decide whether Hawkins or defendant struck the blow that killed the victim, and as such acquitted defendant. Defendant has not shown that presenting this instruction to the jury was error.

D.

[4] Finally, defendant argues that the trial court erred by allowing the State to present evidence identifying defendant and a witness as Muslim. This argument is without merit.

The State presented recordings of certain phone calls made by defendant to Chantay Brown, a woman with whom he had been involved in the past. Brown's initial testimony provided defendant with an alibi for the time of the murder; however, she later retracted that statement and testified that defendant asked her via calls and letters to provide him with an alibi for the time of the crime. Defendant argues that this unfairly prejudiced the jury against him, as the jury could well have anti-Muslim beliefs, and that any probative value of the evidence was outweighed by its prejudicial effect.

This argument is based on Rule 403 of the North Carolina Rules of Evidence. Rule 403 states that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" N.C. Gen. Stat. § 8C-1, Rule 403 (2007).

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

State v. Jones, 347 N.C. 193, 213, 491 S.E.2d 641, 653 (1997) (internal citation omitted). "However, defendant has the burden to show not only that it was error to admit this evidence, but also that the error was prejudicial: A defendant must show that, but for the error, a different result would likely have been reached." *State v. Gayton*, 185 N.C. App. 122, 125, 648 S.E.2d 275, 278 (2007) (citation omitted).

Per North Carolina Rule of Civil Procedure 401, relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2007). Evidence that a defendant attempted to procure a false alibi from a witness is certainly relevant. *See, e.g., State v. Whiteside*, 325 N.C. 389, 397, 383 S.E.2d 911, 915 (1989) (holding as admissible under Rule 401 "relevant circumstantial evidence tending to connect an accused with the crime"). *See also People v. Hansen*, 765 N.E.2d 1033, 1039 (Ill. App. 2002) (holding that "evidence that a defendant attempted to influence the testimony of a witness or to establish a false alibi is admissible to show consciousness of guilt" per state rule of evidence substantially identical to Rule 401); *State v. Allen*, 682 P.2d 417, 419 (Ariz. 1984) (holding as admissible "the attempt to procure a witness with the express purpose of testifying falsely is relevant" per state rule of evidence substantially identical to Rule 401). The question, then, is whether the prejudicial effect of this information outweighed its relevance.

Defendant simply states that the jury probably had an anti-Islamic bias. Aside from the fact that a Bible was in the jury room, however, defendant presents no evidence to support this statement. Further, Brown testified that, per her religious beliefs, when defendant asked her to provide an alibi for him, she felt obligated to do so, which is why she initially testified that he had been with her at the time of the murder. When the State asked her during *voir dire* whether her religious beliefs and the fact that defendant was of the same faith affected the way she reacted to defendant's request, she testified: "You're supposed to help them, assist them, if you can. You're supposed to help him. That's why I did agree to help him." After listening to Brown's testimony and recordings of the phone calls between her and defendant out of the jury's presence, the trial court concluded that "defendant was using his religion as a mechanism to try to get this witness to testify in his behalf, and actually commit perjury; that it is relevant for that purpose, and it is not being offered as a means to showing credibility[.]" The court then went through the calls again and told the State which portions of each call could be played for the jury, a process which eliminated significant portions of each call that the court considered "just discussions of faith and nothing to do with the trying to influence her."

Given the care with which the trial court handled this evidence, and given the fact that defendant cannot show that, without this

evidence, a different result would likely have been reached, this assignment of error is overruled.

III.

Because defendant has not shown any error in his trial, we find no error.

No error.

Judges STEELMAN and STEPHENS concur.

DIANNE EDGE PRIEST AND JEFFERY BRUCE PRIEST, PLAINTIFFS v. SAFETY-KLEEN SYSTEMS, INC., DEFENDANT

No. COA07-1201

(Filed 15 July 2008)

1. Costs— filing fees—service fees—mediation fees—discretionary costs

Although the trial court did not err in a negligence case arising out of an automobile accident by denying statutory costs for filing fees since they are not an enumerated cost under N.C.G.S. § 7A-305(d), it did err by denying plaintiffs' motion for costs totaling $822.50 as to the service fees under N.C.G.S. § 7A-305(d)(6) and mediation fees under N.C.G.S. § 7A-305(d)(7) because these costs must be awarded to the prevailing party. In addition, there was no evidence that the trial court abused its discretion by denying plaintiffs' motion for discretionary costs allowed under N.C.G.S. § 6-20.

2. Costs— witness fees—offer of judgment

The trial court did not err in a negligence case arising out of an automobile accident by allegedly failing to make sufficient findings of fact regarding the offer of judgment and witness fees because: (1) the error complained of in regard to the offer of judgment is not apparent to the Court of Appeals, and thus lacks merit; (2) the trial court did not abuse its discretion by failing to award uniform witness fees and travel expenses under N.C.G.S. § 7A-314(a) when plaintiffs did not ask for the fees in their motion, they did not argue that they were entitled to those fees in

their brief, nor was there evidence that plaintiffs certified the uniform fees to the clerk of superior court as required by N.C.G.S. § 7A-314(a); and (3) additional fees for expert witnesses as allowed by N.C.G.S. § 7A-314(d) were purely within the trial court's discretion, and there was no evidence the trial court abused that discretion.

Appeal by plaintiffs from order entered 3 May 2007 by Judge William C. Gore, Jr., in Bladen County Superior Court. Heard in the Court of Appeals 19 March 2008.

Brian E. Clemmons and Robert E. Whitley for plaintiffs.

Tatum Atkinson & Lively, PLLC, by Donald F. Lively, for defendant.

ELMORE, Judge.

Diane Edge Priest and Jeffery Bruce Priest (plaintiffs) filed a negligence claim against Safety-Kleen Systems, Inc. (defendant) on 17 May 2005 following a motor vehicle accident. Defendant made an offer of judgment on 26 October 2006. Defendant offered "a total sum of ($500,001.00), which includes all damages, interest, if any, and costs now accrued as of and including the date of this offer of judgment." Plaintiffs rejected defendant's offer of judgment and on 6 November 2006, the matter went before a jury. The jury found that plaintiff Diane Edge Priest was entitled to recover $500,000.00 for her personal injuries and plaintiff Jeffery Priest was entitled to recover $2,500.00 for loss of consortium. Judge William C. Gore, Jr., entered judgment on 6 December 2006 and ordered that the costs be taxed "as may be agreed to by the parties or as may be hereafter determined by the Court."

Plaintiffs moved for $93,455.96 in costs on 5 January 2007. The court held a hearing on 8 January 2007 and entered its order denying plaintiffs' motion for costs on 3 May 2007. The court ordered each party to bear its own costs. The court made the following findings of fact "[a]s a basis for the exercise of its discretion":

1. Defendant admitted liability and the only issue submitted to the jury was the amount of damages.
2. Defendant made an Offer of Judgment to plaintiff Dianne Priest in the amount of $500,001.00 ten days prior to trial and plaintiff did not accept the offer.

3. Plaintiffs' counsel argued to the jury that they should award $4 million to plaintiffs.

4. The jury found that Plaintiff Dianne Priest's damages were $500,000.00 and that Plaintiff Jeffery Bruce Priest's damages were $2,500.00[.]

Plaintiffs now appeal the trial court's 3 May 2007 order.

Plaintiffs argue that the trial court erred by denying their motion for costs because the court "made no distinction between statutorily required costs, and those over which the trail [sic] court has discretion. It simply denied the Plaintiffs all costs." Plaintiffs correctly argue that the trial court was required to award certain statutorily required costs. However, plaintiffs incorrectly argue that the trial court's failure to segregate the statutorily required costs from the discretionary costs demonstrates that the trial court failed to exercise its discretion. We review a trial court's denial of a motion for costs for an abuse of discretion. *Carter-Hubbard Pub'lg Co. v. WRMC Hosp. Operating Corp.*, 178 N.C. App. 621, 629, 633 S.E.2d 682, 687 (2006).

[1] We first address plaintiffs' statutory costs. N.C. Gen. Stat. § 6-1 states, "To the party for whom judgment is given, costs shall be allowed as provided in Chapter 7A and this Chapter." N.C. Gen. Stat. § 6-1 (2005). In this case, judgment was entered in favor of plaintiffs. We apply the following three-step analysis when determining whether a trial court properly denied a motion for costs:[1]

> First, we must determine whether the cost sought is one enumerated in N.C. Gen. Stat. § 7A-305(d); if so, the trial court *is required to assess the item as costs*. Second, where the cost is not an item listed under N.C. Gen. Stat. § 7A-305(d), we must determine if it is a "common law cost" under the rationale of *Charlotte Area*. Third, if the cost sought to be recovered is a "common law cost," we must determine whether the trial court

1. We note that the legislature amended N.C. Gen. Stat. §§ 6-20 and 7A-305(d), effective 1 August 2007, in such a manner that this three-step analysis will likely be defunct. *See* N.C. Gen. Stat. § 6-20 (2007) ("In actions where allowance of costs is not otherwise provided by the General Statutes, costs may be allowed in the discretion of the court. Costs awarded by the court are subject to the limitations on assessable or recoverable costs set forth in G.S. 7A-305(d), unless specifically provided for otherwise in the General Statutes."); N.C. Gen. Stat. § 7A-305(d) (2007) ("The expenses set forth in this subsection are complete and exclusive and constitute a limit on the trial court's discretion to tax costs pursuant to G.S. 6-20."). However, plaintiffs brought their motion for recovery of costs on 5 January 2007, under the old version of the statutes. Accordingly, we apply *Miller's* three-step analysis.

> abused its discretion in awarding or denying the cost under N.C. Gen. Stat. § 6-20.

Miller v. Forsyth Mem'l Hosp., Inc., 173 N.C. App. 385, 391, 618 S.E.2d 838, 843 (2005) (citations and quotations omitted) (emphasis added).

N.C. Gen. Stat. § 7A-305(d) states, in relevant part:

> (d) The following expenses, when incurred, are also assessable or recoverable, as the case may be:
>
> (1) Witness fees, as provided by law.
>
> * * *
>
> (6) Fees for personal service and civil process and other sheriff's fees, as provided by law. . . .
>
> (7) Fees of guardians ad litem, referees, receivers, commissioners, surveyors, arbitrators, appraisers, and other similar court appointees, as provided by law. . . .

N.C. Gen. Stat. § 7A-305(d) (2005).

Plaintiffs argue that they are entitled to recover, at a minimum, $907.50 in costs. These costs include a filing fee with the Bladen County Clerk ($85.00), service fees paid to the Cumberland and Wake County Sheriffs ($15.00 each), and a mediation fee ($792.50). Filing fees are not an enumerated cost under section 305(d). *See Oakes v. Wooten*, 173 N.C. App. 506, 520, 620 S.E.2d 39, 48 (2005) ("[T]he trial court erred in awarding numerous costs not authorized by N.C. Gen. Stat. 7A-305 for . . . filing fees, travel costs, trial exhibits, color copies, and photocopies."). Service fees, however, are included in section 305(d)(6). Mediation fees are included in section (305)(d)(7). *Miller* at 392, 618 S.E.2d at 843 ("Mediation fees are recoverable under N.C. Gen. Stat. § 7A-305(d)(7), thus the trial court was required to tax this cost against plaintiffs."). Accordingly, the trial court erred by denying plaintiffs' motion for costs as to the service fees and mediation fee, totaling $822.50.

Plaintiffs make a blanket statement in their brief that the remaining costs were within the trial court's discretion, but do not cite any case law supporting their position. We assume *arguendo* that plaintiffs' remaining costs were within the trial court's discretion[2] and

2. "We are aware, as recognized in *Dep't. of Transp. v. Charlotte Area Mfd. Housing Inc.*, that there has been a lack of uniformity in this Court's cases addressing whether certain costs can or should be taxed against a party." *Vaden v. Dombrowski*,

move on to determining whether the trial court abused its discretion by denying plaintiffs' motion for those costs.

"An abuse of discretion is a decision manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *Vaden v. Dombrowski*, 187 N.C. App. 433, 437, 653 S.E.2d 543, 545-46 (2007) (quoting *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998)). Here, Judge Gore conducted a hearing on 8 January 2007 during which attorneys argued their positions. Defense counsel argued that plaintiffs could have avoided most of their costs as well as most of defendant's costs, but instead took a risk by refusing to engage in "reasonable" or "meaningful settlement discussions," and sticking to their original $4 million demand. He continued,

> [M]y client didn't get a chance to avoid the expenses; they did. And their decision to go for broke was a conscious decision on their part to take that risk. And in essence if the Court exercises its discretion to allow them to recover costs, then you are bailing them out from the risk that they decided to take.
>
> And my argument is you have a perfectly good, reasonable basis, based on the statutes, to say in my discretion I'm not going to award costs.

Plaintiffs' counsel then walked the trial court through all of the requested costs. After hearing both sides' arguments, the court said, "All right, counsel, I would like to take this under advisement. Can I have a stipulation that the Court may consider and rule on it out of county and out of session?" The attorneys agreed and three months later, Judge Gore issued his order.

It appears from the hearing transcript that defense counsel was under the impression that the trial court could deny costs listed in N.C. Gen. Stat. § 7A-305(d) in its discretion. Defense counsel stated, "Statutory costs, I don't think there's any discussion necessary, other than to simply say that if the Court in its discretion decides to award costs, we would not argue these costs that's [sic] listed—that we would acknowledge they are statutorily authorized." The court replied simply, "All right."

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187 N.C. App. 433, 437, 653 S.E.2d 543, 546 (2007). Plaintiffs' argument relies on the trial judge's alleged lack of discretion in denying all costs, rather than on the taxability of each of the non-statutory costs. For that reason, we bypass evaluating each of the non-statutory costs for taxability.

This Court has held that costs enumerated in N.C. Gen. Stat. § 7A-305(d) are discretionary, not mandatory. *See*, *e.g.*, *Smith v. Cregan*, 178 N.C. App. 519, 525, 632 S.E.2d 206, 210 (2006) ("The plain language of section 7A-305(d) makes the items it sets forth 'assessable or recoverable.' Accordingly, nothing in section 7A-305 requires a trial court to exercise its discretion under section 6-20 to award the items listed in section 7A-305(d)."). Although *Smith's* statutory analysis leading to this conclusion is sound, the greater weight of authority from this Court is that costs enumerated in N.C. Gen. Stat. § 7A-305(d) *must* be awarded to the prevailing party. In addition to *Miller* cited above, see *Morgan v. Steiner*, 173 N.C. App. 577, 581, 619 S.E.2d 516, 619 (2005) ("First, if the costs are items provided as costs under N.C. Gen. Stat. § 7A-305, then the trial court is *required* to assess these items as costs.") (quoting *Lord v. Customized Consulting Specialty, Inc.*, 164 N.C. App. 730, 734, 596 S.E.2d 891, 895 (2004)) (emphasis added); *Sara Lee Corp. v. Carter*, 129 N.C. App. 464, 474 500 S.E.2d 732, 738 (1998) ("Section 7A-305, contained within Article 28, specifically enumerates the costs *to be assessed* in civil actions. N.C.G.S. § 7A-305 (1995).") (emphasis added), *rev'd on other grounds*, 351 N.C. 27, 519 S.E.2d 308 (1999).

It appears that the trial court thought that it had an abundance of discretion, rather than none, and that it exercised that discretion over both mandatory and discretionary costs. Even though we reverse and remand the trial court's order regarding the costs enumerated by N.C. Gen. Stat. § 7A-305(d) to remain consistent with the greater weight of authority on this confusing topic, we acknowledge that the trial court had reasonable grounds to deny costs enumerated by section 7A-305 given our holding in *Smith*. Despite plaintiffs' protests to the contrary, we find no evidence that the trial court abused its discretion by denying plaintiffs' motion for costs as the motion pertained to discretionary costs allowed under N.C. Gen. Stat. § 6-20.

[2] Plaintiffs next argue that the trial court failed to make sufficient findings of fact regarding the offer of judgment and witness fees. Plaintiffs state:

> [I]n considering the Offer of Judgment, the trail [sic] court misstates the applicability of the offer of Judgment. It appears that the trail [sic] court was persuaded by the relationship between the verdict amount to Plaintiff Diane Priest ($500,000.00) and the amount of the Offer of Judgment ($500,001.00). The correct application, however, involves the amount of the Offer of Judgment

> and the verdict amounts for both Plaintiffs. Based upon the record, however, it appears that this mistake played a role in the decision of the trial court. This mistake alone justifies remanding the case for reconsideration of all costs that are discretionary.

Plaintiffs cite no authority for their conclusions,[3] nor do they cite to any place in the record that might shed light on how "this mistake played a role in the decision of the trial court." The error complained of is not apparent to this Court, and, being without further direction, we find that this argument lacks merit.

Defendant's argument that the trial court erred by failing to make findings of fact as to witness fees is also fruitless. N.C. Gen. Stat. § 305(d)(1) states that a court may award "[w]itness fees, as provided by law." N.C. Gen. Stat. § 305(d)(1) (2005). "This refers to the provisions of N.C. Gen. Stat. § 7A-314 which provides for witness fees where the witness is under subpoena. The trial judge only has the authority to award witness fees where the witness was under subpoena." *Vaden* at 440, 653 S.E.2d at 547 (quoting *Miller* at 392, 618 S.E.2d at 843). Here, plaintiff's counsel submitted an affidavit stating that fourteen witnesses were served with subpoenas by certified mail to testify at the trial. Plaintiffs' motion for costs suggests that nine of these witnesses testified at trial. By our calculation, these witnesses' trial testimony alone cost plaintiffs $38,844.30.[4]

N.C. Gen. Stat. § 7A-314(a) provides that "[a] witness under subpoena . . . whether to testify before the court . . . *shall be entitled* to receive five dollars ($5.00) per day, or fraction thereof, during his attendance, which . . . must be certified to the clerk of superior court." N.C. Gen. Stat. § 7A-314(a) (2005) (emphasis added). However, section (d) allows a court to increase an expert witness' compensation: "An expert witness . . . shall receive such compensa-

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3. It is possible that plaintiffs are thinking of Rule 68 in our Rules of Civil Procedure, which states, in relevant part, "At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. . . . If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer." N.C. Gen. Stat. § 1A-1, Rule 68(a) (2007). If so, Rule 68 is inapplicable here; the trial court's order does not mention Rule 68, the parties did not mention Rule 68 at the hearing, and the trial court did not require plaintiffs to pay "the costs incurred after the making of the offer."

4. Plaintiffs also asked for costs related to expert witnesses' trial testimony, including reports (totaling $12,625.00), trial preparation ($500.00), airfare ($902.50), and "Research information" ($676.00).

tion and allowances as the court, . . . *in its discretion*, *may authorize*." N.C. Gen. Stat. § 7A-314(d) (2005) (emphasis added). *See also State v. Johnson*, 282 N.C. 1, 27-28, 191 S.E.2d 641, 659 (1972) ("As to expert witnesses, Section (d) modifies Section (a) by permitting the court, in its discretion, to increase their compensation and allowances."). Witnesses who qualify for the uniform fee under section (a) are also entitled to reimbursement for travel expenses. N.C. Gen. Stat. § 7A-314(b) (2005). The amount of travel reimbursement depends on the distance of the witness' residence from the place of appearance and the current mileage reimbursement rate for state employees. *Id.* Some witnesses are also entitled to reimbursement for their actual lodging and meal expenses. N.C. Gen. Stat. § 7A-314(b)(2) (2005).

The trial court did not address the mandatory witness fees outlined in sections (a) and (b), but plaintiffs did not ask for the fees in their motion, nor did they argue that they are entitled to those fees in their brief. There is also no evidence that plaintiffs certified the uniform fees to the clerk of superior court as required in section (a). N.C. Gen. Stat. § 7A-314(a) (2005). Accordingly, the trial court did not abuse its discretion by not awarding uniform witness fees and travel expenses under section 7A-314(a). As stated above, additional fees for expert witnesses as allowed by subsection (d) were purely within the trial court's discretion, and we find no evidence that the trial court abused that discretion in denying those fees.

For the reasons stated above, we reverse and remand the trial court's order denying plaintiffs' motion for costs as it applies to the service fees and mediation fee, totaling $822.50. We affirm the trial court's order as to all other costs.

Affirmed in part; reversed in part and remanded to the trial court for disposition in accordance with the provisions set out herein.

Judges HUNTER and STROUD concur.

STATE OF NORTH CAROLINA v. JERRY DALE HOWELL

No. COA08-111

(Filed 15 July 2008)

1. Appeal and Error— preservation of issues—failure to rule on motion in limine—failure to introduce evidence

Although defendant contends the trial court erred in a multiple attempting to evade or defeat tax case under N.C.G.S. § 105-236(a)(7) by failing to admit into evidence defendant's filing of amended tax returns following his indictment on these charges, this issue is dismissed because defendant has not properly preserved this issue for review when: (1) the trial court did not rule on the motion in limine; (2) defendant failed to attempt to introduce evidence at trial; and (3) even assuming arguendo that the trial court granted the State's motion in limine and that there was a proffer of the evidence in the record, the trial court would have properly excluded this evidence since the subsequent satisfaction of defendant's tax liability has no bearing on whether defendant willfully evaded his tax obligations at the times when those taxes were due.

2. Appeal and Error— preservation of issues—failure to make offer of proof

Although defendant contends the trial court erred in a multiple attempting to evade or defeat tax case under N.C.G.S. § 105-236(a)(7) by excluding evidence of defendant's inquiry to the Department of Revenue investigator of what he could do to "make things right," this issue was not properly preserved for review because: (1) defendant made no request to make a proffer of the agent's answer; and (2) the Court of Appeals will not speculate as to what the answer would have been or its significance.

3. Constitutional Law— effective assistance of counsel—failure to make motion to dismiss charges

A defendant did not receive ineffective assistance of counsel in a multiple attempting to evade or defeat tax case under N.C.G.S. § 105-236(a)(7) based on his trial counsel's failure to make a motion to dismiss the charges at the close of the State's case because: (1) defendant did not contend in his brief that he filed his 2003 and 2004 state income tax returns and did not assert that he filed an accurate return for 2005, but instead contended

only that his actions were not willful; (2) taken in the light most favorable to the State, substantial evidence was presented showing that defendant acted willfully, including defendant's statements coupled with his actions; and (3) defendant failed to demonstrate that but for the failure of counsel, there would have been a reasonable probability of a different outcome.

Appeal by defendant from judgment entered 14 November 2007 by Judge Kenneth C. Titus in Wake County Superior Court. Heard in the Court of Appeals 11 June 2008.

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

Richard E. Jester for defendant-appellant.

STEELMAN, Judge.

Where the trial court reserved ruling on the State's pre-trial motion *in limine* until trial, and defendant failed to attempt to introduce the evidence at trial, the issue is not preserved for appellate review. Where defendant failed to make a proffer of excluded testimony, he has not properly preserved the issue for review. Where defendant failed to show that but for his counsel's failure to make a motion to dismiss at the close of the State's evidence, the outcome would have been different, he has not met the requirements of the *Strickland* test to show ineffective assistance of counsel.

I. Factual and Procedural Background

Jerry Dale Howell (defendant) was hired by the City of Gastonia (the City) as a police officer on 25 June 2001. Prior to starting his new job, defendant completed and returned a NC-4 tax form to the City on 25 June 2001. On his NC-4 form, defendant claimed he was exempt from state withholding taxes. On 28 October 2004 defendant completed a second NC-4 form, where again he claimed he was exempt from withholding taxes.

The City did not withhold taxes from defendant's earnings during 2003 or 2004. Defendant failed to file North Carolina individual income tax returns for the 2003 and 2004 tax years. When the North Carolina Department of Revenue became aware of defendant's failure to file tax returns for the 2003 and 2004 tax years, it sent a letter to the City requesting copies of defendant's 2003 and 2004 Federal W-2 forms and his NC-4 forms. After creating substitute returns for

defendant based on the W-2 and NC-4 forms, the Department of Revenue instructed the City to immediately begin withholding taxes from defendant's earnings. The substitute returns revealed that defendant owed state income taxes for the years 2003 and 2004. Defendant filed a 2005 individual income tax return, but reported no wages, salaries, or tips.

On 9 April 2007 defendant met with a criminal investigator from the North Carolina Department of Revenue. During this meeting defendant gave several reasons why he claimed exemption from withholding taxes.

On 5 June 2007, defendant was indicted on three counts of attempting to evade or defeat tax pursuant to N.C. Gen. Stat. § 105-236(a)(7). The jury found defendant guilty of all three counts. Defendant was sentenced to six to eight months imprisonment. This sentence was suspended and defendant was placed on probation for thirty-six months. Defendant appeals.

II. Evidence of Filing Amended Returns

[1] In his first argument, defendant contends that the trial court erred in not admitting into evidence defendant's filing of amended tax returns following his indictment on these charges. We disagree.

Prior to trial, the State filed a motion *in limine* requesting that the court prohibit defendant from introducing evidence that he had filed amended state tax returns after being indicted on these charges. Judge Titus heard the motion, pre-trial, but decided to defer ruling upon it until the appropriate time during the trial. Defendant did not attempt to introduce this evidence during trial.

N.C. Gen. Stat. § 1-277 limits appeals to judicial orders or determinations actually made by the judge. N.C. Gen. Stat. § 1-277 (2007). Since Judge Titus did not rule on the motion *in limine*, we hold that defendant has not properly preserved this issue for review.

Further, by failing to attempt to introduce the evidence at trial, the issue is not preserved. *State v. Tutt*, 171 N.C. App. 518, 520, 615 S.E.2d 688, 690 (2005); *State v. Oglesby*, 361 N.C. 550, 554-55, 648 S.E.2d 819, 821 (2007).

Even assuming *arguendo* that the trial court granted the State's motion *in limine*, and that there was a proffer of the evidence in the record, the trial court would have properly excluded the evidence that defendant filed amended tax returns following his arrest.

Whether or not defendant subsequently satisfied his tax liability to the State has no bearing on whether defendant willfully evaded his tax obligations at the times when those taxes were due. Such evidence was therefore irrelevant and properly excluded under N.C. Gen. Stat. § 8C-1, Rule 402. *See*, *e.g.*, *United States v. Klausner*, 80 F.3d. 55, 63 (2d Cir. 1996) (where the defendant failed to file tax returns when due, but later filed the delinquent tax returns after becoming the subject of a criminal investigation, the Court stated that the defendant's "eventual cooperation with the government does not negate willfulness in his earlier attempts to evade his income tax liability").

This argument is without merit.

III. Exclusion of Defendant's Statement

[2] In his second argument, defendant contends that the trial court erred in excluding evidence of defendant's inquiry to the Department of Revenue investigator of what he could do to make "things right". We disagree.

On cross-examination, defense counsel questioned Agent Willis about her meeting with defendant on 9 April 2007 and whether defendant had ever asked what he could do to make the situation "right." The State's objection to this question was sustained.

"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. Raines*, 362 N.C. 1, 20, 653 S.E.2d 126, 138 (2007) (citing *State v. Simpson*, 314 N.C. 359, 370, 334 S.E.2d 53, 60 (1985)).

Defendant made no request to make a proffer of Agent Willis' answer. This Court will not speculate as to what the answer would have been or its significance. *Roanoke Chowan Regional Housing Authority v. Vaughan*, 81 N.C. App. 354, 361, 344 S.E.2d 578, 583 (1986) (citing *C.C.T. Equipment Co. v. Hertz Corp.*, 256 N.C. 277, 285 123 S.E.2d 802, 808 (1962)). This issue has not been properly preserved for our review and is dismissed.

IV. Ineffective Assistance of Counsel

[3] In his third argument, defendant contends that his counsel was ineffective in failing to make a motion to dismiss the charges at the close of the State's evidence. We disagree.

The Sixth Amendment guarantees a defendant, in a criminal prosecution, the right to assistance of counsel. U.S. Const. amend. VI. The right to representation by 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 (1987). In *Strickland v. Washington*, the United States Supreme Court enunciated a two-prong test to determine whether counsel is ineffective. 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984).

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland, 466 U.S. at 687, 80 L. E. 2d at 693. 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." *State v. Al-Bayyinah*, 359 N.C. 741, 751, 616 S.E.2d 500, 509 (2005) (quoting *Strickland*, 466 U.S. at 694, 80 L. E. 2d at 698).

Defendant asserts that Agent Willis' testimony revealed that defendant believed that "wages" were not "income" and that defendant lacked the necessary willfulness to be guilty of the crimes. Defendant further argues that had a motion to dismiss been properly made at the close of the State's evidence, the motion would have been granted.

In ruling on a motion to dismiss at the close of the State's evidence, the trial court is required to consider the evidence in the light most favorable to the State. *State v. Lee*, 348 N.C. 474, 488, 501 S.E.2d 334, 343 (1998). The trial court must determine as a matter of law whether the State has offered substantial evidence of defendant's guilt on every essential element of the crime charged. *State v. Corbett*, 307 N.C. 169, 182, 297 S.E.2d 553, 562 (1982). Substantial evidence is "relevant evidence that a reasonable person might accept as adequate or would consider necessary to support a particular conclusion." *State v. Smith*, 178 N.C. App. 134, 137, 631 S.E.2d 34, 37

(2006) (quoting *State v. Garcia*, 358 N.C. 382, 412, 597 S.E.2d 724, 746 (2004)).

Defendant was charged with three counts of willfully attempting to evade income tax pursuant to N.C. Gen. Stat. § 105-236(a)(7), which reads as follows:

> (7) Attempt to Evade or Defeat Tax.—Any person who willfully attempts, or any person who aids or abets any person to attempt in any manner to evade or defeat a tax or its payment, shall, in addition to other penalties provided by law, be guilty of a Class H felony.

N.C. Gen. Stat. § 105-236(a)(7) (2007). In his brief, defendant does not contend that he filed his 2003 and 2004 State income tax returns, nor does he assert that he filed an accurate return for 2005. Rather, he contends only that his actions were not willful. Any argument except for willfulness is deemed abandoned, and we need only address the question of willfulness. N.C. R. App. P. 28(b)(6) (2007).

To withstand defendant's motion to dismiss, the State must present substantial evidence that defendant's failure to file a tax return was willful. *State v. Houston*, 122 N.C. App. 648, 649, 471 S.E.2d 127, 127-28 (1996). Willfully means to purposely commit an offense in violation of a known legal duty. *State v. Whittle*, 118 N.C. App. 130, 135, 454 S.E.2d 688, 691 (1995) (citing *State v. Stephenson*, 218 N.C. 258, 264, 10 S.E.2d 819, 823 (1940)).

"We have previously noted that [a defendant's] mental state is seldom provable by direct evidence. Therefore, the willfulness of an individual's conduct may be inferred from the circumstances surrounding the events." *Rose v. City of Rocky Mount*, 180 N.C. App. 392, 397, 637 S.E.2d 251, 255 (2006) (citations omitted); *see also State v. Davis*, 96 N.C. App. 545, 554, 386 S.E.2d 743, 748 (1989) (the culmination of defendant's failure to file tax returns, his belief that taxes were unconstitutional, and fraudulent claims of exemption is enough to show willful attempt to evade a tax).

Taken in the light most favorable to the State, substantial evidence was presented showing that defendant acted willfully. The State introduced statements made by defendant to Agent Willis regarding his views on taxes and the reason why he did not file returns for two years. Defendant claimed he was "short" after his divorce, that he was trying to "find a way out," and that he was trying

to do whatever he needed to do to "make it." Defendant explained that he was having a hard time as a police officer and he wanted to find a way to keep his earnings. Defendant also told Agent Willis that he was exempt from state taxes in order to provide a nice place for his son to stay when he visited. Defendant further stated Congress and the Senate wasted tax money. The State also introduced evidence of defendant's belief that the government was wasting *his* tax money. (emphasis added). In addition to these statements, the State presented evidence that defendant failed to file individual income tax returns for 2003 and 2004, and that he filed a fraudulent return for 2005. Defendant's statements, coupled with his actions, were sufficient to warrant a finding that defendant willfully attempted to evade the state individual income tax. Taken in the light most favorable to the State, this is sufficient substantial evidence to support the denial of defendant's motion to dismiss, had it been made.

Defendant's arguments are nothing more than a thinly veiled attempt to have this Court construe the evidence in the light most favorable to defendant and not to the State. This is not the correct standard of review, as previously noted above. *Lee*, 348 N.C. at 488, 501 S.E.2d at 343.

Defendant has failed to demonstrate that, but for the failure of counsel to move to dismiss at the close of the State's evidence, there would have been a reasonable probability that the outcome would have been different. *Strickland*, 466 U.S. at 694, 80 L. E. 2d at 698; *Al-Bayyinah*, 359 N.C. at 751, 616 S.E.2d at 509.

This argument is without merit.

Remaining assignments of error listed in the record but not argued in the defendant's brief are deemed abandoned. N.C. R. App. P. 28(b)(6) (2007).

NO ERROR.

Judges McGEE and GEER concur.

MAXWELL SCHUMAN & COMPANY, PLAINTIFF v. THEODORE EDWARDS AND VALERIE EDWARDS, DEFENDANTS

No. COA07-996

(Filed 15 July 2008)

1. Judgments— Canadian—enforcement

Plaintiff complied with the statutory provisions of the Uniform Enforcement of Foreign Judgments Act in seeking enforcement of a Canadian judgment for attorney fees for a Canadian child custody action and was not required to bring forth evidence that none of the defenses available to defendants were valid. The North Carolina Foreign Money Judgments Recognition Act (NCFMJRA) pertains to recognition of a judgment rather than enforcement.

2. Attorneys— child custody—contingency fees

Contingency attorney fees in child custody actions are void as against public policy, and the portion of a Canadian judgment granting such fees was not enforceable.

3. Attorneys; Child Support, Custody, and Visitation— custody—expenses of action—separate from contingency fee for legal expenses

Expenses of a Canadian appeal in a child custody action were recognized in North Carolina even though the attorney fees were voided as being based on a contingency. In general, other fees contained in a contingent fee arrangement are also void, but in this case there was no written agreement about the total costs and defendant was responsible for the expenses, win or lose.

Appeal by defendants from judgment entered 19 April 2007 by Judge Karl Adkins in Mecklenburg County Superior Court. Heard in the Court of Appeals 2 April 2008.

Kennedy Covington Lobdell & Hickman, L.L.P., by Sara W. Higgins and Daniel V. Mumford, for plaintiff-appellee.

Cranford, Schultze, Tomchin, and Allen, P.A., by Michael F. Schultze, for defendant-appellants.

HUNTER, Judge.

Theodore Edwards[1] ("defendant") appeals from a judgment which ordered payment to Maxwell Schuman & Company ("plaintiff") in the amount of $269,243.13 in Canadian funds, plus costs and interest at eight percent. After careful consideration, we reverse in part and affirm in part the order of the trial court.

This action has been brought by plaintiff, a Canadian law firm, for the purpose of enforcing a Canadian judgment against defendant which was obtained in the Supreme Court of British Columbia (the functional equivalent to our trial court) for legal representation made on behalf of defendant by plaintiff. In brief, plaintiff represented defendant in a custody action concerning a child that defendant had out of wedlock. Defendant did not prevail at the trial court level. Thereafter, plaintiff informed defendant that if their appeal to the British Columbia Court of Appeals was unsuccessful, plaintiff would waive its legal fees and bill defendant only for expenses.

On 9 March 2000, defendant's appeal was successful and defendant was awarded custody. Following the appellate decision, plaintiff billed defendant $99,290.33[2] for fees and expenses in connection with the appeal. Of that sum, defendant paid all but $10,290.33.

Following the appeal, the child's mother sought and received a stay on the appellate division's order pending her application to appeal the decision to the Supreme Court of Canada. The mother's application to the Supreme Court of Canada was granted and the judgment of the Canadian trial court was eventually reinstated. In light of the unsuccessful result, plaintiff reduced its legal fees by more than $26,000.00, but the remaining fees and expenses remained outstanding.

Defendant ultimately presents one issue for this Court's review: Whether the trial court erred in recognizing and enforcing the Canadian judgment where plaintiff agreed that attorney fees would be, in part, contingent upon a successful outcome at the appellate court.

I.

[1] Resolution of the issue before this Court requires discussion of both the North Carolina Foreign Money Judgments Recognition Act

1. Mr. Edwards's wife, Valerie Edwards, is also a named defendant in this action. For clarity, however, we refer only to Mr. Edwards as "defendant."

2. All dollar totals are Canadian, unless otherwise noted.

("NCFMJRA") and the Uniform Enforcement of Foreign Judgments Act ("UEFJA"). We discuss each in turn.

The NCFMJRA applies to "any foreign judgment that is final and conclusive and enforceable where rendered even though an appeal of the judgment is pending or the judgment is subject to appeal." N.C. Gen. Stat. § 1C-1802 (2007). The term "foreign judgment" refers to "any judgment of a foreign state granting or denying recovery of a sum of money[.]" N.C. Gen. Stat. § 1C-1801(1) (2007). The term "foreign state" is not a reference to a different state but "any governmental unit other than the United States," or any of its member states. N.C. Gen. Stat. § 1C-1801(2).

Part of the NCFMJRA contains the following relevant language:

> Except as provided in G.S. 1C-1804, a foreign judgment meeting the requirements of G.S. 1C-1802 is conclusive between the parties to the extent that it grants or denies recovery of a sum of money. The foreign judgment is enforceable in the manner set forth in Article 17 of this Chapter. The defenses available to a judgment debtor under G.S. 1C-1804 may be asserted by the judgment debtor in the manner set forth in G.S. 1C-1705.

N.C. Gen. Stat. § 1C-1803 (2007).

The NCFMJRA, however, " 'does not govern the enforcement of foreign judgments.' " *Cotter v. Cotter*, 185 N.C. App. 511, 517, 648 S.E.2d 552, 556 (2007) (quoting *VF Jeanswear Ltd. Partnership v. Molina*, 320 F. Supp. 2d 412, 418 (2004)). Instead, " 'it pertains only to whether a court should recognize the judgment.' " *Id.* Enforcement of judgments is governed by the UEFJA. *Id.* This Act "sets out the appropriate steps for enforcing a judgment recognized under the NCFMJRA." *Id.*

Specifically,

> N.C. Gen. Stat. § 1C-1703(a) [2007] permits an authenticated foreign judgment to be filed with the clerk of court in a county where the judgment debtor resides, or owns real or personal property. The judgment creditor is required (1) "to make and file" an affidavit stating that the judgment is final and unsatisfied; and (2) state the amount remaining unpaid. N.C.G.S. § 1C-1703(a). The judgment is then to be docketed and indexed as any other judgment under N.C. Gen. Stat. § 1C-1703(b) [2007]. Upon filing of the judgment and affidavit, the judgment creditor is required to

> serve a notice of the filing on the judgment debtor. N.C. Gen. Stat. § 1C-1704(a) [2007]. The judgment debtor can then file a motion for relief from, or notice of defense to, the judgment pursuant to N.C. Gen. Stat. § 1C-1705 [2007].

Id. Where the defendant makes no argument for non-recognition after a plaintiff has followed these statutory guidelines, the plaintiff is entitled to enforcement of the foreign judgment. *Id.*

In the instant case, there is no dispute that defendant resides in the county where the action was filed and that an authenticated foreign judgment was filed with the clerk of court. Additionally, plaintiff filed an affidavit stating that the judgment was final and unsatisfied, stating the amount owed ($228,359.41), and stating that notice was served on defendant as to the debt.

Unlike the defendant in *Cotter*, however, defendant in this case has made an argument that the foreign judgment should not be enforced and recognized on the grounds that doing so would violate North Carolina public policy. That said, and counter to defendant's implications, plaintiff is not required "to bring forth evidence that none of the defenses available to defendants were valid." *Lust v. Fountain of Life, Inc.*, 110 N.C. App. 298, 302, 429 S.E.2d 435, 437 (1993). In other words, the burden is on defendant.

II.

[2] Defendant contends that the fee agreement between him and plaintiff was based on a contingency and is therefore void on public policy grounds. We agree that part of the fee agreement was an impermissible contingency arrangement.

Foreign judgments need not be recognized when they are "repugnant to the public policy of this State." N.C. Gen. Stat. § 1C-1804(b)(3) (2007). Additionally, we will not recognize a foreign judgment where "[t]he foreign court rendering the judgment would not recognize a comparable judgment of this State." N.C. Gen. Stat. § 1C-1804(b)(7).

As a general matter, contingency contracts are permitted in North Carolina except where the fee agreement is in direct violation of public policy. *Robinson, Bradshaw & Hinson v. Smith*, 129 N.C. App. 305, 311, 498 S.E.2d 841, 847 (1998). Contingency fee contracts for representation in a divorce and/or for alimony or child support have all been prohibited. *Id.* at 311-12, 498 S.E.2d at 847. The rationale is that

> [t]o allow a contingent-fee contract based on a percentage of a child support award would upset the equilibrium between judicially-monitored support schedules and judicially-monitored awards of attorneys' fees for plaintiffs who could not otherwise afford adequate legal representation. By allowing the trial court to determine the amount a party must pay in support and the amount reasonable for legal expenses, children's interests are protected without disturbing the incentive for attorneys to represent plaintiffs whose only "assets" are their rights to receive child support payments.

Davis v. Taylor, 81 N.C. App. 42, 46-47, 344 S.E.2d 19, 22 (1986).

Whether a child custody arrangement could be based on a contingency fee has not been decided by our appellate courts. Although this issue has not been addressed, arguments prohibiting such arrangements have been advanced on the ground that

> [l]ike alimony and child support, a statutory mechanism exists for attorney's fees for custody claims, mitigating the need for contingency fees. More importantly, the best interest of the child requires that the law keep out of custody disputes any competing interest related to fees. . . . Even more clearly, the law should encourage resolution of custody disputes and minimize the competing interests.

3 Suzanne Reynolds, *Lee's North Carolina Family Law* § 13.97 (5th ed. 2002).

Additionally, this Court has held that, in actions wherein child support and child custody are sought, contingent fee agreements are void on public policy grounds. *Davis*, 81 N.C. App. at 50-51, 344 S.E.2d at 24. This Court reasoned in *Davis*, as Professor Reynolds argued in her treatise, that allowing a contingent fee agreement in child custody and child support actions would "compromise the main policy of the fee statute—to protect the interests of children involved in custody and support cases." *Id.*

With the issue now squarely before us, we hold that contingency fees are void on public policy grounds in custody actions. To hold otherwise, as we stated in *Davis*, would conflict with promoting the best interests of children. This is especially true here, where the finality of the original trial court order may have been delayed because of the contingent fee agreement. Had such an arrangement not been established, defendant might not have sought to appeal the initial

order. Indeed, as plaintiff's counsel stated to the trial court, "[b]ecause of [defendant's] hesitation [to appeal the adverse custody order], my client told him that it would . . . bill[] on an hourly basis; however, . . . if the appeal itself was unsuccessful," plaintiff would not charge defendant any legal fees, only expenses. We therefore conclude that the contingency fee agreement is void on public policy grounds.

We also recognize that in custody only disputes, as opposed to custody and support actions, no money is exchanged in which a lawyer could receive a *pro rata* share. That, however, has not prevented this State from holding that contingent fee arrangements in a divorce proceeding, in which no money is at issue, is void on public policy grounds. *Williams v. Garrison*, 105 N.C. App. 79, 81, 411 S.E.2d 633, 634 (1992). Accordingly, the fact that money is not at issue in this case does not alter our analysis.

Although we find the portion of the agreement in which legal fees were contingent upon a successful appeal voided, we do not void the entirety of the agreement. As this Court has stated, "when a portion of a contract is void as against public policy, the remainder of that contract may still be enforceable to the extent it is severable from, and not dependent in its enforcement upon, the void portion." *Davis*, 81 N.C. App. at 48, 344 S.E.2d at 23. In this case, the only contingent fee agreement was related to the initial appeal. Thus, the fees and expenses associated with the action in the Canadian trial court and the fees and expenses associated with the appeal to Canada's highest court are not voided on public policy grounds.

[3] This leaves only the question of whether the expenses associated with plaintiff's representation of defendant during the initial appeal should be owed by defendant to plaintiff. It is important to note that, in this case, there was no written agreement between the parties as to the total costs (fees and expenses) for the first appeal, and no contract for any other matter appears in the record before this Court. This Court has held that where a contingent fee arrangement is void against public policy, other fee arrangements contained in the same contract are also void as the "contingent-fee provision 'permeates the entire agreement.' " *Id.* at 49, 344 S.E.2d at 24 (citation omitted). Indeed, in *Davis*, the entire contract was voided as the contingency fee agreement was "the essence of the contract." *Id.* Here, the situation is distinct from *Davis*. Unlike *Davis*, where a *pro rata* share of the payments would be recovered, here, plaintiff would recover its normal hourly rate were they successful. Also unlike *Davis*, agree-

ment concerning the expenses are not legal fees and defendant, win or lose, was responsible for legal expenses. Accordingly, we hold that in this case, the expenses associated with prosecuting the initial appeal are not voided on public policy grounds. The judgment of the trial court is therefore reversed in part and affirmed in part.

III.

In conclusion, we hold that plaintiff has complied with the statutory provisions of the UEFJA. Defendant, however, has provided a valid reason as to why the foreign judgment should not be enforced and recognized in its entirety because it is in part void on public policy grounds. The remaining fees and expenses are fully collectable by plaintiff.

Reversed in part; affirmed in part.

Judges ELMORE and STROUD concur.

TABLE ROCK CHAPTER OF TROUT UNLIMITED AND CATAWBA RIVERKEEPER FOUNDATION, PETITIONERS v. ENVIRONMENTAL MANAGEMENT COMMISSION, RESPONDENT, AND DUKE ENERGY CORPORATION, INTERVENOR

No. COA07-1153

(Filed 15 July 2008)

Environmental Law; Costs— attorney fees—substantial justification—special circumstances

The trial court did not abuse its discretion by awarding attorney fees under N.C.G.S. § 6-19.1 to petitioners who successfully challenged the Environmental Management Commission's (EMC) denial of a petition for rulemaking to reclassify a river dam's tailwater to trout waters because: (1) EMC acted without substantial justification in denying the petition for rulemaking to reclassify the tailwater given the facts known at the time of such decision; and (2) no special circumstances existed that made the award of attorney fees unjust.

Appeal by respondent from order entered 5 June 2007 by Judge Beverly T. Beal in Burke County Superior Court. Heard in the Court of Appeals 20 February 2008.

Southern Environmental Law Center, by J. David Farren and Geoffrey R. Gisler, for petitioner appellees.

Attorney General Roy Cooper, by Special Deputy Attorney General Francis W. Crawley and Assistant Attorney General Sueanna P. Sumpter, for respondent appellant.

McCULLOUGH, Judge.

Respondent, North Carolina Environmental Management Commission ("the EMC"), appeals an order awarding petitioners, Table Rock Chapter of Trout Unlimited ("Trout Unlimited") and Catawba Riverkeeper Foundation, attorney's fees pursuant to N.C. Gen. Stat. § 6-19.1 (2007). We affirm.

The relevant facts are as follows: The EMC is responsible for implementing state compliance with the Federal Clean Water Act and its federal implementing regulations. *See* 33 U.S.C.S. § 1313 (2007) and 15A N.C.A.C. 2A.0103(2007). On 2 April 2004, petitioners filed a petition with the EMC for rulemaking to reclassify eleven miles of the Catawba River's Bridgewater Dam tailwater ("the tailwater") to "trout waters."

Petitioners presented undisputed evidence, including a documented study conducted by the Wildlife Resources Commission that a year-round stocked brown trout population had been established and was successfully spawning to some extent in the tailwater and that a population of wild rainbow trout was also present. This was confirmed by the Division of Water Quality ("DWQ") staff member who testified to the EMC that the tailwater met the definition of trout waters. On 21 June 2004, the EMC issued a letter denying the petition to reclassify the tailwater. The letter did not provide a reason for the denial, but noted that the DWQ had been directed to study the issue further and that the EMC would review the proposed reclassification at specified future times.

On 19 August 2004, petitioners filed a petition for judicial review pursuant to N.C. Gen. Stat. §§ 150B-20(d) and -43 (2007), requesting that the trial court reverse respondent's final agency decision and order respondent to commence rulemaking procedures regarding reclassification of the tailwater. Duke Energy Corporation ("Duke Energy") was allowed to intervene in the matter.

On 19 July 2005, the trial court entered an Order reversing the final agency decision and remanding the matter back to the EMC to

commence rulemaking procedures. The trial court concluded that the EMC had "neither authority nor discretion to refuse to protect [the trout use] through proper classification." Further, the trial court concluded that in denying the petition for rulemaking, the EMC "violated its own rules" and acted in a manner that was "arbitrary and capricious."

On 17 September 2005, petitioners filed a motion for attorney's fees incurred with respect to the judicial review proceedings. The trial court found and concluded, in pertinent part:

> 3. . . . The facts known to the EMC at the time of its decision were sufficient to establish the trout population and the EMC could not have "reasonably believed" otherwise. Therefore, the EMC cannot be substantially justified in its position, which relies upon the EMC's misinterpretation of the law. The EMC could not have "reasonably believed" it could deny the petition for rulemaking and thus was substantially unjustified in its action.
>
> 4. [There are no] special circumstances that make such an award unjust.

On appeal, the sole issue before us is whether the trial court erred in awarding attorney's fees. Pursuant to N.C. Gen. Stat. § 6-19.1, the trial court may, in its discretion, award attorney's fees to a prevailing party contesting state action pursuant to N.C. Gen. Stat. § 150B-43 where the trial judge concludes that certain criteria are present. N.C. Gen. Stat. § 6-19.1. The trial court must conclude that: (1) the prevailing party is not the state; (2) the prevailing party petitions for attorney's fees within thirty days following final disposition of the case; (3) "the agency acted without substantial justification in pressing its claim against the party"; and (4) "there are no special circumstances that would make the award of attorney's fees unjust." *Id.* A trial court's determination that the state acted without "substantial justification" is a conclusion of law and is reviewable by this Court on appeal. *Whiteco Industries, Inc. v. Harrelson*, 111 N.C. App. 815, 819, 434 S.E.2d 229, 232-33 (1993), *disc. review denied*, *appeal dismissed*, 335 N.C. 566, 441 S.E.2d 135 (1994).

Respondent contends that the trial court erred by concluding (1) that respondent lacked substantial justification for its position, and (2) that there were no special circumstances that would make an award of attorney's fees unjust. We disagree.

In the case *sub judice*, the EMC, the party against whom counsel fees were sought, has the burden of proving substantial justification for its actions in denying the petition for rulemaking to reclassify the tailwaters as trout water, *Tay v. Flaherty*, 100 N.C. App. 51, 55, 394 S.E.2d 217, 219, *disc. review denied*, 327 N.C. 643, 399 S.E.2d 132 (1990), and further of showing the presence of circumstances which would make an award of counsel fees unjust. *Crowell Constructors, Inc. v. State ex rel. Cobey*, 114 N.C. App. 75, 80-81, 440 S.E.2d 848, 851 (1994) (*Crowell I*), *reversed on other grounds*, 342 N.C. 838, 467 S.E.2d 675 (1996) (*Crowell II*).

I. Substantial Justification

First, we address respondent's contention that the trial court erred in concluding that respondent acted without substantial justification in denying the petition for rulemaking to reclassify the tailwater.

To demonstrate that it acted with substantial justification, within the meaning of N.C. Gen. Stat. § 6-19.1, an agency must show "that its position, at and from the time of its initial action, was rational and legitimate to such degree that a reasonable person *could* find it satisfactory or justifiable in light of the circumstances then known to the agency." *Crowell II*, 342 N.C. at 844, 467 S.E.2d at 679.[1]

Respondent contends that its decision to deny the petition for reclassification of the tailwater was reasonable because at the time of the decision, the agency did not have sufficient data demonstrating that the river was naturally supporting a sustainable trout population nor did they have sufficient data demonstrating that the tailwater satisfied the minimum standards required for classification as trout waters; however, this argument is based upon an unreasonable interpretation of the law, and is, therefore, not a substantial justification for the EMC's decision.

It is true that the EMC has discretionary authority to deny a petition for reclassification and request that further studies be conducted to obtain data and information required for determining the proper classification of the waters at issue, *see* 15A N.C.A.C. 2B.0101(b) (2007); however, N.C. Gen. Stat. § 143-214.1(b) (2007) provides that in

1. As a preliminary matter, we note that the EMC contends that the trial court applied an outcome determinative test instead of properly evaluating the facts known to or reasonably believed by the EMC at the time of its decision, as required by *Crowell II*. Given the trial court's express recitation of the proper test and reference to *Crowell II*, we find this argument to be without merit.

classifying a water body "each classification and the standards applicable thereto should be adopted with ***primary reference to the best usage*** to be made of the waters to which such classification will be assigned." *Id.* (emphasis added). "Best usage" is defined to include "[a]quatic life propagation and maintenance of biological integrity (including fishing, and fish)[.]" 15A N.C.A.C. 2B.0211(1) (2007).

Moreover, North Carolina's Antidegradation policy, as codified in 15A N.C.A.C. 2B.0201 (2007), provides that "existing [water] uses **shall be protected** by classifying surface waters and having standards sufficient to protect these uses." An existing use "mean[s] uses actually attained in the water body . . . **whether or not they are included in the water quality standards[.]"** 15A N.C.A.C. 2B.0202(30) (2007) (emphasis added). The EMC has defined the classification of "trout waters" to include waters that have "conditions which shall sustain and allow for trout propagation and **survival of stocked trout** on a year-round basis." 15A N.C.A.C. 2B.0202(65). Federal Regulations also mandate that "[w]here existing water quality standards specify designated uses less than those which are presently being attained, the State **shall** revise its standards to reflect the uses actually being attained." 40 C.F.R. § 131.10(i) (2007).

Given the express goal of classifying water in a manner to protect the propagation of aquatic life and the clear mandate to protect existing uses irrespective of current water quality standards, the EMC's conclusion that it had to first determine whether the tailwater satisfied higher water quality standards before reclassifying the water was based on an unreasonable interpretation of the law. Further, the Commission's decision to conduct further studies to determine if the trout were naturally self-sustaining was not based on a reasonable interpretation of the law, as the definition of trout water simply requires the survival of stocked trout on a year-round basis and does not require that such trout be naturally propagating. The petitioners presented undisputed evidence, including a documented study conducted by the Wildlife Resources Commission that the stocked brown trout population had been established in the tailwater and was successfully spawning naturally to some extent and that a population of wild rainbow trout was also present in the tailwater. This was confirmed by the Division of Water Quality staff who testified to the EMC that the waters in question met the definition of trout waters. Accordingly, the trial court properly determined that the EMC's decision was not substantially justified given the facts known at the time of such decision. This assignment of error is overruled.

II. Special circumstances

Finally, we turn to the EMC's contention that the trial court erred in concluding that no special circumstances exist that make an award of attorney's fees unjust. First, the EMC contends that the award of attorney's fees is unjust because the petitioners failed to identify an immediate need for reclassification of the tailwater. This argument does not demonstrate a special circumstance, but simply rests on a misinterpretation of the law; as previously discussed, the petitioners produced sufficient evidence to invoke the EMC's duty to reclassify the tailwater.

Next, the EMC argues that the award is unjust because petitioners "agreed that there was a lack of sufficient data at the time to support reclassification." After reviewing the record, we conclude that this is a misstatement of petitioners' position. Accordingly, we conclude that the trial court acted within its discretion in finding that no special circumstances exist that make the award of attorney's fees unjust. This assignment of error is overruled.

The order of the trial court awarding attorney's fees incurred with respect to the judicial review proceeding is affirmed.

Affirmed.

Judges ELMORE and ARROWOOD concur.

CATHY AZAR AS ADMINISTRATOR OF THE ESTATE OF MARY EDITH KEETON, PLAINTIFF v. THE PRESBYTERIAN HOSPITAL, PRESBYTERIAN HEALTHCARE D/B/A NOVANT HEALTH, INC., NOVANT HEALTH INC. D/B/A PRESBYTERIAN HEALTHCARE, JANE/JOHN DOE, RN, JANE/JOHN DOE, NA, JANE/JOHN DOE, DIETICIAN, ET AL., DEFENDANTS

No. COA08-40

(Filed 15 July 2008)

1. Appeal and Error— Rules violations—substantial—costs as sanction

The Court of Appeals imposed costs on plaintiff's attorney as a sanction where the number and nature of the Appellate Rules violations were considered gross or substantial.

2. Medical Malpractice— bedsores—proximate cause of death—evidence speculative

Plaintiff failed to forecast evidence demonstrating causation in a medical malpractice action involving the treatment of bedsores, and defendants were entitled to summary judgment where the decedent suffered from many ailments and testimony as to whether decedent's bedsores were the proximate cause of her death was speculative.

Appeal by plaintiff from an order entered 20 September 2007 by Judge Robert P. Johnston in Mecklenburg County Superior Court. Heard in the Court of Appeals 11 June 2008.

Perry, Perry & Perry, P.A., by Robert T. Perry, for plaintiff-appellant.

Wilson & Coffey, LLP, by J. Chad Bomar and Tamura D. Coffey, for defendants-appellees.

JACKSON, Judge.

Cathy Azar ("plaintiff"), as administrator of the Estate of Mary Edith Keeton ("decedent"), appeals the granting of summary judgment in favor of The Presbyterian Hospital, Presbyterian Healthcare d/b/a Novant Health, Inc., and Novant Health, Inc. d/b/a Presbyterian Healthcare ("defendants"). For the reasons stated below, we affirm.

On or about 9 February 2004, decedent was admitted to defendant hospital. Decedent underwent kidney stent, dialysis, and dialysis access procedures while in defendant hospital's care. On or about 17 March 2004, decedent was discharged. Decedent returned to defendant hospital and was readmitted on or about 24 March 2004. Decedent died on 14 April 2004 while a patient at defendant hospital.

Plaintiff filed a medical negligence action against defendants and various known and unknown hospital staff on 28 July 2006. On 30 March 2007, defendants deposed plaintiff's expert nurse, Patricia Hahn Crow, R.N. ("Crow"). Defendants deposed Victor Gura, M.D. ("Dr. Gura"), plaintiff's expert physician, on 16 May 2007. On 30 August 2007, plaintiff deposed defendants' expert nurse, Anita Faye H. Freeze, R.N.

On 29 August 2007, defendants served a motion to strike and disqualify plaintiff's experts and for summary judgment. The motion, as

well as a brief and supporting affidavits, was filed 30 August 2007. The motion was heard on 11 September 2007 and granted by order filed 20 September 2007. Plaintiff appeals.

By two assignments of error, plaintiff argues that genuine issues of material fact exist and that defendants are not entitled to judgment as a matter of law such that the grant of summary judgment was in error. We disagree.

[1] As a preliminary matter, we note that plaintiff has violated our Rules of Appellate Procedure. "Compliance with the rules . . . is mandatory." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 194, 657 S.E.2d 361, 362 (2008) (citations omitted). These violations include: (1) the record on appeal does not contain a copy of the summons or other statement of personal jurisdiction, in violation of Rule 9(a)(1)(c); (2) no transcript of the summary judgment hearing was submitted with the record on appeal, although there is a statement in the record that one was submitted contemporaneously with the record, in violation of Rules 9(a)(1)(e) and 9(c)(3)(b); (3) some of the documents in the record on appeal do not indicate the date on which they were filed, only the date on which they were served, in violation of Rule 9(b)(3); (4) the assignments of error direct our attention to an affidavit located at record page 59; however, they discuss the order of summary judgment, which is located at record page 86, in violation of Rule 10(c)(1); (5) the standard of review is stated in pieces in appellant's brief—partly in the procedural history section and partly in the argument section—with the appropriate standard for *this* Court stated in the procedural history, in violation of Rules 28(b)(3) and 28(b)(6); (6) not all factual statements in appellant's brief are supported by references to the record, in violation of Rule 28(b)(5); and (7) the statement of facts in appellant's brief is argumentative, also in violation of Rule 28(b)(5).

The violations noted are non-jurisdictional in nature. Therefore, pursuant to the dictates of *Dogwood*, we first must determine "whether [the] noncompliance with the appellate rules rises to the level of a substantial failure or gross violation[.]" *Dogwood*, 362 N.C. at 200, 657 S.E.2d at 366. If not, we are to address the merits of the appeal to the extent possible. *Id.* at 199, 657 S.E.2d at 366. If so, we may sanction the responsible party pursuant to Rules 25 and 34. *Id.* Due to the number and nature of rules violations, we consider them 'gross' or 'substantial' and elect to tax costs to plaintiff's attorney. We direct the clerk of this court to enter an order accordingly.

[2] 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) (2007). This Court reviews an order allowing summary judgment *de novo*. *McCutchen v. McCutchen*, 360 N.C. 280, 285, 624 S.E.2d 620, 625 (2006) (citing *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004)).

In deciding a motion for summary judgment, a trial court must consider the evidence in the light most favorable to the non-moving party. *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) (citing *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000)). 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 the non-moving party cannot surmount an affirmative defense which would bar the claim. *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989) (citations omitted). Once the moving party has met its burden, the non-moving party must forecast evidence that demonstrates the existence of a *prima facie* case. *Id.* (citation omitted).

We note that plaintiff's assignments of error question the trial court's failure to make adequate findings of fact. However, "ordinarily, findings of fact and conclusions of law are not required in the determination of a motion for summary judgment, and if these are made, they are disregarded on appeal." *Sunamerica Financial Corp. v. Bonham*, 328 N.C. 254, 261, 400 S.E.2d 435, 440 (1991) (citing *e.g.*, *Mosley v. Finance Co.*, 36 N.C. App. 109, 111, 243 S.E.2d 145, 147, *disc. rev. denied*, 295 N.C. 467, 246 S.E.2d 9 (1978)).

Plaintiff's argument focuses on whether genuine issues of material fact exist as to the appropriate standard of care to which defendants were to be held. Specifically, she contends that decedent's bedsores were not treated properly. However, "[i]f 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).

In order to survive the motion for summary judgment, plaintiff was required to forecast evidence demonstrating the existence of a *prima facie* case for medical negligence, one element of which is causation. Dr. Gura testified in his deposition that decedent suffered multiple conditions during her stay at defendant hospital, among them: (1) atrial fibrillation, (2) decreased circulation in her legs, (3) pneumonia, (4) infections, (5) coronary artery disease, (6) problems with vascular access to dialysis, (7) valvular disease, (8) microregurgitation, (9) obesity, (10) diabetes, (11) hypertension, and possibly (12) congestive heart failure.

In a medical negligence case, "[t]he connection or causation between the negligence and death must be probable, not merely a remote possibility." *White v. Hunsinger*, 88 N.C. App. 382, 387, 363 S.E.2d 203, 206 (1988) (citing *Bridges v. Shelby Women's Clinic, P.A.*, 72 N.C. App. 15, 21, 323 S.E.2d 372, 376 (1984), *disc. rev. denied*, 313 N.C. 596, 330 S.E.2d 605 (1985)). Our courts rely on medical experts to show medical causation because "the exact nature and probable genesis of a particular type of injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen[.]" *Click v. Freight Carriers*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980) (citations omitted). When this testimony is based merely upon speculation and conjecture, however, it is no different than a layman's opinion, and as such, is not sufficiently reliable to be considered competent evidence on issues of medical causation. *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 915 (2000).

Here, Dr. Gura's testimony was mere speculation as to whether decedent's bedsores were the proximate cause of her death. Decedent suffered from many ailments, any number of which could have been the cause of her death. According to Dr. Gura, decedent's bedsores were "at least one cause of infection." He further testified that decedent passed away "as a result of all of [her] complications." Dr. Gura stated an opinion that "her cardiac condition definitely may have contributed to her death." He testified that he could not say whether one or more of decedent's multiple complications was the ultimate cause of her death. He further stated that although decedent's bedsores were one of the significant causes of infection that caused her demise, there may have been others, and probably were.

Plaintiff had another expert witness; however, Crow stated in her deposition that she was not going to offer an expert opinion with respect to the cause of decedent's death. She stated that she was not qualified to provide an opinion on cause of death.

Because plaintiff failed to forecast evidence demonstrating causation, defendants were entitled to judgment as a matter of law. Therefore the trial court did not err in granting summary judgment in defendants' favor.

Affirmed.

Judges HUNTER and TYSON concur.

IN THE MATTER OF: A.T.

No. COA08-223

(Filed 15 July 2008)

Child Abuse and Neglect— nonsecure custody order—appeal—jurisdiction

An appeal was dismissed where it involved a DSS motion for review of a nonsecure custody order for a child and the foster care board rate, and appellant argued that even though nonsecure custody orders are expressly excluded from the statutory list of appealable juvenile orders, it had the right to appeal under an exception for an order finding an absence of jurisdiction. The trial court had jurisdiction over the proceedings and the order at issue in this case, and the issue raised by appellant is not jurisdictional in nature. The court's order addressing the merits of DSS's motion for review is not transformed into an order finding the absence of jurisdiction merely because the trial court questioned whether it had the authority to order foster care board rates in a nonsecure custody order that was entered months earlier.

Appeal by Petitioner from order entered 4 January 2008 by Judge Lisa V. Menefee in Forsyth County District Court. Heard in the Court of Appeals 11 June 2008.

Theresa A. Boucher, Assistant Forsyth County Attorney, for Petitioner-Appellant Forsyth County Department of Social Services.

Womble Carlyle Sandridge & Rice, by Andrew L. Fitzgerald, for Guardian ad Litem-appellee.

ARROWOOD, Judge.

Petitioner-appellant Forsyth County Department of Social Services (DSS) appeals from an order denying its motion for review of a nonsecure custody order. We dismiss the appeal.

The pertinent history of this case is summarized as follows: In March 2006 DSS substantiated a report of neglect of a female child, A.T.[1] On 3 July 2007, more than a year later, DSS filed a petition alleging that A.T. was neglected. In an attachment to the petition, DSS informed the trial court that since 2 March 2006 A.T. had "been in a Kinship placement" with her mother's ex-husband and the ex-husband's wife, "K.C. and B.F."[2] The court conducted a nonsecure custody hearing on 9 July 2007, and entered a written order on 18 September 2007. The court ordered, *inter alia*, that A.T.'s custody "shall remain with [DSS]" and that "foster care board rate shall be paid to [K.C. and B.F.] effective March 2, 2006." A.T. was adjudicated neglected on 10 August 2007, and a written order was entered 25 September 2007. The trial court ordered that K.C. and B.F. continue to "receive foster care Board Rate" from DSS. Following a review hearing 5 October 2007, the court ordered A.T.'s custody to remain with DSS.

The record shows that DSS did not object to the court's 9 July 2006 order that it pay foster care board to K.C. and B.F., and that it made no attempt to appeal either the nonsecure custody order, the adjudication order, or the review order. However, on 22 October 2007 DSS filed a "Motion for Review" seeking review of "the foster care board rate provisions" of the Court's nonsecure custody order. DSS asserted in its motion that it was "not appropriate" that the trial court had ordered DSS to pay foster care board rate retroactive to 2 March 2006, because A.T. "has only been in the custody and placement responsibility of [DSS] since July 3, 2007." The trial court conducted

1. To preserve the privacy of the minor child, we refer to her in this opinion by the initials "A.T."

2. To preserve the privacy of the individuals involved, we refer to A.T.'s guardians by the initials K.C. and B.F.

a hearing on DSS's motion on 2 November 2007. On 4 January 2008 the trial court entered an order denying DSS's motion, from which DSS has appealed.

The dispositive issue is whether Appellant's appeal is properly before the Court. We conclude that it is not, and that Appellant has no right of direct appeal from either the nonsecure custody order or from the trial court's ruling on DSS's motion for review of the nonsecure custody order.

Appeal in juvenile cases is governed by N.C. Gen. Stat. § 7B-1001 (2007), which provides in pertinent part that:

> (a) In a juvenile matter . . . appeal of a final order of the court . . . shall be made directly to the Court of Appeals. <u>Only the following juvenile matters may be appealed</u>:
>
> (1) Any order finding absence of jurisdiction.
>
> (2) Any order . . . which in effect determines the action and prevents a judgment from which appeal might be taken.
>
> (3) Any initial order of disposition and the adjudication order upon which it is based.
>
> (4) Any order, <u>other than a nonsecure custody order</u>, that changes legal custody of a juvenile.
>
> (5) An order entered under [§] 7B-507(c) . . .
>
> (6) Any order that terminates parental rights or denies a [termination] petition[.]

(emphasis added).

In the instant case, DSS appeals from a motion for review of the board payments ordered in a nonsecure custody order. Nonsecure custody orders are expressly excluded from the statutory list of appealable juvenile orders, and the motion for review is not a "final order" as defined in N.C. Gen. Stat. § 7B-1001. Accordingly, Appellant has no right of appeal from the trial court's ruling on its motion. Appellant, however, argues that it has a right to appeal under N.C. Gen. Stat. § 7B-1001(a)(1), which permits appeal from "[a]ny order finding absence of jurisdiction." We disagree.

First, the term "jurisdiction," used in reference to the trial court's order for foster care board payments, is a misnomer. " 'Subject mat-

ter jurisdiction involves the authority of a court to adjudicate the type of controversy presented by the action before it[,'] . . .'[and] is conferred upon the courts by either the North Carolina Constitution or by statute.' " *In re McKinney*, 158 N.C. App. 441, 443, 581 S.E.2d 793, 795 (2003) (quoting *Haker-Volkening v. Haker*, 143 N.C. App. 688, 693, 547 S.E.2d 127, 130 (2001) and *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987)). "Jurisdiction is the power of a court to decide a case on its merits; it is the power of a court to inquire into the facts, to apply the law, and to enter and enforce judgment. Jurisdiction presupposes the existence of a duly constituted court with control over a subject matter which comes within the classification limits designated by the constitutional authority or law under which the court is established and functions." *Jones v. Brinson*, 238 N.C. 506, 509, 78 S.E.2d 334, 337 (1953) (citations omitted).

Under N.C. Gen. Stat. § 7B-200 (a) (2007) the trial court "has exclusive, original jurisdiction over any case involving a juvenile who is alleged to be abused, neglected, or dependent." Nonsecure custody hearings are governed by N.C. Gen. Stat. § 7B-506 (2007), which directs the trial court to conduct hearings on the need for continued nonsecure custody in certain circumstances. Under Section 7B-506(d), if the trial court determines that the juvenile meets the criteria for nonsecure custody, "the court shall issue an order to that effect . . . in writing . . . signed and entered within 30 days of the completion of the hearing." Clearly, the trial court had jurisdiction over the nonsecure custody hearing and entry of a nonsecure custody order. Under N.C. Gen. Stat. § 7B-1000(b) (2007), if the trial court "finds the juvenile to be abused, neglected, or dependent, the jurisdiction of the court to modify any order or disposition made in the case shall continue during the minority of the juvenile[.]" Accordingly, the trial court had jurisdiction to conduct a hearing and to rule on Appellant's motion for review. We conclude that the trial court had jurisdiction over the proceedings and orders at issue in this case.

We further conclude that the issue raised by Appellant is not jurisdictional in nature. Appellant argues that the trial court erred by including in its nonsecure custody order a provision requiring DSS to pay foster care board retroactively to a date before the hearing. Assuming, *arguendo*, that the trial court erred in the scope of its order for board payments to K.C. and B.F., this does not necessarily deprive the court of jurisdiction. *See*, *e.g.*, *In re A.R.G.*, 361 N.C. 392, 398, 646 S.E.2d 349, 353 (2007) ("absence of the juvenile's address on the petition did not prevent the trial court from exercising subject

matter jurisdiction over this juvenile action"); *In re C.L.C.*, 171 N.C. App. 438, 443, 615 S.E.2d 704, 707 (2005), *aff'd per curiam*, 360 N.C. 475, 628 S.E.2d 760 (2006) ("time limitations in the Juvenile Code are not jurisdictional"); *Parslow v. Parslow*, 47 N.C. App. 84, 89-90, 266 S.E.2d 746, 750 (1980) (case tried in district court; Court holds that, although "appropriate procedure" would have been to try case in superior court, "the defect is not jurisdictional") (citations omitted). In the instant case, Appellant fails to articulate why an error in the award of foster care board fees would deprive the trial court of jurisdiction over the case.

Appellant also asserts a right to appeal based on the trial court's findings of fact numbers seven (7) and nine (9):

> 7. The Court recognizes now that the Juvenile Court had no jurisdiction regarding the care, custody or provision of services for [A.T.] prior to July 3, 2007.
>
> 9. Although the Court had no jurisdiction, the Court continues the July 9, 2007 Court Order as previously entered.

Appellant contends that the presence of these findings compels a conclusion that this is an order "finding absence of jurisdiction" and therefore subject to appeal. We disagree.

The trial court did not rule that it lacked jurisdiction to decide DSS's motion for review. Instead, the court addressed the merits of DSS's motion for review and issued an order denying the requested relief. Consequently, the order is not one "finding absence of jurisdiction." Further, it is not transformed into such an order merely because the trial court questioned whether it had the authority (characterized in the order as its "jurisdiction") to order foster care board rates in a nonsecure custody order that the court entered months earlier. We conclude that the court's ruling on Appellant's motion is not subject to immediate review as an order "finding absence of jurisdiction" in the meaning of N.C. Gen. Stat. § 7B-1001(1).

For the reasons discussed above, we conclude that the Appellant's appeal must be

Dismissed.

Chief Judge MARTIN and Judge ELMORE concur.

BRETA GILLIS, PLAINTIFF v. MONTGOMERY COUNTY SHERIFF'S DEPARTMENT, AND FIDELITY & DEPOSIT COMPANY OF MARYLAND, DEFENDANTS

No. COA07-1503

(Filed 15 July 2008)

1. Appeal and Error— appellate rules violations—failure to include subject index

Although plaintiff's brief violated the Rules of Appellate Procedure since it did not contain a subject index as required by N.C. R. App. P. 28(b)(1), the Court of Appeals did not believe this minor violation warranted sanctions under Rules 25 and 34.

2. Public Officers and Employees— 911 dispatcher—wrongful termination—insufficient allegation of violation of public policy

A former 911 dispatcher in defendant county sheriff's department failed to state a claim against defendant for wrongful termination in violation of public policy where she alleged that she was wrongfully terminated "for reasons that are against the public policy of North Carolina," but she failed to allege a violation of any explicit statutory or constitutional provision or that defendant encouraged plaintiff to violate any law that might result in potential harm to the public.

Appeal by plaintiff from an order entered 10 September 2007 by Judge John O. Craig, III in Montgomery County Superior Court. Heard in the Court of Appeals 14 May 2008.

B. Ervin Brown, II, for plaintiff-appellant.

Nexsen Pruet, PLLC, by Peter G. Pappas, for defendants-appellees.

JACKSON, Judge.

Breta Gillis ("plaintiff") appeals the dismissal of her action against the Montgomery County Sheriff's Department and its surety, Fidelity & Deposit Company of Maryland ("defendants"). For the reasons stated below, we affirm.

Plaintiff was employed with the sheriff's department from 1997 or 1998 until her termination on 22 March 2005. At the time of her termination, plaintiff was a 911 dispatcher in the Telecommunications

Center ("the Center") which was managed by the sheriff's department. Plaintiff was a close friend of a member of the Board of Commissioners. Prior to her termination, the county commission began considering transferring the Center from supervision by the sheriff's department to supervision by the county.

Plaintiff filed her original complaint on 16 April 2007, alleging that two members of the sheriff's department had threatened to terminate her employment if supervision of the Center was transferred. She alleged facts suggesting that her termination was based upon (1) her failure to prevent the transfer of supervision of the Center, and (2) the fact that she had informed co-workers that sheriff's department personnel had used inmate labor for their personal benefit. She further alleged that she was wrongfully terminated "for reasons that are against the public policy of North Carolina." On 20 June 2007, plaintiff filed an amended complaint adding claims for breach of contract and intentional infliction of emotional distress.

Defendants filed a motion to dismiss plaintiff's complaint on 17 July 2007. A hearing on defendants' motion was calendared for 20 August 2007; however, it was not reached on that date and was deferred to 4 September 2007. On 29 August 2007, plaintiff filed a motion to amend her complaint for a second time. In an order filed 10 September 2007, plaintiff's motion to amend her complaint was denied. Plaintiff also presented a proposed, unfiled, motion to amend her complaint at the 4 September 2007 hearing. The trial court did not consider this motion. The trial court granted defendants' motion to dismiss by order filed 10 September 2007. Plaintiff filed timely notice of appeal.

[1] As a preliminary matter, we note that plaintiff's brief violates our Rules of Appellate Procedure. Specifically, it contains no subject index as required by North Carolina Rules of Appellate Procedure 28(b)(1). Although the North Carolina Rules of Appellate Procedure are mandatory, *State v. Hart*, 361 N.C. 309, 311, 644 S.E.2d 201, 202 (2007) (citations omitted), we do not believe this minor violation warrants sanctions pursuant to Rules 25 and 34. *See Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 199, 657 S.E.2d 361, 366 (2008) ("Based on the language of Rules 25 and 34, the appellate court may not consider sanctions of any sort when a party's noncompliance with nonjurisdictional requirements of the rules does not rise to the level of a 'substantial failure' or 'gross violation.' In such instances, the appellate court should simply perform its core function of reviewing the merits of the appeal to the extent pos-

sible."). Nonetheless, we caution counsel to include the index in future filings with this Court.

[2] Plaintiff first argues, in essence, that it was error to dismiss her wrongful termination claim because her complaint alleged facts that would support a claim that her termination violated her constitutional right to free speech. We disagree.

Plaintiff asserts that "the incorrect choice of the legal theory upon which the claim is bottomed should not result in dismissal if the allegations are sufficient to state a claim under some legal theory." *Jones v. City of Greensboro*, 51 N.C. App. 571, 593, 277 S.E.2d 562, 576 (1981), *overruled on other grounds by Fowler v. Valencourt*, 334 N.C. 345, 350-51, 435 S.E.2d 530, 533 (1993), (citing *Stanback v. Stanback*, 297 N.C. 181, 254 S.E.2d 611 (1979)). However, plaintiff's reliance upon the relatively liberal standard of notice pleading is misplaced.

Under certain circumstances, notice pleading is not sufficient to withstand a motion to dismiss; instead a claim must be pled with specificity. *See e.g.*, *Harrold v. Dowd*, 149 N.C. App. 777, 782, 561 S.E.2d 914, 918 (2002) ("Allegations of fraud are subject to more exacting pleading requirements than are generally demanded by 'our liberal rules of notice pleading.' " (quoting *Stanford v. Owens*, 76 N.C. App. 284, 289, 332 S.E.2d 730, 733, *disc. rev. denied*, 314 N.C. 670, 336 S.E.2d 402 (1985))) One such circumstance is when an at-will employee brings a wrongful termination claim upon the theory of a violation of public policy. *Considine v. Compass Grp. USA*, *Inc.*, 145 N.C. App. 314, 551 S.E.2d 179, *aff'd*, 354 N.C. 568, 557 S.E.2d 528 (2001) (per curiam).

> North Carolina courts have consistently held that in the absence of some form of contractual agreement between an employer and employee creating a definite period of employment, "the employment is presumed to be an 'at-will' employment, terminable at the will of either party, irrespective of the quality of the performance by the other party."

Guarascio v. New Hanover Health Network, *Inc.*, 163 N.C. App. 160, 164, 592 S.E.2d 612, 614 (2004) (quoting *Harris v. Duke Power Co.*, 319 N.C. 627, 629, 356 S.E.2d 357, 359 (1987)). When an employee has no definite term of employment, he is an employee at will and may be discharged without reason. *Coman v. Thomas Manufacturing Co.*, 325 N.C. 172, 175, 381 S.E.2d 445, 446 (1989) (citing *Still v. Lance*, 279

N.C. 254, 182 S.E.2d 403 (1971)). "The discharge of an employee at will generally does not support an action for wrongful discharge in this state." *Considine*, 145 N.C. App. at 317, 551 S.E.2d at 181.

Further, pursuant to North Carolina General Statutes, section 153A-103, "[e]ach sheriff . . . has the *exclusive* right to hire, *discharge*, and supervise the employees in his office." N.C. Gen. Stat. § 153A-103(1) (2005) (emphasis added). In *Peele v. Provident Mut. Life Ins. Co.*, 90 N.C. App. 447, 368 S.E.2d 892, *disc. rev. denied*, *appeal dismissed*, 323 N.C. 366, 373 S.E.2d 547 (1988), this Court held a sheriff's office dispatcher was not wrongfully terminated in part because the "plaintiff's status as an *employee at will* . . . justified her discharge with or without cause." *Id.* at 451, 368 S.E.2d at 895 (emphasis added). As in *Peele*, plaintiff was an employee at will who could be terminated with or without cause.

However, North Carolina recognizes three exceptions to the at-will employment doctrine. The first exception occurs when an employee is employed pursuant to a contract for a definite term. *See Kurtzman v. Applied Analytical Industries, Inc.*, 347 N.C. 329, 331, 493 S.E.2d 420, 422 (1997) ("[P]arties can remove the at-will presumption by specifying a definite period of employment contractually."). The second exception arises when the termination is in violation of state or federal anti-discrimination statutes. *See id.* ("[F]ederal and state statutes have created exceptions prohibiting employers from discharging employees based on impermissible considerations such as the employee's age, race, sex, religion, national origin, or disability, or in retaliation for filing certain claims against the employer."). Finally, the third exception applies when the employee was terminated for reasons that would violate the public policy of this State. *See Considine*, 145 N.C. App. at 317, 551 S.E.2d at 181 ("[One] exception[] to th[e] general rule [that the discharge of an employee at will generally does not support an action for wrongful discharge] includ[es] a prohibition against termination for a purpose in contravention of public policy."). Neither of the first two exceptions applies in the case *sub judice*.

In *Considine*, this Court addressed the public policy exception. The plaintiff in that case "failed to identify any specified North Carolina public policy that was violated[.]" *Id.* at 321, 551 S.E.2d at 184. The complaint failed to allege a violation of any "explicit statutory or constitutional provision" or that "defendant encouraged plaintiff to violate any law that might result in potential harm to the public." *Id.* The Court concluded that "[i]n light of the case law that cites

specific conduct by a defendant that violated a *specific* expression of North Carolina public policy, we hold that plaintiff's complaint does not state a claim for wrongful discharge." *Id.* at 321-22, 551 S.E.2d at 184 (emphasis added).

The complaint in the instant case similarly fails to allege a violation of any "explicit statutory or constitutional provision" or that "defendant encouraged plaintiff to violate any law that might result in potential harm to the public." Plaintiff's complaint alleged merely that she was wrongfully terminated "for reasons that are against the public policy of North Carolina." Defendants were not placed on notice of what public policy their termination of plaintiff violated. Therefore, plaintiff's complaint failed to state a claim for wrongful termination.

Because plaintiff's complaint failed to state a claim upon which relief could be granted, the trial court did not err in dismissing it.

Affirmed.

Judges McGEE and ELMORE concur.

NANCY F. HARRELL, PLAINTIFF v. SAGEBRUSH OF NORTH CAROLINA, LLC D/B/A/ SAGEBRUSH STEAKHOUSE & SALOON, DEFENDANT

No. COA07-1264

(Filed 15 July 2008)

Civil Procedure— new trial erroneously granted—repetitive evidence disallowed

The trial court erred in a premises liability case by granting plaintiff a new trial under N.C.G.S. § 1A-1, Rule 59 based on the trial court's failure to allow the jury to view the videotaped deposition of a former employee of the pertinent restaurant because: (1) the exclusion of testimony cannot be held prejudicial when the same witness is thereafter allowed to testify to the same import, the evidence is thereafter admitted, or the party offering the evidence has the full benefit of the fact sought to be established thereby by other evidence; (2) whether to allow plaintiff to introduce this repetitive evidence was within the trial court's discretion; and (3) by having the former employee read aloud the verbatim transcript of her 4 November 2004 deposition, plaintiff

already had the full benefit of the prior inconsistent statements plaintiff sought to introduce through the videotaped deposition.

Appeal by defendant from judgment entered 31 May 2007 by Judge Milton F. Fitch, Jr., in Duplin County Superior Court. Heard in the Court of Appeals 20 March 2008.

Burrows & Hall, by Richard L. Burrows, for plaintiff appellee.

Thompson & Thompson, P.C., by E.C. Thompson, III, for plaintiff appellee.

Helms Mulliss & Wicker, PLLC, by Robert H. Tiller, for defendant appellant.

McCULLOUGH, Judge.

The sole issue before us on appeal is whether the trial court's grant of a new trial pursuant to Rule 59 was proper. We reverse.

On 10 April 2003, Nancy F. Harrell ("plaintiff") filed a complaint alleging that as a result of defendant's negligence, she sustained damages and injuries in excess of $330,000. The case was tried at the 4 December 2006 Civil Session of Duplin County Superior Court. The evidence presented at trial tended to show the following: On 10 November 2002, plaintiff and her family lawfully visited a Dunn restaurant owned and operated by Sagebrush of North Carolina, LLC d/b/a/ Sagebrush Steakhouse & Saloon ("defendant"). While plaintiff was leaving defendant's premises, plaintiff fell in the lobby area. Plaintiff fell upon her left side, which resulted in serious injuries to her head and hip.

Plaintiff and defendant presented conflicting evidence as to the cause of plaintiff's fall. Plaintiff's evidence tended to establish that plaintiff's fall was proximately caused by defendant's practice of having customers throw discarded peanut shells onto the floor where customers regularly walk. Plaintiff alleged in her complaint that as she was exiting the restaurant, she slipped on some peanut shells that were on the wooden floor. Johonna Harrell, plaintiff's granddaughter, testified that she observed peanut shells less than a foot away from where plaintiff fell. Ben Harrell, plaintiff's son, also testified that he saw peanut shells at or near plaintiff's feet while plaintiff lay on the floor.

On the other hand, defendant's witness, Linda Odom Lloyd ("Lloyd"), defendant's former employee, testified that plaintiff's fall

was not caused by peanut shells or debris on the floor of defendant's premises. Lloyd testified that she was sitting in the lobby area, approximately three or four feet away from where plaintiff fell. She stated that peanuts were not served in the lobby area, that she did not see any shells on the floor where plaintiff fell, and that plaintiff's fall appeared to be caused by "a roll of the ankle, a stumble, something of that nature."

During cross-examination, plaintiff used a written verbatim transcript of Lloyd's 4 November 2004 deposition to demonstrate that Lloyd's testimony at trial was inconsistent with prior statements that she made concerning plaintiff's fall:

> Q. Okay. Did you see—do you know whether or not [plaintiff] slipped on a peanut shell? Did you go over there and see?
>
> A. Did I go over and look for a peanut? No, sir, I did not go over and look for a peanut.
>
> Q. So you don't know if [plaintiff] slipped on one or not, do you?
>
> A. That's possible, sir.
>
> Q. Okay. Did you—at the time she fell, did you see her complete body?
>
> A. Yes.
>
> Q. Okay. If you would, go to line 25 on the bottom of page 22 . . . . Would you read to the jury what you testified to back in November of 2004?
>
> * * * *
>
> A. . . . "I mean, when I was looking at her, I can't honestly say I saw her full, complete body. You know, I don't know if she—one foot went sideways too much or—I know she was elderly, you know."
>
> * * * *
>
> Q. Ok. Now, I believe you testified that you saw her trip by putting one foot in front of the other.
>
> A. Yes.
>
> Q. Okay. Now, go down to line—page 24, line 4, and read what your testimony was back in November of 2004.
>
> * * * *

A. "You didn't see her trip by putting one foot in front of the other, did you?"

"No, I didn't."

In the rebuttal phase of the trial, plaintiff moved to introduce a video of Lloyd's 4 November 2004 deposition. The trial court denied that motion, noting that plaintiff had already highlighted the inconsistencies in Lloyd's deposition testimony during cross-examination. At the conclusion of the trial, the jury returned a verdict in favor of defendant.

On 13 December 2006, plaintiff moved for a new trial pursuant to N.C. Gen. Stat. § 1A-1, Rule 59 (2007). The basis for plaintiff's motion was that the trial court erred by not allowing the jury to view the videotaped deposition. By order filed 31 May 2007, the trial court granted plaintiff's motion, finding that "the Pre-Trial Order listed the video deposition of [Lloyd] as an exhibit for both the Defendant and Plaintiff" and that both parties stipulated that the exhibit could "be received into evidence without objection, further identification or proof[.]" The trial court concluded that Lloyd's deposition was admissible for the purpose of contradicting or impeaching the testimony of the deponent as a witness pursuant to Rule 32(1)(2) of the North Carolina Rules of Civil Procedure, and that plaintiff, therefore, was entitled to a new trial. N.C. Gen. Stat. § 1A-1, Rule 32 (2007).

Although both the Order and plaintiff's motion erronesously cite Rule 59(a)(1)(4), which is not a valid section of the North Carolina Rules of Civil Procedure, a movant's failure to state the particular rule number that is the basis for a motion is not a fatal error as long as the substantive grounds and relief desired are apparent and the non-movant is not prejudiced by the omission. *Garrison v. Garrison*, 87 N.C. App. 591, 596, 361 S.E.2d 921, 925 (1987). It is apparent from plaintiff's motion as well as from the Order that the trial court granted plaintiff a new trial based upon the legal inference that the exclusion of the videotape of Lloyd's deposition during the rebuttal stage was an error of law. Therefore, the substantive grounds for the trial court's Order are those provided by Rule 59(a)(8): "[e]rror in law occurring at the trial and objected to by the party making the motion[.]" N.C. Gen. Stat. § 1A-1, Rule 59(a)(8).

Where no question of law or legal inference is involved, a motion to set aside the verdict is addressed to the sound discretion of the trial court, and its ruling is not subject to review in the absence of an

abuse of discretion. *Pruitt v. Ray*, 230 N.C. 322, 52 S.E.2d 876 (1949); *Goodman v. Goodman*, 201 N.C. 808, 811, 161 S.E. 686, 687 (1931); *Glen Forest Corp. v. Bensch*, 9 N.C. App. 587, 589, 176 S.E.2d 851, 853 (1970). However, when a judge presiding at a trial grants or refuses to grant a new trial because of some question of law or legal inference which the judge decides, the decision may be appealed and the appellate court will review it. *McNeill v. McDougald*, 242 N.C. 255, 259, 87 S.E.2d 502, 504-05 (1955); *Akin v. Bank*, 227 N.C. 453, 455, 42 S.E.2d 518, 519 (1947). Accordingly, we review a trial court's grant of a new trial pursuant to Rule 59(a)(8) *de novo*. *Kinsey v. Spann*, 139 N.C. App. 370, 373, 533 S.E.2d 487, 490 (2000).

Although the Rules of Civil Procedure provide extensive rights of discovery to any party, the use of a deposition in a civil case at the trial stage is sharply limited. *Maness v. Bullins*, 11 N.C. App. 567, 568, 181 S.E.2d 750, 751, *cert. denied*, 279 N.C. 395, 183 S.E.2d 242 (1971); *Warren v. City of Asheville*, 74 N.C. App. 402, 409, 328 S.E.2d 859, 864, *cert. denied*, 314 N.C. 336, 333 S.E.2d 496 (1985). It is the duty of the judge to control and supervise the course and conduct of the trial. *Miller v. Greenwood*, 218 N.C. 146, 150, 10 S.E.2d 708, 711 (1971). " ' "It is always in a judge's discretion, as indeed it is his duty, to stop an examination when he can see that its further progress will be futile[,]" ' " or when a party seeks to introduce repetitive evidence. *Reeves v. Hill*, 272 N.C. 352, 363, 158 S.E.2d 529, 537 (1968) (citations omitted).

Likewise, our Supreme Court has stated that " '[t]he exclusion of testimony cannot be held prejudicial when the same witness is thereafter allowed to testify to the same import, or the evidence is thereafter admitted, or the party offering the evidence has the full benefit of the fact sought to be established thereby by other evidence.' " *State v. Edmondson*, 283 N.C. 533, 538-39, 196 S.E.2d 505, 508 (1973) (quoting *Strong*, N.C. Index 2d, Appeal and Error, § 49).

Here, whether or not to allow plaintiff to introduce the videotape of Lloyd's deposition, repetitive evidence, was within the trial judge's discretion. By having Lloyd read aloud the verbatim transcript of her 4 November 2004 deposition, plaintiff had the full benefit of the prior inconsistent statements that plaintiff sought to introduce by having the jury view the videotaped deposition. Therefore, the trial court's denial of plaintiff's request to play such video was not prejudicial and was within the trial court's discretion. *See also Lenins v. K-Mart Corp.*, 98 N.C. App. 590, 598, 391 S.E.2d 843, 846 (1990) (holding that

even once a portion of a deposition has been introduced into evidence, a party does not have a right to introduce the entire deposition; the trial court has discretionary authority to exclude portions of such deposition); *Williams v. CSX Transp., Inc.*, 176 N.C. App. 330, 339, 626 S.E.2d 716, 724 (reasoning that whether or not a party can play a videotaped cross-examination to the jury is a decision within the trial court's discretion).

Thus, the trial court's conclusion that its decision to exclude the videotape of Lloyd's deposition amounted to an error of law was erroneous. As such, the grant of a new trial pursuant to Rule 59(a)(8) was improper. *See also* N.C. Gen. Stat. § 1A-1, Rule 61 (2007) ("[n]o error in either the admission or exclusion of evidence . . . or defect in any ruling . . . is ground for granting a new trial . . . unless refusal to take such action amounts to the denial of a substantial right"). Accordingly, we reverse.

Reversed.

Judges STEELMAN and ARROWOOD concur.

PATRICIA HYATT, PLAINTIFF-APPELLANT v. TOWN OF LAKE LURE, STATE OF NORTH CAROLINA, AND THE NORTH CAROLINA DEPT. OF ADMINISTRATION, DEFENDANTS

No. COA07-728

(Filed 15 July 2008)

Appeal and Error— appealability—partial summary judgment—claims remaining against another defendant

Plaintiff's appeal from an 8 March 2007 partial summary judgment order is dismissed as an appeal from an interlocutory order because: (1) the judgment disposed of plaintiff's claims against the town, but left unresolved her claims against the State of North Carolina; (2) there was no Rule 54(b) certification in the record; and (3) plaintiff neither stated nor argued that her appeal affected a substantial right.

Appeal by plaintiff from summary judgment entered 8 March 2007 by Judge Ronald K. Payne in Rutherford County Superior Court. Heard in the Court of Appeals 12 December 2007.

Tomblin, Farmer & Morris, PLLC, by Joshua B. Farmer, for plaintiff-appellant.

Russell & King, PA, by Sandra M. King, and Callahan Law Office, PLLC, by J. Christopher Callahan, for defendant-appellee.

STEELMAN, Judge.

Appeal of an interlocutory order that fails to dispose of all claims against all parties is premature and must be dismissed.

Factual and Procedural Background

"The procedural quagmire that confronts us here is best unraveled by a chronological account of the proceedings in the trial court[s]." *Bailey v. Gooding*, 301 N.C. 205, 206, 270 S.E.2d 431, 432 (1980). On 24 April 2002 plaintiff filed an action in the United States District Court for the Western District of North Carolina against the Town of Lake Lure ("Town") and others. Her amended complaint asserted four causes of action: (1) a challenge to the validity of the Lake Structures Regulations as being invalid under Article 19 of Chapter 160A of the North Carolina General Statutes; (2) a claim that the Lake Structure Regulations violated plaintiff's constitutional rights, including substantive and procedural due process and equal protection; (3) a claim in the alternative that plaintiff was in compliance with the regulations and that the Town was estopped from enforcement; (4) a claim under 42 U.S.C. § 1983. The Town filed a counterclaim for trespass. On 18 December 2003, Judge Lacy H. Thornburg granted summary judgment in favor of defendants as to all of plaintiff's claims and dismissed the counterclaim, without prejudice. *Hyatt v. Town of Lake Lure*, 314 F. Supp. 2d 562 (W.D.N.C. 2003). In its opinion, the trial court noted that, although plaintiff's claims were under "state law in federal law clothing," it had elected not to abstain from deciding these claims "because it would severely prejudice the parties by forcing them to repeat in the state court action the litigation which has already occurred." *Id.* at 571. All of Judge Thornburg's rulings were affirmed by the United States Court of Appeals for the Fourth Circuit on 10 November 2004. *Hyatt v. Town of Lake Lure*, 114 Fed. Appx. 72 (4th Cir. 2004).

On 23 May 2005, plaintiff filed the instant action in the Superior Court of Rutherford County against the Town, the State of North Carolina, and the North Carolina Department of Administration.

Neither the State nor its agency were parties to the federal court action. This complaint asserted four causes of action: (1) a claim to quiet title among the parties, re-asserting plaintiff's position as to the location of the shoreline; (2) damages and attorney's fees for alleged inverse condemnation by the Town; (3) a challenge to the validity of a 12 April 2005 amendment to the Town's Lake Structure Regulations; and (4) a claim that Chapter 146 of the North Carolina General Statutes vests the regulation of Lake Lure in the North Carolina Department of Administration, rather than in the Town. Plaintiff named both the Town and the State of North Carolina in the first and last causes of action. Claims two and three involved only the Town. All defendants filed answers to the complaint.

On 2 February 2007, the Town filed motions to dismiss under Rule 12 of the North Carolina Rules of Civil Procedure based upon mootness, *res judicata*, collateral estoppel, statute of limitations, and N.C. Gen. Stat. § 1-45.1. These motions were heard by Judge Payne on 12 February 2007 in the presence of all parties. Prior to the entry of the trial court's order in favor of the Town, plaintiff voluntarily dismissed, without prejudice, her third cause of action. The trial court considered matters outside of the record in deciding the Town's motion, and pursuant to Rule 12(b) of the North Carolina Rules of Civil Procedure, treated the motion as being one for summary judgment under Rule 56 of the North Carolina Rules of Civil Procedure.

The order of the trial court was filed on 8 March 2007, granting summary judgment in favor of the Town only. The order is silent as to claims against the State of North Carolina, and the trial court did not certify its order pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure. Plaintiff appeals.

Appeal of Interlocutory Order

Appellant asserts that the 8 March 2007 summary judgment order is a final judgment and that appeal lies to this Court pursuant to N.C. Gen. Stat. § 7A-27(b). We disagree.

At common law, there was no appeal of right from a decision of the trial court. *Oestreicher v. Stores*, 290 N.C. 118, 123, 225 S.E.2d 797, 801 (1976). Until the enactment of Chapter 2 of the Laws of North Carolina, the only manner in which a trial court decision could be reviewed was by writ. *Id.* An appellant must strictly comply with the statutory provisions setting forth an avenue of appeal. *See*, *e.g.*, *Harris v. Matthews*, 361 N.C. 265, 269, 643 S.E.2d 566, 568-69 (2007) (setting forth the statutory requirements under N.C. Gen. Stat.

§§ 1-277, 7A-27 and Rule 54 of the Rules of Civil Procedure for appeal of an interlocutory order); *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994). A party has no right to appeal a decision of the trial court simply because it chooses to or feels it is tactically advantageous to do so.

> A grant of partial summary judgment, because it does not completely dispose of the case, is an interlocutory order from which there is ordinarily no right of appeal. The reason for this rule is to prevent fragmentary, premature and unnecessary appeals by permitting the trial court to bring the case to final judgment before it is presented to the appellate courts.
>
> Nonetheless, in two instances a party is permitted to appeal interlocutory orders. First, a party is permitted to appeal from an interlocutory order when the trial court enters a final judgment as to one or more but fewer than all of the claims or parties and the trial court certifies in the judgment that there is no just reason to delay the appeal. Second, a party is permitted to appeal from an interlocutory order when the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits. Under either of these two circumstances, it is the appellant's burden to present appropriate grounds for this Court's acceptance of an interlocutory appeal and our Court's responsibility to review those grounds.

Jeffreys, 115 N.C. App. at 379, 444 S.E.2d at 253 (internal quotations and citations omitted) (emphasis in original).

A review of the record makes clear that the order appealed from is interlocutory. The judgment disposes of plaintiff's claims against the Town, while leaving unresolved her claims against the State of North Carolina. Plaintiff did not take a voluntary dismissal of her claims against the remaining defendants. There is no Rule 54(b) certification in the record, and plaintiff neither states nor argues that her appeal affects a substantial right. *Jeffreys*, 115 N.C. App. at 379-80, 444 S.E.2d at 253-54. It is not the role of this Court to create an avenue of appeal not properly asserted in plaintiff's brief. *Id.* at 380, 444 S.E.2d at 254 ("It is not the duty of this Court to construct arguments for or find support for appellant's right to appeal from an interlocutory order; instead, the appellant has the burden of showing this Court that the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits.") (citation omitted).

As noted by the Supreme Court in *Veazey v. Durham*, 231 N.C. 357, 57 S.E.2d 377 (1950), interlocutory appeals fragment and impede the judicial process.

> There is no more effective way to procrastinate the administration of justice than that of bringing cases to an appellate court piecemeal through the medium of successive appeals from intermediate orders. The rules regulating appeals from the Superior Court to the Supreme Court are designed to forestall the useless delay inseparable from unlimited fragmentary appeals, and to enable courts to perform their real function, *i.e.*, to administer "right and justice . . . without sale, denial, or delay." N.C. Const., Art. I, Sec. 35.

Id. at 363-64, 57 S.E.2d at 382. We hold that the trial court's granting of summary judgment was not a final order and appellant has not established any right of appeal of the 8 March 2007 order.

"[I]f an appealing party has no right of appeal, an appellate court on its own motion should dismiss the appeal even though the question of appealability has not been raised by the parties themselves." *Bailey v. Gooding*, 301 N.C. at 208, 270 S.E.2d at 433 (citations omitted). Plaintiff's appeal is premature and this matter is

DISMISSED.

Judges McCULLOUGH and GEER concur.

KEVIN L. HINES, PLAINTIFF v. WAL-MART STORES EAST, L.P., DEFENDANT

No. COA07-1160

(Filed 15 July 2008)

Premises Liability— slip and fall—new trial—no evidence that safety policies followed—burden of proof shifted

The trial court improperly shifted the burden of proof to defendant in a negligence action arising from a fall on diced peaches in a store by granting a new trial on the ground that defendant failed to produce evidence that it had complied with its safety sweep policies and failed to identify any employee responsible for performing the safety sweeps.

Appeal by defendant from order entered 24 May 2007 by Judge Milton F. Fitch, Jr., in Wilson County Superior Court. Heard in the Court of Appeals 6 March 2008.

Brown, Crump, Vanore & Tierney, L.L.P., by Michael W. Washburn, for defendant appellant.

Taylor Law Office, by W. Earl Taylor, Jr., for plaintiff appellee.

McCULLOUGH, Judge.

Defendant, Wal-Mart Stores, L.P., appeals an order granting plaintiff, Kevin L. Hines, a new trial pursuant to Rule 59(a)(7) and (9) of the N.C. Rules of Civil Procedure. We reverse.

On 3 February 2006, plaintiff filed a complaint alleging that as a result of defendant's negligence, plaintiff sustained personal injuries damaging him in excess of $10,000. The case was tried at the 16 April 2007 Civil Session of Wilson County Superior Court. The evidence presented at trial tended to show the following: On 8 October 2005, plaintiff was lawfully visiting defendant's store located at 2500 Forest Hills Road in Wilson, when he slipped and fell on some diced peaches and juice that had been spilled on the floor inside the store. Plaintiff had not seen nor was he aware of the presence of the spill prior to slipping on it. As a result of his fall, plaintiff sustained injuries to his back that required surgery.

At the time of plaintiff's fall, defendant was operating under a policy whereby defendant's employees were to conduct "zone defense" and "safety sweeps" to keep the floor free of spills. Additionally, defendant's employees were instructed to wipe up any spills as they saw them.

At trial, conflicting evidence was presented as to whether defendant had notice or constructive notice of the spill. Both plaintiff and plaintiff's wife, Crystal Hines ("Mrs. Hines"), testified that after the incident, Cheryl Ingalls ("Ingalls"), a store manager, apologized for the spill and explained that the employees in the store had been so busy that they were not able to clean the spill from the floor. Ingalls, however, denied telling plaintiff and Mrs. Hines that store employees had been too busy to clean up the spill and testified that she was not aware of the spill until she was notified of plaintiff's fall. Ingalls also testified that she did not know of any Wal-Mart employee who was aware of the spill prior to plaintiff's fall. Alice Fagan, the store employee who reported the incident to Ingalls and called Ingalls over

to the scene of the fall, testified that she did not hear Ingalls make a statement about the store being too busy to have someone clean up the spill.

At the conclusion of the trial, the jury delivered a unanimous verdict in favor of defendant, responding to the first issue as follows: "Was the plaintiff injured by the negligence of the defendant? Answer: No."

In open court, plaintiff moved for a new trial pursuant to Rule 59(a)(7) and (9) of the N.C. Rules of Civil Procedure on the grounds that there was insufficient evidence to justify the verdict, the verdict was contrary to the law, and the verdict was contrary to the overwhelming weight of the evidence. N.C. Gen. Stat. § 1A-1, Rule 59 (2007). The trial court granted plaintiff's motion, finding, *inter alia*:

> 7. No evidence was produced to show that the defendant had complied with its policies and/or practices of performing "zone defense" and "safety sweeps" prior to the plaintiff's fall in the location of the plaintiff's fall.
>
> 8. The defendant was not able to identify any employee and/or persons responsible for performing the "zone defense" and "safety sweeps" in the location that the plaintiff fell at or near the time the plaintiff fell.
>
> 9. The plaintiff testified that the employee and/or agent of the defendant, Cheryl Ingalls, told the plaintiff after the plaintiff fell that she was sorry but the defendants had not had time to clean up the spill on the floor because the store was so busy.
>
> 10. Crystal Hines testified that she heard Ms. Cheryl Ingalls say that she was sorry but the employees of the store did not have time to clean up the spill of the diced peaches and juice because the store was so busy.
>
> * * * *
>
> 13. The court finds in its discretion that there was an insufficiency of the evidence to justify the verdict of the jury.

Rule 59(a)(7) authorizes a trial court to grant a new trial based on the "insufficiency of the evidence to justify the verdict." N.C. Gen. Stat. § 1A-1, Rule 59(a)(7). The trial court has discretionary authority to appraise the evidence and to " 'order a new trial whenever in his opinion the verdict is contrary to the greater weight of the *credible*

testimony.' " *Britt v. Allen*, 291 N.C. 630, 634, 231 S.E.2d 607, 611 (1977) (emphasis added) (quoting *Roberts v. Hill*, 240 N.C. 373, 380, 82 S.E.2d 373, 380 (1954)). In the absence of an abuse of discretion, a trial court's ruling on a motion for a new trial due to the insufficiency of evidence is not reversible on appeal. *In re Buck*, 350 N.C. 621, 626, 516 S.E.2d 858, 860-61 (1999) (re-emphasizing that the proper standard of review for a Rule 59(a)(7) order is an abuse of discretion standard and not a *de novo* standard).

We note, however, that our Supreme Court has stressed that the discretionary authority to grant a new trial under Rule 59 "must be used with *great care and exceeding reluctance*. This is so because the exercise of this discretion sets aside a jury verdict and, therefore, will always have some tendency to diminish the fundamental right to trial by jury in civil cases which is guaranteed by our Constitution." *In re Buck*, 350 N.C. at 626, 516 S.E.2d at 861.

Here, while the trial court had discretionary authority to weigh the evidence that it deemed credible, the order reveals that the trial court misapprehended the law and improperly shifted plaintiff's burden of proof to defendant. A discretionary ruling made under a misapprehension of the law, may constitute an abuse of discretion. *See State v. Cornell*, 281 N.C. 20, 30, 187 S.E.2d 768, 774 (1972) (stating that "where rulings are made under a misapprehension of the law, the orders or rulings of the trial judge may be vacated and the case remanded for further proceedings, modified or reversed, as the rights of the parties and the applicable law may require"); and *Ledford v. Ledford*, 49 N.C. App. 226, 234, 271 S.E.2d 393, 399 (1980) (concluding that the court's denial of a motion to amend was based on a misapprehension of the law, was an abuse of discretion, and was reversible error).

In a premises liability case involving injury to an invitee, the owner of the premises has a duty to exercise "ordinary care to keep in a reasonably safe condition those portions of its premises which it may expect will be used by its customers during business hours, and to give warning of hidden perils or unsafe conditions insofar as they can be ascertained by reasonable inspection and supervision." *Raper v. McCrory-McLellan Corp.*, 259 N.C. 199, 203, 130 S.E.2d 281, 283 (1963). In order to prove that the defendant-proprietor is negligent, plaintiff must show that the defendant either (1) negligently created the condition causing the injury, or (2) negligently failed to correct the condition after actual or constructive notice of its existence. *Hinson v. Cato's, Inc.*, 271 N.C. 738, 739, 157 S.E.2d 537, 538 (1967).

Thus, as a matter of law, the burden to establish negligent conduct is on the plaintiff.

Here, as grounds for granting a new trial, the trial court found that defendant failed to produce evidence that it "had complied with its [safety sweeps] policies" and that defendant failed to identify "any employee . . . responsible for performing the . . . 'safety sweeps' in the location that the plaintiff fell at or near the time the plaintiff fell." By requiring defendant to produce evidence that defendant had been acting in a non-negligent manner at the time of plaintiff's fall, the trial court improperly shifted the legal burden of proof to defendant. This was an abuse of discretion. Accordingly, we reverse.

Reversed.

Judges STEELMAN and ARROWOOD concur.

ALICE CAMARA AND ISATTA CAMARA, PLAINTIFFS v. MUSA GBARBERA, DEFENDANT

No. COA07-1480

(Filed 15 July 2008)

Statutes of Limitation and Repose— tolling by voluntary dismissal—improper service in original action

A plaintiff must obtain proper service of process prior to a voluntary dismissal to toll the statute of limitations. In this case, the trial court correctly granted a motion to dismiss a negligence action where personal service was not obtained in the original action; an alias and pluries summons was issued but service was obtained 62 days after issuance rather than within the required 60; another alias and pluries summons was never served; a voluntary dismissal was taken; and the action was refiled with proper service but beyond the statute of limitation.

Appeal by plaintiffs from order entered 27 August 2007 by Judge Timothy Lee Patti in Mecklenburg County Superior Court. Heard in the Court of Appeals 20 May 2008.

Pamela A. Hunter for plaintiffs.

William T. Corbett, Jr., for defendant.

ELMORE, Judge.

Alica Camara and Isatta Camara (together, plaintiffs) and Musa Gbarbera (defendant) were involved in an automobile collision on 21 June 2003 in Charlotte. On 9 June 2006, plaintiffs filed a negligence action against defendant for personal injuries sustained during the accident. Plaintiff issued an alias and pluries summons on 7 September 2006, which was served on defendant on 8 November 2006 via certified mail. On 22 November 2006, plaintiffs issued a subsequent alias and pluries summons that was never served on defendant. Defendant filed a motion to dismiss for insufficiency of process and insufficiency of service or process on 30 November 2006. On 9 February 2007, plaintiffs voluntarily dismissed their action against defendant without prejudice. Plaintiffs re-filed their complaint on 13 March 2007. Plaintiffs issued an alias and pluries summons on 9 June 2007 that was served on defendant on 23 June 2007. Plaintiffs sent a Federal Express package to defendant on 19 July 2007, and it was delivered the following day. On 23 July 2007, defendant filed a motion to dismiss for insufficiency of process, insufficiency of service of process, and because the statute of limitations had expired. On 22 August 2007, plaintiffs issued another alias and pluries summons, which was served on defendant on the same day. On 27 August 2007, the trial judge heard and granted defendant's motion to dismiss the re-filed action.

Plaintiffs argue on appeal that the trial court erred by dismissing plaintiff's complaint "when at the time in which plaintiff [sic] entered its [sic] notice of voluntary dismissal without prejudice pursuant to Rule 41(a) . . . plaintiff [sic] maintained a valid and unexpired summons according to Rule 4." Plaintiffs also argue that the trial court erred by dismissing their complaint "when plaintiff [sic] properly refiled its [sic] action within one year from having taken its voluntary dismissal without prejudice pursuant to Rule 41(a)." We disagree.

Rule 4 provides, in relevant part:

> (c) Summons—Return.—Personal service . . . must be made within 60 days after the date of the issuance of summons . . . . Failure to make service within the time allowed or failure to return a summons to the clerk after it has been served . . . shall not invalidate the summons.
>
> (d) Summons—Extensional endorsement, alias and pluries— When any defendant in a civil action is not served within the time

> allowed for service, the action may be continued in existence . . . by . . .
>
> > (2) . . . an alias or pluries summons returnable in the same manner as the original process. Such alias or pluries summons may be issued at any time within 90 days after the issuance of the last summons.
>
> * * *
>
> (j) Personal service, the manner in which the State exercises personal jurisdiction, shall be made on a natural person in one of the following ways: by delivering a copy of the summons and complaint to the natural person, by delivering a copy to the persons authorized agent, by mailing a copy of the summons and compliant by registered, certified mail or signature verified mail, or by depositing with a delivery service.

N.C. Gen. Stat. § 1A-1, Rule 4 (2007).

Personal service of the original summons in the original action was never made. Plaintiffs issued an alias and pluries summons within 90 days after the issuance of the original summons in accordance with Rule 4(d)(2). However, personal service of the alias and pluries summons was not returned within 60 days in the same manner that service was to be returned in the original service of process. Defendant was served *62 days after* issuance of the alias and pluries summons, which rendered the service of process on defendant insufficient. Plaintiffs contend that the service of the first alias and pluries summons was valid, but plaintiffs nonetheless issued another alias and pluries summons, which was never served. The first alias and pluries summons is the *only* summons in the chain of summons for which service was ever completed. Plaintiffs relied on this summons, to their detriment, in the subsequent action. *See Latham v. Cherry*, 111 N.C. App. 871, 873, 433 S.E.2d 478, 480 (1993) ((“[T]he summons constitutes the means of obtaining jurisdiction over the defendant . . . . [D]efects in the summons receive *careful scrutiny* and can prove *fatal* to the action.”) (citations omitted) (emphasis added)).

The statute of limitations for a personal injury allegedly due to negligence is three years. N.C. Gen. Stat. § 1-52(16) (2007). Under the statute, plaintiffs had until 22 June 2006 to file an action. If an action is commenced within the statute of limitations, and a plaintiff volun-

tarily dismisses the action without prejudice, a new action on the same claim may be commenced within one year. N.C. Gen. Stat. § 1A-1, Rule 41(a) (2007). However, a plaintiff must obtain proper service prior to dismissal in order to toll the statute of limitations for a year. *Latham*, 111 N.C. App. at 873, 433 S.E.2d at 480 (interpreting N.C. Gen. Stat. § 1A-1, Rule 41(a)(1)). In *Latham*, this Court held that if a voluntary dismissal is based on defective service, the voluntary dismissal does not toll the statute of limitations. *Id.* at 873, 433 S.E.2d at 480 (citing *Johnson v. City of Raleigh*, 98 N.C. App. 147, 389 S.E.2d 849 (1990), and *Hall v. Lassiter*, 44 N.C. App. 23, 260 S.E.2d 155 (1979)).

Plaintiffs are correct in noting that when a complaint is voluntarily dismissed, a plaintiff is returned to the legal position enjoyed prior to filing the complaint. *Bryant v. Williams*, 161 N.C. App. 444, 446, 588 S.E.2d 506, 507 (2003) (citation omitted); *see also Brisson v. Santoriello*, 351 N.C. 589, 593, 528 S.E.2d 568, 570 (2000) (noting that the effect of a voluntary dismissal is to leave plaintiff where he or she was before the action commenced). However, these cases do not address the effect that a voluntary dismissal without prejudice has on the statute of limitations when service, prior to the dismissal, was defective. *Latham*, however, does provide such instruction. *Latham*, 111 N.C. App. at 873, 433 S.E.2d at 480. Plaintiffs' argument that the subsequent action is valid because it was brought within one year as prescribed by Rule 41(a) does not take into account that proper service on defendant was never obtained prior to the voluntary dismissal. Because the service was defective, the statute of limitations did not toll. Plaintiffs re-filed the negligence action approximately three years and nine months after the incident giving rise to the claim, at which point the three-year statute of limitations had run. In the re-filed action, plaintiffs issued three alias and pluries summonses in addition to the original summons. It is unclear from the record if the final alias and pluries summons issued by plaintiffs on 14 March 2007 was included in the Federal Express package sent to defendant on 20 June 2007. It is certain that service was returned on at least two of the alias and pluries summonses. However, the fact that the summonses in the re-filed action were served properly is of no consequence because plaintiffs' service on defendant in the original action was defective. The defective service in the original action resulted in the subsequent action being brought after the statute of limitations had run.

For the reasons stated here, we find no error in the proceedings below. We therefore affirm the order of the trial court.

Affirmed.

Judges WYNN and ARROWOOD concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

Filed 15 July 2008

Case	County	Disposition
BANANA WIND PROPS., LLC v. K&T REAL ESTATE INVS. No. 07-1360	Forsyth) (06CVS5505)	Affirmed
FIPPS v. BABSON & SMITH TRUCKING No. 07-1361	Ind. Comm. (I.C. No. 433843)	Affirmed
HOUSEHOLD REALTY CORP. v. CROWDER No. 07-1467	Guilford (04CVD8014)	Dismissed
IN RE B.G., B.D.G., C.D., C.D.2 No. 08-149	Durham (05J288-91)	Reversed and remanded
IN RE C.C-G., E.C-G., J.C-G. No. 08-252	Wake (06JT124-26)	Affirmed
IN RE D.C. No. 08-276	New Hanover (04J493)	Affirmed
IN RE E.K. & J.K. No. 08-138	Buncombe (07JA88-89)	Affirmed
IN RE K.L.C. & K.R.N. No. 08-189	Brunswick (07J45T-46T)	Affirmed
IN RE P.L.N. No. 07-1414	Davidson (04JB30)	Reversed and remanded
KEYSTONE BUILDERS RES. GRP. v. TOWN OF INDIAN TRAIL No. 07-1416	Union (05CVS1729)	Affirmed
MARTIN v. AKURANG No. 08-148	Guilford (04CVS9949)	Dismissed
MILLS v. WACHOVIA BANK NA No. 07-365	Union (06CVS1624)	Affirmed
SIVITA USA, INC. v. STUTTS No. 07-1509	Harnett (05CVS2308)	Reversed and remanded
SMITH v. MAULDIN No. 07-1482	Stanly (05CVS1751)	Affirmed
SNYDER v. DUNCAN No. 07-106	Mitchell (05SP15)	Affirmed
STATE v. ALLEN No. 07-1528	Wake (05CRS35195-97) (05CRS37635) (05CRS65514-19)	No error

STATE v. ARROYO No. 07-1474	Wake (05CRS21710)	No error
STATE v. BAILEY No. 08-3	Forsyth (06CRS64686)	No error at trial. Remanded for correction of judgment.
STATE v. BANNERMAN No. 08-86	Pender (05CRS53006-7)	No error
STATE v. BRYANT No. 07-1337	Forsyth (06CRS64031) (07CRS5025)	No error
STATE v. BUCK No. 07-471	Pitt (04CRS58151) (04CRS58266) (04CRS15544-45)	No prejudicial error but remanded for correction of clerical errors
STATE v. DAVIS No. 07-1329	Henderson (05CRS2258)	Affirmed
STATE v. DUNCAN No. 07-1559	Henderson (06CRS52534) (06CRS643)	No error
STATE v. FULLER No. 07-663	Alamance (03CRS51328) (03CRS51340-41)	Affirmed
STATE v. FULLER No. 07-1450	Alamance (05CRS59313)	No error
STATE v. GHANEE No. 07-1439	Forsyth (06CRS56449-50)	Reversed in part, no error in part
STATE v. GREEN No. 07-1379	Wake (06CRS39839-40) (06CRS43939-40)	No error
STATE v. GREENE No. 08-88	Pitt (06CRS6994) (06CRS6996-7000) (06CRS53242-43)	No error
STATE v. HARRIS No. 08-1	Nash (07CRS50876)	Dismissed without prejudice
STATE v. HOLLOWAY No. 07-1505	Wake (06CRS87291) (06CRS87229)	No error
STATE v. INGRAM No. 08-108	Forsyth (05CRS57925) (06CRS7521)	No error

Case	County	Disposition
STATE v. JACOBS No. 07-1349	Robeson (05CRS52655)	No error
STATE v. McDONALD No. 07-1567	Jackson (06CRS51541)	No error
STATE v. McGRADY No. 07-1258	Cherokee (04CRS51710)	No error
STATE v. PACE No. 07-1531	Henderson (07CRS50196) (07CRS1650) (07CRS50198) (07CRS50239) (07CRS50241)	Dismissed
STATE v. PITTMAN No. 08-100	Robeson (06CRS55028)	No error
STATE v. RIOS No. 07-1232	Mecklenburg (05CRS238682)	No error
STATE v. ROBINSON No. 08-45	Guilford (03CRS93523) (03CRS45479)	Affirmed
STATE v. SHEARER No. 07-1384	Wayne (06CRS54032)	No error
STATE v. SPENCER No. 08-73	Gaston (06CRS65469) (06CRS65475-76) (06CRS19030) (06CRS65479)	No error
STATE v. WATSON No. 07-1490	Beaufort (03CRS52636)	No error
STATE v. WEST No. 08-47	Guilford (05CRS82553-54)	No error
STATE v. WILDER No. 08-90	Guilford (06CRS74904)	No error

CHARLES W. STONE; MARIE STONE; MONA M. KEECH; MARK DEARMON; MASON P. THOMAS, JR.; MARGARET KAY HOVIOUS; JEANNETTE M. DEAN; WILLIAM R. FOSTER; R. ROSS HAILEY, JR.; THOMAS F. EAMON; FLINT BENSON; DONNIE G. PERRY; W.R. McCLURE; AND MARY SINGLETON; ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS v. THE STATE OF NORTH CAROLINA; MICHAEL F. EASLEY, IN HIS CAPACITY AS GOVERNOR OF NORTH CAROLINA; ROBERT POWELL, IN HIS CAPACITY AS STATE CONTROLLER OF NORTH CAROLINA; DAVID T. McCOY, IN HIS CAPACITY AS STATE BUDGET OFFICER OF NORTH CAROLINA; RICHARD H. MOORE, IN HIS CAPACITY AS TREASURER OF NORTH CAROLINA; AND THE BOARD OF TRUSTEES OF THE TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, A BODY POLITIC AND CORPORATE; DEFENDANTS

No. COA07-718

(Filed 5 August 2008)

1. Governor; Pensions and Retirement— executive order—state employees' retirement system—employer contributions escrowed—unconstitutionality

An executive order signed by the governor directing that state employers send the employer portion of retirement contributions for the state employees' retirement system to the State Controller for placement into an escrow account for the purpose of ensuring a balanced state budget "diverted" the funds in violation of N.C. Const. art. V, § 6(2) even though the employer contributions had not yet been received by the retirement system.

2. Pensions and Retirement— state employees' retirement system—actuarially sound funding—contractual right

Vested state employees have a contractual right to have their retirement systems funded in an actuarially sound manner.

3. Pensions and Retirement— state employees' retirement system—escrow of employer contributions—impairment of contract

The diversion of employer contributions from the state employees' retirement system into an escrow account pursuant to an executive order signed by the governor impaired the contractual rights of vested members to a retirement system funded in an actuarially sound manner because, at the time the employer contributions were escrowed, it was unclear when, or even whether, the diverted funds would be repaid, and the integrity and security of the retirement system were threatened.

4. Pensions and Retirement— state employees' retirement system—escrow of employer contribution—not reasonable and necessary

The escrow of the employer contribution to the state employees' retirement system was not reasonable and necessary to serve the important public purpose of avoiding a constitutionally prohibited budget deficit and violated the contract clause of the U.S. Constitution. A balanced budget could have been achieved in another way. U.S. Const. art. I, § 10.

5. Pensions and Retirement— state employees' retirement system—employer contribution escrowed—no penalty

The trial court did not err by granting summary judgment for the State Treasurer and the board of trustees of the state employees' retirement system on a claim for a writ of mandamus to compel compliance with N.C.G.S. § 135-8(f)(3), which imposes a penalty when contributions to the state employees' retirement system are not received. The statute speaks in terms of default by an employer, but in the present case the employer contributions were escrowed as the result of an executive order. Moreover, the Treasurer and board of trustees had routinely waived the imposition of the fine when it was determined that there was no intent to not remit the contributions in a timely manner.

Appeal by Plaintiffs and Defendants from order entered 27 February 2007, incorporating by reference an order entered 6 September 2006, said orders entered by Judge Joseph R. John, Sr. in Superior Court, Wake County. Heard in the Court of Appeals 15 January 2008.

Blanchard, Miller, Lewis & Styers, P.A., by E. Hardy Lewis and Karen M. Kemerait, for Plaintiffs.

Attorney General Roy Cooper, by Special Deputy Attorney General Alexander McC. Peters, Special Deputy Attorney General Joyce Rutledge, and Assistant Attorney General Robert M. Curran, for Defendants.

Thomas A. Harris for the State Employees Association of North Carolina, Inc., amicus curiae.

McGEE, Judge.

The Governor of the State of North Carolina, Michael F. Easley (the Governor), signed Executive Order No. 3 on 8 February 2001. Executive Order No. 3 provided, in pertinent part:

> [B]y the authority vested in me as Governor by Article III, Sec. 5(3) of the North Carolina Constitution to insure that a deficit is not incurred in the administration of the budget for fiscal year 2001, IT IS ORDERED:
>
> . . . .
>
> The Office of the State Controller, as advised by the State Budget Officer, is directed to receive the employer portion of retirement contributions for all State funded retirement systems and to escrow such funds in a special reserve as established by [the Office of State Budget, Planning, and Management ("OSBPM")]. Before taking such action, OSBPM is directed to confirm with the State Treasurer that such action will not impair the actuarial integrity of the state retirement system. Return of all such receipts shall be made to the retirement system, if possible, after determination that such funds are not necessary to address the deficit.

In compliance with Executive Order No. 3, Edward Renfrow, the State Controller at the time, issued a memorandum on 15 February 2001 to all chief fiscal officers, vice chancellors, business managers, and local education authorities affiliated with employers participating in State-funded retirement systems. Specifically, he directed that all such employers send the funds allocated as employer contributions for the Teachers' and State Employees' Retirement System of North Carolina (the Retirement System) to an escrow account (the escrow account) in the Office of the State Controller.

Between February and June 2001, State employers sent $208,362,861.00 of Retirement System employer contributions to the escrow account. The Governor extended the terms of Executive Order No. 3 to include employer contributions for July and August 2001, and State employers sent an additional $16,511,854.00 of Retirement System employer contributions to the escrow account during that period of time. The amount of $16,511,854.00 was returned on 30 November 2001 to the Retirement System, and the amount of $82,612,901.00 was returned on 7 December 2001 to the Retirement System and to two other retirement systems from which

funds had been seized. The two other retirement systems were the Legislative Retirement System and the Judicial Retirement System. As of 31 December 2001, a total of $129,924,859.00 of Retirement System employer contributions that had been sent to the escrow account had not been repaid to the Retirement System.

Plaintiffs initiated this action on 14 June 2002 by filing a complaint for declaratory judgment and a petition for writ of mandamus. Plaintiffs alleged that the State of North Carolina; the Governor; Robert Powell, in his capacity as State Controller of North Carolina; and David T. McCoy, in his capacity as State Budget Officer of North Carolina, violated the Contract Clause of the United States Constitution; Article V, section 6(2) of the North Carolina Constitution; and Article I, sections 1 and 19 of the North Carolina Constitution. Plaintiffs also sought a writ of mandamus to require the Governor, Robert Powell, and David T. McCoy to permanently desist from the seizure and diversion of employer contributions, and to return to the Retirement System all funds that were appropriated, paid, seized, and diverted. Plaintiffs further sought a writ of mandamus to compel Richard H. Moore, in his capacity as Treasurer of North Carolina (the Treasurer), and the Board of Trustees (the Board) of the Retirement System to comply with N.C. Gen. Stat. § 135-8(f)(3).

Defendants filed a motion to dismiss Plaintiffs' complaint on 19 August 2002. Pursuant to Rule 2.1(a) of the General Rules of Practice, the Chief Justice of the North Carolina Supreme Court designated the case as exceptional and assigned the case to Emergency Judge Joseph R. John, Sr. Plaintiffs filed a first amended complaint for declaratory judgment, petition for writ of mandamus, and motion for class certification dated 12 February 2004.

The trial court entered an order certifying a class on 27 February 2004, and defined the class as follows: "[A]ll North Carolina teachers and State employees who were members of the Teachers' and State Employees' Retirement System of North Carolina, as provided in [N.C. Gen. Stat. §§] 135-3 and 135-4, at any time during the period 7 February 2001 to 7 August 2001, inclusive." The trial court also entered an order denying Defendants' motion to dismiss on 27 February 2004. Defendants filed an answer, dated 27 April 2004, to the first amended complaint.

Following substantial discovery, Plaintiffs and Defendants filed cross-motions for summary judgment on 20 February 2006. Plaintiffs subsequently filed a motion to amend their first amended complaint,

seeking to add a paragraph and amend an existing paragraph to add a claim under Article I, section 6 of the North Carolina Constitution. In their motion, Plaintiffs stated that Defendants did not object to Plaintiffs' motion to amend. The trial court entered an order on 26 July 2006 amending both Plaintiffs' first amended complaint and Defendants' answer to Plaintiffs' first amended complaint.

The trial court entered an order on the cross-motions for summary judgment on 6 September 2006, granting summary judgment for Plaintiffs on their "claim for declaratory judgment establishing that the actions of [D]efendants State of North Carolina, the Governor of North Carolina, the State Controller of North Carolina, and the State Budget Officer of North Carolina violate[d] Article V, Section 6 of the North Carolina Constitution[.]" Regarding Plaintiffs' claim for declaratory judgment that the actions of these Defendants violated the Contract Clause of the United States Constitution, the trial court ordered the following:

> [T]he Court will reserve ruling to allow the parties to determine whether sufficient stipulated facts can be provided to the Court to allow for ruling without a trial. Counsel are directed to report to the Court, within 15 days of the entry of this order, as to whether an additional hearing on this issue is necessary, and whether at such hearing the parties will put on evidence or submit stipulated facts.

The trial court also entered summary judgment for Defendants on Plaintiffs' remaining claims for declaratory judgment and on Plaintiffs' two remaining claims for writ of mandamus, one of which is the subject of Plaintiffs' appeal.

The parties filed a joint statement of stipulations regarding Plaintiffs' Contract Clause claim on 18 October 2006, and the trial court entered a final order on substantive claims on 27 February 2007. The trial court ordered: "The 6 September 2006 order is incorporated by reference in its entirety, such that the present order shall serve as the final judgment of the trial court in this case with regard to the substantive claims raised in the complaint[.]" The trial court also stated:

> 3. The Plaintiff Class has met its burden of proving the existence of a contract. The Plaintiff Class likewise has met its burden of proving that the State's actions impaired the contract.
>
> 4. With regard to the third prong, [D]efendants have met their burden of proving that the Governor's maintaining compliance

> with his constitutional responsibility to ensure a balanced budget constitutes an important public purpose. However, [D]efendants have failed to carry their burden of proving that the diversion of employer contributions was "reasonable" or "necessary" in service of that purpose. In so ruling, the Court observes that the provisions for the 'inviolability' of retirement system funds contained in the Constitution of North Carolina indicate a public policy that would favor protection of these funds under the circumstances of the present case.

The trial court granted summary judgment for Plaintiffs on their Contract Clause claim. The trial court also certified the matter for immediate appeal:

> Further, the Court finds that the instant case involves multiple parties and multiple claims, that the Court has entered final judgment as to certain claims and certain parties, that the Court has entered final judgment as to all substantive claims raised in the complaint, and that there is no just reason for delay of the parties' respective appeals; therefore, pursuant to N.C.G.S. [§] 1A-1, Rule 54(b), the Court certifies this matter for immediate appeal.

Plaintiffs appeal the grant of summary judgment to the Treasurer and to the Board on Plaintiffs' claim for writ of mandamus to compel compliance with N.C. Gen. Stat. § 135-8(f)(3). The grant of summary judgment to Plaintiffs on their claims for declaratory judgment under Article V, section 6(2) of the North Carolina Constitution and under the Contract Clause of the United States Constitution is appealed by the State of North Carolina; the Governor; Robert Powell; and David T. McCoy. For the reasons set forth herein, we affirm the orders of the trial court.

Standard of Review

"It is well settled that de novo review is ordinarily appropriate in cases where constitutional rights are implicated." *Piedmont Triad Reg'l Water Auth. v. Sumner Hills, Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001). "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) (citations omitted). In reviewing a summary judgment order, we consider the evidence in the light most favorable to the nonmoving party. *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998).

Defendants' Appeal

I.

[1] Defendants the State of North Carolina, the Governor, Robert Powell, and David T. McCoy argue the trial court erred by granting summary judgment for Plaintiffs on the ground that Executive Order No. 3 violated Article V, section 6(2) of the North Carolina Constitution. N.C. Const. art. V, § 6(2) provides:

> Neither the General Assembly nor any public officer, employee, or agency shall use or authorize to be used any part of the funds of the Teachers' and State Employees' Retirement System or the Local Governmental Employees' Retirement System for any purpose other than retirement system benefits and purposes, administrative expenses, and refunds; except that retirement system funds may be invested as authorized by law, subject to the investment limitation that the funds of the Teachers' and State Employees' Retirement System and the Local Governmental Employees' Retirement System shall not be applied, diverted, loaned to, or used by the State, any State agency, State officer, public officer, or public employee.

Defendants argue that the protections of Article V, section 6(2) of the North Carolina Constitution do not apply to their actions because the employer contributions at issue in the present case were not yet part of the funds of the Retirement System. Specifically, Defendants argue that

> no monies appropriated by the General Assembly for salaries and related expenses of employees are considered employer contributions to the Retirement System unless and until they are actually remitted to and received by the Retirement System, and only then are they placed in a Retirement System fund subject to the protections of Article V, § 6.

Plaintiffs counter that a violation of Article V, section 6(2) of the North Carolina Constitution occurs where "monies identified as employer contributions, and paid in the exact amounts and on the exact schedule required for employer contributions by the [Retirement] System, are diverted to another use before being deposited into the [Retirement] System[.]" Plaintiffs specifically focus on the language in Article V, section 6(2) that states that Retirement System funds shall not be "diverted."

We thus determine whether Defendants' actions "diverted" Retirement System funds in violation of Article V, section 6(2) of the North Carolina Constitution. "Issues concerning the proper construction of the Constitution of North Carolina 'are in the main governed by the same general principles which control in ascertaining the meaning of all written instruments.' " *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 478 (1989) (quoting *Perry v. Stancil*, 237 N.C. 442, 444, 75 S.E.2d 512, 514 (1953)). "In interpreting our Constitution—as in interpreting a statute—where the meaning is clear from the words used, we will not search for a meaning elsewhere." *Id.* at 449, 385 S.E.2d at 479.

The term "divert" is defined as follows: "To turn aside from a direction or course[.]" Webster's II New College Dictionary 339 (3d ed. 2005). In the present case, the funds at issue were intended for the Retirement System. However, in compliance with Executive Order No. 3, the State Controller ordered those funds to be deposited in the escrow account. State employers did as directed and, as the trial court found, the funds were used entirely "for purposes other than retirement system benefits and purposes, administrative expenses, and refunds." By these actions, Defendants turned the funds aside from their intended destination, which was the Retirement System.

Defendants argue that "the use of the word 'diverted' is consistent with the Constitution's protection against misuse of the funds which are in the possession of and controlled by the Treasurer." Therefore, Defendants argue, the North Carolina Constitution does not protect employer contributions not yet deposited in Retirement System accounts. However, Article V, section 6(2) of the North Carolina Constitution not only precludes retirement system funds from being "applied," "loaned to," or "used by" the State, but also precludes those funds from being "diverted" by the State. Even if the terms other than "diverted" apply only in the context of funds already held in Retirement System accounts, which we do not decide, "we follow the maxims of statutory construction that words of a statute are not to be deemed *useless or redundant*[.]" *Town of Pine Knoll Shores v. Evans*, 331 N.C. 361, 366, 416 S.E.2d 4, 7 (1992) (emphasis added). Therefore, we must give effect to the term "diverted." *See Preston*, 325 N.C. at 449, 385 S.E.2d at 478 (stating: " 'The will of the people as expressed in the Constitution is the supreme law of the land. In searching for this will or intent all cognate provisions are to be brought into view in their entirety and so interpreted as to effectuate the manifest purposes of the instrument. The best way to ascertain

the meaning of a word or sentence in the Constitution is to read it contextually and to compare it with other words and sentences with which it stands connected.' " (quoting *State v. Emery*, 224 N.C. 581, 583, 31 S.E.2d 858, 860 (1944) (citations omitted))). Applying the plain meaning of the term "diverted," we hold that the prohibition against seizure of the Retirement System's funds applies to, and includes, those funds appropriated and intended for the Retirement System, but not yet deposited therein. We thus hold that Defendants diverted assets of the Retirement System and, by doing so, Defendants violated Article V, section 6(2) of the North Carolina Constitution. Therefore, we hold the trial court did not err by granting Plaintiffs' motion for summary judgment.

II.

These Defendants also argue the trial court erred by granting summary judgment for Plaintiffs on the ground that Executive Order No. 3 violated the Contract Clause of the United States Constitution. The Contract Clause of the United States Constitution provides that "[n]o state shall . . . pass any . . . law impairing the obligation of contracts[.]" U.S. Const. art. I, § 10. In order to determine whether there has been a violation of the Contract Clause, a court must ascertain the following: "(1) whether a contractual obligation is present, (2) whether the state's actions impaired that contract, and (3) whether the impairment was reasonable and necessary to serve an important public purpose." *Bailey v. State of North Carolina*, 348 N.C. 130, 140-41, 500 S.E.2d 54, 60 (1998). We address these requirements in the following three subsections.

A.

[2] It is well settled, and Defendants do not contest, that a contractual relationship exists between vested State employees and the State's retirement systems, and that vested State employees have contractual rights to their retirement benefits. *See id.* at 150, 500 S.E.2d at 66 (holding that "the relationship between the Retirement Systems and employees vested in the system is contractual in nature, [and] the right to benefits exempt from state taxation is a term of such contract"); *Faulkenbury v. Teachers' and State Employees' Ret. Sys.*, 345 N.C. 683, 690, 483 S.E.2d 422, 427 (1997) (recognizing that vested state employees have contractual rights to disability benefits calculated pursuant to the method in place when they vested); *Simpson v. N.C. Local Gov't Employees' Retirement System*, 88 N.C. App. 218, 224, 363 S.E.2d 90, 94 (1987), *aff'd per curiam*, 323 N.C. 362, 372 S.E.2d 559 (1988) (holding that "members of the North Carolina Local

Governmental Employees' Retirement System[] ha[ve] a contractual right to rely on the terms of the retirement plan as these terms existed at the moment their retirement rights became vested").

Defendants argue, however, that Plaintiffs do not have a contractual right to a retirement system that is funded in an actuarially sound manner, as concluded by the trial court. Defendants also argue that "[P]laintiffs have neither alleged nor shown that they are not receiving the benefits to which they are entitled, nor can they show that their benefits have in any way been harmed or are in danger of being harmed by action taken pursuant to Executive Order No. 3."

In *Bailey*, our Supreme Court recognized that the determination that a contractual relationship exists does not end the inquiry; "[t]his Court must determine whether the tax exemption was a condition or term included in the retirement contract." *Bailey*, 348 N.C. at 146, 500 S.E.2d at 63; *see also Robertson v. Kulongoski*, 466 F.3d 1114, 1117 (9th Cir. 2006), *cert. denied*, 550 U.S. —–, 167 L. Ed. 2d 1092 (2007) (stating that " '[t]he first sub-inquiry is not whether any contractual relationship whatsoever exists between the parties, but whether there was a "contractual agreement *regarding the specific . . . terms allegedly at issue*" ' " (citations omitted)). In *Bailey*, our Supreme Court held that the trial court's finding that the plaintiffs had a contractual right to the tax exemption at issue was supported by evidence of

> creation of various statutory tax exemptions by the legislature, the location of those provisions alongside the other statutorily created benefit terms instead of within the general income tax code, the frequency of governmental contract making, communication of the exemption by governmental agents in both written and oral form, use of the exemption as inducement for employment, mandatory participation, reduction of periodic wages by contribution amount (evidencing compensation), loss of interest for those not vesting, establishment of a set time period for vesting, and the reliance of employees upon retirement compensation in exchange for their services. Thus, it is clear the tax exemption was a term or condition of benefits of the Retirement Systems to which [the] plaintiffs have a contractual right.

Bailey, 348 N.C. at 146, 500 S.E.2d at 63.

In the present case, our Court must determine whether, as a term of their contracts for retirement benefits, Plaintiffs were entitled to have the Retirement System funded in an actuarially sound manner.

An “actuarially sound retirement system” is defined as a “retirement plan that contains sufficient funds to pay future obligations, as by receiving contributions from employees and the employer to be invested in accounts to pay future benefits.” Black’s Law Dictionary 39 (8th ed. 2004).

We first examine the statutes in effect at the time of the diversion of the employer contributions. *See Wells v. Consolidated Jud’l Ret. Sys. of N.C.*, 136 N.C. App. 671, 673, 526 S.E.2d 486, 488-89 (2000), *aff’d*, 354 N.C. 313, 553 S.E.2d 877, *reh’g denied*, 354 N.C. 580, 559 S.E.2d 553 (2001) (stating that “[t]he [retirement] contract is embodied in state statute and governed by statutory provisions as they existed at the time the employee’s contractual rights vested”). Specifically, we consider N.C. Gen. Stat. § 135-8(d)(1), which deals with the method of financing the Retirement System, and which provides as follows:

> On account of each member there shall be paid in the pension accumulation fund by employers an amount equal to a certain percentage of the actual compensation of each member to be known as the “normal contribution,” and an additional amount equal to a percentage of his actual compensation to be known as the “accrued liability contribution.” *The rate per centum of such contributions shall be fixed on the basis of the liabilities of the Retirement System as shown by actuarial valuation.*

N.C. Gen. Stat. § 135-8(d)(1) (2001) (emphasis added). An actuarial valuation is determined by an actuary, who is a “statistician who determines the present effects of future contingent events; esp., one who calculates insurance and pension rates on the basis of empirically based tables.” Black’s Law Dictionary 39 (8th ed. 2004). N.C. Gen. Stat. § 135-8(d)(3) (2001) provides, in pertinent part: “Upon certification by the actuary engaged by the Board of Trustees that the accrued liability contribution rate may be reduced without impairing the Retirement System, the Board of Trustees may cause the accrued liability contribution rate to be reduced.” This statute demonstrates that contributions to the Retirement System can be reduced only if the State’s actuary certifies that such a reduction will not impair the Retirement System. However, as we discuss in subsection B below, the State’s actuary in the present case did not make such a certification.

We next consider N.C. Gen. Stat. § 135-6 (2001), which governs the administration of the Retirement System. N.C. Gen. Stat.

§ 135-6(g) (2001) requires the Board of Trustees to "engage such actuarial and other service as shall be required to transact the business of the Retirement System." N.C. Gen. Stat. § 135-6(h) (2001) also requires the following: "The Board of Trustees shall keep in convenient form such data as shall be necessary for actuarial valuation of the various funds of the Retirement System, and for checking the experience of the System." N.C. Gen. Stat. § 135-6(i) (2001) provides:

> The Board of Trustees shall keep a record of all of its proceedings which shall be open to public inspection. It shall publish annually a report showing the fiscal transactions of the Retirement System for the preceding year, the amount of the accumulated cash and securities of the System, and the last balance sheet showing the financial condition of the System by means of an actuarial valuation of the assets and liabilities of the Retirement System.

The following statutes, N.C. Gen. Stat. § 135-6(m)-(o) (2001), all envision an active role for an actuary in the Retirement System:

> (m) Immediately after the establishment of the Retirement System the actuary shall make such investigation of the mortality, service and compensation experience of the members of the System as he shall recommend and the Board of Trustees shall authorize, and on the basis of such investigation he shall recommend for adoption by the Board of Trustees such tables and such rates as are required in subsection (n), subdivisions (1) and (2), of this section. The Board of Trustees shall adopt tables and certify rates, and as soon as practicable thereafter the actuary shall make a valuation based on such tables and rates of the assets and liabilities of the funds created by this Chapter.
>
> (n) In 1943, and at least once in each five-year period thereafter, the actuary shall make an actuarial investigation into the mortality, service and compensation experience of the members and beneficiaries of the Retirement System, and shall make a valuation of the assets and liabilities of the funds of the System, and taking into account the result of such investigation and valuation, the Board of Trustees shall:
>
> > (1) Adopt for the Retirement System such mortality, service and other tables as shall be deemed necessary; and
> >
> > (2) Certify the rates of contributions payable by the State of North Carolina on account of new entrants at various ages.

(o) On the basis of such tables and interest assumption rate as the Board of Trustees shall adopt, the actuary shall make an annual valuation of the assets and liabilities of the funds of the System created by this Chapter.

Upon review of these statutes, it is clear that Plaintiffs had a contractual right to the funding of the Retirement System in an actuarially sound manner. Therefore, we hold that the right to have the Retirement System funded in an actuarially sound manner is a term or condition included in Plaintiffs' retirement contracts. *See Bailey*, 348 N.C. at 146, 500 S.E.2d at 63 (holding that "the tax exemption was a term or condition of benefits of the Retirement Systems to which [the] plaintiffs have a contractual right").

Moreover, the record in this case, on which the trial court relied in granting summary judgment for Plaintiffs, contains several examples of representations made to Plaintiffs that demonstrate that Plaintiffs have a contractual right to have the Retirement System funded in an actuarially sound manner. A pamphlet in the record entitled, "1975 YOUR RETIREMENT SYSTEM—how it works," which was distributed to State employees, stated the following:

YOUR EMPLOYER'S CONTRIBUTIONS

> Your employer contributes the major part of the cost of the benefits.
>
> Your employer is currently contributing at the rate of 9.12% of all salaries subject to retirement deductions.
>
> Your employer contributes to your retirement until you retire, regardless of age. The contributions are based on actuarial calculations so that your benefits can be provided on a sound basis.

Similarly, a 1 July 1996 pamphlet in the record entitled, "Your Retirement Benefits" stated the following: "The State bases contributions on the calculations prepared by an actuary." The pamphlet further stated the following:

Funded Status

The Retirement System has been labeled as "actuarially sound" because of the consistent use over the years of:

[—] actuarial assumptions based on experience,

[—] an approved actuarial funding method, and

[—] the recognition of all promised benefits in the actuarial liabilities.

Our decision is further supported by numerous decisions of courts in other jurisdictions, which have held that vested state employees have a contractual right to have their retirement systems funded in an actuarially sound manner. *See Municipality of Anchorage v. Gallion*, 944 P.2d 436 (Alaska 1997); *Dadisman v. Moore*, 384 S.E.2d 816 (W. Va. 1989); *Valdes v. Cory*, 189 Cal. Rptr. 212 (Cal. Ct. App. 1983); *Sgaglione v. Levitt*, 337 N.E.2d 592 (N.Y. 1975); *Weaver v. Evans*, 495 P.2d 639 (Wash. 1972); *Dombrowski v. City of Philadelphia*, 245 A.2d 238 (Pa. 1968); *State Teachers' Retirement Board v. Giessel*, 106 N.W.2d 301 (Wis. 1960).

B.

[3] These Defendants next argue that "even if a contractual right to an actuarially sound retirement system exists, there is no impairment of that contractual right if there is no impairment or diminishment of accrued, vested benefits." In support of their argument, Defendants rely upon *RPEC v. Charles*, 62 P.3d 470 (Wash. 2003), and *Halstead v. City of Flint*, 338 N.W.2d 903 (Mich. Ct. App. 1983). However, these cases are distinguishable.

In *RPEC*, the Washington Supreme Court held, as we do in the present case, that retirees and State employees did "have vested contractual rights to the systematic funding of the retirement system to maintain actuarial soundness." *RPEC*, 62 P.3d at 483. However, the Court also held that "there is no indication that the lowered [employer] contribution rates render the system actuarially unsound." *Id.* at 484. Consequently, the Court held that the "appellants have not met their burden of proof that a question of fact exists as to whether the system is actuarially unsound, i.e., the modifications made in EHB 2487 have not been shown to affect Retirees' and Employees' vested pension right." *Id.* Importantly, however, the State Actuary in *RPEC* had determined that the lowered employer contribution rates would not render the system actuarially unsound: "The stated reason for reducing the rates was that the 1998 valuation from the State Actuary determined that the funding goals expressed in former RCW 41.45.010 (1998) could still be met using lower contribution rates, primarily because of investment returns on the pension funds that were higher than anticipated." *Id.* at 476.

In contrast to *RPEC*, the record shows the State's actuary in the case before us, Edward A. Macdonald (Mr. Macdonald), stated the following in a 6 February 2001 letter to the Deputy Treasurer and Director of the Retirement Systems Division of the State Treasurer: "The employer rate cannot be reduced effective February 1, 2001 in an actuarially sound manner. . . . The System is not being funded in an actuarial[ly] sound manner since the actual contributions will be less than the annual required contributions." Mr. Macdonald also testified at a deposition as follows:

> Q And have you since learning about the case formed any opinions concerning issues that have been raised in this lawsuit?
>
> A I had opinions prior to the lawsuit being filed.
>
> Q Can you tell me generally what those opinions are?
>
> A That the escrowing of the money was not actuarially sound for the system. I believe I wrote at least one letter regarding that back probably three or four, probably three years ago.
>
> Q Do you have any other opinions concerning the escrow of the money?
>
> A That eventually it ought to be repaid. I mean, you know—
>
> Q Will its having been repaid, assuming that happens, will its having been repaid change your opinion about whether the action in escrowing the money was actuarial[ly] sound?
>
> A That action is actuarially unsound at that time, and repaying the money doesn't really change that.

Defendants, however, point to Mr. Macdonald's deposition testimony that his opinion regarding the actuarially unsound manner of funding the Retirement System "does not mean the system is actuarially unsound. It just means during that fiscal year the contribution that was made was not satisfactory of the fund, which should have been funded." Mr. Macdonald also testified that "maintaining an operating System in an actuarially unsound manner does not necessarily render the entire System actuarially unsound[.]"

The courts of other states have previously rejected arguments similar to the argument of Defendants. In *Dadisman*, the West Virginia Supreme Court cited *Valdes*, *Weaver*, and *Dombrowski* for the following proposition:

> Those cases found that even where a unilateral reduction in the state's share of pension contributions, as earned by State employees, does not result in out-of-pocket losses for plan participants, they still have a vested interest in the integrity and security of the funds available to pay future benefits. *See*, *e.g.*, *Valdes*, 139 Cal. App. 3d at 785, 189 Cal. Rptr. 222. We agree with this reasoning.

Dadisman, 384 S.E.2d at 828. We also find this reasoning compelling. At the point in time when the employer contributions were escrowed in this case, the Retirement System was not being funded in an actuarially sound manner. At that time, it was unclear when, or even whether, the diverted funds would be repaid. Accordingly, the actuarially unsound diversion of funds threatened the integrity and security of the Retirement System. Therefore, we hold that by diverting the funds, Defendants' actions impaired the contractual right of Plaintiffs to a retirement system funded in an actuarially sound manner. *See Bailey*, 348 N.C. at 150-51, 500 S.E.2d at 66; *see also Public Employee Pensions in Times of Fiscal Distress*, 90 Harv. L. Rev. 992, 1006 (March 1977) (stating that "[o]n several occasions, governments have failed to continue the actuarial appropriations they had promised to make to the pension system, and courts have uniformly held these missed appropriations to be contract violations").

Defendants also rely upon *Halstead*, in which the Michigan Court of Appeals cited the Michigan State Constitution, which provided that "accrued financial benefits of the state's or a political subdivision's pension plan are a contractual obligation which cannot be diminished or impaired." *Halstead*, 338 N.W.2d at 905-06. The Michigan Court of Appeals also recognized that " '[a]ccrued financial benefits' have been defined as the right to receive certain pension payments upon retirement based on service performed." *Id.* at 906. However, the Court went further in holding that "[b]ecause there is no evidence that ordinance § 35-16.3 diminishes or impairs the full payment of [the] plaintiffs' accrued financial benefits, the ordinance does not violate the constitutional proscription against impairment of contracts." *Id. Halstead* is readily distinguishable from the present case because it presented the narrow issue of whether the legislative enactment violated the constitutional proscription against diminishing accrued financial benefits. In contrast, the issue in the case before us is whether Defendants' actions violated Plaintiffs' contractual right to a retirement system funded in an actuarially sound manner.

C.

[4] These Defendants also argue that even assuming Plaintiffs had a contractual right to a retirement system funded in an actuarially sound manner and that Defendants' actions impaired that contract, any impairment was reasonable and necessary to serve an important public purpose. Defendants contend that "it has been stipulated that the escrow of employer contributions mandated by Executive Order No. 3 was for the sole purpose of fulfilling the constitutional requirement to balance the State budget." Therefore, Defendants argue, the escrow of the employer contributions was reasonable and necessary to serve the important public purpose of avoiding a constitutionally prohibited budget deficit.

Article III, section 5(3) of the North Carolina Constitution provides:

> The total expenditures of the State for the fiscal period covered by the budget shall not exceed the total of receipts during that fiscal period and the surplus remaining in the State Treasury at the beginning of the period. To insure that the State does not incur a deficit for any fiscal period, the Governor shall continually survey the collection of the revenue and shall effect the necessary economies in State expenditures[.]

N.C. Const. art. III, § 5(3). As our Court has recognized, "[t]his provision clearly places a duty upon the Governor to balance the budget and prevent a deficit." *County of Cabarrus v. Tolson*, 169 N.C. App. 636, 638, 610 S.E.2d 443, 445, *disc. review denied*, 359 N.C. 630, 616 S.E.2d 229 (2005).

We agree with the trial court and with Defendants that the avoidance of a constitutionally prohibited budget deficit is clearly an important public purpose. However, we also agree with the trial court that the escrow of the funds in the present case was not reasonable and necessary to achieve that purpose. As we recognized in our earlier discussion of Article V, section 6(2) of the North Carolina Constitution, retirement funds specifically receive special constitutional protection in North Carolina. Article V, section 6(2) of the North Carolina Constitution plainly provides that the State may not use retirement funds for any purpose other than "retirement system benefits and purposes, administrative expenses, and refunds[.]" N.C. Const. art. V, § 6(2). This constitutional provision demonstrates the strong public policy of North Carolina in favor of the inviolability of retirement funds. *See* John V. Orth, *The North Carolina State Constitution* 127 (1993) (stating: "By constitutional amendment,

approved in 1950 and carried forward into the 1971 Constitution, teachers and state employees secured constitutional protection for their retirement funds; in 1971 local government employees were given the same protection. *Money in the funds may not even be loaned to the state.*" (emphasis added)). Defendants argue that the constitutional protection of Retirement System funds extends only to those funds actually held by the Retirement System and that it is not against public policy to use funds not yet received by the Retirement System to balance the budget. Again, we reject this argument. As we held above, the escrow of the employer contributions was a diversion of Retirement System funds that was prohibited by the North Carolina Constitution.

Our Supreme Court in *Bailey* considered whether the impairment at issue in that case was reasonable and necessary to serve an important public purpose. *Bailey*, 348 N.C. at 151-53, 500 S.E.2d at 66-67. Our Supreme Court recognized:

> "In applying this standard, . . . complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake. A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all."

Id. at 151-52, 500 S.E.2d at 66 (quoting *United States Trust Co. v. New Jersey*, 431 U.S. 1, 25-26, 52 L. Ed. 2d 92, 112, *reh'g denied*, 431 U.S. 975, 53 L. Ed. 2d 1073 (1977)). Our Supreme Court thus held:

> While it is clear that the state interest in this case—complying with a Supreme Court ruling—was important, what is equally clear is that the method chosen was not necessary to achieve the state interest asserted. In *Davis*, the Supreme Court did not tell North Carolina that it was required to tax state and local employees; nor did it set forth any mandatory scheme of compliance. *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 103 L. Ed. 2d 891. The Court merely held that federal retirees had to be treated the same as state and local retirees. *Id.* There are numerous ways that the State could have achieved this goal without impairing the contractual obligations of [the] plaintiffs.

Id. at 152, 500 S.E.2d at 67.

As in *Bailey*, we cannot say in the case before us that "the method chosen" of diverting employer contributions to the Retirement System was "necessary to achieve the state interest asserted." *See id.* A balanced budget could have been achieved in another way without diverting Retirement System funds that have been afforded special constitutional protection.

Our Supreme Court further held in *Bailey* that

> the method chosen was not reasonable under the circumstances. The legislature sought a "revenue neutral" approach to complying with the *Davis* decision, meaning that legislators would be faced with neither raising taxes nor cutting other programs in order to comply. However, this convenient approach impaired vested rights of current and future state and local retirees to whom the State had made promises of exemption in consideration of their many years of public service.

Id.

Similarly, in the present case, instead of seeking a tax increase or cuts in other State programs that did not enjoy special constitutional protection, Defendants diverted the employer contributions to the Retirement System. Our Court cannot say that this diversion, which impaired the contractual right of Plaintiffs to a retirement system funded in an actuarially sound manner, was reasonable.

For the reasons stated above, we hold that the trial court did not err by granting summary judgment to Plaintiffs regarding their claim for declaratory judgment under the Contract Clause. Because we affirm the judgment of the trial court for Plaintiffs on the merits of their declaratory judgment claims under Article V, section 6(2) of the North Carolina Constitution and under the Contract Clause of the United States Constitution, we need not address Plaintiffs' cross-assignments of error.

Plaintiffs' Appeal

[5] Plaintiffs argue the trial court erred by granting summary judgment to the Treasurer and to the Board on Plaintiffs' claim for writ of mandamus to compel compliance with N.C. Gen. Stat. § 135-8(f)(3). N.C. Gen. Stat. § 135-8(f)(3) provides:

> In the event the employee or employer contributions required under this section are not received by the date set by the Board of Trustees, the Board shall assess the employer with a penalty of 1% per month with a minimum penalty of twenty-five dollars

> ($25.00). If within 90 days after request therefor by the Board any employer shall not have provided the System with the records and other information required hereunder or if the full accrued amount of the contributions provided for under this section due from members employed by an employer or from an employer other than the State shall not have been received by the System from the chief fiscal officer of such employer within 30 days after the last due date as herein provided, then, notwithstanding anything herein or in the provisions of any other law to the contrary, upon notification by the Board to the State Treasurer as to the *default of such employer as herein provided*, any distributions which might otherwise be made to such employer from any funds of the State shall be withheld from such employer until notice from the Board to the State Treasurer that such employer is no longer in *default*.

N.C. Gen. Stat. § 135-8(f)(3) (2007) (emphases added). Based upon the first sentence of the statute, Plaintiffs argue that because the employer contributions diverted pursuant to Executive Order No. 3 were not "received" by the Retirement System when they were due, the Board should have assessed a one percent per month penalty to those employers. Plaintiffs further argue that pursuant to the second sentence of the statute, all State funds should have been withheld from employers whose employer contributions were not received by the Retirement System "within 30 days after the last due date as [therein] provided[.]" We disagree.

The statute speaks in terms of a default by an employer. The term "default" is defined as the "[f]ailure to perform a task or fulfill an obligation, esp. failure to meet a financial obligation." Webster's II New College Dictionary 301 (3d ed. 2005); *see also* Black's Law Dictionary 449 (8th ed. 2004) (defining "default" as "[t]he omission or failure to perform a legal or contractual duty; esp., the failure to pay a debt when due"). In the present case, the State employers did not default on their obligation to remit their employer contributions to the Retirement System. State employers calculated the amount of their employer contributions to the Retirement System, but then were ordered to pay those amounts into the escrow account. As the trial court found,

> the fact that the employer contributions affected by Executive Order No. 3 were not received by the Retirement System was neither the result of the intent of any employers to withhold contributions nor of negligence on the part of any employers, but rather

was the result of an intervening executive order that employers were bound to follow unless and until directed otherwise by competent authority.

Moreover, as the trial court found,

> [f]or several years prior to and following the issuance of Executive Order No. 3, the Department of State Treasurer had routinely waived the imposition of the 1% per month fine provided in N.C. Gen. Stat. § 135-8(f)(3) for employers from whom the System had not received required payments when due when the Department of State Treasurer determined, in its discretion, that the employer had demonstrated lack of intent to fail to remit the contributions in a timely manner.

N.C. Gen. Stat. § 135-6(f) (2007) provides: "The Board of Trustees shall also, from time to time, in its discretion, adopt rules and regulations to prevent injustices and inequalities which might otherwise arise in the administration of this Chapter." The Board's practice of waiving penalties under circumstances where employers were not at fault for failing to remit employer contributions to the Retirement System is entirely consistent with the Board's statutory discretion to adopt rules "to prevent injustices." Accordingly, for all the reasons stated above, the Treasurer and the Board were not required to punish those employers whose employer contributions were not deposited in the Retirement System. Therefore, we hold the trial court did not err by granting summary judgment to the Treasurer and to the Board on Plaintiffs' claim for writ of mandamus.

Affirmed.

Judges WYNN and CALABRIA concur.

STATE OF NORTH CAROLINA v. HERBERT EARL LAWRENCE

No. COA07-1574

(Filed 5 August 2008)

1. Evidence— shiny object—rape victim's impression of weapon

The trial court did not err in a prosecution for first-degree rape and other offenses by admitting the victim's testimony that she saw a shiny object in defendant's hand and that she thought

it was a knife. The testimony is probative of whether the victim reasonably believed that defendant displayed a dangerous or deadly weapon, one of the statutory elements of the crime.

2. Evidence— rape—opinions of perpetrator's identity—not prejudicial

There was no prejudice in a prosecution for first-degree rape and other offenses in the admission of testimony from various witnesses about whether there was ever any question as to who committed the crime. The testimony was offered as an explanation of why the SBI protocol for the victim's sexual assault kit was not followed rather than for the truth of the matter. Moreover, defendant did not show a reasonable possibility of a different result without this evidence.

3. Rape— first-degree—evidence of weapon—sufficiency

The trial court did not err by denying defendant's motion to dismiss a charge of first-degree rape where there was an adequate evidentiary basis for the jury to conclude that the victim reasonably believed that defendant employed a deadly weapon to threaten the victim with death, whereby he effectively discouraged any further resistance. Defendant's threats were sufficiently connected in time to the acts for there to be a continuous transaction.

Judge ELMORE dissenting.

Appeal by Defendant from judgment entered 13 July 2007 by Judge J.B. Allen in Durham County Superior Court. Heard in the Court of Appeals 10 June 2008.

Attorney General Roy Cooper, by Assistant Attorney General, Philip A. Lehman, for the State.

Cheshire, Parker, Schneider, Bryan and Vitale, by John Keating Wiles for Defendant.

ARROWOOD, Judge.

Defendant appeals from judgment entered 13 July 2007 convicting him of first-degree rape and felonious larceny. We find no error.

The State's evidence tends to show the following: Jacqueline Brown (Brown) and Herbert Lawrence (Defendant) were neighbors in Durham, North Carolina, having first met in July 2005. Defendant

and Brown began dating in August 2005 and continued dating for six weeks. Defendant, however, began to harass Brown with repeated phone calls to Brown at work and home, which concerned her. Defendant and Brown intended to remain friends after Brown ended their relationship, and they communicated with each other frequently until January 2006. At one point, however, Defendant's harassing calls made Brown so uncomfortable that she and her daughter left home to stay with a friend for three or four days.

At approximately 6:10 A.M. on Saturday, 28 January 2006, Brown stepped outside of her house to start her car to travel to a prayer meeting at her church. Unbeknownst to Brown, Defendant was hiding beside her car. Defendant revealed himself as Brown approached, and Defendant said, "Jackie, Jackie." Brown, startled by Defendant, screamed for help and ran back toward the house, tripping on a step in her haste. Defendant then threatened, "You better get up, or if you don't I'm going to kill you." Brown saw that Defendant carried an object in his hand, which she described as "silver . . . [and i]t reflected because I had my porch light on[.]" Brown "thought it was a knife." Defendant then dragged Brown into the house.

Once inside the house, Defendant began ranting about the termination of their relationship. Defendant lay Brown on her back in the living room, and Brown began pretending to have seizures. Defendant then moved Brown to the couch; Brown continued pretending to be unconscious and to have seizures, falling off of the couch and urinating on herself. Defendant undressed Brown, washed her and moved her to another place in the house.

Later that day, Defendant got on top of Brown and penetrated her vagina three times with his penis. Brown heard Defendant tell Brown's three-year-old daughter to go to her room. Brown remained in the living room Saturday, pretending to be unconscious and to have seizures. Late Saturday night or early Sunday morning, Defendant moved Brown to the bedroom, tied Brown's hands and feet to the bedposts, and left the room. Defendant said he did not trust her and believed she could be faking.

Early Sunday morning, Brown overheard Defendant tell her daughter to get dressed, after which Defendant entered the bedroom and penetrated Brown's vagina again with his penis while she lay on the bed. Afterwards, Defendant told Brown's daughter that "mommy [is] sick" and they "may have to take her to the doctor."

Defendant then dressed Brown and moved her first to the living room couch and finally to the passenger seat in his car. Brown continued pretending to be unconscious and to have seizures. Defendant then drove the car, with Brown and Brown's daughter as passengers, away from the house. Defendant began driving recklessly, and Brown overheard Defendant making phone calls. In the first call, Defendant said, "[m]an, if anybody come [sic] looking for me, tell them you ain't [sic] seen me, you don't know where I'm at." In the second call, Brown overheard Defendant telling a coworker that his sister was in a coma and he was going to Rocky Mount. In the third call, Brown heard Defendant say, "Vicki, Vicki, answer the phone. . . . I need to talk to you." Brown knew that Vicki was Defendant's ex-wife who lived in Rocky Mount.

After Defendant made the phone calls, Defendant took Brown to a hospital in Rocky Mount. Brown heard Defendant tell the nurse that Brown was his sister and that she may be in a coma. The nurse said, "Jackie, open your eyes," but Brown did not open her eyes; Brown also did not respond to ammonia. When the nursing staff moved Brown inside the hospital, and away from Defendant, Brown opened her eyes and said that her child was in the car with Defendant, who was not her brother, and that Defendant had kidnapped and raped her. Nurses called the police, found numerous bruises on Brown's arms and thighs, and also bruising, swelling and tearing on and around Brown's vagina. Nurses also indicated the presence of semen with a Woods lamp.

Law enforcement responded to the call at the hospital and took Brown's statement. Police also found a damp washcloth in the bathroom sink at Brown's house and nylon stockings on the bed. Brown and her daughter stayed at a women's shelter in Rocky Mount for three months and did not return to Durham until April.

On Monday, January 30, Defendant did not come to work. Defendant's employer talked to Defendant and told him that the police were looking for him and that he needed to come to work. Defendant replied that he was in Rocky Mount. Defendant did not contact his employer again after that day. Investigator Charles Britt (Officer Britt) called Defendant and left messages on his cell phone, and Defendant returned his calls in tears and said, "I'm sorry for what I did." Defendant grew frightened that "I would go to jail for doing something like this" and fled in Brown's vehicle to Daytona Beach, Florida.

On 17 March 2006, Defendant was arrested in New Smyrna Beach, Florida. Defendant was cooperative and spoke freely to the police, giving a statement of the events of 28 and 29 January. When asked if Brown consented to sex, Defendant replied, "No. She was semi-conscious or almost unconscious. . . . No, she neither consented or opposed to [sic] having sex with me."

In April 2006, Brown received a letter from Defendant, which had a return address of a county jail in Daytona Beach, Florida; the letter stated: "I'm sorry that I hurt you and Cherish (Brown's daughter) in any kind of way. I didn't mean to. I can't change what has happened, but I definitely regret it. I'm paying for it now[.] . . . I do love you and Cherish, and I am indeed sorry for the wrong that I've done." Defendant then asked Brown to sign an affidavit enclosed with the letter, which stated that if called to testify, Brown would invoke her Fifth Amendment right to remain silent, and if given immunity, her testimony would vindicate Defendant. Brown gave the letter to an investigator with the Durham Police Department.

On 1 May 2006, Defendant was indicted on counts of first-degree rape, second-degree rape, first-degree kidnapping, second-degree kidnapping and felonious larceny of a motor vehicle. Defendant's trial began on 10 July 2007, and on 13 July 2007, a jury found Defendant guilty of first-degree rape, first-degree kidnapping, second-degree kidnapping and felonious larceny. Following the verdicts, the trial court entered judgment, sentencing Defendant consecutively to 288 to 355 months imprisonment on the first-degree rape conviction and 8 to 10 months imprisonment on the larceny conviction. The court continued judgment on the remaining counts. From these judgments, Defendant appeals.

Admissibility of Evidence

[1] In Defendant's first argument, Defendant contends that the trial court erred by overruling his objection to Brown's testimony regarding the shiny object in Defendant's hand. We conclude the trial court did not err.

" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2007). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue

delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403 (2007). " 'Whether or not to exclude evidence under Rule 403 of the Rules of Evidence is a matter within the sound discretion of the trial court and its decision will not be disturbed on appeal absent a showing of an abuse of discretion.' " *State v. Cunningham*, 188 N.C. App. 832, 836-37, 656 S.E.2d 697, 700 (2008) (quoting *State v. McCray*, 342 N.C. 123, 131, 463 S.E.2d 176, 181 (1995)). "[A] trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403[; however] such rulings are given great deference on appeal." *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991).

At trial, Brown gave the following testimony, to which Defendant assigns error on appeal:

> When I saw him come from behind my car, my first reaction was, "Oh, my God. Oh, my God." I turned, and I tried to get back to my house. I have one step that I have to step up to get right on my porch. I tried to get there. . . . He came around . . . from around the side and jumped right onto the porch. I fell right there at the step in the porch. . . . I grabbed the railing, and I kept screaming.
>
> . . . .
>
> And he grabbed me, and he said, "Get up." . . . And he said, "I'll kill you. I'll kill you." He reached into his pocket to get something. I didn't see if it was a knife. I didn't see if it was a gun. I just saw something shiny. That was all I saw. I had my head down, and I was holding the railing like this. I was holding the railing, and I was still screaming. And he said, "Shut up. Shut up. I'm going to kill you."
>
> . . . .
>
> And so he grabbed the screen door, and he pulled my body in the door, and then he thought he had me in the door, but my foot got caught between the screen door. . . . And then when he realized that my foot was in the screen door, that's when he pushed back and then he finished pulling me in the house.
>
> Q: Okay. Now, when you said he reached in his pocket, which pocket do you remember?
>
> A: It was his left pocket, because he was turned—he reached in his left pocket.

Q: Was it a shirt pocket, a coat pocket?

A: No, he had on a jacket because it was cold that morning. It was a short jacket.

Q: Now, you said you saw something shiny. Do you remember what color shiny?

A: It was just like—it was silver. It was just something silver. It reflected because I had my porch light on, because I flipped the porch light. It was dark.

Q: Could you tell what the size was of the object?

A: Honestly, no.

Q: What did you think it was?

A: I thought it was a knife.

[Defense Attorney]: Objection.

The Court: Overruled.

Defendant specifically contends that the foregoing portion of Brown's testimony was incorrectly admitted because her testimony was contradictory and speculative. Defendant argues that because Brown first testified that she "didn't see what [Defendant] had in his hand[,]" the trial court should not have admitted Brown's testimony that she "thought it was a knife." We disagree.

N.C. Gen. Stat. § 14-27.2(a)(2) (2007) states:

(a) A person is guilty of rape in the first degree if the person engages in vaginal intercourse:

. . . .

(2) With another person by force and against the will of the other person, and:

a. Employs or displays a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon[.]

The pertinent question on appeal is (1) whether the trial court abused its discretion by overruling Defendant's objection to the foregoing testimony under Rule 403 and (2) whether the trial court erred in its determination that the foregoing evidence was relevant pursuant to Rule 401. Defendant relies on *State v. Baker*, 320 N.C. 104, 357 S.E.2d

340 (1987), and *State v. Allen*, 80 N.C. App. 549, 342 S.E.2d 571 (1986), for the proposition that Brown's testimony was inadmissible due to its contradictory and speculative nature. In *Baker*, the Court stated that a grandmother's statements that the grandfather "stayed in 'the bathroom a long time[,]' " and that "the grandfather did not come immediately to let her in when she was locked out of the house[,]" were not relevant to the question of whether the grandfather was guilty of sexual assault. *Baker*, 320 N.C. at 108, 357 S.E.2d at 342. The Court further stated, "[i]f the grandmother had testified to these facts her conclusion that the grandfather had engaged in sexual relations with the granddaughter would have been too speculative to be admissible." *Id.*

In *Allen*, the Court concluded that the Defendant's proffered evidence that "another [unrelated] robbery [was] perpetrated by a man resembling defendant [who] utiliz[ed] an almost identical *modus operandi* [as Defendant,]" was irrelevant and inadmissible. *Allen*, 80 N.C. App. at 550, 342 S.E.2d at 572. The Court explained that "[e]vidence is relevant if it has any logical tendency, however slight, to prove the fact in issue[,]" and that the Defendant's proffered evidence was "so weak, so speculative and uncertain, that it did not possess sufficient probative value to justify receiving it in evidence." *Id.* at 551, 342 S.E.2d at 573.

The instant case is readily distinguished from *Allen* and *Baker*. Here, the trial court did not err by concluding that Brown's testimony that she thought Defendant held a knife, a dangerous weapon, had a logical tendency to prove the fact in issue—that Defendant "display[ed] . . . an article which [Brown] reasonably believe[d] to be a dangerous or deadly weapon[.]" N.C. Gen. Stat. § 14-27.2. Unlike the Defendant's proffered irrelevant evidence in *Allen* and *Baker*, Brown's statement, "I thought it was a knife[,]" is probative to the question of whether Brown reasonably believed that Defendant "display[ed] a dangerous or deadly weapon[.]" The trial court did not err by admitting this evidence.

We believe the facts of this case are more closely analogous to *State v. King*, 256 N.C. 236, 239, 123 S.E.2d 486, 488 (1962), in which our Supreme Court reasoned that the "vague" testimony of the victim regarding "the time the alleged crime was committed by the defendant . . . goes to [the] weight [of the evidence] rather than to its admissibility." *Id.* As in *King*, we conclude that even though Brown's statement, "I thought it was a knife[,]" may have been speculative, this goes to the weight of the evidence, rather than its admissibility. The

trial court did not err by concluding that the statement was relevant to the question of whether Defendant "display[ed] a dangerous or deadly weapon or an article which [Brown] reasonably believe[d] to be a dangerous or deadly weapon[.]" N.C. Gen. Stat. § 14-27.2. Furthermore, the trial court did not abuse its discretion in determining under Rule 403 that the "probative value [of the evidence was not] substantially outweighed by the danger of unfair prejudice[.]" Rule 403. This assignment of error is overruled.

[2] In Defendant's second argument, he contends that the trial court erred by overruling his objection to the testimony of various witnesses regarding the prosecutor's question: "[was] there ever any question as to who committed this incident?"

Specifically, Defendant challenges the testimony of Officer Britt and Investigator Donna Jackson of the Durham Police Department (Officer Jackson) who were questioned about why certain procedures were not completed in their investigation. Specifically, when asked about SBI requirements, Officer Jackson stated:

> A: The SBI has certain criteria that must be met before they will examine . . . a victim's sexual assault kit. . . .
>
> [Defense Counsel]: Well, Your Honor, this item was never sent for testing, so I'd object to relevance to that. . . .
>
> Q: Okay. And with regard to this particular crime, was there, to your knowledge and based on what the criteria that were given to you in terms of collecting evidence—was the identity of this suspect in question?
>
> A: No.
>
> [Defense Counsel]: Well, objection, Your Honor. . . .
>
> The Court: Sustained. Motion to strike allowed.

Defense counsel requested a curative jury instruction, but the court did not give this instruction to the jury.

During the examination of Officer Britt, the State asked whether there was "ever any question as to who committed this incident," to which defense counsel objected. The court sustained defense counsel's objection, and the State then rephrased the question, asking whether "[i]n the course of your investigation, . . . the identity of the perpetrator [was] ever in question?" Defense counsel again objected, and the court overruled the objection, allowing Officer Britt to answer, "no[.]"

Defendant argues that because the State used the word "perpetrator" instead of "suspect" that Defendant was "deprived . . . of the full effect of his not guilty plea[.]" Defendant cites *State v. Stegmann*, 286 N.C. 638, 652-53, 213 S.E.2d 262, 273 (1975), for the proposition that a plea of not guilty puts at issue not only whether the crimes charged were committed, but also whether the Defendant committed the crimes. We believe that Defendant's argument is misplaced, and conclude that *State v. O'Hanlan*, 153 N.C. App. 546, 570 S.E.2d 751 (2002), is controlling here. In *O'Hanlan*, a Deputy offered the following testimony:

Q. Did you find any [evidence]?

A. Any evidence of—

Q. Or were you looking for any?

A. I didn't need much evidence, sir, because I have a victim that had told me who her attacker was and from the look that her physical person was and the way she described the attack and her bruising and her scars, she told me who the attacker was and she gave me a name and a description. That's what I needed because I was fortunate I had an eye witness [sic] victim that survived.

Id. at 561-62, 570 S.E.2d at 761. On redirect, the State revisited the earlier testimony:

Q. There was a lot of questions here from counsel for the defendant about the fact that you didn't send [evidence] off [for scientific tests], you didn't send that off, you didn't do this or that check. What can you tell this jury about why you didn't have these things checked?

A. I had a victim that survived her attack. She could positively identify her assailant, the person that kidnapped, raped, and brutally beat her. If she had died—

[Defense Counsel]: Objection, Your Honor, speculative.

The Court: Overruled.

Q. Go ahead?

A. . . . I would have done more fingerprinting, more checking under fingernails, more fiber transfer, because I wouldn't have known who done it. But she positively told me who done it and I arrested him.

Id. at 562, 570 S.E.2d at 761. In upholding the trial court's admission of the foregoing testimony, the Court in *O'Hanlan* explained:

> The context in which this testimony was given makes it clear [the Investigator] was not offering his opinion that the victim had been assaulted, kidnapped, and raped by defendant, but was explaining why he did not pursue as much scientific testing of physical evidence in this case as he would a murder case because the victim in this case survived and was able to identify her assailant.

Id. at 562, 570 S.E.2d at 761. Further, this Court explained, "[h]is testimony was helpful to the fact-finder in presenting a clear understanding of his investigative process." *Id.* at 562-63, 570 S.E.2d at 761.

As in *O'Hanlan*, Officer Britt and Officer Jackson's testimony was not offered as an opinion that Defendant raped and kidnapped Brown; rather, Officer Britt and Officer Jackson explained why the SBI protocol with regard to examining the victim's sexual assault kit was not followed in this case. Here, Brown provided eyewitness testimony identifying Defendant. Moreover, Defendant freely made statements to the police that "[Brown] was semi-conscious or almost unconscious. . . . [and] she neither consented or opposed to [sic] having sex with me[.]"

Even assuming *arguendo* that the foregoing testimony was inadmissible, defendant has failed to demonstrate prejudice. To establish prejudicial error, a defendant must show there was a reasonable possibility that a different result would have been reached had the evidence been excluded. N.C. Gen. Stat. § 15A-1443(a) (2007). This assignment of error is overruled.

<u>Motion to Dismiss</u>

[3] In Defendant's third argument, Defendant contends that the trial court erred by denying Defendant's motion to dismiss the charge of first degree rape for insufficient evidence. We disagree.

"The standard of review on a motion to dismiss for insufficient evidence is whether the State has offered substantial evidence of each required element of the offense charged." *State v. Goblet*, 173 N.C. App. 112, 118, 618 S.E.2d 257, 262 (2005). "Evidence is substantial if it is relevant and is sufficient to persuade a rational juror to accept a particular conclusion." *Id.* "In ruling on a motion to dismiss

for insufficient evidence, the court must view the evidence in the light most favorable to the State and every reasonable inference drawn from the evidence must be afforded to the State." *Id.*

The statute governing first-degree rape, N.C. Gen. Stat. § 14-27.2(a)(2) provides:

> (a) A person is guilty of rape in the first degree if the person engages in vaginal intercourse:
>
> . . . .
>
> (2) With another person by force and against the will of the other person, and:
>
> a. Employs or displays a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon[.]

See also State v. Worsley, 336 N.C. 268, 275, 443 S.E.2d 68, 70 (1994).

Specifically, Defendant argues that "proof was lacking with respect to the use or employment of an object that Ms. Brown reasonably believed was a dangerous or deadly weapon." Therefore, the pertinent question is whether the State offered substantial evidence that Defendant displayed an article which Brown reasonably believed to be a dangerous or deadly weapon. N.C. Gen. Stat. § 14-27.2; *see also State v. Mayse*, 97 N.C. App. 559, 562-63, 389 S.E.2d 585, 586 (1990). Here, Brown testified that Defendant repeatedly stated that he would kill Brown:

> And he grabbed me, and he said, "Get up." . . . And he said, "I'll kill you. I'll kill you." He reached into his pocket to get something. I didn't see if it was a knife. I didn't see if it was a gun. I just saw something shiny. . . .
>
> I was holding the railing, and I was still screaming. And he said, "Shut up. Shut up. I'm going to kill you."

When specifically asked about the "shiny" object, Brown stated:

> A: It was just like—it was silver. It was just something silver. It reflected because I had my porch light on, because I flipped the porch light. It was dark.
>
> Q: Could you tell what the size was of the object?
>
> A: Honestly, no.

Q: What did you think it was?

A: I thought it was a knife.

Brown's testimony tends to show that she was afraid of Defendant and believed her life was in danger; to protect herself, Brown feigned having seizures and unconsciousness for almost two days. In fact, Brown even urinated on herself to make her unconscious state more believable. We conclude that Brown's testimony as to Defendant's possession of a shiny, silver object, which she thought was a knife, together with the circumstances of Defendant's threatening behavior and statements such as "I'll kill you[,]" is sufficient evidence that Defendant displayed an article which Brown reasonably believed to be a dangerous or deadly weapon.

Finally, we examine whether there was sufficient evidence that Defendant "employed" the dangerous weapon as required by *State v. Langford*, 319 N.C. 340, 354 S.E.2d 523 (1987):

> The statute, N.C.G.S. § 14-27.2, does not require a showing that a dangerous or deadly weapon was used in a particular manner in order to sustain a conviction for first degree rape. Instead it requires a showing only that such a weapon was "employed or displayed." Further, such a weapon has been "employed" within the meaning of N.C.G.S. § 14-27.2 when the defendant has it *in his possession at the time of the rape.*

Id. at 344-45, 354 S.E.2d at 525-26 (citations omitted) (emphasis added).

Prior to the Court's opinion in *Langford*, the Court stated in *State v. Sturdivant*, 304 N.C. 293, 283 S.E.2d 719 (1981), that "the Legislature intended to make implicit in G.S. 14-27.2 a matter of ordinary common sense: that the use of a deadly weapon, in any manner, in the course of a rape offense, always has some tendency to assist, if not entirely enable, the perpetrator to accomplish his evil design upon the victim, who is usually unarmed." *Id.* at 299 n.1, 283 S.E.2d at 725 n.1. The statute "simply necessitates a showing that a dangerous or deadly weapon was employed or displayed in the course of a rape period." *Id.* at 300, 283 S.E.2d at 725. "The plain meaning of the word 'employ' is 'to use in some process or effort' or 'to make use of.' " *Id.* (citing The American Heritage Dictionary of the English Language 428 (1969); Webster's Third New International Dictionary 743 (1964)).

In *State v. Powell*, 306 N.C. 718, 295 S.E.2d 413 (1982), the Court interpreted *Sturdivant* in the context of the following scenario:

In *Powell*, the defendant argued that there was no testimony at trial that defendant "employed" or "displayed" a deadly or dangerous weapon in order to effectuate the rape. In fact, the victim testified on cross-examination that after leaving her kitchen, she did not see the knife and did not know what had happened to it. However, the Court reasoned:

> Defendant . . . [b]randish[ed] a five to six inch knife blade [and] held [the knife] to [the victim's] throat[.] . . . [D]efendant warned [the victim] not to resist. Shortly thereafter, in an upstairs bedroom and without her consent, [the victim] was forced to submit to the sexual act. Under these circumstances, we hold that the State presented sufficient evidence that a dangerous or deadly weapon was employed in a manner consistent with that contemplated by G.S. § 14-27.2 to accomplish the offense.

Id. at 723, 295 S.E.2d at 416.

In *State v. Pruitt*, 94 N.C. App. 261, 380 S.E.2d 383 (1989), the deadly weapon employed by the defendant lay on a table eight feet away from the place where the sexual act occurred. In *Pruit*, the Court quoted *Langford*, stating:

> The North Carolina Supreme Court has held that the State is not required to prove "that a dangerous or deadly weapon was used in a particular manner in order to sustain a conviction for first degree rape." *State v. Langford*, 319 N.C. 340, 344, 354 S.E.2d 523, 525 (1987). The State is only required to show that defendant possessed a deadly or dangerous weapon at the time of the rape and that the victim was aware of the presence of the weapon, because it had been displayed or employed. *See id.* Although the trial court's instruction did not emphasize the victim's awareness of the weapon, the instruction made clear that the State was required to prove that the weapon was displayed in some fashion. The victim's testimony indicates that not only did defendant have a knife in his possession during his sexual assault on her, defendant threatened her with this knife, and the knife remained on the bedside table, within eight feet of defendant, throughout the attack.

Id. at 268, 380 S.E.2d at 386.

The Court again interpreted *Sturdivant* in *State v. Blackstock*, 314 N.C. 232, 333 S.E.2d 245 (1985), stating that *Sturdivant* "stands

for the proposition that if a weapon is employed or displayed in the course of the rape period it is sufficient to support the verdict of guilty upon a charge of first[-]degree rape." *Id.* at 241, 333 S.E.2d at 251. The Court defined the time frame encompassing the "rape period" with regard to the infliction of serious personal injury under N.C.G.S. § 14-27.2(a)(2)(b), an element which elevates rape and sexual offense from second to first degree offenses, by saying that "the element of infliction of serious personal injury upon the victim or another person in the crimes of first[-]degree sexual offense and first[-]degree rape is sufficiently connected in time to the sexual acts when there is a series of incidents forming one continuous transaction between the rape or sexual offense and the infliction of the serious personal injury." *Id.* at 242, 333 S.E.2d at 252.

The Court in *State v. Whittington*, 318 N.C. 114, 347 S.E.2d 403 (1986), applied *Blackstock* to the defendant's alleged employment of a deadly weapon during the course of a sexual assault, in which the victim wrestled the deadly weapon from the defendant's hands. The defendant contended that he "did not employ or display a dangerous or deadly weapon during the commission of the sexual assault since prior to the act the victim managed to take the knife away from him and throw it out of his grasp." *Id.* at 118, 347 S.E.2d at 405. In *Whittington*, the following transpired:

> [T]he victim testified that after engaging in a brief conversation with defendant at the front of the car wash, "[defendant] had a knife pulled on me and he said if I didn't do what he said—that I had better do what he said because he had a gun in his back pocket." Defendant grabbed the victim and began dragging her to the rear of the car wash. During this time, the victim placed both hands on the blade of the knife to keep it from getting close to her. After defendant had dragged the victim about eighty feet, both fell to the ground and the victim "twisted the knife out of his hand and got it away from him." During the struggle, the victim lost consciousness. When the victim awakened, she felt defendant penetrate her vagina with his finger.

Id. at 119-20, 347 S.E.2d at 405-06. The Court reasoned that the foregoing testimony revealed "a series of incidents forming a continuous transaction between defendant's wielding the knife and the sexual assault." *Id.* "The knife was employed during this period of time in an effort to force the victim to give in to defendant's demands." *Id.* Therefore, the Court concluded that "[u]nder the holdings in

Sturdivant and *Powell*, it is of no consequence that defendant was not in possession of the deadly weapon at the precise moment that penetration occurred," because "[t]he knife had been used during the course of the assault to assist the perpetrator in accomplishing his evil design upon the victim who was unarmed." *Id.*

In the instant case, viewing the foregoing statements of the victim in the light most favorable to the State, with the benefit of every reasonable inference arising therefrom, we hold that there was an adequate evidentiary basis for the jury to conclude that the victim reasonably believed that Defendant employed a deadly weapon to threaten the victim with death, whereby he effectively discouraged any further resistance. Defendant's threats were "sufficiently connected in time to the sexual acts" such that there was "a series of incidents forming one continuous transaction between the rape" and the employment of what Brown reasonably believed to be a dangerous weapon. *Blackstock*, 314 N.C. at 242, 333 S.E.2d at 252. Such evidence satisfied the requirements of N.C. Gen. Stat. § 14-27.2. *See Sturdivant*, 304 N.C. at 300, 283 S.E.2d at 726; *Powell*, 306 N.C. at 722, 295 S.E.2d at 416; *Whittington*, 318 N.C. at 118, 347 S.E.2d at 405.

The trial court did not err in denying Defendant's motion to dismiss the charge of first-degree rape. This assignment of error is overruled.

No Error.

Judge WYNN concurs.

Judge ELMORE dissents by separate opinion.

ELMORE, Judge, dissenting in part.

I respectfully dissent from that part of the majority opinion holding that the trial court did not err by denying defendant's motion to dismiss because I would vacate defendant's first-degree rape conviction and remand for entry of judgment on second-degree rape and resentencing.

As explained in the majority opinion, defendant was indicted and convicted under the theory that he "[e]mploy[ed] or display[ed] a dangerous or deadly weapon or an article which the other person reasonably believe[d] to be a dangerous or deadly weapon . . . ." N.C. Gen. Stat. § 14-27.2(a)(2)a (2007). However, the record only shows

that when defendant forced Ms. Brown into his house, he displayed a shiny, silver object that Ms. Brown thought was a knife. Even if her testimony were sufficient to show that Ms. Brown reasonably believed that defendant displayed a dangerous weapon at this time, which I do not believe is the case, there was no evidence that defendant displayed the alleged weapon during the rapes.

Our Supreme Court has explained that although § 14-27.2 "does not require a showing that a dangerous or deadly weapon was used in a particular manner in order to sustain a conviction for first-degree rape," the defendant must have the weapon "*in his possession at the time of the rape*." *State v. Langford*, 319 N.C. 340, 344, 354 S.E.2d 523, 525-26 (1987) (citations omitted) (emphasis added); *see also State v. Roberts*, 310 N.C. 428, 434-35, 312 S.E.2d 477, 481 (1984) (affirming the denial of a motion to dismiss because the evidence showed that the defendant employed or displayed a dangerous weapon "during the course of the rape").

Here, there was no evidence that defendant had the alleged knife in his possession at the time of the rapes. Ms. Brown testified that she had her eyes closed and was feigning a seizure at the time of the rapes. She testified that she closed her eyes on Saturday morning after defendant dragged her into her house and did not open them again until Sunday afternoon when she arrived at the hospital and could no longer hear defendant. During her cross-examination, she confirmed that she "never saw that silver object again" after defendant initially displayed it. Her testimony strongly suggests that a significant period of time passed between when defendant forced her into the house and when he raped her. She testified that she started seizing on the floor, and "eventually" defendant moved her from the floor to her couch, where she continued seizing. She said, "And I stayed there, and I did that for I don't know how long. I did it until the point, because it was so long in the day that I had to go to the bathroom."

Accordingly, I would hold that the trial court erred by denying defendant's motion to dismiss because the State did not present sufficient evidence to support a finding that defendant employed or displayed a dangerous weapon during the rape. In all other respects, I concur with the majority opinion.

STATE OF NORTH CAROLINA, PLAINTIFF v. PAUL GUZMAN TADEJA, DEFENDANT

No. COA07-1391

(Filed 5 August 2008)

1. Appeal and Error— assignment of error—necessity

The Court of Appeals did not review defendant's contentions regarding Miranda warnings in a prosecution for indecent liberties and sexual acts with a 13-year-old where defendant did not assign error to the trial court's findings or conclusions.

2. Evidence— prior bad acts—relevant to victim's delay in reporting

The trial court did not err in a prosecution for indecent liberties and sexual acts with a 13-year-old by admitting evidence of defendant's extra-marital affair where defendant told the victim that his wife had almost left him after discovering the affair. The evidence was relevant to the victim's delay in reporting defendant's actions.

3. Appeal and Error— preservation of issues—arguments not presented at trial

A defendant convicted of indecent liberties and sexual acts with a 13-year-old waived appellate review of contentions that some of the charges should have been dismissed where the arguments in his brief were not those he presented at trial.

4. Sexual Offenses— instructions—factual basis for guilt

There was no plain error in a conviction for sexual acts with a 13-year-old where the court's summary of the facts as to one charge was not the appropriate set of facts for guilt of that charge. There was evidence upon which the jury could properly find that defendant had committed a sexual act, the law was correctly stated to the jury, the instructions as a whole were correct, and the jury was admonished to personally determine the facts of the case.

5. Evidence— juvenile victim—sealed records—in camera review

The trial court did not err by denying disclosure of some of the sealed records of a 13-year-old victim of indecent liberties and sexual acts. After a thorough review of the records not supplied to defendant, the Court of Appeals agreed with

the trial court that they did not contain favorable or material evidence for defendant.

Appeal by defendant from judgments entered on or about 23 March 2007 by Judge Richard D. Boner in Superior Court, Lincoln County. Heard in the Court of Appeals 19 May 2008.

Attorney General Roy A. Cooper, III by Assistant Attorney General Laura E. Crumpler, for the State.

Brian Michael Aus, for defendant-appellant.

STROUD, Judge.

Defendant appeals from his convictions by a jury of four counts of engaging in a sexual act with a person of the age of 13 years and four counts of taking indecent liberties with a child. Defendant argues the trial court erred in (1) denying his motion to suppress, (2) allowing defendant's statements regarding an extra-marital affair into evidence, (3) failing to grant defendant's motions to dismiss two of the statutory sex offense charges, and (4) instructing the jury on sex offense and accepting the guilty verdict thereon. Defendant also "requests that this Court review sealed records for both favorable and material evidence." For the following reasons, we find no prejudicial error.

I. Background

The State's evidence tended to show the following: Defendant, Ruby Tadeja ("Ms. Tadeja"), and their three sons lived next door to Jane.[1] Jane frequently visited defendant's home and Ms. Tadeja "dr[o]ve [Jane] to school, almost every day[.]"

During the summer of 2005, the relationship between defendant and Jane changed. At times, Jane would be at defendant's home when his wife was not present, and at one point defendant put his hands down Jane's pants and rubbed her vagina subsequently "insert[ing] his middle finger . . . about an inch." Defendant's behavior continued almost every time Jane came over. That summer defendant also placed his hands up Jane's shirt and fondled her breasts on at least two occasions.

Later during the summer, defendant took Jane to his room, "pulled [her] pants down, pulled his pants down [and] he rubbed his

1. To protect the identity of the victim, the pseudonym "Jane" will be used.

penis on [her] vagina and he tried to insert it but [she] told him to stop because it hurt." About three times that summer defendant engaged in activities with Jane while she was undressed. On other occasions defendant licked Jane's vagina. Defendant also showed Jane pornographic videos and web sites and told Jane "he wanted to do this stuff to [her]." Before Jane's birthday in October, defendant told her that he had two presents for her, "one to open in front of [her] mother and another would be a vibrator that [she] could keep in her room."

Until October 2005, Jane had concealed the interactions between herself and defendant because defendant told Jane that he would get into trouble and she knew she would no longer be able to see defendant's children if she reported defendant. Furthermore, defendant told Jane that he had sex with his former karate student who was also a babysitter and that his wife found out and almost left him. On 27 October 2005, Jane told her best friend, Kindra, that defendant was "messing" with her and she was tired of it.

On 9 December 2005, Kindra convinced Jane to see the guidance counselor at school, Carol Porter ("Ms. Porter"), and to report defendant's actions. Ms. Porter called Jane's mother and later submitted a report to the Sheriff's Department. Detective Sally Dellinger ("Detective Dellinger"), was assigned to the case.

> 4. On December 16, 2005, officers of the Lincoln County Sheriff's Department went to the La-Z-Boy factory in Lincolnton, North Carolina, to serve an arrest warrant on the defendant, an employee at the factory.
>
> 5. The defendant was called to the front lobby of the factory where he was taken into custody. The defendant was placed in handcuffs and shackles.
>
> 6. Before leaving the factory, the defendant was asked to sign a waiver of his Miranda Rights. . . .
>
> 7. The rights were read to the Defendant by Detective Sally Dellinger. The defendant signed the Waiver of Rights form and placed his initials beside each of the rights on the form.
>
> 8. The defendant was transported to the Lincoln County Sheriff's Department where he was interviewed by Detective Dellinger in her office. The defendant was arrested at 2:00 p.m. and the interview began at approximately twenty-five minutes later at 2:25 p.m.

> 9. While the defendant was in Detective Dellinger's officer, he was not in handcuffs or otherwise restrained. The door to Detective Dellinger's office was open.
>
> 10. Following the interview, the defendant was presented a written statement which he signed. . . .
>
> 11. The interview between Detective Dellinger and the defendant lasted approximately one hour. During the interview, the defendant did not request that he be permitted to consult an attorney.
>
> 12. No threats or promises were made to the defendant to induce his execution of the written statement.
>
> 13. Although the defendant's wife was at the Sheriff's Department during the interview, the defendant was not permitted to speak with her.
>
> 14. On December 16, 2005, officers at Lincoln County Sheriff's Department executed a Search Warrant at the defendant's residence. Prior to the execution of the Search Warrant, the defendant provided Detective Dellinger with a diagram of his residence showing the location of various items which the Sheriff's officers were attempting to seize during the search. . . .[2]

On or about 17 January 2006, defendant was indicted. Trial began on 20 March 2007. The jury found defendant guilty of four counts of engaging in a sexual act with a person of the age of 13 years and four counts of taking indecent liberties with a child. Defendant was sentenced concurrently to 240 to 297 months imprisonment for each of the four counts of statutory rape and 16 to 20 months imprisonment for each of the four counts of indecent liberties with a child. Defendant appeals, arguing the trial court erred in (1) denying his motion to suppress, (2) allowing defendant's statements regarding an extra-marital affair into evidence, (3) failing to grant defendant's motions to dismiss two of the statutory sex offense charges, and (4) instructing the jury on sex offense and accepting the guilty verdict thereon. Defendant also "requests that this Court review sealed

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2. After his arrest defendant filed a motion to suppress his statement. On 22 March 2007, this motion was denied in a detailed order setting forth several findings of fact. Several of those findings of fact are quoted *supra* and as defendant did not assign error to them, the findings are conclusive upon this appeal. *See e.g.*, *State v. Campbell*, 188 N.C. App. 701, 704, 656 S.E.2d 721, 724 (2008) ("[F]indings of fact to which defendant failed to assign error are binding on appeal." (citation omitted)).

records for both favorable and material evidence." For the following reasons, we find no prejudicial error.

II. Motion to Suppress

[1] Defendant first argues that "the trial court erred in denying . . . [his] motion to suppress his statements to law enforcement and by allowing their subsequent admission into evidence." Defendant claims his "*Miranda* Waiver Was Not Knowingly and Intelligently Made[,]" and even "If . . . [his] *Miranda* Waiver is Deemed to Have Been Knowingly and Intelligently Made, The Waiver was Stale By the Time He Made Any Inculpatory Statements." Defendant contends the statements should have been excluded, and thus he should be granted a new trial. We disagree.

"The 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. Young*, 186 N.C. App. 343, 347, 651 S.E.2d 576, 579 (2007) (citation and internal quotation marks omitted), *appeal dismissed*, 362 N.C. 372, ––– S.E.2d ––– (2008). As our Supreme Court stated in *State v. Cheek*,

> In this assignment of error, defendant has failed to specifically except to any of the trial court's findings of fact relating to this motion [to suppress]. Defendant has additionally failed to identify in his brief which of the trial court's . . . findings of fact are not supported by the evidence. Therefore, this Court's review of this assignment of error is limited to whether the trial court's findings of fact support its conclusions of law.

State v. Cheek, 351 N.C. 48, 63, 520 S.E.2d 545, 554 (1999) (citation omitted), *cert. denied*, 530 U.S. 1245, 147 L. Ed 2d 965 (2000). Furthermore, "[t]he 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) (citation omitted).

The trial court made detailed findings of fact and conclusions of law including that (1) defendant was read his *Miranda* rights and signed the Waiver of Rights form; (2) defendant signed a written statement; and (3) "[n]o threats or promises were made to the defendant to induce his execution of the written statement[.]" Furthermore, as

to staleness, defendant's own brief notes "the length of time between the giving of the warning and beginning of the interrogation was about 25 minutes[.]" As defendant failed to assign error to any of the trial court's findings of fact or conclusions of law these contentions are not reviewable. *See Cheek* at 63, 520 S.E.2d at 554; *Fran's Pecans, Inc.* at 112, 516 S.E.2d at 649.

III. Defendant's Statements

[2] Defendant next argues "the trial court erred by allowing into evidence any statements ostensibly made by . . . [defendant] regarding an extra-marital affair" because the evidence was irrelevant and defendant "was unduly prejudiced by the admission of evidence[.]"

> Although the trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal. Because the trial court is better situated to evaluate whether a particular piece of evidence tends to make the existence of a fact of consequence more or less probable, the appropriate standard of review for a trial court's ruling on relevancy pursuant to Rule 401 is not as deferential as the 'abuse of discretion' standard which applies to rulings made pursuant to Rule 403.

Dunn v. Custer, 162 N.C. App. 259, 266, 591 S.E.2d 11, 17 (2004) (internal citations and internal quotation marks omitted).

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403 (2005). Relevant evidence is defined as "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2005). "[E]vidence is relevant if it has any logical tendency, however slight, to prove a fact in issue in the case." *State v. Hannah*, 312 N.C. 286, 294, 322 S.E.2d 148, 154 (1984). "[E]ven though evidence may tend to show other crimes, wrongs, or acts by the defendant and his propensity to commit them, it is admissible under Rule 404(b) so long as it also is relevant for some purpose other than to show that defendant has the propensity for the type of conduct for which he is being tried." *State v. Coffey*, 326 N.C. 268,

279, 389 S.E.2d 48, 54 (1990) (citation and internal quotation marks omitted); *see* N.C. Gen. Stat. § 8C-1, Rule 404(b) (2005) ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.").

During the discussion between defendant's attorney and the trial court regarding excluding defendant's statement about the extra-marital affair, the trial court reasoned that the evidence of defendant's extra-marital affair helped explain why Jane waited to come forward and report what was happening to her. The trial judge determined that Jane would be allowed to testify as to what defendant told her regarding the extra-marital affair. We find no error with the trial court's decision as this statement is relevant to show why Jane waited to disclose defendant's actions towards her, and the probative value of the statements is not substantially outweighed by the danger of unfair prejudice. *See* N.C. Gen. Stat. § 8C-1, Rule 403. This argument is overruled.

IV. Motions to Dismiss

[3] Defendant contends that the trial court erred in failing to dismiss (1) the charge of sex offense in 05 CRS 54070 because "[t]he evidence, if believed, was sufficient for statutory rape for which . . . [defendant] was not charged[, but] [i]t was not sufficient to constitute a sex offense[,]" and (2) one of the sex offense charges in 05 CRS 53071-3 because "it is pure speculation as to whether there was a third act of cunnilingus committed."

At the close of the State's evidence, defendant moved to dismiss charges based on the following arguments: (1) "there is a variance in the indictment and the facts that have been presented to the Court[;]" (2) "the State has an affirmative duty to prove that the persons involved are not lawfully married[;]" and (3) "there has been no evidence to suggest that . . . [defendant's] purported actions were for the purposes of gratifying and sexually arousing him." At the close of all of the evidence defendant's attorney requested the court "to enter a dismissal" based upon "the same contentions" as the previous motion.

> "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[.]

State v. Tollison, 190 N.C. App. 552, 559, 660 S.E.2d 647, 652 (2008). As in *Tollison*, here "defendant has waived his right to appellate review" on the arguments presented in his brief as these were not the arguments he presented at trial. *See id.*

V. Jury Instructions

[4] Defendant also argues that the trial court erred "in giving the sex offense instruction to the jury in 05 CRS 54070 and by accepting the guilty verdict thereon."

> Because defendant failed to object to the jury instructions in this case, this assignment of error must be analyzed under the plain error standard of review. *State v. Holden*, 346 N.C. 404, 434-35, 488 S.E.2d 514, 530-31 (1997). Plain error with respect to jury instructions requires the error be "so fundamental that (i) absent the error, the jury probably would have reached a different verdict; or (ii) the error would constitute a miscarriage of justice if not corrected." *Id.* at 435, 488 S.E.2d at 531. Further, "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. Bell*, 359 N.C. 1, 23, 603 S.E.2d 93, 109 (2004) (citation and quotations omitted), *cert. denied*, 544 U.S. 1052, 125 S.Ct. 2299, 161 L. Ed. 2d 1094 (2005).

State v. Wood, 185 N.C. App. 227, 232, 647 S.E.2d 679, 684 (brackets omitted), *disc. review denied*, 361 N.C. 703, 655 S.E.2d 402 (2007).

The trial court instructed the jury, in pertinent part, as follows:

> Ladies and gentlemen, in Case Number 05 CRS 54070, the defendant, Paul Tadeja, has been charged with statutory sexual offense against a child of the age of thirteen years.
>
> During this trial, the State has presented evidence which the State contends shows that during the summer of 2005, the defendant attempted to insert his penis into the vagina of . . . [Jane]. The defendant denies that this act occurred. What, if

> anything, the evidence shows is for you to say and determine, members of the jury.
>
> For you to find the defendant guilty of this offense, the State must prove four things beyond a reasonable doubt.
>
> First, that the defendant engaged in a sexual act with . . . [Jane]. A sexual act means any penetration, however slight, by an object into the genital opening of a person's body.
>
> Second, that at the time of the act, . . . [Jane] was thirteen years old.
>
> Third, that at the time of the act, the defendant was at least six years older than . . . [Jane].
>
> And fourth, that at the time of the act, the defendant was not lawfully married to . . . [Jane].
>
> If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant engaged in a sexual act with . . . [Jane], who was thirteen years old and that the defendant was at least six years older than . . . [Jane] and was not lawfully married to . . . [Jane], then it would be your duty to return a verdict of guilty as to this charge.
>
> On the other hand, if you do not so find or if you have any reasonable doubt as to one or more of the these things, then it would be your duty to return a verdict of not guilty as to this particular charge.

The pertinent statute under which defendant was indicted for 05 CRS 54070 is N.C. Gen. Stat. § 14-27.7A(a) which provides, "A defendant is guilty of a Class B1 felony if the defendant engages in . . . a sexual act with another person who is 13, 14, or 15 years old and the defendant is at least six years older than the person, except when the defendant is lawfully married to the person." N.C. Gen. Stat. § 14-27.7A(a) (2005). "Sexual act" does not include the act of vaginal intercourse. N.C. Gen. Stat. § 14-27.1(4) (2005). Defendant argues that the trial court's instruction "supported a charge of statutory rape and not statutory sexual offense. . . . [because] [t]he trial court instructed the jury on the crime of statutory sexual offense where the State's evidence tended to show that a statutory rape occurred."

In *State v. McLellan*, the trial court incorrectly summarized the State's evidence to the jury. 56 N.C. App. 101, 104, 286 S.E.2d 873, 876

(1982). "[The] [d]efendant argue[d] that the misstatement was prejudicial because it improperly added credibility[.]" *Id.* This Court found no error in the misstatement noting that,

> Defendant highlights an isolated portion of the court's jury instructions. The charge, however, must be construed contextually. *State v. Gaines*, 283 N.C. 33, 43, 194 S.E.2d 839, 846 (1973). . . . We will not hold one portion prejudicial when the charge as a whole is correct. *Id.*

Id. at 104-05, 286 S.E.2d at 876.

Furthermore,

> The charge of the court must be read as a whole, in the same connected way that the judge is supposed to have intended it and the jury to have considered it. *State v. Wilson*, 176 N.C. 751, 97 S.E. 496 (1918). It will be construed contextually, and isolated portions will not be held prejudicial when the charge as whole is correct. *State v. Cook*, 263 N.C. 730, 140 S.E.2d 305 (1965); *State v. Goldberg*, 261 N.C. 181, 134 S.E.2d 334 (1963); *State v. Taft*, 256 N.C. 441, 124 S.E.2d 169 (1962). If the charge presents the law fairly and clearly to the jury, the fact that some expressions, standing alone, might be considered erroneous will afford no ground for reversal. *State v. Hall*, 267 N.C. 90, 147 S.E.2d 548 (1966).

State v. Lee, 277 N.C. 205, 214, 176 S.E.2d 765, 770 (1970) (internal quotation marks and ellipses omitted).

Here, during the trial court's instruction on 05 CRS 54070 regarding a sexual offense the trial court stated that "the State has presented evidence which the State contends shows that during the summer of 2005, the defendant attempted to insert his penis into the vagina of . . . [Jane]". Defendant is correct in arguing that a penis cannot serve as the object of penetration for a "sexual act" as this would instead constitute the act of vaginal intercourse which is specifically excluded from the definition of a "sexual act." N.C. Gen. Stat. § 14-27.1(4); *State v. Mueller*, 184 N.C. App. 553, 562, 647 S.E.2d 440, 448 ("Vaginal intercourse is defined as the slightest penetration of the female sex organ by the male sex organ." (citations and internal quotation marks omitted)), *cert. denied*, 362 N.C. 91, 657 S.E.2d 24 (2007).

However, the trial court also instructed the jury, "[I]t is now your duty to decide from this evidence what the facts are. You must then

apply the law I'm about to give you to those facts." Furthermore, the trial court correctly instructed the jury as to the definition of a "sexual act."[3] The State presented evidence that defendant had penetrated Jane's vagina with his finger. Therefore, though the trial court's summary of facts as to 05 CRS 54070 was not the appropriate set of facts upon which to find defendant guilty of this charge, we conclude that the trial court did not commit plain error, as there was evidence upon which the jury could properly find defendant committed a "sexual act" upon Jane, the law was correctly stated to the jury, the instructions as a whole were correct, and the jury was admonished to personally determine the facts of the case. *State v. Wood* at 232, 647 S.E.2d at 684; *McLellan* at 104-05, 286 S.E.2d at 876; *Lee* at 214, 176 S.E.2d at 770. This argument is overruled.

VI. *In Camera* Review

[5] Defendant last

> requests this Court review the sealed record [from the Department of Social Services which pertain to Jane] for evidence that is favorable and material to his defense. In the event that such information is contained in the sealed records, . . . [defendant] requests this Court to disclose said information, . . ., vacate his convictions and award him a new trial.

"[T]he proper standard of review [for reviewing sealed documents from the trial court] is *de novo*." *State v. Scott*, 180 N.C. App. 462, 463, 637 S.E.2d 292, 293 (2006), *disc review denied*, 361 N.C. 367, 644 S.E.2d 560 (2007).

> A defendant who is charged with sexual abuse of a minor has a constitutional right to have the records of the child abuse agency that is charged with investigating cases of suspected child abuse, as they pertain to the prosecuting witness, turned over to the trial court for an *in camera* review to determine whether the records contain information favorable to the accused and material to guilt or punishment. *Pennsylvania v. Ritchie*, 480 U.S. 39, 58, 94 L. Ed. 2d 40, 58 (1987). If the trial court conducts an *in camera* inspection but denies the defendant's request for the evidence, the evidence should be sealed and "placed in the record for appellate review." *State v. Hardy*, 293 N.C. 105, 128, 235

3. The trial court's instruction followed N.C.P.I. Crim. 207.15.3 nearly verbatim, except for the one sentence summarizing the evidence, to which defendant assigns error.

> S.E.2d 828, 842 (1977). On appeal, this Court is required to examine the sealed records to determine if they contain information that is "both favorable to the accused and material to either his guilt or punishment." *Ritchie*, 480 U.S. at 57, 94 L. Ed. 2d at 57; *see also Hardy*, 293 N.C. at 127-28, 235 S.E. 2d at 842; *State v. Jarrett*, 137 N.C. App. 256, 267, 527 S.E.2d 693, 700, *disc. review denied*, 352 N.C. 152, [544] S.E.2d [233] (2000). If the sealed records contain evidence which is both "favorable" and "material," defendant is constitutionally entitled to disclosure of this evidence. *Id.* at 60, 94 L. Ed. 2d at 59.

State v. McGill, 141 N.C. App. 98, 101-02, 539 S.E.2d 351, 355 (2000) (brackets omitted). The trial court reviewed the sealed records *in camera* and "had the Clerk make copies of those documents, which relate to any prior complaints or reports of possible sexual abuse of the victim in this case" and provided defense counsel with those documents. "The Court . . . also directed the Clerk to make copies of all the other documents that were in the Social Services file for possible appellate review. Those documents . . . [were] sealed and maintained in the court file for appellate review, if needed." Upon a thorough review of the remaining sealed records, we agree with the trial court and conclude they contain neither favorable nor material evidence for defendant. *See id.* The trial court did not err in denying disclosure of these records to defendant.

VII. Conclusion

For the foregoing reasons, we find that the defendant received a trial free of prejudicial error.

NO ERROR.

Chief Judge MARTIN and Judge CALABRIA concur.

MARINA HEATZIG, Plaintiff v. ELIZABETH MacLEAN, Defendant v. B.A. MacLEAN AND WIFE, CHARLOTTE MacLEAN, Intervenor Defendants and Cross-Complainants

No. COA07-875

(Filed 5 August 2008)

1. Parent and Child— parent by estoppel—theory not adopted

The theory of parent by estoppel is not adopted: the North Carolina Supreme Court has enunciated a clear and comprehensive framework for determining custody claims of persons who are not the parent of the children.

2. Parent and Child— parental status—no authority to confer

The trial court erred by conferring parental status on a same sex partner where the court rejected the assertion that the birth mother had acted inconsistently with her constitutionally protected status as a natural parent. A district court in North Carolina is without authority to confer parental status upon a person who is not the biological parent of a child.

3. Child Support, Custody, and Visitation— same sex partners—findings regarding intent to create a family unit required—clear, cogent and convincing standard

A child custody action involving same sex partners was remanded for further findings where the trial court acted under a misapprehension of the law. The court made no findings specifically addressing the intent of defendant to create a family unit that included plaintiff and the two children or to cede to plaintiff parental responsibility and decision-making authority. The required evidence must be clear, cogent, and convincing.

4. Judges— order of the court—drafted by party—appearance of impartiality

It was noted that a remanded order should have been entirely typewritten and should have had consistent paragraph numbers where the order as filed included the footer "Defendant's Proposed Order" and a handwritten addition, so that the paragraph numbers were not consistent. The signing of such an order does not convey an appearance of impartiality on the part of the court.

Appeal by defendant from orders entered 22 January 2007 by Judge M. Patricia DeVine in Orange County District Court. Heard in the Court of Appeals 6 February 2008.

Patterson Harkavy, LLP, by Burton Craige, and Epting & Hackney, by Karen P. Davidson, for plaintiff-appellee.

Wyrick Robbins Yates & Ponton, LLP, by K. Edward Greene, Tobias S. Hampson, and D. Caldwell Barefoot, Jr., for defendant-appellant.

STEELMAN, Judge.

Where the trial court improperly attempted to confer parental status on plaintiff and failed to conduct a proper analysis under *Price v. Howard*, the judgment of the trial court must be reversed, and the case remanded for further findings of fact.

I. Factual and Procedural Background from Trial Court Orders

Elizabeth MacLean (defendant) and Marina Heatzig (plaintiff) met in 1992 in San Francisco, California. They became domestic partners, and moved to North Carolina together.

Defendant had always wanted to have children and had been trying to become pregnant for many years. Plaintiff and defendant decided that defendant would be artificially inseminated. The timing of the pregnancy was largely the decision of defendant. They sought a sperm donor with physical attributes matching those of plaintiff. Plaintiff attended all birthing classes with defendant. On 20 December 2000, defendant gave birth to twins. Plaintiff was present at the delivery, and one of the names of each child was from plaintiff's family. Both parties signed the birth certificate application form. Due to hospital policy, only defendant signed the birth certificates. It was agreed that defendant would stay at home with the infants. For almost three and a half years, plaintiff, defendant, and the two children resided together in the same household. Defendant executed documents allowing plaintiff to obtain health care for the children; each party signed durable powers of attorney naming the other as attorney in fact and wills naming the other as beneficiary; plaintiff was nominated as guardian for the children in the event of defendant's death; both parties' names appear on the baptism certificates for the children; both parties signed as parents on medical forms; and both signed enrollment forms when the children attended preschool.

Beginning in January 2002, the relationship between plaintiff and defendant began to deteriorate. Plaintiff wanted to go out at night and defendant wanted to stay at home with the children. The parties had markedly different styles of dealing with the children. Plaintiff would become frustrated with the children and would curse at them. Defendant's dedication to the children made plaintiff feel crowded out of the relationship.

On 4 April 2004, defendant left the parties' residence, taking the children with her. It appears that the parties agreed to a written schedule which allowed plaintiff and defendant equal access to the children. On 26 June 2004, defendant advised plaintiff that she was taking the children to live with her and would decide whether she would afford plaintiff visits.

On 28 June 2004, plaintiff filed an action in Orange County District Court, seeking joint custody and visitation. On that same date, the trial court entered an *ex parte* order granting plaintiff temporary joint custody of the children and continuing the parties' previously agreed-upon visitation schedule.

In her amended complaint filed 16 July 2004, plaintiff did not allege that defendant had acted inconsistently with her constitutionally protected rights. There was no articulation of a theory of *de facto* parent, or parent by estoppel. Plaintiff merely asserted that she was a parent of the two minor children.

The matter was heard on 18-20 September 2006. On 22 January 2007, the trial court entered and filed two separate orders. The first order reduced to writing two earlier rulings of the trial court: (1) the denial of defendant's motion for judgment on the pleadings, heard on 16 August 2006; and (2) the denial of defendant's motions to dismiss pursuant to Rule 41(b) of the Rules of Civil Procedure at the close of plaintiff's evidence and at the close of all the evidence. The first order also referenced the trial court's earlier denial of defendant's motion to dismiss for failure to state a claim upon which relief could be granted (Rule 12(b)(6) of the Rules of Civil Procedure). The second order granted sole legal custody of the children to defendant, but awarded joint physical custody of the children to plaintiff and defendant, with a detailed schedule for plaintiff to have time with the children. The second order also provided for the appointment of a parenting coordinator by separate order. Defendant appeals. Plaintiff makes cross-assignments of error asserting that the trial court erred in concluding that defendant had not acted inconsistently with her constitutionally protected rights as a parent.

II. Custody Order[1]

Standard of Review

"The standard of review on appeal from a judgment entered after a non-jury trial is 'whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment.' " *Cartin v. Harrison*, 151 N.C. App. 697, 699, 567 S.E.2d 174, 176 (2002) (quotation omitted). We review the trial court's conclusions of law *de novo*. *Huyck Corp. v. Town of Wake Forest*, 86 N.C. App. 13, 15, 356 S.E.2d 599, 601 (1987) (citation omitted). "Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal." *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). "Facts found by the judge are binding upon this court if they are supported by any competent evidence notwithstanding the fact that the appellant has offered evidence to the contrary." *Williams v. Williams*, 261 N.C. 48, 56, 134 S.E.2d 227, 233 (1964) (citation omitted).

Price v. Howard

"[T]he '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.' " *Owenby v. Young*, 357 N.C. 142, 144, 579 S.E.2d 264, 266 (2003) (quoting *Troxel v. Granville*, 530 U.S. 57, 66, 147 L. Ed. 2d 49, 57 (2000)). If a legal parent (biological or adoptive) acts in a manner inconsistent with his or her constitutionally-protected status, the parent may forfeit this paramount status, and the application of the 'best interest of the child' standard in a custody dispute with a non-parent would not offend the Due Process Clause. *Price v. Howard*, 346 N.C. 68, 484 S.E.2d 528 (1997); N.C. Gen. Stat. § 50-13.2(a) (2007) ("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 *Mason v. Dwinnell*, 190 N.C. App. 209, 660 S.E.2d 58 (2008), we noted that the determination of whether a parent has acted in a manner inconsistent with his or her constitutionally protected status must be made on a case-by-case basis. *Mason* at 214-15, 660 S.E.2d at 64. In

1. While the trial court designated the Custody Order entered in this case as a "Permanent Custody Order," this terminology is legally incorrect. Custody orders are never "permanent," but rather are always subject to revision based upon changes in circumstances. N.C. Gen. Stat. § 50-13.7(a) (2007).

Estroff v. Chatterjee, 190 N.C. App. 61, 660 S.E.2d 73 (2008), this Court emphasized that "both conduct and intent are relevant" in making this determination. *Estroff* at 69, 660 S.E.2d at 78. Further, it is clear from *Mason* and *Estroff* that in order to constitute acts inconsistent with a parent's constitutionally protected status, the acts *are not* required to be "bad acts" that would endanger the children. However, "[i]f 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." *Price* at 79, 484 S.E.2d at 534.

Interlocutory Order and Parent by Estoppel

[1] In her first argument, defendant contends that the trial court erred in applying the doctrine of parent by estoppel in this case. We hold that the trial court did not expressly apply this doctrine in its Custody Order, and that such an application would have been improper.

The trial court entered and filed two orders on 22 January 2007. The first memorialized its denials of defendant's motions to dismiss under Rule 41(b) at trial. The second was the Custody Order. In the first order, the trial court concluded, *inter alia*, that defendant abrogated her "primary paramount right" as a parent, and, in the alternative, that plaintiff was a "parent by estoppel." The Custody Order concluded that defendant "has not acted in a manner inconsistent with her constitutionally protected status as a natural parent of the minor children." Further, it did not expressly address the legal theory of "parent by estoppel."

The order denying defendant's Rule 41(b) motions to dismiss was interlocutory, and was superceded by the entry of the Custody Order. *See Howard v. Ocean Trail Convalescent Center*, 68 N.C. App. 494, 495, 315 S.E.2d 97, 99 (1984) ("Denial of a motion to dismiss is interlocutory because it simply allows an action to proceed and will not seriously impair any right of [a party] that cannot be corrected upon appeal from final judgment."). On appeal, we only review the Custody Order.

Because the trial court may have concluded that plaintiff was a "parent" based upon an unarticulated "parent by estoppel" theory, and because plaintiff extensively argues in her brief that we adopt this theory, we address this question.

Plaintiff cites the American Law Institute's ("ALI") recent recommendation which endorses this approach, defining a parent by estoppel as a person who, although not a biological or adoptive parent:

> [L]ived with the child since the child's birth, holding out and accepting full and permanent responsibilities as parent, as part of a prior co-parenting agreement with the child's legal parent . . . to raise a child together each with full parental rights and responsibilities, when the court finds that recognition of the individual as a parent is in the child's best interests[.]

Am. Law Inst., *Principles of the Law of Family Dissolution: Analysis and Recommendations*, § 2.03(b). As a preliminary matter, we note that the courts of North Carolina are not bound by the recommendations of ALI. Further, it is clear that, as defined by ALI, the foundation of a parent by estoppel claim is a co-parent agreement. This theory is directly contrary to this Court's holding in *Mason*, which, while recognizing that a parenting agreement may be considered in determining whether a parent had acted inconsistently with his or her constitutionally protected status, made clear that there is no "specific set of factors" which must be present in order for the standard in *Price* to be met, and that a parent's conduct must be viewed on a case-by-case basis. *Mason* at 214-15, 660 S.E.2d at 64.

Finally, although plaintiff cites to the Uniform Parentage Act in her brief, we note that North Carolina has not enacted this Act. *See Carrington v. Townes*, 53 N.C. App. 649, 682, 281 S.E.2d 765, 773 (1981).

We decline plaintiff's invitation to adopt the theory of parent by estoppel. In *Price*, our Supreme Court enunciated a clear and comprehensive framework for determining custody claims of persons who are not the parent of the children. This framework was carefully tailored to meet the due process concerns articulated by the United States Supreme Court in *Lehr v. Robertson*, 463 U.S. 248, 77 L. Ed. 2d 614, 103 S. Ct. 2985 (1983). It is not the role of this Court to adopt theories that conflict with or are inconsistent with the holdings of our Supreme Court in *Lehr* and *Price*. *See Rogerson v. Fitzpatrick*, 121 N.C. App. 728, 732, 468 S.E.2d 447, 450 (1996) ("It is elementary that this Court is bound by holdings of the Supreme Court.").

<u>Conferring Parental Status on Plaintiff</u>

[2] In her next argument, defendant contends that the trial court erred in conferring parental status of the two minor children upon plaintiff. We agree.

In its Custody Order, the trial court made the following nine conclusions of law:

> 1. It is in the best interest of these children that BOTH parents enjoy SHARED PHYSICAL CUSTODY: the exclusive and parallel right to take care of the children; to keep them safe; to enjoy their company; to share the best of themselves with them; to learn in turn from them; to teach them; and to expose them to new and wonderful ideas and places and experiences and extended family.
>
> 2. It is in the best interest of these children that one parent have the right and responsibility of decision-making with respect to the important and long-term implications for their welfare and best interest, education, health care, religious training, and the like.
>
> 3. This court concludes as a matter of law that the parties cannot share the responsibility of making the major decisions: they cannot work and come together to evaluate options; to reach consensus on shared values upon which decisions would be based; to share a common perception of each child's wishes and needs at each stage of the child's life; to compromise where there is simply clear disagreement; and to support one-another in the decision reached in front of the children; and then to strive to work together to make the resulting decision work.
>
> 4. Elizabeth has not neglected or abandoned the minor children and has remained an involved and engaged party since the children's birth. Elizabeth is a fit and proper person to have physical and legal custody of the minor children and has not acted in a manner inconsistent with her constitutionally protected status as a natural parent of the minor children.
>
> 5. Marina is the non-biological parent of the children and is to be given legal status equal to that of Elizabeth, the biological parent, and Marina is a fit and proper person to have physical custody of the minor children as set forth in this order.
>
> 6. Elizabeth is the parent who is best able to promote the interest and welfare of these children.
>
> 7. It is in the best interest of the children that Elizabeth have sole legal custody.
>
> 8. It is in the children's best interest that the visitation schedule recommended by Dr. Sortisio be adopted in its entirety.

> 9. It is in the children's best interest that a Parent Coordinator be appointed to assist the parties in fine-tuning and putting into place this schedule.

These conclusions show that the trial court affirmatively rejected plaintiff's assertion that defendant had acted inconsistently "with her constitutionally protected status as a natural parent of the minor children." Rather, the trial court chose to grant shared physical custody of the minor children to plaintiff by conferring the legal status of parent upon plaintiff. This is confirmed by the trial court's remarks at the time the final ruling in this matter was orally announced on 27 September 2006 in open court:

> The biggest single issue in this case in the opinion of this Court is my conclusion that each woman comes into this court and ends this trial with the designation as parent. That was not clear at the beginning and some people thought very hard in that regard, but I made a ruling that I am comfortable with and that I love that says Elizabeth MacLean and Marina Heatzig are now to be considered parents of Quinn and Enid. I believe that is the single biggest issue in the case as a matter of law.

This ruling by the trial court was without legal authority or precedent. A district court in North Carolina is without authority to confer parental status upon a person who is not the biological parent of a child. The sole means of creating the legal relationship of parent and child is pursuant to the provisions of Chapter 48 of the General Statutes (Adoptions). *See* Legislative findings and intent set forth in N.C. Gen. Stat. § 48-1-100 (2007).

The trial court's ruling in this case rests solely upon a flawed and non-existent legal theory. *Seyboth v. Seyboth*, 147 N.C. App. 63, 67-68, 554 S.E.2d 378, 382 (2001). Further, as discussed above, it was improper for the trial court to apply a "best interest" analysis without first determining that defendant's conduct was inconsistent with her constitutionally protected status as a parent. *See Price* at 79, 484 S.E.2d at 534.

<u>Conclusion of Law Number Four</u>

[3] Because we have held that the trial court erred in applying the "best interests" test without first concluding that defendant had acted inconsistently with her constitutionally protected status as a parent, this appeal hinges upon the resolution of plaintiff's cross-assignments

of error, and we need not address defendant's remaining assignments of error.

In her first cross-assignment of error, plaintiff contends that the trial court erred in its conclusion of law number four by accepting defendant's contention that only "bad acts" on the part of a parent can constitute acts inconsistent with a parent's constitutionally protected status. In her second cross-assignment of error, plaintiff contends that conclusion of law number four was in error. Plaintiff contends that the trial court's conclusion is based on a misinterpretation of *Price*, and that the trial court erroneously merged defendant's fitness as a parent with the separate determination of whether she acted in a manner inconsistent with her constitutionally protected status. Plaintiff argues that the findings of fact by the trial court compel a conclusion that defendant's acts were in fact inconsistent with her constitutionally protected status as a parent. We conclude that the trial court acted under a misapprehension of law, and remand this matter to the trial court for further findings.

Our review of a trial court's conclusions of law is *de novo*. *See Huyck Corp.* at 15, 356 S.E.2d at 601. Plaintiff does not cross-assign as error any of the trial court's findings of fact, and they are therefore binding upon the appellate courts. *Koufman* at 97, 408 S.E.2d at 731. Our review is limited to whether the trial court's findings of fact support its conclusion of law number four.

In *Mason*, this Court stated a number of factors that supported the trial court's conclusion that the defendant acted inconsistently with her constitutionally protected rights as a parent: (1) both plaintiff and defendant jointly decided to create a family unit; (2) defendant intentionally identified plaintiff as parent; (3) the sperm donor was selected based upon physical characteristics similar to those of plaintiff; (4) the surname of plaintiff was used as one of the child's names; (5) plaintiff participated in the pregnancy and the birth of the child; (6) there was a baptism ceremony where both plaintiff and defendant were identified as parents; (7) plaintiff was identified as a parent on school forms; (8) they functioned together as a family unit for four years; (9) after the relationship between plaintiff and defendant ended, the defendant allowed plaintiff the functional equivalent of custody for three years; (10) defendant encouraged, fostered, and facilitated an emotional and psychological bond between plaintiff and the child; (11) plaintiff provided care and financial support for the child; (12) the child considered plaintiff to be a parent; (13) plaintiff and defendant shared decision-making authority with respect to the

child; (14) plaintiff was a medical power of attorney for the child; (15) the parties voluntarily entered into a parenting agreement; and (16) defendant intended to create between plaintiff and the child a permanent parent-like relationship. *Mason* at 214, 660 S.E.2d at 67.

In *Estroff*, this Court focused heavily upon the intent of the biological mother of the children, stating ". . . 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* at 69, 660 S.E.2d at 78.

A review of the trial court's findings of fact in the instant case reveals that the court made no findings specifically addressing the intent of defendant to create a family unit that included plaintiff and the two children or to cede to plaintiff parental responsibility and decision-making authority. The order contains no ultimate findings of fact, but only evidentiary findings. *See Woodard v. Mordecai*, 234 N.C. 463, 470, 67 S.E.2d 639, 644 (1951). The following findings by the trial court would appear to support a conclusion that defendant acted inconsistently with her constitutionally protected parental rights: (1) it was a joint decision for defendant to get pregnant by artificial insemination; (2) the sperm donor was selected based upon physical characteristics similar to plaintiff; (3) plaintiff participated in the birthing classes and was present at the birth; (4) both parties signed the birth certificate application; (5) there was a baptismal ceremony where both plaintiff and defendant were identified as parents; (6) plaintiff was given authority to obtain health care treatment for the children; and (7) names from plaintiff's family were used in the names of each of the children. However, there are also findings of fact that would support a conclusion that defendant did not act inconsistently with her constitutionally protected rights: (1) defendant had been trying to get pregnant for many years before she and plaintiff began their relationship; (2) the timing and methodology decisions regarding defendant's pregnancy were made primarily by defendant; and (3) the parties were unable to work out a parenting agreement.

The evidence required to show that a parent has acted inconsistently with her constitutionally protected parental status must be clear, cogent and convincing. *Adams v. Tessener*, 354 N.C. 57, 63, 550 S.E.2d 499, 503 (2001). There is no indication that the trial court applied this standard in reaching its decision in the instant case.

It is clear that the trial court acted under several misapprehensions of law. First, it applied a non-existent legal theory to award custodial rights in the children to plaintiff. Second, it is not clear whether it believed that acts inconsistent with a parent's constitutionally protected rights had to be bad acts to qualify under *Price*. *See Mason*. Third, the trial court did not consider that the evidence required to meet the standard under *Price* be clear, cogent and convincing. Fourth, the trial court failed to focus upon the intentions of defendant as required by *Price*, now made manifestly clear under the holdings in *Mason* and *Estroff*.

We remand this matter to the trial court for further findings of fact, and their consideration in light of the principles of *Price* as explained by *Mason* and *Estroff*. *See Cantrell v. Wishon*, 141 N.C. App. 340, 342, 540 S.E.2d 804, 806 (2000) ("[Tlhe findings and conclusions of the trial court must comport with [the] case law regarding child custody matters."); *see also Concerned Citizens v. Holden Beach Enterprises*, 329 N.C. 37, 54-55, 404 S.E.2d 677, 688 (1991) ("When the order or judgment appealed from was entered under a misapprehension of the applicable law, the judgment, including the findings of fact and conclusions of law on which the judgment was based, will be vacated and the case remanded for further proceedings.").

Form of the Custody Order

[4] Orders and judgments in civil actions are orders of the court, and not the orders of the parties. *See Walters v. Walters*, 307 N.C. 381, 386, 298 S.E.2d 338, 342 (1983). The Custody Order in this case contains a footer at the bottom of each page reading "Defendant's Proposed Order." On the final page of the order, the trial judge crossed through the signature line, and wrote in longhand an additional paragraph designated as "E." The designation of this paragraph bears no relationship to the numeration of the paragraphs in the typewritten order.

This Court has held that a trial court should not sign orders prepared on stationery bearing the name of the law firm that prepared the order, since it does not convey an appearance of impartiality on the part of the court. *See In re T.M.H.*, 186 N.C. App. 451, 652 S.E.2d 1 (2007); *Habitat for Humanity of Moore Cty., Inc. v. Board of Comm'rs of the Town of Pinebluff*, 187 N.C. App. 764, 653 S.E.2d 886 (2007). Similarly, the signing of an order marked as "Defendant's Proposed Order" does not convey an appearance of impartiality on the part of the court. We also note that the trial court signed the order

on 22 January 2007 after announcing her ruling on 27 September 2006. Given the long delay in signing the order, the trial court should have directed the revision of the order so that it was entirely typewritten and contained consistent paragraph numbers.

III. Conclusion

We remand this case to the trial court for a proper application of *Price*, *Mason*, and *Estroff*. In applying these cases, the trial court should be mindful of the language in *Estroff* stating that the proper focus of the trial court is whether defendant "voluntarily chose[] to create a family unit" with plaintiff and to cede to plaintiff "parental responsibility and decision-making authority." *See Estroff* at 69, 660 S.E.2d at 78. The trial court may not apply a "best interests of the child" test unless it finds that plaintiff has proved by "clear, cogent, and convincing evidence" that defendant acted inconsistently with her constitutionally protected parental rights. Such rights are protected by the United States Constitution as interpreted by the United States Supreme Court and the North Carolina Supreme Court, and are not lightly to be set aside. In its discretion, the trial court may receive additional evidence as to whether defendant acted inconsistently with her constitutionally protected parental rights, and, if necessary, the best interests of the children.

REVERSED and REMANDED.

Judges ELMORE and ARROWOOD concur.

STATE OF NORTH CAROLINA v. JEREMY TYLER MARTIN

No. COA07-1392

(Filed 5 August 2008)

1. Evidence— prior crimes or bad acts—admissible for motive and intent—not too remote in time

The trial court did not err by admitting testimony of an attempted burglary defendant's prior acts of breaking and entering and larceny. The prior acts were admissible to show motive and intent, and the time span of two years was not too remote, although remoteness in time is less significant when the prior conduct is used to show intent or motive.

2. Evidence— prior crimes or bad acts—burglary prosecution—marijuana possession—motive

The trial court did not err in an attempted burglary prosecution by admitting a prior act of marijuana possession. The evidence was relevant to show motive in that defendant needed money, and the prior act occurred just days before the alleged attempted burglary.

3. Evidence— prior crimes or bad acts—sufficiently similar and timely

The trial court did not err in an attempted burglary prosecution by admitting defendant's prior act of breaking and entering and larceny where the two incidents were sufficiently similar in that defendant attempted or did enter through a window, both residences were in the same neighborhood, a gun registered to defendant's grandfather was recovered from the earlier scene, and the incidents were only six months apart.

4. Burglary and Unlawful Breaking or Entering— instruction—prior crimes or bad acts—intent and motive—no plain error

There was no plain error in an attempted burglary prosecution where the trial court instructed the jury to consider prior acts only to determine intent and motive and did not include language that the jury could not consider the evidence to prove the character of defendant or that he acted in conformity therewith. The court's instruction was substantially similar to the pattern jury instruction; while the additional instructions would not have been inappropriate, it is incumbent on defendant to make those requests to the trial court.

5. Appeal and Error— preservation of issues—objection at trial—argument in brief

The Court of Appeals did not consider defendant's contentions concerning the cross-examination of his grandmother in a prosecution for attempted burglary where defendant did not cite authority for his proposition and abandoned it, or did not object at trial and did not specifically argue plain error.

6. Burglary and Unlawful Breaking or Entering— attempted—fingers underneath a screen

The trial court did not err by denying a motion to dismiss a charge of attempted first-degree burglary where the State presented evidence that defendant removed a portion of a window screen and inserted his fingers underneath the screen in the nighttime.

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

Defendant abandoned his argument concerning the prosecutor's argument about prior acts where he failed to cite authority in support of his contention.

8. Burglary and Unlawful Breaking or Entering— attempted first-degree—no charge on lesser-included offense

The trial court did not err in a prosecution for attempted first-degree burglary by not instructing the jury on the lesser-included offense of attempted misdemeanor breaking and entering. The State presented sufficient evidence to submit the attempted burglary charge to the jury, and no evidence was presented to suggest that defendant's intent was anything other than to commit a felony within the home.

Appeal by defendant from judgment entered 20 July 2007 by Judge Paul C. Ridgeway in Person County Superior Court. Heard in the Court of Appeals 30 April 2008.

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

McCotter, Ashton & Smith, P.A., by Rudolph A. Ashton, III and Terri W. Sharp, for defendant-appellant.

HUNTER, Judge.

Jeremy Tyler Martin ("defendant") appeals from a judgment entered on 20 July 2007 pursuant to a jury verdict finding him guilty of attempted first degree burglary. Defendant was sentenced to a minimum of thirty-two months' imprisonment and a maximum of forty-eight months' imprisonment. After careful review, we find defendant's trial to be free from error.

The State presented evidence tending to show that on 29 March 2007, around 8:30 p.m., Deborah Rickman ("Mrs. Rickman") was at home with her husband, police officer Ken Rickman ("Mr. Rickman"), and their two children. Mrs. Rickman was taking a bath when she "heard this racket going on outside, like loud four wheelers." Mrs. Rickman heard her dog barking and looked out the bathroom window and saw defendant walk around the corner of her house.

Mrs. Rickman then heard scratching at her bedroom window. She pulled back the window shade on the bedroom window and saw

defendant on the other side of the window, pulling on the window and a cord attached to the window. Defendant had put his fingers around the window screen and had pushed the window off of its track.

Mrs. Rickman saw a man's face on the other side of the window and recognized him as defendant. She testified that defendant was wearing a white t-shirt at the time. She had known defendant for five or six years because defendant's parents live near the Rickmans' home and "he's very well known in [the] neighborhood." She testified that the lights were on both inside her bedroom and outside where defendant was standing.

When defendant saw Mrs. Rickman, he walked away from the window, and went along the side of the house. Mrs. Rickman ran outside to the front porch, saw defendant standing outside, made eye contact with him and said, "Jeremy Martin, get off my property now."

Mrs. Rickman then walked back inside her home, awoke her husband, and told him that "Jeremy Martin was trying to break into the house." Mr. Rickman retrieved his gun, walked outside to the porch, and fired a few warning shots into the air. Mr. Rickman then called 911 at 8:48 p.m.

Defendant's grandmother, Emily Martin, testified on behalf of defendant at trial. Ms. Martin testified that she picked up defendant from his father's home around 7:30 p.m. She testified that defendant was wearing a royal blue shirt and khaki pants. They then went to a CVS pharmacy, with defendant remaining in the car, while Ms. Martin shopped for approximately thirty minutes. The two then went to a Bojangles' restaurant and then went home.

Defendant presents the following issues for this Court's review: (1) whether the trial court erred in admitting testimony of other crimes and/or wrongs committed by defendant; (2) whether the trial court committed plain error in its limiting instruction regarding the other crimes and/or wrongs alleged to have been committed by defendant; (3) whether the trial court erred in allowing the State to cross-examine Ms. Martin about defendant's prior record, sentences, and the length of sentence he might face were he convicted; (4) whether the trial court erred in failing to dismiss the charges against defendant; (5) whether the trial court erred in overruling defendant's objection to the State's arguments regarding defendant's prior criminal record; and (6) whether the trial court erred in refusing defendant's requested instructions on attempted misdemeanor breaking and entering.

I.

Defendant first argues that the trial court erred in admitting testimony of prior bad acts of defendant. We disagree.

We review a trial court's decision on admission or exclusion of evidence for abuse of discretion. *Brown v. City of Winston-Salem*, 176 N.C. App. 497, 505, 626 S.E.2d 747, 753 (2006). An abuse of discretion will be found where the trial court's decision is so arbitrary that it could not have been the result of a reasoned decision. *Id.*

As a general matter, character evidence is not admissible to prove conformity therewith. *State v. Bogle*, 324 N.C. 190, 201, 376 S.E.2d 745, 751 (1989). Under N.C.R. Civ. P. 404(b), however, evidence of other crimes, wrongs or acts is "admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2007).

Rule 404(b) is a "rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990). In other words, evidence of other crimes or wrongs committed by a defendant is admissible even if it shows a propensity to act in comformity therewith "so long as it also 'is relevant for some purpose *other than* to show that defendant has the propensity for the type of conduct for which he is being tried.' " *State v. Bagley*, 321 N.C. 201, 206-07, 362 S.E.2d 244, 247 (1987) (quoting *State v. Morgan*, 315 N.C. 626, 637, 340 S.E.2d 84, 91 (1986)).

"Even if offered for a proper purpose under Rule 404(b)," the evidence still must be relevant, "and such evidence is not relevant unless it 'reasonably tends to prove a material fact in issue' other than the character of the accused.' " *State v. Haskins*, 104 N.C. App. 675, 679, 411 S.E.2d 376, 380 (1991) (citations omitted). If relevant and proper under Rule 404(b), the evidence still must satisfy the Rule 403 balancing test. Under that rule, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury[.]" N.C. Gen. Stat. § 8C-1, Rule 403 (2007). "Whether to exclude evidence under Rule 403 is a matter left to the sound discretion of the trial court." *Coffey*, 326 N.C. at 281, 389 S.E.2d at 56.

Thus, in summation, we must first determine whether the evidence was offered for a proper purpose under Rule 404(b), then determine whether the evidence is relevant under Rule 401, and finally determine whether the trial court abused its discretion in balancing the probative value of the evidence under Rule 403.

In determining whether the prior acts "are offered for a proper purpose, the ultimate test of admissibility is 'whether the [prior acts] are sufficiently similar and not so remote in time as to be more probative than prejudicial under the balancing test of . . . Rule 403.' " *State v. Pruitt*, 94 N.C. App. 261, 266, 380 S.E.2d 383, 385 (1989) (citation omitted). In the instant case, defendant argues that the following prior acts should not have been admitted: (1) defendant's prior acts of breaking and entering and larceny on 24 April 2005 and 28 April 2005; (2) defendant's prior act of marijuana possession; and (3) defendant's prior bad acts of breaking and entering and larceny on 4 October 2006. We address each in turn.

A. Defendant's prior acts of breaking and entering and larceny on 24 April 2005 and 28 April 2005

[1] Person County Sheriff's Department Sergeant A.J. Weaver testified that: (1) on 28 April 2005, defendant committed breaking and entering of a motor vehicle and misdemeanor larceny of property; and (2) on 24 April 2005, defendant committed breaking and entering of a residence and misdemeanor larceny of property. Defendant pled guilty to misdemeanor possession of stolen goods arising out of the 28 April 2005 charges, and felony possession of stolen goods arising out of the 24 April 2005 charges.

The State argues that evidence of defendant committing a larceny after he broke and entered the motor vehicle and residence is admissible under Rule 404(b) to show defendant's motive and intent to commit a larceny. Specifically, the State argues that the evidence of the prior acts "are not too remote in time because defendant committed the prior acts two years before his 29 March 2007 attempted first degree burglary" and they are "sufficiently similar because defendant broke into a motor vehicle and a residence and committed a larceny with the two prior acts[.]" We agree.

As to time, "remoteness in time is less significant when[,]" as is the case here, "the prior conduct is used to show intent [or] motive[.]" *State v. Stager*, 329 N.C. 278, 307, 406 S.E.2d 876, 893 (1991). Instead, "remoteness in time generally affects only the weight to be given such evidence, not its admissibility." *Id.* In determining whether the prior

acts are sufficiently similar, for purposes of showing motive or intent, the similarities need not " 'rise to the level of the unique and bizarre.' " *Id.* at 304, 406 S.E.2d at 891 (citation omitted). Instead, "the similarities simply must tend to support a *reasonable* inference that the same person committed both the earlier and later acts." *Id.*

This Court has found prior acts of "(1) shoplifting of a vacuum cleaner from K-Mart, (2) breaking and entering and larceny at [a place of business], and (3) car theft . . . relevant to show [defendant's] intent and motive for unlawfully entering the [victim's] residence." *State v. Hutchinson*, 139 N.C. App. 132, 136-37, 532 S.E.2d 569, 572 (2000). In this case, like defendant in *Hutchinson*, defendant had committed a prior larceny and broke into a car. Although defendant did not commit the larceny in a place of business as occurred in *Hutchinson*, the fact that defendant committed the prior act in a home makes the prior act even more similar and relevant. We also do not find the time span of two years to be too remote in time to show motive and intent. *See State v. Frazier*, 344 N.C. 611, 615, 476 S.E.2d 297, 300 (1996) (incidents as remote as twenty-seven years earlier not too remote in time). Considering the trial court's proper instructions as to Rule 403 and this Court's holding in *Hutchinson*, we do not find error in the trial court's admission of this evidence.

B. Defendant's prior act of marijuana possession

[2] Person County Sheriff's Department Officer Mike Clayton testified that he witnessed defendant conduct a drug transaction on 26 March 2007. Officer Clayton also testified that after witnessing the transaction, he arrested defendant for possession of marijuana. Defendant pled guilty to misdemeanor possession of marijuana as a result of this prior act.

Evidence of drug use has been properly used to establish a motive for a robbery. *State v. Stephenson*, 144 N.C. App. 465, 470, 551 S.E.2d 858, 862 (2001). We agree with the State that this evidence is relevant to show defendant's motive in that he possessed a need for money. Moreover, this act occurred three days before his 29 March 2007 attempted first degree burglary. As this Court has held, "when evidence leading up to a crime is part of the scenario which helps explain the setting, there is no error in permitting the jury to view the criminal episode in the context in which it happened." *State v. Holadia*, 149 N.C. App. 248, 254, 561 S.E.2d 514, 519 (2002). For these same reasons, we also find the evidence relevant under Rule 401.

Finally, we must determine whether the trial court abused its discretion in conducting the Rule 403 balancing test before admitting this evidence. In *Holadia*, this Court found no abuse of discretion in admitting the evidence of prior drug related acts even though they occurred four years before the act for which the defendant was tried. *Id.* at 255, 561 S.E.2d at 520. Here, the prior act occurred just days before defendant's alleged attempted burglary occurred. Accordingly, we cannot say that the trial court's decision was manifestly unsupported by reason or in any way amounted to an abuse of discretion.

C. Defendant's prior act of breaking and entering and larceny on 4 October 2006

[3] Person County Sheriff's Department Officer Ryan Weaver testified that defendant committed a breaking and entering and larceny at the residence of Amanda McKay-Walker on 4 October 2006. Defendant had entered the Walker residence through the back window. The Walker residence is located in the same neighborhood as the Rickman residence. In that case, defendant pled guilty to felony breaking and entering.

This Court has held that admission of evidence regarding a prior break-in was admissible under Rule 404(b) to show identity where the defendant entered through a window, the homes were in the same neighborhood, and both break-ins occurred at a similar hour. *See State v. Whitaker*, 103 N.C. App. 386, 387, 405 S.E.2d 911, 911 (1991). As in *Whitaker*, the two incidents herein are sufficiently similar because, in both cases, defendant attempted to or did enter through a window and both residences were in the same neighborhood. Additional evidence linking defendant to the 4 October 2006 break-in includes recovery by police of a gun left at the scene that was registered to defendant's grandfather. Moreover, the prior act was only six months before the 29 March 2007 attempted first degree burglary for which defendant was convicted in the instant case, so we cannot say that the incidents were too remote in time.

Additionally, the similarity between this act and the prior act also shows intent. Here, defendant was convicted of attempted first degree burglary. His prior act helped establish that had Mrs. Rickman not caught him, defendant intended to burglarize the home. Accordingly, the trial court did not abuse its discretion in admitting the evidence under Rule 404(b). Finally, we conclude that the trial court did not abuse its discretion in admitting the evidence under Rule 403,

especially given the fact that the trial court properly instructed the jury to use it only for purposes of intent. *See*, *e.g.*, *id.* at 388, 405 S.E.2d at 911. Defendant's assignments of error as to this issue are therefore rejected.

II.

[4] Defendant next argues that the trial court committed plain error when it instructed the jury to consider prior acts only for the purpose of determining defendant's intent and motive and by not including language that the jury "could not consider the evidence to prove the character of the defendant or that he acted in conformity therewith." We disagree.

Defendant's argument is reviewable on appeal for plain error because he failed to object at trial to the instructions. *State v. Jones*, 358 N.C. 330, 346, 595 S.E.2d 124, 135 (2004). "Under the plain error standard of review, defendant has the burden of showing: '(i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial.' " *Id.* (quoting *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997)).

The North Carolina Pattern Jury Instructions for Rule 404(b) state:

> Evidence has been received tending to show that (*state specific evidence*). This evidence was received solely for the purpose of showing
>
> [a Rule 404(b) purpose].
>
> If you believe this evidence you may consider it, but only for the limited purposes for which it was received.

1 N.C.P.I.—Crim. 104.15 (2005). The trial court instructed the jury in a substantially similar fashion when it instructed the jury at the close of all evidence that:

> Now, evidence has been received tending to show that the defendant had been charged and convicted of crimes prior to March 29, 2007. This evidence was received *solely for the purposes of showing that the defendant had a motive for the commission of the crime charged in this case*, *and that the defendant had the intent which is a necessary element of the crime charged in this case*. If you believe this evidence, you

> may consider it, but *only for the limited purpose for which it was received.*

(Emphasis added.)

We can find no error, much less plain error, when the trial court instructed the jury consistent with the pattern jury instructions. Although additional instructions would not have been inappropriate, it is incumbent upon defendant to make those requests to the trial court. *State v. Hopper*, 292 N.C. 580, 589, 234 S.E.2d 580, 585 (1977). Defendant's arguments to the contrary are therefore rejected.

III.

[5] Defendant next argues that the trial court erred in allowing the State to cross-examine Ms. Martin, defendant's grandmother, concerning: Defendant's potential sentence, whether defendant was kicked out of high school for having drugs in school, whether defendant had been in drug treatment court, whether defendant had a drug problem, and whether Ms. Martin knew defendant stole Oxycontin pills from an Earlene Robinson in 2004. We address each in turn.

As to defendant's first contention, that the trial court erred by questioning Ms. Martin regarding the sentence defendant could receive upon conviction, defendant cites no authority for such a proposition. Where no argument or authority has been cited to the alleged error, it is deemed abandoned. N.C.R. App. P. 28(b)(6). Defendant, having failed to present any authority that the trial court erred, has abandoned this argument.

As to defendant's remaining contentions in this section, defendant failed to object at trial and has not specifically argued that the trial court committed plain error. Under such circumstances, this Court will not review whether the alleged error rises to the level of plain error. *State v. Alston*, 131 N.C. App. 514, 518, 508 S.E.2d 315, 318 (1998). Defendant's assignments of error as to this issue are therefore dismissed.

IV.

[6] Defendant next argues that the trial court erred in denying his motion to dismiss the charge of attempted first degree burglary. We disagree.

The standard of review on appeal of the denial of a criminal defendant's motion to dismiss for insufficient evidence is whether the

State has offered substantial evidence to show that the defendant committed each element required to be convicted of the crime charged. *State v. Williams*, 154 N.C. App. 176, 178, 571 S.E.2d 619, 620 (2002). Substantial evidence is evidence that is existing, not just seeming or imaginary. *State v. Irwin*, 304 N.C. 93, 97-98, 282 S.E.2d 439, 443 (1981). Upon a motion to dismiss, the evidence must be viewed in the light most favorable to the State, "giving the [S]tate the benefit of every reasonable inference that might be drawn therefrom." *State v. Etheridge*, 319 N.C. 34, 47, 352 S.E.2d 673, 681 (1987).

"Burglary is defined in North Carolina by the common law and G.S. 14-51, as the breaking and entering of the dwelling house or sleeping apartment of another in the nighttime with intent to commit a felony therein, whether such intent be executed or not." *State v. Goodman*, 71 N.C. App. 343, 345, 322 S.E.2d 408, 410 (1984). In this case, defendant was charged with attempted first degree burglary. "An attempt to commit a crime is an act done with intent to commit that crime, carried beyond mere preparation to commit it, but falling short of its actual commission." *Id.*

In *State v. Bumgarner*, 147 N.C. App. 409, 415, 556 S.E.2d 324, 329 (2001), this Court held that "the evidence presented that the defendant stood on the chair and removed the screen from [the victim's] window . . . was sufficient to satisfy the elements of attempted first-degree burglary." In the instant case, the State presented evidence that defendant was able to remove a portion of the screen and insert his fingers underneath that screen in the nighttime. Under *Bumgarner*, this is sufficient evidence to submit the issue to the jury and the trial court did not err in denying defendant's motion to dismiss. *See also State v. Gibbs*, 297 N.C. 410, 418, 255 S.E.2d 168, 174 (1979) (holding that " 'an entry is accomplished by inserting into the place broken the hand, the foot, or any instrument with which it is intended to commit a felony' ") (citation omitted). Defendant's arguments to the contrary are therefore rejected.

V.

[7] Defendant next argues the trial court abused its discretion when it allowed the prosecutor to address defendant's prior acts in his closing argument. Because defendant has again failed to cite any authority in support of his contention that the trial court erred, his argument is deemed abandoned. N.C.R. App. P. 28(b)(6).

VI.

[8] Defendant's final argument is that the trial court erred in refusing to instruct the jury on the lesser-included offense of attempted misdemeanor breaking and entering. We disagree.

If there is any evidence that indicates the absence of an important element of the primary offense and the existence of an element of a lesser offense, the jury must be instructed on the lesser offense as well. *State v. Annadale*, 329 N.C. 557, 567, 406 S.E.2d 837, 843 (1991). However, "[a] defendant is not entitled to an instruction on a lesser included offense merely because the jury could possibly believe some of the State's evidence but not all of it." *Id.* at 568, 406 S.E.2d at 844.

As discussed in section IV of this opinion, the State presented sufficient evidence to submit the charge of first degree attempted burglary to the jury. Accordingly, the trial court did not err in denying defendant's request for instructions on the lesser-included offense. Moreover, neither case cited by defendant is applicable to the case at bar. In both, *State v. Barlowe*, 337 N.C. 371, 446 S.E.2d 352 (1994), and *State v. Peacock*, 313 N.C. 554, 330 S.E.2d 190 (1985), an instruction on a lesser-included offense was required because there was a conflict in the evidence as to the defendants' intent. Here, no evidence was presented to suggest that defendant's intent was anything other than to commit a felony within the home. Defendant argues on appeal, for the first time, that defendant could have been attempting to look at Mrs. Rickman while she was bathing. No evidence in the record or transcript, however, supports such an inference. Accordingly, defendant's arguments to the contrary are therefore rejected.

VII.

In conclusion, we find no abuse of discretion when the trial court admitted into evidence defendant's prior bad acts. We find no error in the trial court's instructions to the jury, denial of defendant's motion to dismiss, and refusal to instruct on a lesser-included offense. Because defendant has failed to cite any authority or argue plain error regarding alleged trial court errors relating to the scope of the State's cross-examination and closing argument, those issues are rejected.

No error.

Judges STEELMAN and STEPHENS concur.

STATE OF NORTH CAROLINA, PLAINTIFF v. KINSEY CHAMBERS HADDOCK, III, DEFENDANT

No. COA07-1050

(Filed 5 August 2008)

1. Rape— second-degree—indictment—disjunctive—not facially invalid

An indictment was not facially invalid where it alleged that defendant had raped a victim who was mentally incapacitated "and/or" physically helpless. A person of common understanding would know the intent of the indictment, and the language was sufficient to notify defendant of the charges against him.

2. Appeal and Error— right to unanimous jury verdict—not raised at trial

An assignment of error which alleges that a defendant's constitutional right to a unanimous jury verdict has been violated may be raised on appeal even though it was not raised at trial.

3. Rape— second-degree—instruction—disjunctive—mental incapacity and physical helplessness

An instruction on second-degree rape in which the clauses on mental incapacity and physical helplessness were joined by the disjunctive "or" was not fatally ambiguous in that it did not offer a choice between two discrete acts. Mental incapacity and physical helplessness are two alternative means by which the force necessary to complete a rape may be shown and are not discrete criminal acts.

4. Rape— second-degree—instruction—mental incapacity—act committed upon victim—voluntary intoxication short of unconsciousness

The trial court erred when it did not include the words "due to any act committed upon the victim" in an instruction on second-degree rape based upon the theory of mental incapacitation. Strictly construed because it is a criminal statute, the protection of N.C.G.S. § 14-27.1(2) does not serve to negate the consent of a person who voluntarily and as a result of her own actions becomes intoxicated to a level short of unconsciousness or physical helplessness. In this case, there was a reasonable possibility that a different result would have been reached at trial.

Appeal by defendant from judgment entered 26 April 2007 by Judge Richard W. Stone in Guilford County Superior Court. Heard in the Court of Appeals 21 February 2008.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Dorothy Powers, for the State.

Wyatt Early Harris Wheeler LLP, by Stanley F. Hammer, for defendant-appellant.

STROUD, Judge.

Defendant Kinsey C. Haddock, III, appeals from judgment entered upon a jury verdict finding him guilty of second degree rape. The dispositive question presented by this case is whether, when a criminal defendant is tried for second degree rape on the theory of mental incapacitation, it is error for the trial court to fail to instruct the jury that it must find beyond a reasonable doubt that the victim's mental incapacitation was due to an act committed upon the victim. Because we conclude that it is, we reverse defendant's conviction and remand for a new trial.

I. Background

The evidence in the record tends to show the following: On 31 December 2005 defendant accompanied the victim (or "S.B.") as the designated driver while S.B. and her friends drank alcohol to celebrate New Year's Eve. Defendant escorted S.B. to several bars and restaurants of her choice where she drank alcohol past midnight and into the early hours of the morning of 1 January 2006. Sometime between 2:00 a.m. and 4:00 a.m. on 1 January 2006, defendant, S.B., and S.B.'s friends, Krista Case and Joe Watkins went to Watkins' apartment. Watkins' roommate asked S.B. to leave the apartment around 4:00 or 5:00 a.m. because her drunken state had caused her to become loud and obnoxious. Defendant and S.B. left Watkins' apartment and went to defendant's apartment in Market Square Towers. S.B. testified at trial that she did not know where she was when she arrived at defendant's apartment and that she soon passed out from excessive drinking, falling asleep on defendant's bed. Defendant put on a condom and had intercourse with S.B. at around 6:00 a.m. on 1 January 2006.

After the act of intercourse, S.B. left defendant's apartment and went down to the lobby of the building, where she sprawled out on the floor in a "very intoxicated" state. Police officers were summoned

to the lobby on account of defendant's intoxicated behavior, and they smelled alcohol as soon as they entered the lobby. S.B. was taken by ambulance to High Point Regional Hospital, where she was evaluated for possible injuries arising from excessive alcohol consumption and from sexual intercourse. She told a nurse at the hospital that she had not lost consciousness during the night.

Later that morning, police officers went upstairs to defendant's apartment and questioned him. He admitted to having sex with S.B. but asserted that it was consensual. On 8 May 2006 the Guilford County Grand Jury, alleging that defendant had sexual intercourse with S.B. "by force and against the victim's will[,]" returned an indictment for second degree rape. On 2 April 2007, a superseding indictment alleged that defendant "unlawfully, willfully and feloniously did carnally know and abuse [S.B.] who was at the time mentally disabled, mentally incapacitated, and/or physically helpless." Defendant was tried before a jury in Superior Court, Guilford County, from 9 to 13 April 2007. The jury found defendant guilty of second degree rape. Upon the jury verdict, the trial court sentenced defendant to 70 to 93 months imprisonment. Defendant appeals.

II. The Indictment

[1] Defendant contends that the superceding indictment was facially invalid because it alleged that defendant "unlawfully, willfully and feloniously did carnally know and abuse [S.B.], who was at the time mentally disabled, mentally incapacitated *and/or* physically helpless." (Emphasis added.) A facially invalid indictment deprives the trial court of jurisdiction to enter judgment in a criminal case. *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). Indictments alleged to be facially invalid are therefore reviewed *de novo*. *State v. Marshall*, 188 N.C. App. 744, 748, 656 S.E.2d 709, 712, *disc. review denied*, 362 N.C. 368, ––– S.E.2d ––– (2008).

Although use of the phrase "and/or" in indictments has been criticized by the North Carolina Supreme Court, it is not *per se* fatal to the indictment. *See*, *e.g.*, *State v. Daughtry*, 236 N.C. 316, 319, 72 S.E.2d 658, 660 (1952) (criticizing the use of "and/or" in indictments, but finding no error when the indictment was "sufficiently intelligible and explicit to (1) inform the defendant of the charge he must answer, (2) enable him to prepare his defense, and (3) sustain the judgment." (Citation and quotation omitted.)). An indictment is not facially invalid as long as it notifies an accused of the charges against him

sufficiently to allow him to prepare an adequate defense and to protect him from double jeopardy. *State v. Lowe*, 295 N.C. 596, 603, 247 S.E.2d 878, 883 (1978). Notification is sufficient if the illegal act or omission alleged in the indictment is "clearly set forth so that a person of common understanding may know what is intended." *State v. Coker*, 312 N.C. 432, 435, 323 S.E.2d 343, 346 (1984).

Short form indictments are permitted in prosecutions for rape by N.C. Gen. Stat. § 15-144.1, which states in pertinent part:

> (a) In indictments for rape it is not necessary to allege every matter required to be proved on the trial . . . .
>
> . . . .
>
> (c) If the victim is a person who is mentally disabled, mentally incapacitated, or physically helpless it is sufficient to allege that the defendant unlawfully, willfully, and feloniously did carnally know and abuse a person who was *mentally disabled*, *mentally incapacitated or physically helpless*, naming such victim, and concluding as aforesaid. Any bill of indictment containing the averments and allegations herein named shall be good and sufficient in law for the rape of a mentally disabled, mentally incapacitated or physically helpless person and all lesser included offenses.

N.C. Gen. Stat. § 15-144.1 (2005) (emphasis added). A short-form indictment for rape which tracks the language of N.C. Gen. Stat. § 15-144.1 is sufficient to give the trial court jurisdiction to enter judgment, "even though such indictments do not specifically allege each and every element," *State v. Harris*, 140 N.C. App. 208, 215, 535 S.E.2d 614, 619, *disc. review denied and appeal dismissed*, 353 N.C. 271, 546 S.E.2d 122 (2000), because such an indictment specifies the offense "[i]n words having precise legal import [thereby] put[ting] the defendant on notice that he will be called upon to defend against proof of the manner and means by which the crime was perpetrated. *Lowe*, 295 N.C. at 604, 247 S.E.2d at 883-84.

Except for the insertion of the words "and/or" in place of "or" the indictment tracked the language of N.C. Gen. Stat. § 15-144.1(c) precisely. From reading the indictment, a person of common understanding would know that the intent of the indictment was to accuse defendant of having sexual intercourse with a person deemed by law to be incapable of giving consent. In turn, this language was sufficient to notify defendant of the charges against him in order to

prepare an adequate defense and to protect him from being punished a second time for the same act. The indictment *sub judice* might have been clearer if only the word "or" or the word "and" had been used, but we hold that the use of "and/or" did not render the indictment facially invalid.

III. Unanimous Jury Verdict

Defendant contends that his constitutional right to a unanimous jury verdict was violated when the trial court gave ambiguous instructions to the jury. N.C. Const. art. I, § 24. The allegedly erroneous instruction stated, in pertinent part:

> If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant engaged in vaginal intercourse with the victim, and at the time (a) the victim was *so substantially incapable of appraising the nature of her conduct or resisting an act of vaginal intercourse as to be mentally incapacitated*; *or*, (b) the victim was so physically unable to resist an act of vaginal intercourse or communicate unwillingness to submit to an act of vaginal intercourse as to be physically helpless, and that the defendant knew . . . or should reasonably have known that the victim was mentally incapacitated or physically helpless, it would be your duty to return a verdict of guilty.

Defendant contends that the trial court's jury instruction was ambiguous in two ways. First, he contends that the instruction was ambiguous because it was a disjunctive instruction which offered the jury a choice between two discrete criminal acts. Second, he contends that even if simply joining the instruction on mental capacity and the instruction on physical helplessness in the disjunctive was not ambiguous, the portion of the instruction relating to mental incapacity was ambiguous because it misstated the law. The State argues that the disjunctive instruction was not ambiguous and that the law was correctly stated.

For the reasons that follow, we disagree with defendant that the disjunctive instruction improperly gave the jury a choice between two discrete criminal acts. However, we agree with defendant that the instruction was ambiguous because the jury instruction on mental incapacity misstated the law.

A. Standard of Review

[2] Defendant did not object to the jury instructions at trial, on constitutional grounds or otherwise. In general, a constitutional issue

may not be raised for the first time on appeal. *State v. Chapman*, 359 N.C. 328, 360, 611 S.E.2d 794, 819 (2005). However, the North Carolina Supreme Court has recognized an exception for assignments of error which allege that a defendant's constitutional right to a unanimous jury verdict has been violated. *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985) (holding that because the defendant's right to a unanimous jury verdict had been violated when the trial judge spoke only with the jury foreman and not the whole jury when ruling that the jury could not review the evidence after beginning their deliberations, failure to object at trial did not waive the right to raise the issue on appeal); *see also State v. Mueller*, 184 N.C. App. 553, 575-76, 647 S.E.2d 440, 456 (extending the holding of *Ashe* to review defendant's appellate argument that ambiguous indictments led to a nonunanimous jury verdict even though he had not raised the issue at trial), *cert. denied*, 362 N.C. 91, 657 S.E.2d 24 (2007).

When a criminal defendant is denied a right arising under the North Carolina Constitution, he is entitled to a new trial only "when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443(a) (2005); *State v. Hartness*, 326 N.C. 561, 569, 391 S.E.2d 177, 182 (1990). *Contra State v. Smith*, 188 N.C. App. 207, 213-14, 654 S.E.2d 730, 735-36 (2008) ("Although the right to presence arises under the North Carolina Constitution . . . a new trial is appropriate unless the State proves the error to be harmless beyond a reasonable doubt."); *see* N.C. Gen. Stat. § 15A-1443(b) (2005) ("A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless.").

B. Disjunctive Instructions

[3] First we consider defendant's contention that the instruction was error because the clauses on mental incapacity and on physical helplessness were joined by the disjunctive "or".[1] Defendant relies on *State v. Diaz*, 317 N.C. 545, 346 S.E.2d 488 (1986), to contend that a disjunctive instruction on the elements of a crime is fatally ambiguous unless the two clauses joined by the disjunctive are synonymous. We disagree.

1. Because we are granting defendant a new trial on a different assignment of error, it would not be necessary to consider this argument except that the issue may arise at a new trial. *State v. Barrow*, 350 N.C. 640, 645, 517 S.E.2d 374, 377 (1999).

A fatally ambiguous jury instruction violates a defendant's constitutional right to a unanimous verdict. N.C. Const. art. I, § 24; *State v. Lyons*, 330 N.C. 298, 307, 412 S.E.2d 308, 314 (1991); *see also* N.C. Gen. Stat. § 15A-1237(b) (2005) ("The verdict must be unanimous, and must be returned by the jury in open court."). *Diaz*, *supra*, and *Hartness*, *supra*, are the seminal cases in North Carolina regarding whether a disjunctive jury instruction is fatally ambiguous; both *Hartness* and *Diaz* have given rise to a line of cases applying the principles found therein. *See, e.g.*, *State v. Funchess*, 141 N.C. App. 302, 307-09, 540 S.E.2d 435, 438-39 (2000) (discussing the differences between the *Diaz* line and the *Hartness* line); *State v. Almond*, 112 N.C. App. 137, 144, 435 S.E.2d 91, 96 (1993) ("[T]he difference [between the *Hartness* line and the *Diaz* line] is whether the two underlying acts are separate offenses or whether they are merely alternative ways to establish a single offense."). *Diaz* held that when the underlying acts joined by the disjunctive are separate offenses for which a defendant may be separately convicted and punished, the jury instruction is fatally ambiguous. 317 N.C. at 554-55, 346 S.E.2d at 494-95. *Hartness*, on the other hand, held that when the underlying acts joined by the disjunctive constitute a "single wrong . . . established by a finding of various alternative elements," the jury instruction is not fatally ambiguous. 326 N.C. at 566, 391 S.E.2d at 180. To decide whether the underlying acts joined by the disjunctive are separate offenses or merely alternative ways to establish a single offense, this Court considers the gravamen of the offense, determined by considering the evil the legislature intended to prevent and the applicable statutory language. *Lyons*, 330 N.C. at 305-06, 412 S.E.2d at 313-14.

The gravamen of the offense of second degree rape is forcible sexual intercourse. N.C. Gen. Stat. § 14-27.3 (2005). Force may be shown in several alternative ways including: (1) actual force, *State v. Hall*, 293 N.C. 559, 562-63, 238 S.E.2d 473, 475 (1977) (defendant grabbed victim's neck and pushed her onto the bed); (2) constructive force, *State v. Parks*, 96 N.C. App. 589, 594, 386 S.E.2d 748, 752 (1989) ("threats and displays of force by defendant for the purpose of compelling the victim's submission to sexual intercourse"); and (3) force implied in law, which includes sexual intercourse with a person who is mentally incapacitated, *State v. Washington*, 131 N.C. App. 156, 167, 506 S.E.2d 283, 290 (1998) ("[O]ne who is mentally defective under the sex offense laws is statutorily deemed incapable of consenting to intercourse or other sexual acts. . . . [F]orce is inherent to having sexual intercourse with a person who is deemed by law to

be unable to consent." (Citations and quotation marks omitted.)), *disc. review denied and appeal dismissed*, 350 N.C. 105, 533 S.E.2d 477-78 (1999), sleeping, *State v. Moorman*, 320 N.C. 387, 392, 358 S.E.2d 502, 506 (1987) ("[S]exual intercourse with [a sleeping] victim is *ipso facto* rape because the force and lack of consent are implied in law."), or physically helpless, *State v. Aiken*, 73 N.C. App. 487, 499, 326 S.E.2d 919, 926 ("The physical act of vaginal intercourse with the victim while she is physically helpless is sufficient 'force' for the purpose of second degree rape[.]"), *disc. review denied and appeal dismissed*, 313 N.C. 604; 332 S.E.2d 180 (1985).

Because mental incapacity and physical helplessness are but two alternative means by which the force necessary to complete a rape may be shown, and not discrete criminal acts, we conclude that this case is analogous to *Hartness*, 326 N.C. at 566-67, 391 S.E.2d at 180-81, and hold that the jury instruction excepted to *sub judice* was not fatally ambiguous simply because the physical helplessness clause and the mental incapacity clause were joined in the disjunctive. Accordingly, we overrule this assignment of error.

C. Instruction on Mental Incapacity

[4] Defendant alternatively contends that the jury instruction quoted *supra* is fatally ambiguous because the words "due to any act committed upon the victim" were omitted from the instruction on mental incapacity.[2] The State argues in its brief that the omission of those words was not error, because

> [t]he term 'any act committed upon the victim' in N.C.G.S. § 14-27.1(2) may be *broadly interpreted* to include acts by others, by the victim, by animals, and/or inert objects. For purposes of this statute, a victim could be hit by a falling boulder rendering the victim incapacitated or bit [sic] by an insect causing a severe allergic reaction rendering the victim incapacitated. In the case at bar, *the act committed upon the victim was the act of the victim* consuming large quantities of alcohol.

(Emphasis added.)

The State's broad construction of the statute would render the words "due to any act committed upon the victim" unnecessary sur-

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2. N.C. Gen. Stat. § 14-27.1(2) defines a mentally incapacitated victim as "a victim who *due to any act committed upon the victim* is rendered substantially incapable of either appraising the nature of his or her conduct, or resisting the act of vaginal intercourse or a sexual act." *Id.* (emphasis added).

plusage which need not be included in a jury instruction where a rape charge is based upon the mental incapacity of the victim. We disagree with the State.

"A trial judge is required to instruct the jury on the law arising on the evidence. This includes instruction on the elements of the crime. Failure to instruct upon all substantive or material features of the crime charged is error." *State v. Whiteley*, 172 N.C. App. 772, 780, 616 S.E.2d 576, 581 (2005) (citations, ellipses and quotation marks omitted). Therefore, in reviewing this assignment of error our task is to construe N.C. Gen. Stat. § 14-27.1 in order to determine whether or not the words "due to any act committed upon" the victim constitute a material feature of the crime charged. We conclude that they do.

> [W]e are guided by the principle of statutory construction that a statute should not be interpreted in a manner which would render any of its words superfluous. We construe each word of a statute to have meaning, where reasonable and consistent with the entire statute, because it is always presumed that the legislature acted with care and deliberation.

State v. Coffey, 336 N.C. 412, 417-18, 444 S.E.2d 431, 434 (1994) (citations, quotation marks, ellipses and brackets omitted). The other principle which guides us is that "[i]n construing ambiguous criminal statutes, we apply the rule of lenity, which requires us to strictly construe the statute." *State v. Hinton*, 361 N.C. 207, 211, 639 S.E.2d 437, 440 (2007).

At common law, the doctrine of force implied in law protected the class of persons who were "unconscious or insensibly drunk," whether the intoxicating substance was administered involuntarily by the defendant or someone else, or was voluntarily ingested by the victim. *Aiken*, 73 N.C. App. at 499, 326 S.E.2d at 926.[3] In the current statutory codification of the law of rape, the General Assembly clearly intended to continue to protect that class of persons when it inserted the subsection criminalizing intercourse with someone who

3. We acknowledge that some of the language in *Aiken* tends to conflate physical helplessness with mental incapacity. 73 N.C. App. at 499, 326 S.E.2d at 926. However, the statute expressly distinguishes physical helplessness from mental incapacity. N.C. Gen. Stat. § 14-27.1. Furthermore, the holding of *Aiken* is firmly grounded in the victim's physical helplessness in that the evidence showed that the victim was unconscious when the defendant had sexual intercourse with her, *id.*, and the defendant argued only that the jury instruction on physical helplessness was error, *id.* at 498, 326 S.E.2d at 925.

is physically helpless.[4] N.C. Gen. Stat. § 14-27.3(a)(2) (2005); *compare Moorman*, 320 N.C. at 392, 358 S.E.2d at 506 ("Our rape statutes essentially codify the common law of rape." (Citing N.C. Gen. Stat. § 14-27.2 *et seq.*)), *with State v. Turman*, 52 N.C. App. 376, 377, 278 S.E.2d 574, 575 (1981) ("The purpose of the [indecent liberties] statute is to give broader protection to children than the prior laws provided."). For purported rape victims with a lesser degree of impairment than physical helplessness, the question *sub judice* is whether the General Assembly intended for the protection of the doctrine of force implied in law to be extended to negate the consent of alleged victims who have voluntarily ingested intoxicating substances through their own actions. We conclude that it did not.

Under the plain language of N.C. Gen. Stat. § 14-27.3 and N.C. Gen. Stat. § 14-27.1(2), the protection of the doctrine of force implied in law was extended to a person who is suffering from a lesser degree of impairment than "unconscious or insensibly drunk" when that person is "*substantially incapable* of either appraising the nature of his or her conduct, or resisting the act of vaginal intercourse or a sexual act" *and* the person's condition was "*due to any act committed upon the victim*." N.C. Gen. Stat. § 14-27.1(2) (2005). Although the words "committed upon" the victim could extend to acts committed by someone other than the person accused of the rape, *Aiken*, 73 N.C. App. at 499, 326 S.E.2d at 926, this phrase connotes an action committed *upon* the victim and not a voluntary act *by* the victim herself. Thus, the language of the statute, *strictly construed* as required for criminal statutes, *Hinton*, 361 N.C. at 211, 639 S.E.2d at 440, leads us to conclude that the protection of the statute does not serve to negate the consent of a person who voluntarily and as a result of her own actions becomes intoxicated to a level short of unconsciousness or physical helplessness as defined by N.C. Gen. Stat. § 14-27.1(3) (2005). Because we must strictly construe the statute, *Hinton*, 361 N.C. at 211, 639 S.E.2d at 440, limiting criminal liability to acts which the General Assembly clearly intended to forbid,[5] we decline the State's invitation to interpret the statute broadly

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4. " 'Physically helpless' means (i) a victim who is *unconscious*; or (ii) a victim who is physically unable to resist an act of vaginal intercourse or a sexual act or communicate unwillingness to submit to an act of vaginal intercourse or a sexual act." N.C. Gen. Stat. § 14-27.1(3) (emphasis added).

5. The General Assembly could clarify the law of mental incapacity as applied to rape and other sexual offenses by adding words as Florida has done:

> "Mentally incapacitated" means temporarily incapable of appraising or controlling a person's own conduct due to the influence of a narcotic, anesthetic, or intoxi-

to render the words "due to any act committed upon the victim" as unnecessary surplusage which need not be included in a jury instruction on mental incapacity.

For these reasons we hold that the words "due to any act committed upon the victim" were material to instructing the jury on the law of second degree rape. Accordingly, we conclude that the trial court erred when it did not include those words in the jury instruction quoted *supra*.

This error rendered the jury verdict fatally ambiguous, depriving the defendant of his constitutional right to a unanimous verdict granted by the North Carolina Constitution. N.C. Const. art. I, § 24. He is entitled to a new trial for this error if there is a reasonable possibility that a different result would have been reached at trial. N.C. Gen. Stat. § 15A-1443(a); *Diaz*, 317 N.C. at 554, 346 S.E.2d at 494. A careful review of the record shows that the evidence essentially boils down to a "he said/she said" version of the event. The evidence is uncontradicted that S.B. was voluntarily highly intoxicated as a result of her own actions at the time she had sexual intercourse with defendant. There was contradictory evidence as to whether S.B. was intoxicated to the point of being unconscious or physically helpless or to a lesser degree of impairment. We therefore conclude that there is a reasonable possibility that a different result would have been reached at trial if the jury had been properly instructed. Accordingly, we grant defendant a new trial on the charge of second degree rape.

> cating substance administered without his or her consent or due to any other act committed upon that person *without his or her consent*.

Fla. Stat. § 794.011(1)(c) (2007) (emphasis added); *see also Coley v. State*, 616 So. 2d 1017, 1022-23 (Fla. App. 3 Dist. 1993) ("Plainly . . . the Florida sexual battery statute does not place voluntary drug or alcohol consumption on the same footing as involuntary consumption. . . . The prevailing view is that voluntary consumption of drugs or alcohol does not, without more, render consent involuntary."). The General Assembly could also leave out the "any act committed upon the victim" language altogether as Virginia has done:

> "*Mental incapacity*" means that condition of the complaining witness existing at the time of an offense under this article which prevents the complaining witness from understanding the nature or consequences of the sexual act involved in such offense and about which the accused knew or should have known.

Va. Code Ann. § 18.2-67.10(3) (2004) (italics in original); *see also Molina v. Commonwealth*, 636 S.E.2d 470, 474-75 (Va. 2006) (discussing the meaning of mental incapacity under Virginia law).

NEW TRIAL.

Judges HUNTER and TYSON concur.

STATE OF NORTH CAROLINA v. JIMMIE SINCLAIR

No. COA08-103

(Filed 5 August 2008)

1. Obstruction of Justice— resisting an officer—fleeing

The trial court properly dismissed a charge of resisting a public officer where defendant was approached by an officer who knew him in a known drug area, defendant asked if the officer wanted to search him again, and then fled after the officer said yes. Flight from a consensual encounter cannot be used as evidence that defendant was resisting, delaying, or obstructing the officer.

2. Drugs— constructive possession—crack cocaine found along route of fleeing defendant

The trial court properly denied a motion to dismiss a charge of possessing cocaine with intent to sell or deliver where defendant ran from officers and the crack cocaine was found along the route followed by defendant shortly after he was apprehended. The circumstances create a reasonable inference that the drugs came from defendant.

3. Criminal Law— instructions—flight

There was no plain error in instructing the jury on defendant's flight in considering a cocaine possession charge where defendant fled after an officer indicated that he wanted to search defendant.

4. Drugs— instructions—constructive possession

The trial court did not err by instructing the jury on constructive possession of cocaine where the drugs were found along the path defendant had followed as he fled from officers.

5. Sentencing— habitual felon—indictment not defective

An habitual felon indictment was not fatally defective where it did not allege that defendant was at least eighteen years

old at the time of at least two prior convictions (the indictment need not allege defendant's age or date of birth); the statement that the felonies were committed in violation of the General Statutes and that defendant was convicted in Superior Court in North Carolina sufficiently named the state against whom the felonies were committed; there was sufficient notice that defendant was being tried as a recidivist; and, the indictment is not fatally defective for its failure to indicate that a detective testified before the Grand Jury.

Appeal by Defendant from judgments entered 19 September 2007 by Judge Jack W. Jenkins in Beaufort County Superior Court. Heard in the Court of Appeals 22 May 2008.

Attorney General Roy Cooper, by Assistant Attorney General Susan K. Hackney, for the State.

Sue Genrich Berry for Defendant.

STEPHENS, Judge.

On 21 August 2006, Defendant was indicted on charges of possession with intent to sell or deliver cocaine, resisting a public officer, and of having attained the status of an habitual felon. The case was tried before a jury at the 17 September 2007 session of Beaufort County Superior Court, the Honorable Jack W. Jenkins presiding. The State called two witnesses at trial: officers Jerry Davis ("Davis" or "Detective Davis") and Jesse Dickinson ("Dickinson"), both of the Washington, North Carolina, Police Department.

Detective Davis testified as follows: on 6 August 2004, Davis was the lead detective in the Police Department's Drug Enforcement Division. Davis knew Defendant, having had between ten and twelve "conversations" with Defendant before that day. Defendant was known as "PooSack." About a week or two before 6 August, Davis confronted and searched Defendant at a bowling alley. On another occasion before 6 August, Davis strip-searched Defendant at the police station. Defendant was not charged with any offenses as a result of either of those encounters.

On 6 August at 3:41 p.m., Davis, other police officers, and one agent of the North Carolina Alcohol Law Enforcement Agency ("ALE") went to the bowling alley where Davis had previously confronted Defendant because Davis had "received information about

drug activity." The bowling alley was "a local hangout[,]" and a known drug activity area. Davis had observed or made other arrests in that area for drug-related activity. Davis and the ALE agent rode to the bowling alley in an unmarked car and "there were a couple of marked vehicles" also. All of the officers arrived at the bowling alley around the same time. Davis saw Defendant sitting outside the bowling alley in a chair among six to ten other people. Davis parked his car sixteen to twenty feet from Defendant, and Davis and the ALE agent exited the car and walked toward Defendant. Davis was wearing khaki pants and a burgundy polo shirt with a police badge embroidered on the shirt's front, and the ALE agent was in "plain clothes" and was either beside or behind Davis. Davis said, "PooSack, let me talk to you." Defendant stood up out of his chair, took two steps toward Davis, and said, "Oh, you want to search me again, huh?" Defendant did not sound irritated or agitated, "[j]ust normal[.]" Davis replied, "Yes, sir[,]" and continued walking toward Defendant. Defendant stopped ten or twelve feet from Davis, "quickly shoved both of his hands in his front pockets and then removed them." Defendant made his hands into fists and took a defensive stance. As Davis got closer to Defendant, Defendant stated, "Nope. Got to go," and "took off running" across an adjacent vacant lot.

All of the officers chased Defendant across the lot. The lot was "[v]ery unkept[,]" with grass "18 to 24 inches tall[,]" and the lot contained "lots of junk[.]" "There was no defined path through the lot . . . ." Defendant ran "with both of his hands in front of him[]" and never put his hands to his side. Davis was ten or twelve steps behind Defendant. After running 150 feet, Defendant laid down "in the push-up position[]" in a street, and the officers took Defendant into custody and searched him. The only items discovered during the search were a pack of cigarettes and $170.00 in cash. A couple of minutes later, Dickinson approached Davis with a clear plastic bag containing a substance which appeared to be crack cocaine. According to the State Bureau of Investigation, the substance in the bag contained one gram of cocaine. Davis never saw Defendant throw or drop anything during the chase.

Dickinson testified as follows: he drove to the bowling alley with Davis and the other officers. By the time Dickinson got out of his vehicle, Defendant was running through the vacant lot. After Defendant was taken into custody, Dickinson "was able to see through the grass a path from the area where we were told the group was going to be at and the path to exactly where" Defendant laid down in the

street. The path "was like two or three people had come through." Dickinson followed and searched the path, and found a clear, plastic bag. The bag was "on the top of the bent grass." The trash and other items in the vacant lot were "[o]ld[,]" but the bag was not weathered or soiled. It was "clean and undisturbed[,]" and Dickinson did not have to reach through any grass to retrieve it.

Defendant did not present any evidence. At the close of all the evidence, Defendant made a motion "to dismiss the State's case based upon a lack of evidence." The trial court denied the motion. On the charge of possession with intent to sell or deliver, the jury convicted Defendant of the lesser included offense of possession of cocaine. The jury convicted Defendant on the charge of resisting a public officer. Following the verdicts, the State proceeded on the habitual felon charge. The jury found that Defendant had attained the status of an habitual felon, and the trial court sentenced Defendant to 135 to 171 months in prison on the possession conviction. The trial court imposed a concurrent sixty-day sentence on the charge of resisting a public officer. Defendant appeals.

[1] Defendant argues that the trial court erred in denying his motion to dismiss the charge of resisting a public officer. *See* N.C. Gen. Stat. § 14-223 (2007) (proscribing the offense). When reviewing the denial of a motion to dismiss for insufficient evidence, this Court asks whether there was " 'substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense.' " *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002) (quoting *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980)). "Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *Id.* at 597, 573 S.E.2d at 869 (citing *State v. Mann*, 355 N.C. 294, 301, 560 S.E.2d 776, 781, *cert. denied*, 537 U.S. 1005, 154 L. Ed. 2d 403 (2002)). This Court must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. *State v. Benson*, 331 N.C. 537, 417 S.E.2d 756 (1992).

The elements of the offense with which Defendant was charged are:

1) that the victim was a public officer;

2) that the defendant knew or had reasonable grounds to believe that the victim was a public officer;

3) that the victim was discharging or attempting to discharge a duty of his office;

4) that the defendant resisted, delayed, or obstructed the victim in discharging or attempting to discharge a duty of his office; and

5) that the defendant acted willfully and unlawfully, that is intentionally and without justification or excuse.

State v. Dammons, 159 N.C. App. 284, 294, 583 S.E.2d 606, 612, (citing N.C. Gen. Stat. § 14-223 (2001); 2 N.C.P.I.—Crim. 230.30 (1999)), *disc. review denied*, 357 N.C. 579, 589 S.E.2d 133 (2003), *cert. denied*, 541 U.S. 951, 158 L. Ed. 2d 382 (2004). The third element of the offense presupposes lawful conduct of the officer in discharging or attempting to discharge a duty of his office. *State v. Sparrow*, 276 N.C. 499, 173 S.E.2d 897 (1970).

In the case at bar, there is no dispute that there was substantial evidence of the first, second, and fourth elements of the offense. The evidence in support of the fourth element consisted of the officers' testimony concerning Defendant's flight, as there was no evidence that Defendant struggled with any of the officers after Defendant laid down in the street. Concerning the third element, Defendant argues that there was no evidence that Defendant "resist[ed] lawful police conduct." Concerning the fifth element, Defendant argues that he was "under no duty to submit to a search[]" and, therefore, "did not resist, delay[,] or obstruct Officer Davis by running away[.]" In response, the State argues that, under the circumstances of the encounter, "a reasonable person would not have felt compelled to cooperate with a search[]" and that, therefore, "[D]efendant did not have the right to resist by fleeing." We find Defendant's arguments the more convincing.

As the starting point in our analysis, we first determine whether the encounter between Defendant and Detective Davis was consensual or whether Detective Davis was attempting to effectuate an investigatory stop. If the encounter was consensual, Defendant was at liberty " 'to disregard the police and go about his business,' " *Florida v. Bostick*, 501 U.S. 429, 434, 115 L. Ed. 2d 389, 398 (1991) (quoting *California v. Hodari D.*, 499 U.S. 621, 628, 113 L. Ed. 2d 690, 698 (1991)), and there was insufficient evidence of the fifth element of the offense. If, on the other hand, Davis was attempting an investigatory stop, we must then determine whether such a stop was lawful. If it was unlawful, there was insufficient evidence that Davis was dis-

charging or attempting to discharge a duty of his office. *State v. Anderson*, 40 N.C. App. 318, 322, 253 S.E.2d 48, 51 (1979) ("One resisting an illegal arrest is not resisting an officer within the discharge of his official duties.") (citations omitted). If it was lawful, there was substantial evidence that Defendant resisted, delayed, or obstructed Detective Davis in the discharge of his official duties. *State v. Swift*, 105 N.C. App. 550, 554, 414 S.E.2d 65, 67-68 (1992) ("A person is entitled to resist an illegal, but not a legal, arrest.") (citation omitted).

" 'No one is protected by the Constitution against the mere approach of police officers in a public place.' " *State v. Streeter*, 283 N.C. 203, 208, 195 S.E.2d 502, 506 (1973) (quoting *United States v. Hill*, 340 F. Supp. 344, 347 (E.D. Pa. 1972)). An encounter "will not trigger Fourth Amendment scrutiny unless it loses its consensual nature." *Bostick*, 501 U.S. at 434, 115 L. Ed. 2d at 398. "[M]ere police questioning does not constitute a seizure." *Id.*

> [E]ven when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual, . . . ask to examine the individual's identification, . . . and request consent to search his or her luggage, . . . as long as the police do not convey a message that compliance with their requests is required.

Id. at 434-35, 115 L. Ed. 2d at 398-99 (citations omitted). "[T]he crucial test is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.' " *Id.* at 437, 115 L. Ed. 2d at 400 (quoting *Michigan v. Chesternut*, 486 U.S. 567, 569, 100 L. Ed. 2d 565, 569 (1988)).

We conclude that, considering all the circumstances surrounding the encounter prior to Defendant's flight, a reasonable person would have felt at liberty to ignore Detective Davis' presence and go about his business. There is no evidence that Davis made any show of force or otherwise communicated to Defendant that cooperation was required. Davis merely approached Defendant, asked if he could talk to him, and informed Defendant that he wanted to search him. A reasonable person would not have felt compelled to comply with Davis' request. The State acknowledges as much in its brief, stating that Defendant "was under no obligation to consent to talk with [Davis] or to agree to a search." Although Defendant's subsequent flight may have contributed to a reasonable suspicion that criminal

activity was afoot thereby justifying an investigatory stop, Defendant's flight from a consensual encounter cannot be used as evidence that Defendant was resisting, delaying, or obstructing Davis in the performance of his duties. There is no evidence that Defendant acted "unlawfully, that is . . . without justification or excuse." *Dammons*, 159 N.C. App. at 294, 583 S.E.2d at 612 (citations omitted). The trial court erred in denying Defendant's motion to dismiss the charge of resisting a public officer.

We note, however, that even if Davis was attempting to effectuate an investigatory stop, there are insufficient "specific and articulable facts, which taken together with rational inferences from those facts, reasonably warrant[ed] [the] intrusion." *State v. Thompson*, 296 N.C. 703, 706, 252 S.E.2d 776, 779, *cert. denied*, 444 U.S. 907, 62 L. Ed. 2d 143 (1979) (quotation marks and citation omitted). We view the circumstances "as a whole 'through the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training.' " *Id.* (quoting *United States v. Hall*, 525 F.2d 857, 859 (D.C. Cir. 1976)). *Compare State v. Fleming*, 106 N.C. App. 165, 415 S.E.2d 782 (1992) (holding seizure unlawful where officer had only generalized suspicion of criminal activity based on observing the defendant walking in a high drug area), *with State v. Robinson*, 189 N.C. App. 454, 658 S.E.2d 501 (2008) (holding investigatory stop lawful where officer was in a notorious drug activity area, had a crime stoppers tip that the defendant sold large amounts of cocaine behind a particular building, and observed defendant acting suspiciously at that place while talking to another person). The only facts articulated which arguably supported the intrusion in the case at bar were that the officers "received information about drug activity[,]" the scene of the attempted stop was a known drug activity area, and Davis had made prior drug arrests in the area. These facts did not give Davis a reasonable, articulable suspicion that Defendant was involved in criminal activity. Accordingly, even if Davis was attempting an investigatory stop, such a stop was unlawful. Thus, there was insufficient evidence that Davis was discharging or attempting to discharge a lawful duty of his office. In sum, we agree with Defendant that the trial court erred in denying his motion to dismiss the charge at the close of all the evidence. The trial court's ruling on that motion is reversed.

[2] Next, Defendant argues that the trial court erred in denying his motion to dismiss the possession charge. Although our standard of review is identical to the standard set forth above, we also acknowledge that " '[i]f the evidence is sufficient only to raise a suspicion or

conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion should be allowed.' " *Scott*, 356 N.C. at 595, 573 S.E.2d at 868 (quoting *Powell*, 299 N.C. at 98, 261 S.E.2d at 117).

Defendant was charged with possession with intent to sell or deliver a controlled substance—in this case, cocaine. The elements of the offense are "(1) possession of a substance; (2) the substance must be a controlled substance; and (3) there must be intent to sell or distribute the controlled substance." *State v. Nettles*, 170 N.C. App. 100, 105, 612 S.E.2d 172, 175 (citations omitted), *disc. review denied*, 359 N.C. 640, 617 S.E.2d 286 (2005); N.C. Gen. Stat. § 90-95(a)(1) (2007). Possession of a controlled substance is a lesser-included offense of possession with intent to sell or deliver a controlled substance, *State v. Turner*, 168 N.C. App. 152, 607 S.E.2d 19 (2005), and the lesser included offense has two essential elements: "[t]he substance must be possessed, and the substance must be knowingly possessed." *State v. Weldon*, 314 N.C. 401, 403, 333 S.E.2d 701, 702 (1985) (quotation marks and citation omitted); N.C. Gen. Stat. § 90-95(a)(3) (2007).

The possession element of the offenses "can be proven by showing either actual possession or constructive possession." *State v. Siriguanico*, 151 N.C. App. 107, 110, 564 S.E.2d 301, 304 (2002). "Constructive possession exists when the defendant, while not having actual possession, . . . has the intent and capability to maintain control and dominion over the narcotics." *State v. McNeil*, 359 N.C. 800, 809, 617 S.E.2d 271, 277 (2005) (quotation marks and citations omitted). "Constructive possession depends on the totality of the circumstances in each case. No single factor controls, but ordinarily the question will be for the jury." *State v. Baublitz*, 172 N.C. App. 801, 810, 616 S.E.2d 615, 621 (2005) (quotation marks and citation omitted). Furthermore, if the defendant's control of the premises where the contraband is found is non-exclusive, constructive possession of the contraband may be inferred from other incriminating circumstances. *State v. Brown*, 310 N.C. 563, 313 S.E.2d 585 (1984).

Defendant argues that there was insufficient evidence that he possessed the crack cocaine. Because the cocaine was not found in Defendant's actual possession, we evaluate Defendant's argument in the context of constructive possession. Incriminating circumstantial evidence of Defendant's possession of the cocaine included: Defendant fled upon learning that Davis wanted to search him; Defendant kept his hands in front of him during the chase; the bag

was found on the precise route Defendant took while being chased by the officers; the bag was found on top of the grass that was bent during the chase; and the bag was "clean and undisturbed." We hold that these circumstances create a reasonable inference that the crack cocaine found on the ground shortly after Defendant was apprehended came from Defendant. Viewing the evidence in the light most favorable to the State, the trial court properly denied Defendant's motion and submitted the issue to the jury. This assignment of error is overruled.

By his third assignment of error, Defendant argues that the trial court erred in its instructions to the jury on the charge of resisting a public officer. Because we have concluded that the trial court should have dismissed this charge at the close of all the evidence, we need not address this assignment of error.

[3] By his fourth assignment of error, Defendant argues that the trial court erred in instructing the jury that his flight from the officers was evidence of guilt. The trial court instructed the jury, generally, that

> [e]vidence of flight may be considered by you, together with all other facts and circumstances in this case, in determining whether the combined circumstances amount to an admission or show a consciousness of guilt. However, proof of this circumstance is not sufficient in itself to establish [D]efendant's guilt.

Because we have concluded that the trial court should have dismissed the charge of resisting a public officer, we need only determine if the trial court erred in giving this instruction as it concerned the possession charge.

Defendant did not object to this instruction at trial; thus, our review is limited to plain error. A court commits plain error when its instructions "amount to a miscarriage of justice or . . . result[] in the jury reaching a different verdict than it otherwise would have reached." *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987) (citations omitted), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988).

"[A] trial court may not instruct a jury on defendant's flight unless 'there is some evidence in the record reasonably supporting the theory that defendant fled after commission of the crime charged.' " *State v. Levan*, 326 N.C. 155, 164-65, 388 S.E.2d 429, 433-34 (1990) (quoting *State v. Irick*, 291 N.C. 480, 494, 231 S.E.2d 833, 842 (1977)) (citation omitted). "Mere evidence that defendant left the scene of

the crime is not enough to support an instruction on flight. There must also be some evidence that defendant took steps to avoid apprehension." *State v. Thompson*, 328 N.C. 477, 490, 402 S.E.2d 386, 392 (1991) (citation omitted).

Davis testified that Defendant fled from the scene after Davis communicated to Defendant that he wanted to search Defendant. This evidence shows that Defendant "took steps to avoid apprehension." *Id.* The trial court did not err in giving the jury this instruction. Defendant's assignment of error is overruled.

[4] By his fifth assignment of error, Defendant contends the trial court erred in instructing the jury on constructive possession. Defendant maintains that "this is not a constructive possession case, but a circumstantial evidence case of actual possession." As stated above, "[c]onstructive possession exists when the defendant, while not having actual possession, . . . has the intent and capability to maintain control and dominion over the narcotics." *McNeil*, 359 N.C. at 809, 617 S.E.2d at 277 (quotation marks and citations omitted). "Constructive possession depends on the totality of the *circumstances* in each case." *Baublitz*, 172 N.C. App. at 810, 616 S.E.2d at 621 (quotation marks and citation omitted) (emphasis added). Since Defendant was not found in actual possession of the crack cocaine, this is a case of constructive possession. Defendant's assignment of error is overruled.

[5] By his sixth and final assignment of error, Defendant argues that the habitual felon indictment was fatally defective. Section 14-7.3 of our General Statutes provides, in pertinent part:

> An indictment which charges a person with being an habitual felon must set forth the date that prior felony offenses were committed, the name of the state or other sovereign against whom said felony offenses were committed, the dates that pleas of guilty were entered to or convictions returned in said felony offenses, and the identity of the court wherein said pleas or convictions took place.

N.C. Gen. Stat. § 14-7.3 (2007). Section 15A-626(b) of our General Statutes provides that "[i]n proceedings upon bills of indictment submitted by the prosecutor to the grand jury, the clerk must call as witnesses the persons whose names are listed on the bills by the prosecutor." N.C. Gen. Stat. § 15A-626(b) (2007). Defendant argues that the indictment was fatally defective because it: (1) failed to allege that Defendant was at least eighteen years old at the time of his conviction

of at least two of the prior felonies; (2) failed to name a state or other sovereign against whom the prior felonies were committed; and (3) did not indicate that any witness appeared before the Grand Jury. Defendant's contentions lack merit.

First, an habitual felon indictment need not allege a defendant's age or date of birth. N.C. Gen. Stat. § 14-7.3. Defendant presents no authority which holds to the contrary.

Second, we disagree that the indictment failed to name the state or sovereign against whom the prior offenses were committed. For each of the prior felonies enumerated in the indictment, the indictment stated that the felonies were committed in violation of a specific one of North Carolina's General Statutes and that Defendant was convicted of the felony in "the Superior Court of Beaufort County, North Carolina[.]" These statements sufficiently named the state against whom the felonies were committed; namely, North Carolina. Moreover, "[i]t is well established that an indictment is sufficient under the Habitual Felons Act if it provides notice to a defendant that he is being tried as a recidivist." *State v. Williams*, 99 N.C. App. 333, 335, 393 S.E.2d 156, 157 (1990) (citations omitted). The indictment in this case provided such notice.

Finally, we agree with Defendant that the habitual felon indictment did not clearly indicate that Detective Davis, listed by the State as a witness on the bill of indictment, was called as a witness before the Grand Jury. This Court has held, however, that "although the foreman [of a Grand Jury] by statute must indicate which witness(es) were sworn and examined . . . the absence of [this] endorsement[] will not render an otherwise valid indictment fatally defective." *State v. Gary*, 78 N.C. App. 29, 33, 337 S.E.2d 70, 73 (1985) (citations omitted), *disc. review denied*, 316 N.C. 197, 341 S.E.2d 586 (1986). The bill of indictment was not fatally defective for its failure to indicate that Detective Davis testified before the Grand Jury as a witness. Defendant's sixth assignment of error is overruled.

Because there was insufficient evidence that Defendant committed the offense of resisting a public officer, the trial court erred in denying Defendant's motion to dismiss that charge. We discern no other error in Defendant's trial.

NO ERROR IN PART; REVERSED IN PART.

Judges McCULLOUGH and BRYANT concur.

STATE OF NORTH CAROLINA v. MAURICE STREETER

No. COA08-08

(Filed 5 August 2008)

1. Evidence— victim's prior statements—corroboration—additional details—curative instruction

The trial court did not err in an assault prosecution by admitting the testimony of an officer about a victim's prior statements for corroborative purposes. The statements that defendant contends were not corroborative merely provide additional details, immaterial to defendant's guilt, and the trial court gave a curative instruction prohibiting consideration of any non-corroborative statements. Moreover, there was other evidence of guilt and the jury would not have reached a different result even without the testimony.

2. Criminal Law— prosecutor's closing argument—witness's prior statements—properly admitted

There was no plain error in an assault prosecution where the prosecutor used a witness's prior statements in her closing argument. The prosecutor may refer to any evidence presented at trial in her closing argument, and these statements had been admitted as corroborating evidence.

3. Criminal Law— instructions—defense of accident not included

There was no plain error in an assault prosecution from the trial court not instructing the jury on the defense of accident. The only evidence of accident was defendant's statement, and the possibility of a different verdict is too remote to meet the test of plain error.

4. Criminal Law— inquiry into division of jury—*Allen* charge—two hours into deliberations

The trial court did not abuse its discretion when it inquired into the numerical division of the jury and gave an *Allen* instruction two hours into deliberations. The inquiry was reasonable so that the court could plan for the afternoon recess and the following day, the court was not impatient toward the jury, and it did not take any action to coerce or intimidate the jury into reaching a verdict.

5. Criminal Law— clerical errors in judgment—remand for correction

A conviction for assault was remanded for correction of clerical errors in the date of judgment and the date of the offense. It is important that the record speak the truth.

Appeal by defendant from judgment entered 16 August 2007 by Judge J.B. Allen, Jr., in Durham County Superior Court. Heard in the Court of Appeals 10 June 2008.

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

Appellate Defender Staples Hughes, by Assistant Appellate Defender David W. Andrews, for defendant-appellant.

ELMORE, Judge.

On 16 August 2007, a jury found Maurice Frank Streeter (defendant), guilty of assault with a deadly weapon inflicting serious injury for shooting Atalaya Liles on 16 November 2006. The trial court sentenced defendant to a term of forty-six to sixty-five months' imprisonment. Defendant appeals the judgment entered against him. For the reasons stated below, we find no error in defendant's trial, but remand with instructions to correct clerical errors.

A Durham County grand jury indicted defendant on 5 February 2007 for attempted murder and assault with a deadly weapon with intent to kill inflicting serious injury. The State tried the case before a jury on 13 August 2007.

Ms. Liles testified that defendant shot her on 16 November 2006. She said that the previous day, she was outside of a store in Durham and bought drugs from A.P.[1] She later found out that the drugs were fake and confronted A.P. about it. A.P. told her that he would hang out with her until the following day, when he could get back to his house, where he lived with defendant, to repay her. Ms. Liles and A.P. then went to an abandoned house and spent the night there. The next morning, Ms. Liles left the abandoned house shortly after A.P. and followed him. When she caught up to A.P., he was talking with defendant. Defendant was asking A.P. where he had been all night. A.P. told defendant that the previous night, Ms. Liles had tried to "set him up" and "have him robbed." Defendant asked Ms. Liles if she tried to set

1. A.P. was a juvenile at the time and will be referred to by his initials.

A.P. up. When she responded that she had not, A.P. punched her in the face twice, causing her to fall to the ground. Defendant stood over Ms. Liles and continued asking her if she had "set [A.P.] up." When Ms. Liles said she had not, defendant shot her. She heard the gun fire about five or six shots.

Ms. Liles was later taken to the hospital, where she was treated for four bullet wounds. Durham Police Officer K.D. Emanuel interviewed Ms. Liles at the hospital and she gave him a description of defendant.

Based on Ms. Liles' description, the Durham Police Department located defendant within an hour and arrested him. Although defendant initially denied being present when Ms. Liles was shot, he eventually told Officer Emanuel that his gun had accidently discharged while he was trying to separate A.P. and Ms. Liles. The SBI performed a gunshot residue analysis on defendant's hands, which indicated the presence of gunshot residue. Defendant's gun was never found.

On 4 January 2007, Officer Emanuel located Ms. Liles and interviewed her again. Officer Emanuel had another police officer administer a photo line-up, from which she identified defendant's photograph.

On 16 January 2007, Ms. Liles met with defendant's attorney and signed an affidavit stating that defendant did not shoot her and that the person who shot her had darker skin than defendant. At trial, Ms. Liles testified that the affidavit was false and said that she had signed it because defendant's mother had offered her $500.00 to say that defendant did not shoot her.

In order to corroborate Ms. Liles's testimony at trial, the State introduced Officer Emanuel to testify about Ms. Liles's prior statements to him. As soon as the State began questioning Officer Emanuel about his previous conversation with Ms. Liles, defendant objected to Officer Emanuel testifying about any of Ms. Liles's prior statements. The trial court responded by giving the jury instructions to disregard any non-corroborative evidence. Defendant continued to object and the trial court gave defendant a standing objection.

Officer Emanuel testified that on 4 January 2007, he located Ms. Liles and interviewed her. Ms. Liles told him the following: She met A.P. outside of a convenience store on 15 November 2006 and obtained drugs from him. Ms. Liles gave the drugs to a friend, who later told her that the drugs were fake. When Ms. Liles

confronted A.P., he denied giving her fake drugs. While A.P. and Ms. Liles were talking, defendant called out to A.P. and A.P. did not respond. As defendant was calling out to A.P., A.P. told Ms. Liles, "That's my O.G."[2] She and A.P. then went to an abandoned house and spent the night there. The following day, Ms. Liles found A.P. talking with defendant. When she approached A.P. and asked if he was going to pay her, A.P. responded that she had "set him up." Defendant told A.P. to "handle his business" and A.P. punched Ms. Liles. After Ms. Liles fell to the ground, defendant pulled out a gun and fired approximately six shots. Ms. Liles also told Officer Emanuel that defendant's mother had previously contacted her and offered her money to not testify against defendant.

After the jury had deliberated for approximately two hours, the trial court inquired into the numerical division of the jury. When the foreperson responded that he did not know how to answer, the trial court gave an *Allen* instruction to the jury. Defendant objected.

On 16 August 2007, the jury returned verdicts of not guilty of attempted murder and guilty of assault with a deadly weapon inflicting serious injury. Defendant gave oral notice of appeal.

I.

[1] Defendant first argues that the trial court erred when it allowed Officer Emanuel to testify about Ms. Liles's prior statements in order to corroborate her testimony. Defendant contends that Ms. Liles's prior statements contradicted her testimony and were improperly used as substantive evidence. Defendant asserts that he is entitled to a new trial, arguing that if those statements had not been introduced, the jury probably would have reached a different verdict. Defendant objected to this testimony during trial, and therefore, the issue has been properly preserved for appeal. *See* N.C.R. App. P. 10(b)(1) (2007). We will review the trial court's determination *de novo*. *State v. Hazelwood*, 187 N.C. App. 94, 98-99, 652 S.E.2d 63, 66 (2007) (reviewing *de novo* a trial court's finding that a defendant's prior statements were admissible).

Prior consistent statements of a witness may be admitted to corroborate the witness's courtroom testimony if the statements tend to "strengthen, confirm, or make more certain the testimony of another witness." *State v. Harrison*, 328 N.C. 678, 681, 403 S.E.2d 301, 303 (1991) (quoting *State v. Rogers*, 299 N.C. 597, 601, 264 S.E.2d

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2. A.P. testified that "O.G." meant higher authority.

89, 92 (1980)). "[T]he witness's prior contradictory statements may not be admitted under the guise of corroborating his testimony." *State v. McCree*, 160 N.C. App. 200, 207, 584 S.E.2d 861, 866 (2003) (citations omitted).

In *State v. Warren*, our Supreme Court held that the witness's prior statement that the defendant said that he planned to kill the victim did not corroborate the witness's testimony that the defendant said he had planned to rob the victim. 289 N.C. 551, 556-58, 223 S.E.2d 317, 320-21 (1976). In that case, the testimony and the prior statements of the witness were clearly contradictory as to whether the defendant had intended to kill the victim. *Id.* at 557, 223 S.E.2d at 321. Similarly in *McCree*, this Court held that the witness's prior statement that the defendant hit the victim with a handgun did not corroborate the witness's testimony that the defendant punched the victim because the witness's prior statement clearly contradicted whether the defendant used a deadly weapon. 160 N.C. App. at 207, 584 S.E.2d at 866.

Contrary to the facts in *Warren* and *McCree*, Ms. Liles's prior statements do not contradict her trial testimony. Her prior statements to Officer Emanuel are generally consistent with her trial testimony. The only statements that defendant argues went beyond Ms. Liles's testimony are the following: (1) on 15 November 2006, defendant called out to A.P. and A.P. ignored him, (2) A.P. told Ms. Liles that defendant was his "O.G.," and (3) on 16 November 2006, before A.P. hit Ms. Liles, defendant told A.P. to "handle his business." If previous statements offered in corroboration are generally consistent with the witness's testimony, additional facts do not render the statements inadmissible. *Harrison*, 328 N.C. at 681-82, 403 S.E.2d at 304.

We find that the trial court did not err in admitting Officer Emanuel's testimony about Ms. Liles's prior statements for corroborative purposes. A careful comparison of Ms. Liles's testimony with that offered by Officer Emanuel indicates that the two are substantially the same account of the events that occurred on 15 November 2006 and 16 November 2006. "[P]rior consistent statements are admissible even though they contain new or additional information so long as the narration of events is substantially similar to the witness'[s] in-court testimony." *State v. Williamson*, 333 N.C. 128, 136, 423 S.E.2d 766, 770 (1992) (citations omitted).

Ms. Liles's prior statements to Officer Emanuel strengthened the credibility of her testimony at trial. Ms. Liles testified that she pur-

chased drugs from A.P. and was told that the drugs were fake, she spent the night with A.P. at an abandoned house, the next day A.P. told defendant she "set him up" and A.P. punched her, defendant questioned her about setting A.P. up, and that defendant shot her about five or six times. She had previously recounted all of that information to Officer Emmanuel. The statements that defendant contends were not corroborative of her testimony merely provide additional details, immaterial to defendant's guilt.

Nonetheless, variations between Ms. Liles's testimony and her prior statements affect only the weight and credibility of the evidence, not the admissibility. *State v. Benson*, 331 N.C. 537, 552, 417 S.E.2d 756, 765 (1992) (citations omitted); *Harrison*, 328 N.C. at 684, 403 S.E.2d at 305. It is the responsibility of the jury to determine a witness's credibility and to decide if the proffered testimony does, in fact, corroborate the testimony of another witness. *State v. Jones*, 64 N.C. App. 505, 509, 307 S.E.2d. 823, 825 (1983).

Defendant further argues that the State improperly used Ms. Liles's prior statements as substantive evidence. Although prior statements may be introduced to corroborate in court testimony, the corroborative statements may not be used as substantive evidence. *State v. Stills*, 310 N.C. 410, 415-16, 312 S.E.2d 443, 447 (1984).

Even if Ms. Liles's prior statements had not corroborated her testimony, the trial court gave the following curative instructions to the jury: "[I]f [Officer Emanuel's testimony] corroborates what Ms. Liles has heretofore testified to, then you will consider it. If it does not corroborate her testimony, then you will disregard it." The trial court clearly explained to the jury that it could not consider any non-corroborative statements as evidence. We presume "that jurors . . . attend closely [to] 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 (1993) (citations omitted). We conclude that the instructions the trial court gave were in accordance with the law and that the jury was able to follow the instructions as they were given and therefore find no error.

Even assuming *arguendo* that the trial court erred in allowing Ms. Liles's prior statements, defendant has not established that the error was prejudicial. The test for prejudicial error is whether there is a "reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial. . . ."

N.C. Gen. Stat. § 15A-1443(a) (2005); *State v. Frazier*, 344 N.C. 611, 617, 476 S.E.2d 297, 300 (1996).

It is entirely unlikely that the statements at issue had any serious effect on the trial's outcome. This Court finds that the State presented other evidence that the jury could have used to find defendant guilty. Ms. Liles testified that defendant shot her and identified him both in court and in a photo line-up. Furthermore, after being arrested, defendant admitted to Officer Emmanuel that he shot Ms. Liles by claiming that his gun had accidently discharged. We cannot find that the jury would have reached a different result if Officer Emanuel had not been permitted to testify about Ms. Liles's prior statements and therefore, we find no error.

II.

[2] Defendant next argues that the trial court erred in failing to intervene *ex mero motu* when the prosecutor improperly used Ms. Liles's prior statements during the State's closing argument. In the closing argument, the prosecutor made the following remarks, to which defendant assigns error:

> If we look through all of the evidence, if we look to all the people who testified. [Ms. Liles] stated that she stayed the night with [A.P.], that she heard [defendant] call for [A.P.] [A.P.] didn't answer; that [A.P.] kept calling him his O.G. [A.P.] stated that this O.G. was a higher authority. He didn't answer that higher authority.
>
> So the next day when [Ms. Liles] came up to him and said, what's going on, [A.P.] had to have a reason for not answering his O.G. During the interview he said that the reason was that [Ms. Liles] had set [A.P.] up for something, at which point [defendant] told [A.P.] you need to handle your business. You need to deal with your street stuff.
>
> What did he do? [A.P.] punched [Ms. Liles]. He told [defendant] to shoot her. . . .
>
> ***
>
> This time we have a back story. This time we know more about what's going on. We know why [A.P.] wasn't answering his O.G. We know more. We know why.

Since defendant did not object during the closing argument, we must review the prosecutor's remarks for plain error. N.C.R. App. P.

10(c)(4) (2007). Under our plain error standard of review, "a defendant has the burden of showing: (i) that a different result probably would have been reached but for the error; or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial." *State v. Watkins*, 181 N.C. App. 502, 507, 640 S.E.2d 409, 413 (2007), *appeal dismissed by* 181 N.C. App. 502, 640 S.E.2d 896 (2007) (quoting *State v. Jones*, 358 N.C. 330, 346, 595 S.E.2d 124, 135 (2004)). The plain error rule is always to be applied cautiously and only to be used in the exceptional case. *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983).

Our appellate courts have routinely recognized that "counsel are given wide latitude in arguments to the jury and are permitted to argue the evidence that has been presented and all reasonable inferences that can be drawn from that evidence." *State v. Peterson*, 179 N.C. App. 437, 466-67, 634 S.E.2d 594, 616 (2006) (citations omitted), *aff'd*, 361 N.C. 587, 652 S.E.2d 216 (2007); *see also State v. Nguyen*, 178 N.C. App. 447, 457-58, 632 S.E.2d 197, 204-05 (2006) (holding that the prosecutor could use statements in her closing argument that had been admitted to impeach a witness). The statements of the prosecutor that defendant argues were improper had already been admitted into evidence through Officer Emanuel to corroborate Ms. Liles's testimony. The prosecutor is permitted to refer to any evidence presented at trial in her closing argument. We find that the prosecutor did not improperly use Ms. Liles's prior statements in her closing argument and therefore, the trial court's failure to intervene *ex mero moto* was not plain error.

III.

[3] Defendant asserts that the trial court erred by not instructing the jury on the defense of accident. Because the defendant did not request that the trial court instruct the jury on the accident defense, the standard of review is also plain error. *State v. Walters*, 357 N.C. 68, 91, 588 S.E.2d 344, 358 (2003) (citations omitted). "Before deciding that an error by the trial court amounts to 'plain error,' the appellate court must be convinced that absent the error the jury would have reached a different verdict." *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986) (quoting *Odom*, 307 N.C. at 661, 300 S.E.2d at 378-79). In this case, the only evidence relevant to an accident defense was defendant's prior statement to Officer Emanuel that his gun had accidentally discharged while he was trying to intervene between A.P. and Ms. Liles.

We find that defendant has not satisfied his burden of showing plain error. As discussed above, there is enough evidence in the record supporting the State's case so that the possibility of a different verdict is too remote to meet the test of plain error. Thus, we do not find plain error.

IV.

[4] Defendant contends that the trial court coerced a verdict from the jury when only two hours after the jury began deliberating, it inquired into the numerical division of the jury and gave an *Allen* instruction. To determine if the trial court abused its discretion by inquiring into the numerical division early in the jury deliberations, the court examines whether, in the totality of the circumstances, the inquiry was coercive. *State v. Nobles*, 350 N.C. 483, 510, 515 S.E.2d 885, 901-02 (1999). Our Supreme Court has held that an inquiry into a jury division, without asking which votes were for conviction or acquittal, is not inherently coercive. *Id.*, 515 S.E.2d at 901. Some of the factors to be considered in the totality of circumstances include whether the trial court conveyed the impression that it was irritated with the jury for not reaching a verdict, whether the trial court intimated that it would hold the jury until it reached a verdict, and whether the trial court told the jury that a retrial would burden the court system. *Id.*, 515 S.E.2d at 901-02 (quotations and citations omitted).

In this case, the record demonstrates that the trial court did not take any action to coerce or intimidate the jury into reaching a verdict. After inquiring into the numerical split, the trial court did not ask whether the split was for conviction or acquittal. The trial court was not impatient towards the jury nor did it indicate that it would hold the jury until a verdict was reached.

Under certain circumstances, an inquiry may be necessary to efficient operation of the trial court and proper administration of justice. *State v. Fowler*, 312 N.C. 304, 308-09, 322 S.E.2d 389, 392 (1984) (deciding that the trial court's inquiry into the numerical division of the jury was necessary so that the court could plan whether or not to resume the trial after the weekend). Here, the trial court made the inquiry at approximately 4:00 p.m., which was an hour away from the afternoon recess. It was reasonable for the trial court to inquire into the numerical split in order to plan for the afternoon recess and the following day. We find that the trial court did not abuse its discretion when it inquired into the numerical division of the jury.

Defendant also argues that the trial court erred and coerced a verdict from the jury when it gave an *Allen* instruction. The *Allen* instruction is codified at N.C. Gen. Stat. § 15A-1235(b). N.C. Gen. Stat. § 15A-1235(b) (2005). According to the statute, the trial court may inform the jury before it retires for deliberation that jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, jurors should not hesitate to re-examine or change their views, and no juror should surrender his honest convictions. *Id.* The decision to give an *Allen* instruction is within the sound discretion of the trial court. *State v. Adams*, 85 N.C. App. 200, 210, 354 S.E.2d 338, 344 (1987) (citations omitted). We will review the trial court's decision to give an *Allen* instruction for abuse of discretion. *Id.*

In *Adams*, this Court found that giving an *Allen* instruction after about two hours was not an abuse of discretion because there was no indication that the trial judge was using other means to force a verdict. *Id.* Similarly, the record here does not show that the trial court attempted to coerce the jury into reaching a verdict. We hold that the trial court did not abuse its discretion when it gave an *Allen* instruction to the jury.

V.

[5] Defendant has brought to our attention a clerical error in defendant's judgment and commitment form and asks this Court to remand the matter for correction. Specifically, defendant notes that his judgment and commitment form incorrectly states the date judgment was entered as 14 August 2007. Moreover, the judgment and commitment form also incorrectly states the offense date as 6 November 2006 and that the offense he was convicted of, assault with a deadly weapon inflicting serious injury, is codified at N.C. Gen. Stat. § 14-31(b). When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record speak the truth. *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696-97, (2008) (citations and quotations omitted).

Based on the record, defendant's judgment and commitment form should indicate (1) the date of judgment as 16 August 2007, (2) the offense date as 16 November 2006, and (3) the offense defendant was convicted of is codified at N.C. Gen. Stat. § 14-32(b). Accordingly, we remand for correction of the clerical errors found on defendant's judgment and commitment form.

VI.

For the reasons stated here, we find no error in defendant's trial and remand only to correct clerical errors in defendant's judgment and commitment form.

No error at trial; remanded for correction of clerical errors.

Judges WYNN and ARROWOOD concur.

STATE OF NORTH CAROLINA v. MICHAEL LEVON TICE, DEFENDANT

No. COA07-226

(Filed 5 August 2008)

1. Assault— deadly weapon inflicting serious injury—seriousness of injury

The trial court correctly denied defendant's motion to dismiss a charge of assault with a deadly weapon inflicting serious injury where defendant argued that there was insufficient evidence of a serious injury, but the victim was shot in the knee; drove himself to the hospital; received treatment and pain medication, which he took for two weeks (although he was not hospitalized); walked with a limp for one to two weeks; and took about a month for his knee to fully heal.

2. Constitutional Law— effective assistance of counsel—stipulation to prior offense

Defendant was not denied effective assistance of counsel on a charge of possession of a firearm by a felon where his counsel agreed to stipulate that he had been convicted of possession of cocaine and did not insist that the nature of the felony not be disclosed to the jury. Defendant did not demonstrate that the charges equate such that the jury was likely to believe that the past charge makes the current one more likely.

3. Sentencing— judge's remarks—defendant's rejection of plea offers

The trial court's remarks about defendant's rejection of a previous plea offer and the sentence to which he would be exposed if he rejected another were an effort to ensure that defendant was

fully informed of the risk he was taking and did not indicate consideration of improper facts in sentencing defendant.

4. Sentencing— judge's remarks—rejection of plea bargain—use of fabricated evidence

A trial judge's remarks at sentencing did not indicate punishment for rejecting a plea bargain where the judge justified the sentence with his belief that defendant's evidence was fabricated.

Appeal by defendant from judgments entered 13 September 2006 by Judge Jerry Braswell in Lenoir County Superior Court. Heard in the Court of Appeals 13 November 2007.

Attorney General Roy Cooper, by Assistant Attorney General Donna B. Wojcik, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Katherine Jane Allen, for defendant-appellant.

GEER, Judge.

Defendant Michael Levon Tice appeals from his convictions of possession of a firearm by a felon and assault with a deadly weapon inflicting serious injury. Although defendant argues on appeal that the State failed to prove that the victim was seriously injured, we find sufficient the State's evidence that defendant was shot in the knee, took pain medication for two weeks, walked with a limp for one to two weeks, and required one month to heal. We also find unpersuasive defendant's contention that the trial judge based defendant's sentence in part on defendant's insistence on a jury trial. We, therefore, hold that defendant received a trial free of prejudicial error.

Facts

The State's evidence tended to show the following facts. On 16 November 2005, at approximately 11:30 p.m., defendant was playing poker at a club with Dexter Bradshaw and three other men. When Bradshaw argued with one of the other players about who had the better hand, everyone but defendant began to laugh. Defendant became upset and then left the card game angrily, saying "I'll be right back."

Several minutes later, Bradshaw looked out the window of the club and did not see defendant's car. Approximately 20 minutes after defendant left the club, Bradshaw decided to go home. One of the

other men, Mr. Best, left with Bradshaw. As the two men were walking on the sidewalk towards the parking lot, defendant drove down the street towards them. When defendant stopped his car in front of Bradshaw and Best and got out, Best went back inside the club.

Defendant walked up to Bradshaw, pointing a handgun at him. When defendant was approximately five feet from Bradshaw, defendant first pointed the gun at Bradshaw's head, followed by his chest, and then his knee. Defendant then shot Bradshaw in the knee. Defendant got back into his car, parked it in the parking lot, and ran back to Bradshaw, shouting, "I should have killed you." Bradshaw walked to his car and drove himself to the hospital. The bullet had entered and exited through Bradshaw's knee. Bradshaw was on pain medication for two weeks and walked with a limp for one to two weeks.

The morning after the shooting, defendant drove to Greensboro. He stayed in Greensboro until he received a phone call informing him that there was a warrant for his arrest. On 30 May 2006, defendant was indicted on charges of possession of a firearm by a convicted felon and assault with a deadly weapon inflicting serious injury.

At trial, defendant testified that he went back to the club approximately 30 minutes after he left. He saw Bradshaw walking down the street and checked with Bradshaw to make sure the men were still playing poker. While defendant was talking with Bradshaw, defendant heard a loud bang, and Bradshaw said that he was shot. Defendant denied having a gun, threatening Bradshaw, or knowing who shot Bradshaw. Defendant also presented two witnesses to corroborate his assertion that he did not have a gun and did not shoot Bradshaw.

On 13 September 2006, the jury found defendant guilty of possession of a firearm by a felon and assault with a deadly weapon inflicting serious injury. The court imposed consecutive sentences of 18 to 22 months imprisonment for possession of a firearm by a felon and 42 to 60 months imprisonment for assault with a deadly weapon inflicting serious injury. Defendant timely appealed his conviction.

I

[1] Defendant contends the trial court erred by denying his motion to dismiss.[1] When considering a motion to dismiss, the trial court must

1. Defendant's argument regarding the motion to dismiss is limited to the assault charge. Defendant has not contended that the trial court should have dismissed the charge of possession of a firearm.

determine whether the State presented substantial evidence of each element of the crime and of the defendant's being the perpetrator. *State v. Robinson*, 355 N.C. 320, 336, 561 S.E.2d 245, 255, *cert. denied*, 537 U.S. 1006, 154 L. Ed. 2d 404, 123 S. Ct. 488 (2002). " 'Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 270 (2001) (quoting *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984)). The evidence must be viewed "in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818, 115 S. Ct. 2565 (1995).

In order to be found guilty of assault with a deadly weapon inflicting serious injury, the State must prove that the defendant (1) assaulted the victim, (2) with a deadly weapon, (3) inflicting serious injury, (4) not resulting in death. *State v. Woods*, 126 N.C. App. 581, 592, 486 S.E.2d 255, 261 (1997). Defendant concedes that the State presented sufficient evidence as to all of the elements except for the third. Consequently, the sole issue before us is whether the State presented substantial evidence that Bradshaw sustained a "serious injury" when shot by defendant.

"Whether a serious injury has been inflicted depends upon the facts of each case and is generally for the jury to decide under appropriate instructions." *State v. Hedgepeth*, 330 N.C. 38, 53, 409 S.E.2d 309, 318 (1991). When making its determination, a jury may consider various factors such as hospitalization, pain, loss of blood, and time lost at work. *Id.* Nevertheless, the absence of hospitalization does not preclude a jury from finding a serious injury. *Id.*

In *State v. Bagley*, 183 N.C. App. 514, 526, 644 S.E.2d 615, 623 (2007), the defendant fired two bullets at the victim. One of the bullets struck the victim and traveled through his right leg. *Id.* After the shooting, the victim refused help from a passerby. *Id.* at 527, 644 S.E.2d at 624. He instead drove home, waited almost 30 minutes, and then asked a friend for a ride to the hospital because his leg hurt too much to drive. *Id.* On the way to the hospital, the victim changed his mind and went back to the scene of the shooting where he gave a statement to the police and sought treatment from a paramedic. *Id.* Later, at the hospital, the victim was examined, given pain medication, and released after two hours. *Id.* The victim suffered pain for two to three weeks after the shooting. *Id.*, 644 S.E.2d at 623. This Court held that this evidence, when viewed in the light most favorable

to the State, was sufficient to permit a jury to find that the victim was seriously injured and, therefore, the trial court properly denied the defendant's motion to dismiss. *Id.*

The evidence of injury in this case is materially indistinguishable from that in *Bagley*. Bradshaw drove himself to the hospital and, although he was not hospitalized, he did receive treatment and was prescribed pain medication that he took for two weeks. Additionally, he walked with a limp for one to two weeks after the shooting, and it took approximately one month for his knee to fully heal. Based on this evidence and *Bagley*, we hold the trial court did not err in denying defendant's motion to dismiss for lack of evidence of a serious injury. *See also Hedgepeth*, 330 N.C. at 54, 409 S.E.2d at 319 (holding trial court did not err in giving peremptory instruction that victim's injury was serious as a matter of law when victim was shot and bullet traveled through thickness of her ear); *State v. Owens*, 65 N.C. App. 107, 109, 308 S.E.2d 494, 497 (1983) (holding there was sufficient evidence for jury to determine whether victim suffered a serious injury when evidence showed victim was shot in right arm).

II

[2] Defendant next contends that he was denied effective assistance of counsel when his trial lawyer agreed to stipulate that defendant had a prior felony conviction, for purposes of the firearm charge, without insisting, as a condition of that stipulation, that the nature of the conviction not be disclosed to the jury. Defendant has, however, failed to demonstrate how he was prejudiced.

In order to successfully prove a claim of ineffective assistance of counsel, a defendant must establish not only that his counsel's performance was deficient, but also that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693, 104 S. Ct. 2052, 2064 (1984). Our Supreme Court has held that "if a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient." *State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 249 (1985).

During the trial in this case, the State requested that defendant stipulate that he had been convicted of possession of cocaine on 11 January 1990. Defense counsel agreed to the stipulation as requested.

On appeal, defendant argues that his trial counsel should have relied upon *Old Chief v. United States*, 519 U.S. 172, 136 L. Ed. 2d 574, 117 S. Ct. 644 (1997), and insisted that the nature of the felony—possession of cocaine—not be disclosed to the jury. Rather than providing any specific explanation as to how he was prejudiced by the identification of the felony, defendant simply states in his brief: "Evidence that the Defendant is a convicted drug possessor is prejudicial to a fair determination by the jury of the issues in the present case against him. The prejudicial nature of such evidence is apparent."

The prejudice is not apparent to us. We do not see how a prior conviction of possession of cocaine, a nonviolent crime, would adversely affect a defendant charged with the violent crime of assault with a deadly weapon inflicting serious injury. In *State v. Jones*, 322 N.C. 585, 589, 369 S.E.2d 822, 824 (1988) (quoting *State v. McClain*, 240 N.C. 171, 174, 81 S.E.2d 364, 366 (1954)), cited by defendant, our Supreme Court observed: " 'Proof that a defendant has been guilty of another crime *equally heinous* prompts to a ready acceptance of and belief in the prosecution's theory that he is guilty of the crime charged.' " (Emphasis added.) Defendant has not demonstrated that a possession of cocaine conviction equates with the charges in this case such that the jury was likely to believe that if he possessed cocaine in the past, he was likely to have possessed a gun and shot Bradshaw 15 years later. We fail to see how defendant would have fared better if the jury had been left to speculate as to the nature of defendant's prior felony conviction as opposed to being informed that the conviction was for cocaine possession. This assignment of error is, therefore, overruled.

III

[3] Defendant next contends his constitutional right to a jury trial was violated because the trial court based its sentence on defendant's refusal of two previous plea agreements offered by the State. "A sentence within the statutory limit will be presumed regular and valid. However, such a presumption is not conclusive." *State v. Boone*, 293 N.C. 702, 712, 239 S.E.2d 459, 465 (1977). That presumption is overcome where the record reveals that the court considered improper matters in determining the sentence. *Id.*

It is well established that "[a] criminal defendant may not be punished at sentencing for exercising [his] constitutional right to trial by jury." *State v. Cannon*, 326 N.C. 37, 39, 387 S.E.2d 450, 451 (1990). "Where it can reasonably be inferred from the language of the trial

judge that the sentence was imposed at least in part because defendant did not agree to a plea offer by the state and insisted on a trial by jury, defendant's constitutional right to trial by jury has been abridged, and a new sentencing hearing must result." *Id.*

In this case, defendant first points to the fact that at the beginning of the trial, the trial judge acknowledged defendant's refusal to accept the plea offered by the State:

> The Court: Mr. Tice, it has come to the Court's attention that at the earlier stage in these proceedings in the administrative term of court that the State offered you an opportunity to plead to a misdemeanor and you rejected that offer; is that correct, sir?
>
> A. Yes, sir.
>
> The Court: Okay. Today your lawyer has had some discussions with both the District Attorney and the Court about that previous offer and the State said, because of your rejection, that offer was no longer available. It is my understanding that the State has tendered to you through your lawyer an opportunity for you to plead to a class E felony, to be sentenced at the low end of the mitigated range, which would be a sentence of not less than 28 months nor more than 43 months; that the State would dismiss the class G felony.
>
> The class E felony is assault with a deadly weapon inflicting serious bodily injury and the class G felony would be possession of a firearm by a convicted felon.
>
> It's the Court's understanding that you have also rejected that offer; is that correct?
>
> A. Yes.
>
> The Court: Now you understand that if you go to trial and if you are convicted of both of these charges then instead of a possible sentence of not less than 28 months nor more than 43 months that you could be looking at a sentence of not less than 66 months nor more than 89 months. Do you understand that, sir?
>
> A. Yes, sir.
>
> The Court: Okay. And so what you are telling the Court, at least what your lawyer has indicated that you are telling the Court, is that understanding the significant increase in the pos-

sible sentence that you could get, that you are still rejecting the State's offer; is that correct, sir?

A. Yes, sir.

. . . .

The Court: You clearly understand that if you are convicted, the State is going to be urging this Court that you not be sentenced in the mitigated range, but that you be sentenced in a different range exposing you to substantially more time, over twice what you are exposed to now. Do you understand that, sir?

A. Yes, sir.

Defendant argues that this colloquy was an "implicit warning" to defendant that the trial court would likely substantially increase the sentence if defendant went to trial.

A review of this colloquy, however, reveals that the trial judge was ensuring that defendant was fully informed of the risk he was taking given that he had previously rejected a plea that would have resulted in a misdemeanor sentence and, at that point, was rejecting a plea that would result in a single mitigated-range sentence of 28 to 43 months. The trial judge set out the risks of going forward: being convicted of two charges instead of one; *the State's* requesting a non-mitigated-range sentence; and a total possible sentence of 66 to 89 months. Through his questions, the trial judge ensured that defendant fully understood the possible ramifications of his rejection of the plea, including the fact that he was "exposing [himself] to substantially more time."

[4] Defendant also points to the trial judge's remarks prior to sentencing defendant. After giving defendant an opportunity to speak, which he declined, the trial judge stated:

Mr. Tice, I imagine you've got to be feeling awfully dumb along right now. You've had ample opportunities to dispose of this case. The State has given you ample opportunity to dispose of it in a more favorable fashion and you chose not to do so. And I'm not sure if you thought that you were smarter than everybody else or that everybody else was just dumb.

I've listened to the evidence in this case and in my opinion it's overwhelming. Your witnesses were completely uncredible in their testimony and, quite frankly, I think their stories were fabri-

> cated. You know, you offered no explanation whatsoever, for somebody who has known you for as long as the gentlemen have known you, to make up such a story. And the evidence to this Court was pretty clear that you got upset and you went home and you got a firearm and you came back and you shot somebody that had been playing cards with you.
>
> Then you fled the jurisdiction to go to Greensboro. That is all this case is about and there is no reason for those gentlemen to come into this courtroom, especially the victim, to say you out of all the people, of all the other folks in Lenoir County that he could have identified as having shot him, he said it was you and I find it more than coincidental that nobody heard a shot until you came back on the scene. So in spite of all of what your witnesses said, the fact remains that no shot was heard until you got back, that when you left you were agitated, you were irritated and you told everybody, I'll be back. They apparently took you at your word.
>
> As your counsel indicated, there were some things that perhaps were unsaid or not known, but one thing was clear to the Court and that was they believed what you said which is why they were looking out the window, which is why they were trying to be very careful when they left the club. And low and behold, you happened to drive up and then a shot is heard. I think that's more than coincidental. I think it was heard when you drove up because you fired it. For that, I intend to sentence you.

Defendant argues that the trial judge's language during sentencing indicates that defendant received the sentences that he did because he chose to exercise his right to a jury trial rather than, in the words of the judge, "dispose [of the case] in a more favorable fashion."

This Court addressed similar remarks in *State v. Gantt*, 161 N.C. App. 265, 588 S.E.2d 893 (2003), *disc. review denied*, 358 N.C. 157, 593 S.E.2d 83 (2004). During the sentencing phase of that case, the trial court stated to the defendant:

> "At the beginning of the trial I gave you one opportunity where you could have exposed yourself probably to about 70 months but you chose not to take advantage of that. I'm going to sentence you to a minimum of 96 and a maximum of 125 months in the North Carolina Department of Corrections. That's a 125-month sentence; however, if you have good behavior and don't get in any trouble while you're in the Department of Corrections, you're

> only looking at seven years versus more than ten years. If you get in trouble while you're in the Department of Corrections, you'll have to serve that entire 125-month sentence, which is ten years and five months."

Id. at 272, 588 S.E.2d at 898. This Court held that these statements did not give rise to improper considerations because there was no " 'express indication of improper motivation.' " *Id.* (quoting *State v. Johnson*, 320 N.C. 746, 753, 360 S.E.2d 676, 681 (1987)). *See also State v. Person*, 187 N.C. App. 512, 528, 653 S.E.2d 560, 570 (2007) (concluding trial court did not improperly consider defendant's decision to go to trial when court mentioned defendant's recent refusal to accept plea offer, but additional remarks indicated that court, in referencing that rejection, was questioning sincerity of defendant's comments to court at sentencing), *rev'd in part on other grounds*, 362 N.C. 340, ––– S.E.2d ––– (2008).

We do not believe that the remarks in this case, when viewed in context, indicate an improper motivation. The totality of the trial judge's remarks reveals that he was not sentencing defendant more severely for choosing to reject a plea bargain, but rather the trial judge was focusing on his conclusion that defendant had submitted false testimony and "fabricated" testimony from other witnesses. The trial judge's initial comments referencing the plea bargain appear to be an unfortunate comment on defendant's strategic gamble to forego a plea to a misdemeanor in favor of defending against substantial evidence with fabricated evidence. While such comments are unnecessary, they do not necessarily mandate—in light of the trial judge's further explanation—the conclusion that the trial judge was basing his choice of sentence on defendant's exercise of his constitutional right to a jury trial. The trial judge noted that defendant made a bad choice, but justified the sentence he imposed on his belief that defendant's evidence was fabricated. *Compare Cannon*, 326 N.C. at 39, 387 S.E.2d at 451 (remanding to trial court when trial judge indicated to defense counsel that in the event of a conviction the court would impose the maximum sentence as a result of defendants' refusal to accept a plea offer); *Boone*, 293 N.C. at 712, 239 S.E.2d at 465 (remanding for resentencing when record disclosed that trial judge " 'indicated that he would be compelled to give the defendant an active sentence due to the fact that the defendant had pleaded not guilty and the jury had returned a verdict of guilty' ").

The trial judge's remarks are somewhat similar to those of the trial judge in *State v. Peterson*, 154 N.C. App. 515, 518, 571 S.E.2d 883,

885 (2002), cited by defendant. The *Peterson* trial judge stated defendant had " 'rolled the dice in a high stakes game with the jury,' " had attempted " 'to be a con artist with the jury,' " and the evidence was so overwhelming " 'that any rational person would never have rolled the dice and *asked for a jury trial.*' " *Id.* (emphasis added). Thus, in *Peterson*, the judge specifically referenced the defendant's request for a jury. We believe this case is more comparable to *Gantt*, especially since a review of the trial judge's entire remarks reveal that the actual basis for the sentence was the trial judge's conviction that defendant had fabricated evidence.

Although we do not believe resentencing is required in this case, we caution trial judges to ensure that sentencing decisions are not based upon a defendant's decision to proceed to trial despite overwhelming evidence of guilt or the effect on witnesses. Such considerations may play no role in sentencing. Moreover, judges must take care to avoid using language that could give rise to an appearance that improper factors have played a role in the judge's decision-making process even when they have not.

No error.

Judges WYNN and STEELMAN concur.

ST. REGIS OF ONSLOW COUNTY, NORTH CAROLINA OWNERS ASSOCIATION, INC., PLAINTIFF v. WILLIAM C. JOHNSON, DEFENDANT

No. COA07-1295

(Filed 5 August 2008)

1. Judicial Sales— defendant not within county—notice not required

Defendant was not entitled to receive personal notice of the impending execution sale of a condominium on the North Carolina coast because he was not located in Onslow county, there was no evidence that he had an agent in North Carolina, and the Sheriff complied with the statutory requirement that notice be sent by registered mail.

2. Judicial Sales— judgment docketed—ownership transferred before sale—no personal notice—no due process violation

A New Jersey family trust which received ownership of a condominium on the North Carolina coast after a judgment but before the execution sale was not entitled to personal notice, nor were its due process rights affected. The judgment had been docketed and the trust had record notice of the judgment lien.

3. Judicial Sales— notice via registered letter—additional steps impractical

The notice of an impending execution sale complied with due process requirements where the Sheriff provided notice via registered letter and did not become aware that the normal procedures for providing notice were ineffective until after the sale had been finalized. It was not practicable for the Sheriff, without knowledge of the non-receipt, to take additional reasonable steps to notify defendant of the impending sale of the property.

Appeal by Defendant from order entered 2 May 2007 by Judge Jack W. Jenkins in Onslow County Superior Court. Heard in the Court of Appeals 19 March 2008.

Edwin L. West, III, for Defendant-Appellant.

Ward and Smith, P.A., by J. Michael Fields and John P. Crolle, for Plaintiff-Appellee.

STEPHENS, Judge.

This case concerns the adequacy of the means employed by the Sheriff of Onslow County to provide notice to Defendant William C. Johnson of the pending execution sale of his condominium unit.

I. FACTS

Defendant was the owner of condominium unit 2107 located in the St. Regis condominium complex in Onslow County, North Carolina. Plaintiff St. Regis of Onslow County, North Carolina Owners Association, Inc., filed a Claim of Lien against Defendant to enforce assessments due and owed to Plaintiff for homeowner's dues for the condominium unit. Plaintiff subsequently filed a complaint against Defendant on 25 March 1999 to recover the delinquent assessments.

On 6 March 2000, judgment was entered against Defendant upon Plaintiff's motion for summary judgment. By this order and judgment, Plaintiff was entitled to recover from Defendant $10,063.66, plus court costs, attorney's fees of $551.54, and interest at a rate of eight percent per annum from the date of the filing of the complaint. Plaintiff was also allowed to foreclose its lien on the property and to sell the property to satisfy Defendant's debt to Plaintiff. Also on 6 March 2000, the judgment lien was docketed in Onslow County in Judgment Docket Book 87 on page 236.

On 4 April 2003, approximately three years after the entry of judgment, Defendant deeded the subject real property to the Johnson Family Trust ("Trust"). The deed on its face requested that the Register of Deeds mail the recorded deed to Defendant at 39 Pitney Lane, Jackson, New Jersey 08527.

On 5 January 2006, the Onslow County Clerk of Superior Court ("Clerk") issued a Writ of Execution to the Sheriff of Onslow County ("Sheriff"). On 30 January 2006, the Sheriff mailed, via registered mail, a letter and a Notice of Sale of Real Property Under an Execution ("Notice") to Defendant at 39 Pitney Lane, Jackson, New Jersey 08527. The letter stated: "Under and by virtue of a Judgment rendered against Defendant in the referenced action, an execution was issued by the Court on the 5th day of January, 2006, and directed to the Sheriff of Onslow County." The Notice further provided: "The sale will be held on the 6th day of March, 2006, at 11:30 o'clock a.m., at the Onslow County Courthouse."

On 27 January 2006, the Sheriff posted the Notice at the Onslow County Courthouse in the area designated by the Clerk for the posting of notices. On 3 February, and again on 9 February 2006, the United States Postal Service notified Defendant of the Sheriff's registered mail envelope, but Defendant did not claim the envelope. On 20 February and 1 March 2006, the Sheriff published the Notice in the *Jacksonville Daily News*.

On 6 March 2006, the Sheriff conducted the execution sale. Floyd B. McKissick, Jr., the President of the Plaintiff owners association, submitted the winning bid of $87,000. On 10 March 2006, Mr. McKissick paid the purchase price, and on 31 March 2006, a Sheriff's Deed conveying the property to Mr. McKissick was recorded. On 27 April 2006, the registered mail envelope containing the letter and Notice was returned to the Sheriff marked "unclaimed."

On 5 March 2007, Defendant, along with the Trust, trustees Karen Gillen and William M. Johnson, and trust beneficiaries William Charles Johnson, Jr., Christopher Michael Johnson, and Stacy Lynn Johnson (collectively "Movants") filed a Motion to Set Aside Execution Sale, Order Confirming Execution Sale, and the Sheriff's Deed Issued to the Execution Sale Purchaser pursuant to North Carolina Civil Procedure Rule 60. On 16 April 2007, Movants filed an Amended Motion.

On 23 April 2007, a hearing was conducted on the motion, and an order denying the motion was entered on 2 May 2007. From this order, Defendant, joined by the Rule 60 Movants, appeals.

II. DISCUSSION

By Defendant's nine assignments of error, he argues the trial court erred in denying his motion for relief pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b)(6) because the notice of the execution sale provided by the Sheriff did not meet due process requirements.

Under Rule 60(b), the trial court may "relieve a party or his legal representative from a final judgment, order, or proceeding" for the reasons specified in Rule 60(b)(1)-(5). N.C. Gen. Stat. § 1A-1, Rule 60(b) (2005). Rule 60(b)(6) permits the trial court to grant relief for any other reason "justifying relief from the operation of the judgment." *Id.* This provision "authorizes the trial judge to exercise his discretion in granting or withholding the relief sought." *Kennedy v. Starr*, 62 N.C. App. 182, 186, 302 S.E.2d 497, 499-500, *disc. review denied*, 309 N.C. 321, 307 S.E.2d 164 (1983).

On appeal, this Court's review of a trial court's Rule 60(b) ruling "is limited to determining whether the trial court abused its discretion." *Vaughn v. Vaughn*, 99 N.C. App. 574, 575, 393 S.E.2d 567, 568, *disc. review denied*, 327 N.C. 488, 397 S.E.2d 238 (1990). An abuse of discretion is shown only when the court's decision "is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. McDonald*, 130 N.C. App. 263, 267, 502 S.E.2d 409, 413 (1998) (citation omitted).

The Due Process Clause of the Fifth Amendment to the United States Constitution, as applied to the states by the Fourteenth Amendment, and Article 1, section 19, of the North Carolina Constitution, prohibit the government from depriving any person of his or her property without due process of law. Due process does not require that a property owner receive actual notice before the gov-

ernment may take his property. *Dusenbery v. United States*, 534 U.S. 161, 151 L. Ed. 2d 597 (2002). Rather, due process requires the government to provide "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *McLean v. McLean*, 233 N.C. 139, 143, 63 S.E.2d 138, 146 (1951) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 94 L. Ed. 865, 873 (1950)). "Whether a party has adequate notice is a question of law." *Trivette v. Trivette*, 162 N.C. App. 55, 58, 590 S.E.2d 298, 302 (2004).

[1] Defendant first argues that Movants were entitled to receive "personal notice" of the impending sale of the property. Specifically, Defendant argues that the language of N.C. Gen. Stat. § 1-339.54 makes it clear that Defendant, as the judgment debtor, was entitled to personal notice of the sale of the condominium unit. We disagree.

Pursuant to N.C. Gen. Stat. § 1-339.54, the sheriff must comply with the following procedure for notifying a judgment debtor of the sale of real property:

> [T]he sheriff shall, at least ten days before the sale of real property,
>
> (1) If the judgment debtor is found in the county, serve a copy of the notice of sale on him personally, or
>
> (2) If the judgment debtor is not found in the county,
>
> a. Send a copy of the notice of sale by registered mail to the judgment debtor at his last address known to the sheriff, and
>
> b. Serve a copy of the notice of sale on the judgment debtor's agent, if there is in the county a person known to the sheriff to be an agent who has custody or management of, or who exercises control over, any property in the county belonging to the judgment debtor.

N.C. Gen. Stat. § 1-339.54 (2005). Additionally, the sheriff must comply with the following procedure for posting and publishing notice of an execution sale of real property:

> (a) The notice of sale of real property shall:
>
> (1) Be posted, in the area designated by the clerk of superior court for the posting of notices in the county in which the

property is situated, for at least 20 days immediately preceding the sale; and

(2) Be published once a week for at least two successive weeks:

a. In a newspaper qualified for legal advertising published in the county; or

b. If no newspaper qualified for legal advertising is published in the county, in a newspaper having general circulation in the county.

(b) When the notice of sale is published in a newspaper:

(1) The period from the date of the first publication to the date of the last publication, both dates inclusive, shall not be less than seven days, including Sundays; and

(2) The date of the last publication shall be not more than 10 days preceding the date of the sale.

N.C. Gen. Stat. § 1-339.52 (2005).

As Defendant was not located in Onslow County, he was not entitled to have a copy of the Notice served on him personally pursuant to N.C. Gen. Stat. § 1-339.54(1). Furthermore, there was no evidence that Defendant had an agent in Onslow County upon whom the Sheriff was required to personally serve a copy of the Notice pursuant to N.C. Gen. Stat. § 1-339.54(2)b. Accordingly, here, at least ten days before the sale of the property, the Sheriff was required to "[s]end a copy of the [N]otice [] by registered mail to [Defendant] at his last address known to the [S]heriff[.]" N.C. Gen. Stat. § 1-339.54(2)a. The Sheriff complied with this mandate by sending the Notice via registered mail on 30 January 2006, more than 30 days prior to the sale of the property on 6 March 2006, to 39 Pitney Lane, Jackson, New Jersey 08527, Defendant's last address known to the Sheriff.

[2] Defendant also alleges that the Trust, as the owner of the unit at the time of the sale, and the Trust beneficiaries, as parties with legally protected interests, were entitled to receive personal notice of the impending execution sale. Again, we disagree.

In *Scott v. Paisley*, 271 U.S. 632, 70 L. Ed. 1123 (1926), the plaintiff purchased a tract of land that was subject to a prior-recorded security deed executed by the previous owner. After the plaintiff pur-

chased the land, the previous owner defaulted on the note secured by the property. Without notice to the plaintiff, the creditor brought suit against the former owner of the land. Judgment was entered in the creditor's favor and the sheriff subsequently executed on the land. After the required advertisement of the sale, the property was sold at public sale in satisfaction of the judgment. The plaintiff brought suit to set aside the sale because she was not provided with notice of the sale. In concluding that the validity of the sale was not affected, nor were the plaintiff's due process rights violated, by the fact that notice of the sale was not given to the plaintiff, the United States Supreme Court stated:

> A purchaser of land on which there is a prior security deed acquires his interest in the property subject to the right of the holder of the secured debt to exercise the statutory power of sale. There is no established principle of law which entitles such a purchaser to notice of the exercise of this power.

Id. at 636, 70 L. Ed. at 1125.

Here, the Warranty Deed transferring the condominium unit from Defendant to the Trust erroneously asserted that the property was "free and clear of all encumbrances[.]" In fact, the property was encumbered by a judgment lien which allowed Plaintiff to foreclose its lien and exercise its power of sale to satisfy Defendant's debt. As in *Scott*, the Trust and the beneficiaries acquired their interests in the property subject to the right of Plaintiff to exercise its statutory power of sale. Furthermore, docketing a judgment puts third parties on notice of the existence of a judgment, and transferees are bound to look into the proper dockets to examine for judgment liens. *Jones v. Currie*, 190 N.C. 260, 129 S.E. 605 (1925). While in *Scott* no judgment was docketed and the defendant's power of sale did not arise until after the plaintiff had purchased the property, here, the judgment had been docketed on 6 May 2000 in Onslow County in Judgment Docket Book 87 on page 236. Thus, unlike the plaintiff in *Scott* who had no record notice of the defendant's power of sale, here the Trust had record notice of the judgment lien allowing Plaintiff to exercise its power of sale to satisfy Defendant's debt. Accordingly, as in *Scott*, the Trust and the beneficiaries were not entitled to personal notice of the execution sale and the validity of the sale of the condominium was not affected, nor were Movants' due process rights violated, by the fact that such notice was not given to the Trust or the beneficiaries.

[3] Defendant next argues that N.C. Gen. Stat. § 1-339.54 “run[s] afoul” of due process requirements in that, under the circumstances, the Sheriff was obligated to take “further reasonable steps” to notify Defendant of the impending property sale.

As stated above, individuals whose property interests are at stake are entitled to “notice reasonably calculated, under all the circumstances, to apprise [them] of the pendency of the action.” *Mullane*, 339 U.S. at 314, 94 L. Ed. at 873. Whether a particular method of notice is reasonable depends on the particular circumstances and “[t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.” *Id.* at 315, 94 L. Ed. at 874.

Thus, the issue is whether the notice in this case was “reasonably calculated under all the circumstances” to apprise Defendant of the pendency of the execution sale. The Sheriff sent registered mail addressed to Defendant at Defendant’s last known and actual address. Additionally, the Sheriff posted the Notice at the Onslow County Courthouse in the area designated by the Clerk for the posting of notices, and published the Notice in the *Jacksonville Daily News* on two occasions.

Although Defendant contends that “the attempt at providing notice solely by means of one attempt at sending notice via registered mail was constitutionally inadequate to accord with due process requirements under the law[,]” use of the postal service to send a letter to a party is well-recognized as an adequate means of effecting notice upon known addressees when notice by publication has been found to be insufficient.[1] *Dusenbery*, 534 U.S. 161, 151 L. Ed. 2d 597. Defendant further claims that “*Jones v. Flowers* [] makes it clear that, if nothing else, one charged with providing notice as to the impending loss of another’s property must send one last notice, via regular United States mail, if the provider cannot figure out a better way of

1. *E.g.*, *Mullane*, 339 U.S. at 319, 94 L. Ed. at 876 (“[T]he mails today are recognized as an efficient and inexpensive means of communication.”); *Walker v. City of Hutchinson*, 352 U.S. 112, 116, 1 L. Ed. 2d 178, 182 (1956) (“[T]he notice by publication here falls short of the requirements of due process. . . . Even a letter would have apprised [appellant] that his property was about to be taken . . . .”); *Schroeder v. City of New York*, 371 U.S. 208, 214, 9 L. Ed. 2d 255, 260 (1962) (“[T]he city was constitutionally obliged to make at least a good faith effort to give [notice] personally to the appellant—an obligation which the mailing of a single letter would have discharged.”); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798, 77 L. Ed. 2d 180, 187 (1983) (“When the mortgagee is identified in a mortgage that is publicly recorded, constructive notice by publication must be supplemented by notice mailed to the mortgagee’s last known available address, or by personal service.”).

providing personal notice." We are of the opinion, however, that Defendant's interpretation and reliance on *Jones v. Flowers*, 547 U.S. 220, 164 L. Ed. 2d 415 (2006), is misplaced.

In *Flowers*, the Arkansas Commissioner of State Lands ("Commissioner") mailed a certified letter to the defendant to notify him of his tax delinquency. The letter stated that unless the defendant redeemed the property, the property would be subject to public sale two years later. No one was home to sign for the letter and nobody retrieved the letter from the post office within the next fifteen days. The post office returned the unopened letter to the Commissioner marked "unclaimed." *Id.* at 224, 164 L. Ed. 2d at 424.

Two years later, the Commissioner published a notice of public sale in the newspaper several weeks before the sale. No bids were submitted, permitting the State to negotiate a private sale of the property. Several months later, Linda Flowers submitted a purchase offer. The Commissioner then mailed another certified letter to the defendant, attempting to notify him that his house would be sold to Flowers if he did not redeem the property. Like the first letter, the second was also returned to the Commissioner marked "unclaimed." *Id.* The property was subsequently sold to Flowers.

The defendant filed suit against the Commissioner and Flowers, alleging that the Commissioner's failure to provide notice of the tax sale and of the defendant's right to redeem his property resulted in the taking of his property without due process. The United States Supreme Court held that "when mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so." *Id.* at 225, 164 L. Ed. 2d at 425. The Court reasoned that "despite the fact that the letters were reasonably calculated to reach their intended recipients when delivered to the postman[,]" *id.* at 229, 164 L. Ed. 2d at 428, when the notice provider becomes aware that normal procedures are ineffective in providing notice, this triggers an obligation "to take additional steps to effect notice." *Id.* at 230, 164 L. Ed. 2d at 428. The Court then determined that "[u]nder the circumstances presented [], additional reasonable steps were available to the State." *Id.* at 225, 164 L. Ed. 2d at 425.

As in *Flowers*, the Sheriff in this case sent notice of the pending property sale to Defendant through the United States Postal Service via registered letter. However, unlike in *Flowers* where the unclaimed letters were returned *before* the sale of the property at issue, trigger-

ing the state's obligation "to take additional steps to effect notice" before the sale of the property, *id.*, in this case, the unclaimed letter was returned almost two months *after* the execution sale of the condominium, and one month *after* the Sheriff's Deed was recorded. Thus, similar to *Dusenbery* and *Mullane* where the government heard nothing back indicating that their attempts at notice had gone awry, the Sheriff did not become aware that the normal procedures for providing notice were ineffective until after the sale had been finalized. Here, as in *Flowers*, the letter was reasonably calculated to reach Defendant when it was delivered to the postman, but, unlike *Flowers*, under the circumstances presented in this case, it was not practicable for the Sheriff, without knowledge of the non-receipt, to take additional reasonable steps to notify Defendant of the impending sale of the property.

Accordingly, the notice provided to Defendant complied with due process requirements. The use of the mail addressed to Defendant at his last known and actual address was clearly acceptable for much the same reason the United States Supreme Court and the North Carolina Appellate Courts have approved mailed notice in the past. *Dusenbery*, 534 U.S. 161, 151 L. Ed. 2d 597. *E.g.*, *Henderson Cty. v. Osteen*, 292 N.C. 692, 708, 235 S.E.2d 166, 176 (1977) ("[N]otice of the execution sale . . . sent by registered or certified mail to the listing taxpayer at his last known address . . ., in conjunction with the posting and publication also required by the statute, would, in our opinion, be sufficient to satisfy the fundamental concept of due process of law . . . ."); *Hardy v. Moore Cty.*, 133 N.C. App. 321, 515 S.E.2d 84 (1999) (concluding that due process was satisfied where notice of a tax foreclosure sale of plaintiff's property was mailed to plaintiff's last known address and published in the local newspaper); *Myers v. H. McBride Realty, Inc.*, 93 N.C. App. 689, 379 S.E.2d 70 (1989) (concluding that due process requirements were complied with where the sheriff sent notice of an execution sale via certified mail to the plaintiff's address listed on the execution notice and to an address where plaintiff owned real property).

We conclude that the Sheriff's actions were "reasonably calculated, under all the circumstances, to apprise [Defendant] of the action." *Mullane*, 339 U.S. at 314, 94 L. Ed. at 873. Due process requires no more.

The order of the trial court denying Defendant's Rule 60(b) motion is

AFFIRMED.

Judges McGEE and TYSON concur.

IN THE MATTER OF: R.D.L., JUVENILE

No. COA07-1427

(Filed 5 August 2008)

1. Juveniles— cars damaged—insufficiency of evidence of some counts—entire adjudication remanded

A juvenile adjudication was reversed and remanded where the proceeding arose from a series of incidents in which cars were damaged by rocks, respondent's statements did not amount to a general admission, and the State did not present substantial evidence of respondent's participation in seven of the nine offenses. It could not be determined whether the disposition order would have been altered had the trial court properly adjudicated respondent delinquent based solely on the two petitions on which the State presented sufficient evidence.

2. Appeal and Error— preservation of issue—basis of objection at trial—oral motion for joinder at proceeding

A juvenile did not preserve for appeal the question of whether the State's oral motion for joinder should have been written because he objected at trial on a different ground. However, even if it had been preserved, it has been held that an oral motion may be made in the judge's discretion, and respondent neither argued nor demonstrated that the trial court abused its discretion in this regard.

Appeal by Respondent from orders entered 22 August 2007 by Judge Shirley H. Brown in District Court, Buncombe County. Heard in the Court of Appeals 30 April 2008.

Attorney General Roy Cooper, by Assistant Attorney General Alexandra Gruber, for the State.

Carol Ann Bauer for Respondent.

McGEE, Judge.

R.D.L. (Respondent), a juvenile, appeals from adjudication and disposition orders entered 22 August 2007. For the reasons set forth herein, we reverse seven of the nine adjudications and remand for a new disposition as to the two remaining adjudications.

Officer Jackie Stepp (Officer Stepp) of the Asheville Police Department filed nine juvenile petitions on 23 May 2007, alleging that Respondent was a delinquent juvenile, and charging that: (1) on 8 December 2006, Respondent damaged a 2007 black Chevrolet Silverado, owned by Tony Ray Clark, with an "unknown blunt object [that] was thrown and hit the truck in the passenger side"; (2) on 13 January 2007, Respondent broke two windows in a 1994 beige Ford Aerostar owned by Mary Honeycutt MacKintosh, causing damage in excess of $200.00; (3) on 13 January 2007, Respondent damaged real property at Braswell Scale and Equipment (Braswell Scale), by breaking "[w]indows on the right side of the building" and damaging the windshield of a commercial box truck; (4) on 15 January 2007, Respondent "smashed out" all the windows in a 1993 Ford Econoline van owned by "Hav A Cup, Karl Lail," causing damage in excess of $200.00; (5) on 22 January 2007, Respondent damaged the back doors and back right side of a 2007 white Chevrolet van owned by Enterprise Leasing, causing damage in excess of $200.00; (6) on 22 January 2007, Respondent broke three windows "in the back of the business" on real property owned by Braswell Scale; (7) on 13 March 2007, Respondent "shot out" the back door window of a 1993 Ford Econoline van owned by "Karl Lail, Hav A Cup"; (8) on 23 April 2007, Respondent broke four front windows of a warehouse owned by "Connie Byrd, Bruner & Lay"; and (9) on 24 April 2007, Respondent broke a glass window on the south side of the Braswell Scale building.

At the start of trial, the State moved for joinder of Respondent's case with the case involving his co-respondent, D.S. Counsel for Respondent and for D.S. objected to joinder arguing that the incidents were diverse and that there was no indication that the same individuals were involved in all of the incidents. The trial court allowed the State's motion for joinder.

John Timothy Farlow, Jr. (Mr. Farlow) testified that he was a salesman at Braswell Scale. Mr. Farlow testified that he told police about damage to personal and real property that occurred at Braswell Scale on 13 January 2007, 22 January 2007, and 24 April 2007.

However, Mr. Farlow twice testified that he did not know which damage occurred on which date. Mr. Farlow also testified that he had a video which showed "a busted window and fireworks going off between the vehicles" on 24 April 2007. The video was admitted into evidence. Mr. Farlow testified as follows that he went with Officer Stepp to Respondent's grandmother's house:

Q What, if anything, happened there?

A We basically asked [Respondent]—you know, he didn't say a whole lot. He cried most of the time. Finally he said that he—his grandmother said, "You better tell them what's going on," and [Respondent] told us that he did do it and he told—we asked him who the third person that had been with him—wasn't in the picture, who it was, and he told us it was [D.W.] and he assured us he wouldn't be back.

Q After you spoke with Officer Stepp and met with [D.S.] and his mother and [Respondent] and his grandmother, have you had any problem since then?

A No, ma'am.

Q Have you had any windows broken out?

A No, ma'am.

Q Of vehicles or your building?

A No, ma'am.

On cross-examination, Mr. Farlow testified as follows:

Q And you don't recall what day it was that you went to [Respondent's] house?

A No. I don't. I know I've got a file at work.

Q If Officer Stepp's report indicated that was the 25th day of April, would you have any reason to doubt that?

A No.

Q When you went to the house that day, you were specifically inquiring about the incident that happened the day before?

A No. We were inquiring about all of them.

Q Well, you said that [Respondent] said he did it. Isn't it true that what he said was that he had thrown a rock at someone and had almost hit someone?

A I don't recall. He pretty much basically confessed to being at all—

Q So you don't recall the exact words he said?

A No.

Q And you didn't write them down?

A No.

Tony Clark (Mr. Clark) testified regarding an incident that occurred on 8 December 2006. Mr. Clark testified that as he drove past Hillside Mobile Home Park on Sweeten Creek Road, he "felt and heard [a] wild bang on [his] truck." Mr. Clark pulled over and saw "a big dent on the rear-passenger side of the truck." Mr. Clark further testified that as soon as he heard the thump on his truck, he looked back and saw two or three people running near the road and "up under the trees." Mr. Clark identified D.S. as one of the people he saw running near the road on 8 December 2006, but he could not identify Respondent.

Officer Stepp testified that she showed D.S. a still photograph derived from the video taken on 24 April 2007, and D.S. admitted that he was one of the individuals in the photograph. Officer Stepp also testified that D.S. identified Respondent as the other person in the photograph, and that Respondent admitted that he was the other person in the photograph. Officer Stepp also testified that she went to Respondent's grandmother's house:

> We went up there, just talked about what had happened. As he said, [Respondent] was pretty upset about the situation. [Respondent] admitted that he threw the rock. [Respondent] specifically said, "Yeah, it's me in the picture. Yeah, I threw the rock." [Respondent] also stated that back in January, when the most damage was done to the properties, that it was he, [D.S.], and [D.W.]

On cross-examination, Officer Stepp twice clarified that Respondent admitted involvement in only two incidents at Braswell Scale. She testified that Respondent "also stated that he's thrown rocks at vehicles[,]" but that Respondent did not admit to hitting a vehicle with a rock. Officer Stepp further testified that she did not question Respondent about any specific incidents other than the 24 April 2007 incident at Braswell Scale.

At the close of the State's evidence, Respondent's counsel moved to dismiss. Respondent's counsel conceded that the State had offered sufficient evidence of the 13 January 2007 and 24 April 2007 incidents at Braswell Scale. However, Respondent's counsel moved to dismiss the remaining seven petitions for insufficient evidence. The trial court denied the motion. Respondent did not present evidence.

In an adjudication order entered 22 August 2007, the trial court adjudicated Respondent delinquent "by reason of four counts of injury to real property in violation of G.S. 14-127 and five counts of injury to personal property in violation of G.S. 14-160." The trial court entered a Level 1 disposition on 22 August 2007, which: (1) placed Respondent on probation for a period of twelve months; (2) ordered Respondent to serve 100 hours of community service; (3) imposed a curfew upon Respondent; (4) ordered that Respondent not associate with D.S. or D.W.; (5) ordered that Respondent not be on the property of "Hav A Cup, Braswell Scale, [and] Brunner & Lay, Inc."; and (6) ordered Respondent's "[p]arent to contact Western Highlands within 10 days to schedule an appointment for [Respondent] to be assessed for mental health services." Respondent appeals.

I.

[1] Respondent first argues the trial court erred by denying his motion to dismiss seven of the nine juvenile petitions. Respondent contends that the State's evidence against him in seven of the nine petitions was "weak to the point of being mere speculation." We agree.

In reviewing a motion to dismiss a juvenile petition, courts must consider the evidence in the light most favorable to the State, which is entitled to every reasonable inference that may be drawn from the evidence. *In re Brown*, 150 N.C. App. 127, 129, 562 S.E.2d 583, 585 (2002). "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 [the] [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)). " 'Substantial evidence is relevant evidence which a reasonable mind might accept as adequate to support a conclusion.' " *In re S.R.S.*, 180 N.C. App. 151, 156, 636 S.E.2d 277, 281 (2006) (quoting *State v. Wood*, 174 N.C. App. 790, 795, 622 S.E.2d 120, 123 (2005)). If the evidence raises merely " 'suspicion or conjecture as to either the commission of the offense or the identity of the [juve-

nile] as the perpetrator of it, the motion should be allowed.' " *In re Heil*, 145 N.C. App. at 28, 550 S.E.2d at 819 (quoting *Powell*, 299 N.C. at 98, 261 S.E.2d at 117).

In the case before us, the State did not present individualized proof of each of the offenses charged in the nine petitions. In fact, the State did not present any testimony from the property owners, other than Mr. Farlow and Mr. Clark, whose real and personal property was allegedly damaged. Rather, in its brief, the State contends that Respondent made a general admission at trial to all nine offenses:

> Six of the incidents occurred in close temporal and physical proximity, and all six involved cars being damaged by rocks. [Respondent] confessed that he threw rocks at cars. [Respondent] also said "it would stop." [Mr.] Farlow, who was with Officer Stepp during the interviews, considered [Respondent's] statements to implicate [Respondent] in the several incidents when cars were damaged. Here, the trial court properly considered [Respondent's] statements to be a general admission that he participated in all nine incidents of vandalism.

The State also points to the following evidence as sufficient to survive Respondent's motion to dismiss:

> The evidence at trial also included the picture of [Respondent] and [D.S.] taken from the surveillance camera. Both [D.S.] and [Respondent] lived within a short walking distance from the road and businesses where the vandalism occurred, and there was a trail leading from [D.S.'s] residence to Braswell Scale. Finally, once the juveniles were directly questioned, both tearfully admitted their actions and promised to stop, and no further incidents occurred at Braswell Scale, the primary victim.

We cannot agree with the State that Respondent's statements amounted to a general admission, nor can we agree that the State presented substantial evidence of Respondent's participation in the seven challenged offenses. Officer Stepp testified that she did not question Respondent about any specific incidents other than the 24 April 2007 incident at Braswell Scale. She also testified that Respondent did not admit to hitting any vehicles with rocks. Moreover, although Mr. Farlow testified that Respondent said that he "did do it," it appears from the context of this testimony that Respondent was admitting his involvement in the 24 April 2007 incident at Braswell Scale that had been captured on videotape. Directly

following Mr. Farlow's testimony that Respondent said he "did do it," Mr. Farlow further testified that "we asked him who the third person that had been with him—wasn't in the picture, who it was, and he told us it was [D.W.] and he assured us he wouldn't be back." The State also asked Mr. Farlow whether there had been any more damage at Braswell Scale since meeting with Respondent, and Mr. Farlow said there had not. This further demonstrates that any admission made by Respondent at that meeting related to incidents at Braswell Scale. Furthermore, because Mr. Farlow was employed by Braswell Scale, any admission that Respondent made to him and Officer Stepp logically would have related to the incidents at Braswell Scale.

We recognize that Officer Stepp testified that "[Respondent] also stated that back in January, when the most damage was done to the properties, that it was [Respondent], [D.S.], and [D.W.]" However, the transcript does not reflect that Officer Stepp questioned Respondent about each particular incident that occurred in January 2007. Officer Stepp's testimony does not reveal the "properties" to which she was referring. Therefore, the record is too ambiguous for this statement to amount to a general admission that Respondent committed the offenses that allegedly occurred in January 2007.

As to the other evidence cited by the State, the photograph of Respondent only tied him to the 24 April 2007 incident at Braswell Scale, and Respondent did not move to dismiss that petition. Furthermore, the fact that Respondent lived in close proximity to the area where the damage occurred does not provide substantial evidence that Respondent was the perpetrator of the offenses. As to the fact that there was no more damage at Braswell Scale following the meeting with Respondent, this merely demonstrates that Respondent's admission to Mr. Farlow and Officer Stepp was confined to incidents at Braswell Scale.

In sum, the State failed to present substantial evidence that Defendant was the perpetrator of the seven offenses that he moved to dismiss. Specifically, although Mr. Clark identified D.S. as one of the people he saw running near the road after he felt and heard the "bang" on his truck, Mr. Clark could not identify Respondent as a perpetrator of that offense. Mary Honeycutt MacKintosh did not testify and there was no other evidence to establish that Respondent broke two windows of her 1994 beige Ford Aerostar. Neither Karl Lail, nor any other representative from Hav A Cup, testified that Respondent caused damage to a 1993 Ford Econoline van on two different occa-

sions. Likewise, no representative from Enterprise Leasing testified that Respondent caused damage to the back doors and back right side of a 2007 white Chevrolet van. Respondent did not admit to any violation at Braswell Scale on 22 January 2007, and Mr. Farlow did not testify as to this specific incident. Finally, neither Connie Byrd, nor any other representative of Brunner & Lay, testified that Respondent broke four front windows of Brunner & Lay's warehouse.

For all the reasons stated above, we hold that the evidence merely raised " 'suspicion or conjecture' " as to Respondent's participation in the acts charged in the challenged juvenile petitions. *See In re Heil*, 145 N.C. App. at 28, 550 S.E.2d at 819 (quoting *Powell*, 299 N.C. at 98, 261 S.E.2d at 117). Accordingly, we hold the trial court erred by denying Respondent's motion to dismiss those petitions. We thus reverse and remand said adjudications with instructions to dismiss those petitions.

In *State v. Gilley*, 135 N.C. App. 519, 522 S.E.2d 111 (1999), *cert. denied*, 353 N.C. 528, 549 S.E.2d 860 (2001), our Court remanded the case for re-sentencing after we determined that one conviction must be vacated and that the trial court had consolidated numerous convictions for sentencing. *Id.* at 530-31, 522 S.E.2d at 118. Moreover, in *State v. Brown*, 350 N.C. 193, 513 S.E.2d 57 (1999), our Supreme Court stated that an appellate court cannot "assume that the trial court's consideration of two offenses, as opposed to one, had no affect [sic] on the sentence imposed." *Id.* at 213, 513 S.E.2d at 70.

In the case before us, the trial court determined that Respondent had a low delinquency history level. Moreover, the offenses with which Respondent was charged are Class 1 and 2 misdemeanors, which are classified as minor offenses. N.C. Gen. Stat. § 7B-2508(a)(3) (2007). Based upon the table under N.C. Gen. Stat. § 7B-2508(f) (2007), a juvenile with a low delinquency history who commits a minor offense is subject to a Level 1 disposition. Accordingly, after the trial court found that Respondent had committed nine minor offenses, the trial court properly classified Respondent at the lowest Level 1 for dispositional purposes. The trial court then entered a disposition order with six specific dispositions.

We recognize that these are among the most lenient of dispositional alternatives available for delinquent juveniles. *See* N.C. Gen. Stat. § 7B-2506 (2007). We further recognize that while there are fundamental distinctions between criminal trials and juvenile proceedings, we believe that the decisions of our Courts in which we have

remanded a case for re-sentencing for non-vacated convictions are instructive. We are unable to determine whether the trial court would have altered the disposition order had the trial court properly adjudicated Respondent delinquent based solely upon the two petitions in support of which the State submitted sufficient evidence. Although we recognize that, upon remand, this case could result in the same disposition based solely upon the two valid adjudications, we must remand it nonetheless for a new disposition. *Gilley*, 135 N.C. App. at 530-31, 522 S.E.2d at 118; *Brown*, 350 N.C. at 213-14, 513 S.E.2d at 70.

II.

[2] Respondent also argues the trial court erred by "allowing the State's oral motion for joinder of the juveniles' cases for trial in that the motion was not written as required by [N.C. Gen. Stat.] § 15A-926(b)(2)." However, at trial, Respondent did not object to joinder on this ground. Rather, Respondent argued that the incidents were diverse and that there was no indication that the same individuals were involved in all of the incidents. Therefore, Respondent failed to preserve the argument he now attempts to assert on appeal. *See* N.C.R. App. P. 10(b)(1) (stating that "[i]n order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context"); *State v. Frye*, 341 N.C. 470, 496, 461 S.E.2d 664, 677 (1995), *cert. denied*, 517 U.S. 1123, 134 L. Ed. 2d 526 (1996) (holding that the "[d]efendant objected to the evidence on only one ground; thus, he failed to preserve the additional grounds presented on appeal").

However, even assuming *arguendo* that Respondent preserved this issue, Respondent's argument lacks merit. In *State v. Fink*, 92 N.C. App. 523, 375 S.E.2d 303 (1989), our Court held that a joinder motion "need not be *written* if made at a hearing, and, in the judge's discretion, the motion may be made orally even at the beginning of trial." *Id.* at 529, 375 S.E.2d at 306-07 (citing N.C. Gen. Stat. §§ 15A-926(b)(2), 15A-951(a), 15A-952(b), (f) (1988); *State v. Slade*, 291 N.C. 275, 281-82, 229 S.E.2d 921, 926 (1976)). Respondent has neither argued, nor demonstrated, that the trial court abused its discretion in this regard. We overrule this assignment of error.

Respondent has abandoned his first assignment of error by failing to set forth argument in support thereof. *See* N.C.R. App. P. 28(b)(6).

Reversed in part and remanded.

Judges ELMORE and JACKSON concur.

STATE OF NORTH CAROLINA v. MICHAEL REYSHAWN DAVIS

No. COA07-648

(Filed 5 August 2008)

1. Appeal and Error— record—exhibit not included—argument abandoned

Defendant's failure to include a video as an exhibit to the record on appeal and to record it in the trial transcript meant that he abandoned his argument concerning admission of the videotaped interview with a child.

2. Evidence— corroborative—interview with child—questions asked and background information

A report from a clinical social worker concerning the victim of statutory rape and indecent liberties was not rendered noncorroborative of the child's testimony because it contained questions posed to the child, as well as some background information. The jury needed to hear the questions to comprehend the child's prior statements, and the background information was relevant to understand the nature and purpose of the interview.

3. Evidence— opinion of child's credibility—admission not plain error

Statements in the report of a clinical social worker vouching for the credibility of a victim of statutory rape and indecent liberties should not have been admitted, but there was no plain error because the jury could assess for itself from other evidence the credibility of the child and there was not a reasonable probability of a different result without the conclusory statement.

4. Appeal and Error— preservation of issues—necessity of assignment of error and supporting authority

Arguments on appeal were not properly before the appellate court where the issues were not assigned as error or supported by authority.

5. Evidence— state of mind—child victim of sexual assault

The trial court did not err by admitting evidence of the state of mind of a child victim of indecent liberties and statutory rape. Evidence of her state of mind, including fear, was relevant to whether she had been sexually abused. Defendant cited no authority for the contention that the probative value was outweighed by the danger of prejudice.

6. Evidence— state of mind—mother of child victim

Admission of evidence that the mother of a child victim of statutory rape and indecent liberties did not believe her accusations was not plain error.

7. Evidence— relevance—child victim of sexual assault—treatment plan

The trial court did not abuse its discretion in a prosecution for statutory rape and indecent liberties by admitting testimony about the victim's therapy and treatment plan. The evidence was relevant to show that the victim had suffered trauma, and defendant cross-examined the victim about her therapy.

8. Evidence— social workers—reasons children delay reporting abuse—collateral to this case

Evidence from social workers about the reasons children do not report sexual abuse was collateral in a case in which the victim reported the abuse in question the day after it occurred. Moreover, defendant did not demonstrate prejudice.

9. Evidence— generally emotional subject—prejudice not shown

A defendant in a prosecution for statutory rape and indecent liberties did not show prejudice from certain evidence with a generalized argument that the evidence was highly emotional and likely to inflame the jury.

10. Jury— out-of-state juror—not challenged—issue not preserved for review

Defendant did not preserve for review the issue of seating a juror who had moved out-of-state where he did not move to have the juror excused for cause, object to the juror, or use one of his peremptory challenges to excuse him.

Appeal by defendant from judgment entered 12 January 2007 by Judge Henry W. Hight in Durham County Superior Court. Heard in the Court of Appeals 14 January 2008.

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

Reita P. Pendry for defendant-appellant.

STEELMAN, Judge.

Where the admission of certain pieces of evidence by the trial court did not constitute plain error, a new trial is not warranted. Where defendant failed to follow the statutory procedure for challenging an allegedly unqualified juror, defendant has failed to preserve the issue for appellate review.

I. Factual and Procedural Background

In August of 2005, K.T., aged 10, lived in Durham with her mother, younger brother D.T., younger sister N.T., and her mother's boyfriend, Michael Rayshawn Davis (defendant). K.T.'s mother worked as a receptionist, arriving home at 6:00 or 6:15 p.m. K.T. and D.T. would arrive home from school around 4:00 p.m. At that time, defendant and N.T. would be at home.

On 29 August 2005, when K.T. and D.T. arrived home, defendant was there. Defendant asked K.T. to come into the bedroom. K.T. went into the bedroom. The door was closed and defendant asked her if she wanted "to play," which meant that he wanted to have sex. This was a regular demand made by defendant of K.T. When K.T. attempted to avoid defendant's advances, defendant told her to "just do it," pulled off his pants, and forced her to perform oral sex. Defendant left for work 30 minutes before K.T.'s mother arrived.

The following day, 30 August 2005, defendant once again called K.T. into the bedroom and asked her "if she wanted to play." Defendant then engaged in vaginal intercourse with her. K.T. was wearing a skirt, and defendant's semen got on the skirt. On the following day, K.T. told one of her teachers what had occurred. She repeated the story to the principal and a school counselor. K.T.'s mother was summoned to the school, and arrived with defendant. K.T., together with her mother and defendant, left the school together and went to Durham Regional Hospital, where K.T. was given a physical examination and hair samples were collected. Defendant con-

sented to DNA testing. K.T.'s mother consented to police searching the residence and taking possession of K.T.'s clothing.

Following the laboratory testing of the DNA samples and clothing, defendant was charged with one count of statutory rape of a child under 13 years old, one count of first-degree sex offense, and two counts of indecent liberties with a child. On 12 January 2007, the jury found defendant guilty of statutory rape and one count of indecent liberties with a child. He was found not guilty of the remaining two charges. Defendant was sentenced to a minimum of 288 months and a maximum of 355 months imprisonment. Defendant appeals.

II. Plain Error Standard of Review

With respect to defendant's first two arguments, he failed to object at trial to the matters now raised on appeal, and contends that these arguments are subject to plain error review.

In order to establish plain error "[d]efendant must show that the error was so fundamental that it had a probable impact on the result reached by the jury." *State v. Campbell*, 340 N.C. 612, 640, 460 S.E.2d 144, 159 (1995) (citation omitted). "Plain error is error 'so fundamental as to amount to a miscarriage of justice or probably resulted in the jury reaching a different verdict than it otherwise would have reached.' " *State v. Hannah*, 149 N.C. App. 713, 720, 563 S.E.2d 1, 6 (2002) (quotation omitted). Plain error review is limited to evidentiary rulings and jury instructions. *State v. Atkins*, 349 N.C. 62, 81, 505 S.E.2d 97, 109-10 (1998).

III. Admission of Prior Statements

In his first argument, defendant contends that the trial court committed plain error in admitting evidence of K.T.'s out-of-court prior statements to other persons who testified at trial. We disagree.

We first note that this argument purports to encompass four different assignments of error, which reference "fifteen State's witnesses." However, in his brief, defendant only argues with respect to statements contained in State's exhibits 18 and 19. Assignments of error not argued in a defendant's brief are deemed abandoned, N.C. R. App. P. 28(b)(6), and we limit our analysis to defendant's arguments pertaining to State's exhibits 18 and 19.

State's exhibit 18 was a videotape of an interview of K.T. by Jeanne Arnts, a clinical social worker in the Department of Psychiatry at Duke University Medical Center and an employee of the Center

for Child and Family Health in Durham. State's exhibit 19 was the medical report of the evaluation of K.T. on 1 September 2005. This report consisted of two parts: first, the physical examination of K.T. conducted by Dr. Edith Kocis; and second, the physchosocial examination conducted by Jeanne Arnts. The second part contained a detailed summary of the videotaped interview, as well as a treatment plan and recommendations for K.T.

State's Exhibit 18

[1] Defendant initially contends that State's exhibits 18 and 19 are "primarily out of court statements of Jeanne Arnts," are not corroborative of the testimony of K.T., and were therefore not admissible as hearsay.

We note that State's exhibit 18, the videotaped interview of K.T., was not included as an exhibit to the record on appeal and was not recorded on the trial transcript. It is the duty of the appellant to ensure that all documents and exhibits necessary for an appellate court to consider his assignments of error are part of the record or exhibits. *State v. Berryman*, 360 N.C. 209, 216, 624 S.E.2d 350, 356 (2006). We will not attempt to divine what was on the videotape, and deem any argument as to State's exhibit 18 to be abandoned. N.C. R. App. P. 9(a), 28(b)(6). To the extent that the videotaped interview was summarized in State's exhibit 19, we consider defendant's argument below.

State's Exhibit 19

[2] State's exhibit 19 contained a summary of questions posed by Arnts and K.T.'s answers to those questions. It also contained Arnts' summary of K.T.'s age, academic levels, cognitive abilities, and demeanor during the interview. It further summarized the admonitions given to K.T. at the outset of the interview that it was part of the doctor's office, and that it was important for K.T. to tell the truth. Appended to the report was K.T.'s handwritten statement of what occurred:

> He made me give him orral [sic] sex on Tuesday of this week. Monday he put his penis in my vagina. On tuesday I was wearing blue jean pants and a baby phat shirt. Monday I was wearing a pink and jean 3 layer skirt[.] I forgot what kind of shirt I had on. When he took his penis out wet stuff got on my skirt. On tuesday the wet stuff got in my mouth[.] I spit it out immediantly [sic]. Then I went in the bathroom and started crying.

A Trauma Symptom Checklist for Children was completed by K.T. However, it was invalidated by K.T. overresponding to items on the test. K.T. expressed suicidal ideations.

Finally, the report disclosed that Dr. Kocis interviewed K.T.'s mother, who was adamant that "she did not believe [K.T.]'s report of sexual abuse," and that K.T. had made similar allegations against her former boyfriend. The mother stated that K.T. had made the allegations because she was upset with the domestic violence between defendant and the mother. The report concluded that K.T. had provided a "credible disclosure of sexual abuse."

State's Exhibit 19: Arnts' Statement

The fact that the report contained questions posed by Arnts and some background material regarding the interview does not render the report non-corroborative of K.T.'s testimony. Prior consistent statements are admissible to corroborate a witness's testimony and may contain new or additional facts not referred to in the witness's testimony so long as such facts tend to add weight or credibility to the testimony. *State v. Williams*, 355 N.C. 501, 566, 565 S.E.2d 609, 647 (2002). A prior statement that is substantially similar to testimony at trial is admissible if it has a tendency to strengthen or confirm the witness's testimony, even if there are slight variations in the prior statement. *State v. McCord*, 140 N.C. App. 634, 657, 538 S.E.2d 633, 647 (2000).

For the jury to comprehend K.T.'s prior statements, they needed to hear the questions posed by Arnts. Further, the background information at the beginning of the interview, and the admonitions to K.T. about the purpose of the interview, while not specifically corroborative of K.T.'s testimony, were relevant in order for the jury to understand the nature and purpose of Arnts' interview. *See In re Mashburn*, 162 N.C. App. 386, 392, 591 S.E.2d 584, 589 (2004).

State's Exhibit 19: Conclusion by Arnts

[3] While defendant argues that statements in the report by Arnts were "improper bolstering" of K.T.'s testimony, no cases are cited by defendant in support of this argument.

Nevertheless, a review of North Carolina case law reveals that expert opinion as to the credibility of a child victim in a sexual offense prosecution is inadmissible in the absence of physical evidence supporting a diagnosis of abuse. *See, e.g.*, *State v. Bush*, 164 N.C. App. 254, 258, 595 S.E.2d 715, 718 (2004); *State v. Stancil*, 355

N.C. 266, 266-67, 559 S.E.2d 788, 789 (2002); *State v. Ewell*, 168 N.C. App. 98, 102-03, 606 S.E.2d 914, 918-19, *disc. review denied*, 359 N.C. 412, 612 S.E.2d 326, 612 S.E.2d 327 (2005); *State v. Couser*, 163 N.C. App. 727, 729-30, 594 S.E.2d 420, 422-23 (2004).

Accordingly, admission of Arnts' statement was error as it improperly vouched for K.T.'s credibility. However, on the facts of the instant case, we hold that admission of this statement did not constitute plain error.

In *State v. Hammet*, the North Carolina Supreme Court held that it is not plain error for an expert witness to vouch for the credibility of a child sexual abuse victim where the case does not rest solely on the child's credibility. *State v. Hammet*, 361 N.C. 92, 97-99, 637 S.E.2d 518, 522-23 (2006).

In the instant case, in addition to K.T.'s consistent statements and testimony that defendant had abused her sexually, the jury was able to consider properly admitted evidence of defendant's sperm found on K.T.'s skirt, as well as his bizarre explanation of how it got there. The jury also heard the testimony of K.T. in the courtroom and viewed the videotape of her interview with Arnts. The jury could therefore assess for themselves the credibility of K.T. Thus, while Arnts' statement vouching for K.T. was improper, there is not a reasonable probability that the result in this case would have been different had the conclusory statement in the report been excluded, and the admission of the statement did not constitute plain error.

<u>Failure of Trial Judge to Instruct on Corroboration</u>

[4] Defendant argues that the trial court failed to instruct the jury on how to consider K.T.'s out-of-court statements. However, defendant failed to assign this as error, and thus it is not properly before this Court. N.C. R. App. P. 10(a) (2008).

<u>Cumulative Effect of Evidence</u>

Defendant argues that "[e]ven if the prior statements and exhibits were individually properly admissible as corroborative evidence, their sheer numbers make them cumulative and prejudicial." We note that defendant cites no authority for this argument. N.C. R. App. P. 28(a) (2008). Further, in light of our previous ruling limiting our review of defendant's argument to State's exhibit 19, this argument is without merit.

Defendant's first argument is without merit.

IV. Admission of Additional Evidence

In his second argument, defendant contends that the trial court committed plain error in admitting certain pieces of evidence on the grounds that the evidence was irrelevant and highly prejudicial. We disagree.

N.C. Gen. Stat. § 8C-1, Rule 401 defines relevant evidence as "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." *Id.* Pursuant to N.C. Gen. Stat. § 8C-1, Rule 403, relevant "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.* "Unfair prejudice has been defined as 'an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.' " *State v. Mason*, 315 N.C. 724, 731, 340 S.E.2d 430, 435 (1986) (quoting commentary to N.C.R. Evid. 403). The decision to exclude evidence under Rule 403 is a matter within the discretion of the trial court. *Id.* "[E]ven though a trial court's rulings on relevancy technically are not discretionary . . . such rulings are given great deference on appeal." *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991) (citation omitted).

Evidence of K.T.'s State of Mind

[5] Defendant contends that the trial court committed plain error by admitting evidence of K.T.'s state of mind, including her fear that defendant would abuse her younger sister, her fear that defendant would kill her, evidence that she slept with a knife under her pillow, and evidence that she had a nightmare about defendant killing her family.

The issue before the jury was whether K.T. had been sexually abused by defendant. Evidence of K.T.'s state of mind, including her fear of defendant, was relevant to this issue. Further, defendant cites no authority, and we find none, that suggests that the trial court acted outside the bounds of reason in determining that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. We accordingly hold the trial court did not commit error, much less plain error, in admitting evidence concerning K.T.'s state of mind.

Evidence of K.T.'s Mother's State of Mind

[6] Defendant next contends that evidence that K.T.'s mother did not believe her accusations was irrelevant and unduly prejudicial.

Although defendant contends that the evidence was improperly admitted, a review of the transcript in this case reveals that defendant made use of the contested evidence at trial during his closing argument. We fail to see how admission of evidence that K.T.'s mother did not believe K.T.'s testimony was plain error.

Evidence of Treatment Plan

[7] Defendant argues that testimony about the treatment plan developed for K.T. and evidence that she was attending therapy sessions at the time of the trial was irrelevant and highly prejudicial.

We hold that evidence of K.T.'s therapy and treatment plan was relevant to show that she had suffered trauma. This made the issue regarding defendant's sexual abuse of her more likely to be true, and we hold that this evidence was relevant. Additionally, a review of the transcript reveals that defendant questioned K.T. on cross-examination about her therapy.

Defendant cites no authority, and we find none, that suggests that the trial court abused its discretion in admitting this evidence. The admission of this evidence was not error, much less plain error.

Background Information on Child Sexual Abuse

[8] Defendant argues that the testimony from social workers regarding the reasons children do not report incidents of sexual abuse "was not offered to meet any challenge by the defense" and should have been excluded under Rules 401 and 403.

We note that K.T. reported the abuse which is the subject of the instant case on the day after it occurred. Evidence regarding delays in child reporting of sexual abuse pertained solely to earlier incidents of alleged abuse, and was collateral to the crimes for which defendant was being tried. Moreover, defendant has failed to demonstrate prejudice from its admission.

State's Exhibits 18 and 19

[9] Defendant next argues that the background information contained in State's exhibits 18 and 19 should have been excluded as irrelevant and prejudicial.

Defendant acknowledges that potions of these exhibits were admissible as corroborating evidence, but contends that those portions which were admissible were "so intertwined with inadmissible portions that the entire exhibits should have been excluded."

As previously discussed, the background information in exhibit 19 was relevant for the jury's understanding of the nature and purpose of Arnts' interview. Further, defendant has failed to show how he suffered prejudice from the admission of this evidence, apart from his generalized argument that "[t]he evidence was of a highly emotional nature, likely to inflame the jury."

Expert Testimony Regarding K.T.'s Credibility

Defendant argues that it was improper for the State's expert witness to mention K.T.'s credibility. As previously discussed, the admission of this evidence did not constitute plain error.

We hold that defendant's second argument is without merit.

IV. Alleged Non-resident Juror

[10] In defendant's third argument, he contends that the trial court committed plain error in allowing a juror that was not a resident of Durham County to sit on the jury. We disagree.

We first note that plain error review is limited to evidentiary rulings and jury instructions. *See Atkins*. It is not applicable to jury selection issues.

During the jury selection, one of the jurors stated that he had moved to Richmond, Virginia. Defendant did not move to have the juror excused for cause, nor did he object to the juror or use one of his peremptory challenges to excuse him.

Defendant cites N.C. Gen. Stat. § 9-3 and Sections 19 and 24 of Article I of the North Carolina Constitution for the proposition that a juror must be a resident of the State in order to be qualified to serve as a juror. Defendant argues that he is entitled to a new trial due to this alleged error.

Constitutional issues must be raised at trial. *State v. Tirado*, 358 N.C. 551, 571, 599 S.E.2d 515, 529 (2004). Since defendant failed to raise these issues at trial, he has waived appellate review based on constitutional grounds. *See id.*

N.C. Gen. Stat. § 9-3 provides "[a]ll persons are qualified to serve as jurors and to be included on the jury list who are citizens of the

State and residents of the county, . . . Persons not qualified under this section are subject to challenge for cause."

Ordinarily, alleged statutory violations do not require an objection at trial in order to be preserved for appellate review. *Id.* However, N.C. Gen. Stat. § 9-3 specifically provides that persons not qualified to be jurors are subject to challenge for cause. N.C. Gen. Stat. § 9-3. If defendant believed that the juror was not qualified, his sole recourse under the statute was to challenge the juror for cause. Having failed to do so at trial, he has not preserved the issue for appellate review. *See id.* at 571, 599 S.E.2d at 529-30.

We hold that defendant's third argument is without merit.

NO PREJUDICIAL ERROR.

Chief Judge MARTIN and Judge STEPHENS concur.

RONALD R. MATTHEWS AND CHUCK STANLEY, PLAINTIFFS v. JAMES E. DAVIS, DEFENDANT

No. COA07-946

(Filed 5 August 2008)

1. **Appeal and Error— preservation of issues—assignments of error—supporting argument or case law required**

   Assignments of error which were not supported by argument or case law were deemed abandoned.

2. **Construction Claims— breach—unworkmanlike construction of sea wall—motion to dismiss denied**

   The trial court did not err by denying defendant's motion to dismiss a breach of contract claim which arose from the construction of a rip rap sea wall and subsequent erosion. The court's findings support its conclusion that the sea wall was constructed in an unworkmanlike manner so that soil and sand could pass through the fabric under the rip rap and erosion could occur.

3. Damages and Remedies— repair of sea wall—conflicting evidence—nonjury trial

The trial court did not err in a nonjury trial in its award of damages for repair of a sea wall built in an unworkmanlike manner where there was evidence to support the damages awarded, even though the award was less than the cost of repair estimated by plaintiffs' expert. The credibility and weight of the evidence was for the court.

Appeal by defendant from judgment entered 22 January 2007 by the Honorable D. Jack Hooks, Jr. in Onslow County Superior Court. Heard in the Court of Appeals 20 February 2007.

Lanier, Fountain & Ceruzzi, by John W. Ceruzzi, for plaintiff-appellee.

Jeffrey S. Miller for defendant-appellant.

BRYANT, Judge.

Defendant James E. Davis appeals from an order awarding damages to plaintiff Chuck Stanley in the amount of $9,243.75, with interests and costs. We affirm the award.

Plaintiffs Ronald Matthews and Chuck Stanley owned adjacent lots in Stella, North Carolina along the White Oak River. In the early summer of the year 2000, Davis met with plaintiffs and as a result of that meeting entered into an oral contract for the construction of a sea wall. The cost of this sea wall to each plaintiff was $9,243.75.

The sea wall was a "rip rap" construction—large stones laid over a small slope extending out approximately 12 feet and standing approximately 8 feet high. Beneath the layer of stone lay a woven filter cloth, and beneath the cloth was sandy soil. The sea wall construction was completed and paid for by 6 November 2000.

Although plaintiffs lots adjoined, the grading and landscaping of their respective properties was "significantly different." The Matthews property had "sock tile" (a six inch, corrugated black plastic pipe with a nylon sock) in place to assist in draining. The Stanley property did not. The Matthews property was graded to a "shallower or lower grade" with landscape features such as burlap laid over planting beds to enable roots to take hold, rye grass and a row of bushes. The Stanley property did not have the same grade or the landscaping.

By early to mid December 2000, approximately a month after completion of the sea wall, erosion was noted as a result of soil washing from behind the sea wall, leaving large holes on the surface of the Stanley lot. There was some erosion of the Matthews property during this same period but significantly less than the Stanley property. Plaintiffs brought suit for breach of contract, breach of express warranty, breach of implied warranty of fitness for a particular purpose, and unfair and deceptive trade practices.

At trial, plaintiffs submitted the testimony of John Louis Eddy, a professional consulting engineer, who testified as an expert in the field of geotechnical and water resource engineering. In his initial observation of the plaintiffs' properties, Eddy testified that "[t]here was some loss of soil from the slope, movement of rip-rap erosion at the top of the drain. . . . There were holes in the fabric and obviously, the fabric was not retaining the soil . . . ."

The fabric used in the sea wall was woven. Eddy testified that "the fabric may not have been the appropriate fabric for use at the site. The soil particles[, relatively fine grain silty sand,] are fine enough that they can go through the woven fabric . . . ." The mechanism for that movement being the flow of water.

Eddy also observed "that the fabric had been placed with the machine direction parallel to the slope so that you have horizontal joints in the fabric. So when there's tension in that fabric, it tends to pull apart and go down slope leaving openings." The standard way to install the fabric is vertically, or perpendicular to the shoreline, rather than horizontally. In his opinion the slope of the rip-rap wall was also too steep to remain stable. "It wouldn't take much to upset [the rip-rap] and cause [the stones] to move down the slope." And, as there was no cushion layer of small stones between the fabric and the large stones laid on it, the result was that jagged holes appeared in the fabric from the tension created by the rip-rap. According to Eddy the purpose of the fabric under the rip-rap in the sea wall was "to serve as a separation layer between the rip-rap and the soil and retain the soil. . . . [I]f you punch holes in the fabric, you're going to loose [sic] soil through those holes where it was intended to hold it in place."

Eddy testified that "[he] reached the conclusion that there had not been adequate surface and sub-surface drainage installed. A rip-rap blanket like that is routinely installed to handle sub-surface drainage issues, but obviously with the problems with the fabric it couldn't perform that function." When asked whether he formed an

opinion satisfactory to himself to a reasonable degree of engineering certainty as to the cause of the serious distress observed in the rip-rap wall on plaintiffs' properties, Eddy responded, "that there were problems with the design and construction of the rip-rap wall, basically that the proper fabric was not used." When asked whether he formed an opinion satisfactory to himself to a reasonable degree of engineering certainty as to whether the rip-rap wall appeared to be capable of performing the function for which it was intended, Eddy responded, "[t]hat it was not."

Furthermore, Eddy testified that the rip-rap wall "does not meet the standard of first-rate workmanship . . . ." "[T]he rip-rap is in a marginally stable condition borderline incipient failure . . . [meaning] it wouldn't take much for it to come down."

At the conclusion of the plaintiffs' evidence, the trial court dismissed all but the claims for breach of express warranty and general breach of contract. At the conclusion of the evidence, the trial court found and concluded that the construction of the sea wall was in accordance with Davis's design and such was not constructed in a workmanlike manner. The orientation of the filter fabric, to be laid in a workmanlike manner, should have been perpendicular to the shoreline rather than parallel, and holes in the fabric, created by stakes driven through it to hold the fabric in place during construction, ultimately allowed soil and sand to pass through the fabric and erode plaintiffs' lots. The trial court denied Matthews' claim despite the conclusion that the sea wall was constructed in less than a workmanlike manner on the basis that Matthews evidenced little to no damage to his property. The trial court awarded Stanley $9,243.75. Davis appealed.

Davis presents four questions on appeal: whether the trial court erred in (I) denying Davis's motion to dismiss at the end of plaintiff's evidence; (II) awarding damages to Stanley for poor construction of the sea wall; (III) entering judgment for Stanley; and (IV) awarding Stanley $9,243.74.

[1] We note questions II and III are not supported by argument or case law, and according to our rules of appellate procedure those assignments of error are deemed abandoned. *See* N.C. R. App. P. 28(b)(6) (2007) ("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.").

I

[2] Davis argues the trial court erred in denying his motion, pursuant to Civil Procedure Rule 41(b), to dismiss plaintiffs' breach of contract claim. Davis argues there was no showing the sea wall caused any damage or harm to the property of either plaintiff, and he invites this Court to reexamine the facts.

Under the North Carolina Rules of Civil Procedure, Rule 41(b)

> [a]fter the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief.

N.C.R. Civ. P. 41(b) (2007). When a motion to dismiss pursuant to Rule 41(b) is made, "the judge becomes both the judge and the jury; he must consider and weigh all competent evidence before him; and he passes upon the credibility of the witnesses and the weight to be given their testimony." *Miles v. Carolina Forest Ass'n*, 167 N.C. App. 28, 34, 604 S.E.2d 327, 332 (2004) (citation omitted). "The trial judge may weigh the evidence, find the facts and sustain defendant's Rule 41(b) motion at the conclusion of plaintiff's evidence even though plaintiff has made out a prima facie case which would have precluded a directed verdict for defendant in a jury trial." *Childers v. Hayes*, 77 N.C. App. 792, 794, 336 S.E.2d 146, 148 (1985) (citation omitted). "Dismissal under Rule 41(b) is left to the sound discretion of the trial court and will not be disturbed on appeal in the absence of a showing of abuse of discretion." *In re Pedestrian Walkway Failure*, 173 N.C. App. 237, 247, 618 S.E.2d 819, 826 (2005) (citation omitted).

"As a fact-finder, however, the trial judge must find the facts on all issues raised by the pleadings, and state his conclusions of law based thereon, in order that an appellate court may determine from the record the basis of his decision." *McKnight v. Cagle*, 76 N.C. App. 59, 65, 331 S.E.2d 707, 711 (1985) (citations omitted). Still, where a party on appeal makes only a general exception to the denial of a Rule 41(b) motion and fails to direct the attention of this Court to any contested findings of fact or supporting evidence, that party does not bring up for review the findings of fact or the evidence on which those findings are based. *Miles*, 167 N.C. App. at 35, 604 S.E.2d at 332 (citations omitted). Where the trial court's findings

of fact are not brought up for our review, "the appeal presents the question of whether the findings support the court's inferences, conclusions of law, judgment, and whether error appears on the face of the record." *Id.*

"To state a claim for breach of contract, the complaint must allege that a valid contract existed between the parties, that defendant breached the terms thereof, the facts constituting the breach, and that damages resulted from such breach." *Jackson v. Associated Scaffolders & Equip. Co.*, 152 N.C. App. 687, 692, 568 S.E.2d 666, 669 (2002) (citation omitted). "[W]here the cause of action is a failure to construct in a workmanlike manner . . ., plaintiff[s'] pleading should allege wherein the workmanship was faulty . . . ." *Cantrell v. Woodhill Enterprises, Inc.*, 273 N.C. 490, 497, 160 S.E.2d 476, 481 (1968) (citation omitted).

Here, the parties do not dispute the existence of a valid contract to construct a sea wall. Plaintiffs brought an action for breach of contract alleging "the Defendant failed to construct the rip-rap wall in a workmanlike and satisfactory manner which has caused distress, erosion and subsidence problems . . . ."

At the conclusion of the presentation of the evidence, the trial court made the following findings:

13. In the construction of the sea wall, driving the stakes through the fabric material into the sloping soil, and then placing the heavier stones upon the fabric material, as well as the action of the waves and heavy rain upon the fabric cloth with holes punched in it for these stakes, will and did allow soil to pass through the sea wall, and washing and erosion to occur.

14. The fabric on the sea wall, rather than being laid parallel to the White Oak River, should have been laid perpendicular to the shore line, or vertically, to be laid in a workmanlike manner. Further driving the stakes through the fabric constituted construction in less than a workmanlike manner.

Based on these findings the trial court concluded

> [t]he actual construction of this sea wall in accordance with the design by the defendant Davis was not in a workmanlike manner. The stakes driven through the sea wall, particularly through the filter fabric, and the horizontal placement of that filter fabric, ultimately allowed soil and sand to pass through the fabric and erosion to occur.

We hold that the trial court's findings support its conclusion that defendant's construction of the sea wall was constructed in an unworkmanlike manner, which allowed soil and sand to pass through the fabric and erosion of plaintiff Stanley's land to occur. Therefore, this assignment of error is overruled.

IV

[3] Defendant next argues the trial court erred in awarding Plaintiff Stanley damages of $9,243.75. We disagree.

"The trial court's authority to award damages in a breach of contract action is well established." *Southern Bldg. Maintenance v. Osborne*, 127 N.C. App. 327, 331, 489 S.E.2d 892, 895 (1997); *see also Terry's Floor Fashions, Inc. v. Crown General Contractors, Inc.*, 184 N.C. App. 1, 14-15, 645 S.E.2d 810, 819 (2007) (defendant's argument contesting a trial court's award overruled where, in a non-jury trial, the trial court was charged with determining the credibility and weight of the evidence and had competent evidence to support its award). The party claiming these damages bears the burden of proving its losses with reasonable certainty. *Olivetti Corp. v. Ames Business Systems, Inc.*, 319 N.C. 534, 546, 356 S.E.2d 578, 585 (1987) (citation omitted). While the reasonable certainty standard requires something more than "hypothetical or speculative forecasts," it does not require absolute certainty. *McNamara v. Wilmington Mall Realty Corp.*, 121 N.C. App. 400, 407-08, 466 S.E.2d 324, 329 (1996) (citation omitted).

And, "[w]hile the amount of damages is ordinarily a question of fact, the proper standard with which to measure those damages is a question of law. Such questions are, therefore, fully reviewable by this Court." *Olivetti*, 319 N.C. at 548, 356 S.E.2d at 586-87 (citations omitted).

Plaintiffs presented testimony from expert witness Engineer Eddy regarding the cost of stabilizing the sea wall. Eddy testified there was more than one repair option, but regardless of what option plaintiffs chose, the underlying fabric in the sea wall would need to be removed because it was inadequate to retain the soil while allowing any water coming off plaintiffs' properties to pass through.

Eddy testified that in his eighteen year practice he has designed stabilization projects and solicited bids from contractors to carry out the construction. When asked about his familiarity with construction costs for a repair project of the plaintiffs' lots, Eddy responded "[he]

[has] construction projects all over the state where [he] has sought bids or negotiated contracts with contractors and [has] been responsible for helping owners sort out among the bids and selecting contractors to do work of this nature." And, in his opinion, the cost to repair plaintiffs' lots is $20,000 per lot. Eddy testified that of the $20,000, approximately $5,000 would be for moving soil while the repair cost remainder accounted for time and materials.

The trial court found the estimated cost of repair to bring the sea wall to a properly constructed and functioning sea wall would be $20,000 per lot, including $5,000 for additional soil grading between the plaintiffs' lots. But, the original cost of the sea wall to each plaintiff was $9,243.75. From this the trial court concluded that "in considering the measure of damages in this matter that the cost of repair of $20,000 per lot would be inappropriate in that it includes design, grading and work for which this defendant and these plaintiffs did not originally contract." The trial court concluded "the proper award of damages to plaintiff Stanley should be $9243.75[,]" the amount Stanley contracted to build the sea wall.

We note that as this was a non-jury trial the trial court was charged with determining the credibility and weight of the evidence presented, and we hold there was competent evidence admitted to support a $9,243.75 award to Stanley. Accordingly, this assignment of error is overruled.

Affirmed.

Judges HUNTER and JACKSON concur.

IN THE MATTER OF: S.D.R.

No. COA07-1481

(Filed 5 August 2008)

1. Obstruction of Justice— juvenile—sufficiency of evidence

There was sufficient evidence for the trial court to find a juvenile delinquent for resisting, delaying, and obstructing an officer during an investigation of missing cash at an Extension Service office.

2. Search and Seizure— consent to search body—inside of mouth

A juvenile's consent to a search of his body extended to his mouth where the officer was investigating missing money, defendant consented to a search, defendant became unresponsive to the officer's questions and would not make eye contact, and the officer saw something in defendant's mouth.

3. Burglary and Unlawful Breaking or Entering— juvenile— money taken from purse in office

There was sufficient evidence to support a charge of felonious breaking or entering and larceny and to find a juvenile delinquent where defendant was sitting in a library across the hall from the office of an Extension Service director, she left her office for about five minutes and was greeted by defendant standing in her office, defendant did not have permission to be in the office, the director discovered that her pocket book had been tampered with, and there was money missing. The director's office is in a public building, but her job functions do not require public access to her office, so that there was no implied consent to the juvenile's entry into her office; even if there had been, stealing cash from the director's purse voids that consent ab initio.

4. Larceny— money taken from purse—evidence sufficient

The evidence was sufficient to deny a juvenile's motion to dismiss a charge of felonious larceny pursuant to a breaking or entering where defendant was seen across the hall from an office, an occupant of the office left for about five minutes and returned to find defendant in her office, defendant did not have permission to be in the office, and her purse had been tampered with and money was missing.

Appeal by defendant from disposition order entered 6 July 2007 by Judge Kevin Bridges in Anson County District Court. Heard in the Court of Appeals 14 May 2008.

Attorney General Roy Cooper, by Assistant Attorney General Allison A. Angell, for the State.

James N. Freeman, Jr., for defendant.

ELMORE, Judge.

S.D.R. (defendant), a juvenile, appeals his finding of delinquency for resisting, delaying, and obstructing an officer, and felonious

breaking and entering and larceny. After a careful review of the record, we find no error in the trial court's finding of delinquency for resisting, delaying, and obstructing an officer, and felonious breaking and entering and larceny.

At approximately noon on 11 April 2007, defendant was brought to the Anson Cooperative Extension Service in Wadesboro (the Extension) by the Extension's community service assistant, Betty Garris. Defendant was a participant in the community service and restitution after school program. Garris directed defendant to the Extension's library, brought him lunch, turned on the TV, and directed defendant to stay in the library until she returned from a meeting at 1:00 p.m. On the day in question, the building was nearly vacant.

The library was located directly across the hall from the office of Janine Rywak, the Anson County Extension Director. Rywak observed defendant in the library across from her office for approximately forty-five minutes. Rywak testified that she was not familiar with defendant before this day, but that when she returned from a brief trip to the restroom, defendant greeted her in her office doorway. Rywak later discovered that her pocketbook had been unzipped and the enclosed wallet had been opened.

After searching her pocket book in the presence of several other individuals, Rywak discovered that all of her cash was missing. The total sum of the cash missing from the purse was $140.00 or $160.00. When asked, defendant denied taking the money. Shortly thereafter, an officer from the Wadesboro Police Department arrived to investigate. The officer requested that defendant consent to a search of his person, and defendant consented to the search without protest. After patting defendant down and searching his shoes, the officer proceeded to question defendant. At this point, defendant became unresponsive, and did not make eye contact with the officer.

The officer noticed what appeared to be something green in defendant's mouth. The officer asked defendant to open his mouth; defendant did not respond. The trial court received evidence that defendant immediately attempted to swallow. After requesting that defendant open his mouth, the officer placed his hand on defendant's chin in an attempt to prevent swallowing. Defendant began to struggle with the officer. The officer, defendant, and another individual fell to the floor during the course of the struggle. There was evidence presented at trial that during the physical confrontation, money emerged from defendant's mouth, and defendant then proceeded to eat the money.

[1] Defendant first contends that the trial court erred in finding him delinquent for resisting, delaying, and obstructing an officer because there was not sufficient evidence to find defendant delinquent on this charge.

> In reviewing a challenge to the sufficiency of evidence, it is not our duty to weigh the evidence, but to determine whether there was substantial evidence to support the adjudication, viewing the evidence in the light most favorable to the State, and giving it the benefit of all reasonable inferences.

In re J.F.M. & T.J.B., 168 N.C. App. 143, 146, 607 S.E.2d 304, 306 (2005) (quotations and citations omitted).

"Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Stone*, 323 N.C. 447, 451, 373 S.E.2d 430, 433 (1988) (quotations and citations omitted). Furthermore, "[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." *Id.* at 452, 373 S.E.2d at 433 (citation omitted). The issue of resisting, delaying, and obstructing an officer is addressed by N.C. Gen. Stat. § 14-223. That statute provides that "[i]f any person shall willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office, he shall be guilty of a Class 2 misdemeanor." N.C. Gen. Stat. § 14-223 (2007). "The conduct proscribed under G.S. 14-223 is not limited to resisting an arrest but includes any resistance, delay, or obstruction of an officer in the discharge of his duties." *State v. Lynch*, 94 N.C. App. 330, 332, 380 S.E.2d 397, 398 (1989). Because the State provided substantial evidence to support the adjudication, defendant's contention is without merit.

The State, at trial and on appeal, relies upon the following evidence: (1) the officer was investigating Rywak's missing cash; (2) the officer was on duty and in uniform at the time of the investigation; (3) defendant consented to a search by the officer; (4) defendant refused to comply when the officer asked him to open his mouth; (5) defendant attempted to swallow what he had in his mouth; and (6) defendant willfully engaged in a physical confrontation with the officer and attempted to flee.

[2] Defendant further argues that he consented to a search of his person, which did not extend to the interior of his mouth. Consent searches are "recognized as a special situation excepted from the

warrant requirement, and a search is not unreasonable within the meaning of the Fourth Amendment when lawful consent to the search is given." *State v. Smith*, 346 N.C. 794, 798, 488 S.E.2d 210, 213 (1997) (citation omitted). "[T]he question of whether consent to a search was in fact 'voluntary' or was the product of duress or coercion, expressed or implied, is a question of fact to be determined from the totality of all the circumstances." *State v. Motley*, 153 N.C. App. 701, 707, 571 S.E.2d 269, 273 (2002) (quotations and citations omitted) (alteration in original).

> In order for a seizure to pass constitutional muster, the officer must have reasonable suspicion to believe criminal activity was afoot. Factors relevant in determining whether a police officer had reasonable suspicion include [among others] . . . nervousness of an individual. . . . Also, [t]he facts known to the officers at the time of the stop [or seizure] must be viewed through the eyes of a reasonable and cautious police officer on the scene, guided by experience and training.

In re I.R.T., 184 N.C. App. 579, 585, 647 S.E.2d 129, 134-35 (2007) (quotations and citations omitted) (alteration in original).

In the present case, the officer was investigating a potential larceny. When the officer requested a search, defendant consented. The officer began to question defendant after the search. The trial court received evidence that defendant became unresponsive to the officer's questions and would not make eye contact. Furthermore, there was evidence that the officer observed something in defendant's mouth. The police officer had reasonable suspicion that criminal activity was afoot. Reviewing this evidence in the light most favorable to the State, we must agree with the State's contention that this evidence was sufficient to justify the adjudication.

[3] Defendant next contends that the trial court erred in denying his motion to dismiss the charge of felonious breaking and entering and larceny and then finding defendant delinquent on this charge. "To survive a motion to dismiss, the State must present substantial evidence of each element of the charged offenses sufficient to convince a rational trier of fact beyond a reasonable doubt of defendant's guilt." *In re T.C.S.*, 148 N.C. App. 297, 301, 558 S.E.2d 251, 253 (2002) (quotations and citations omitted). "The evidence must be considered in the light most favorable to the State, and the State is entitled to receive every reasonable inference of fact that may be drawn from the evidence."

In re Brown, 150 N.C. App. 127, 129, 562 S.E.2d 583, 585 (2002) (citation omitted). As previously stated, "[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." *Stone* at 452, 373 S.E.2d at 433 (citation omitted). The issue of felonious breaking or entering is addressed by N.C. Gen. Stat. § 14-54(a). That statute provides that "[a]ny person who breaks or enters any building with intent to commit any felony or larceny therein shall be punished as a Class H felon." N.C. Gen. Stat. § 14-54(a) (2007). " '[B]uilding' shall be construed to include any . . . structure designed to house or secure within it any activity or property." N.C. Gen. Stat. § 14-54(c) (2007). "To support a conviction for felonious breaking and entering under [N.C. Gen. Stat.] § 14-54(a), there must exist substantial evidence of each of the following elements: (1) the breaking or entering, (2) of any building, (3) with the intent to commit any felony or larceny therein." *State v. Jones*, 188 N.C. App. 562, 564-65, 655 S.E.2d 915, 917 (2008) (quotations and citations omitted) (alteration in original).

The State relies upon the following evidence: (1) Rywak observed defendant sitting in the library across the hall from her office; (2) Rywak left her office for the restroom; (3) approximately five minutes after visiting the restroom, Rywak returned and was greeted by defendant, who was standing in her office; (4) defendant had not been given permission to enter Rywak's office; and (5) upon entering her office, Rywak discovered that her pocketbook had been tampered with and money was missing.

Defendant argues that there was no evidence that he committed a breaking or entering, even if he entered Rywak's office, because Rywak's office was held open to the public. We disagree.

"[A]n entry with consent of the owner of a building, or anyone empowered to give effective consent to entry, cannot be the basis of a conviction for felonious entry under G.S. 14-54(a)." *State v. Boone*, 297 N.C. 652, 659, 256 S.E.2d 683, 687 (1979). However, "there may be occasions when subsequent acts render the consent void *ab initio*, as where the scope of consent as to areas one can enter is exceeded . . . ." *Id.* at 659 n.3, 256 S.E.2d at 687 n.3 (citation omitted). We held in *State v. Winston* that the rule from *Boone* applies to N.C. Gen. Stat. § 14-54(b) "insofar as it discusses the meaning of 'entry.' " 45 N.C. App. 99, 102, 262 S.E.2d 331, 333 (1980).

In *Winston*, the "[d]efendant was convicted of wrongfully entering an office in the Cumberland County Courthouse . . ., a violation of

N.C.G.S. 14-54(b)." *Id.* at 100, 262 S.E.2d at 332. The office was "occupied by Irene Russell, assistant clerk, who handle[d] adoptions, foreclosures and 'anything anybody need[ed her] to do.' " *Id.* A corridor connected the office "to a large hallway in front of the civil division offices of the clerk. There [were] no signs indicating that either the corridor or the office [was] private or that the general public should 'keep out.' " *Id.* While Russell was in the neighboring break room, the defendant entered her office, although the door was partially closed. *Id.* When asked what he wanted, the defendant replied that "he was looking for the public defender's office and was going to leave a note for him. The public defender's office [was] in the courthouse." *Id.* The defendant did not have explicit permission to enter Russell's office and took nothing from it. *Id.*

In our analysis, we stated that "the evidence indicates that members of the general public do use the office." *Id.* at 101, 262 S.E.2d at 333. The office

> [was] used to handle adoptions, foreclosures and other business of the clerk of court, a public official. These functions *necessarily require* the general public to have access to the office . . . . It was open for public business when entered by defendant between 1:00 and 2:00 p.m. The general public, including the defendant, had implied consent and invitation to enter the office at that time.

Id. (citation omitted) (emphasis added). We reversed the trial court's judgment because the defendant had implied consent to enter Russell's office and therefore could not be guilty of wrongful entry. We noted that there was no evidence that "the defendant after entry committed acts sufficient to render the implied consent void *ab initio*." *Id.* at 102, 262 S.E.2d at 333.

The case at hand is distinguishable from *Winston* in two important ways. First, Rywak's office was not held out to the public in the same way that Irene Russell's was. Although the Extension is a public building that houses a public agency, just as the Cumberland County Courthouse is a public building that houses public agencies, the evidence does not show that Rywak's job functions necessarily require the general public to have access to her office or that members of the general public use Rywak's office. Rywak testified,

> We have people come to our offices by appointment and invitation only. It is not open to regular foot traffic. Anybody just can't come into the building like they come and sit in on a courtroom

> and listen to the hearing. You've go [sic] to—to actually come in to our offices, you need to either have an appointment with us or you need to be invited."

She further explained that when people walk into the building "just out of the blue" saying, "I need somebody to look at my tomato plants," then the receptionist notifies the appropriate agent and either sends the visitor back to the agent's office or the agent comes to the lobby and escorts the visitor back to the agent's office. For Rywak to carry out the function of the Anson County Extension Director, it is not necessary for the general public to have access to her office, nor does the general public have actual access to her office.

Second, even if defendant did have implied consent to enter Rywak's office because it was necessary for the general public to have access to her office, that consent was void *ab initio*. Stealing cash from Rywak's purse certainly constitutes an act sufficient to render implied consent void *ab initio* as contemplated by *Winston* and *Boone*. There was no evidence that the defendant in *Winston* did anything other than wander into the wrong office. Here, the evidence showed that defendant was seated in the library and from that seat he could see Rywak's office. Only after she left her office did defendant exit the library and enter the office. At that point, defendant removed the cash from Rywak's purse. Defendant's situation here is more similar to that of the defendant in *State v. Brooks*, who "took action which rendered [his] consent void *ab initio* when he went into areas of the firm that were not open to the public so that he could commit a theft . . . ." 178 N.C. App. 211, 215, 631 S.E.2d 54, 57 (2006).

In *Brooks*, the defendant was convicted of felonious breaking or entering and felonious larceny in a law office. *Id.* at 212, 631 S.E.2d at 56. This Court held that the defendant had implied consent to enter the reception area of the law office, which was open to the public. *Id.* at 215, 631 S.E.2d at 57. The defendant testified that he distracted a secretary while his accomplice stole an attorney's day planner and wallet from the attorney's office. *Id.* at 213, 631 S.E.2d at 56. We held that the defendant had the firm's implied consent to enter the reception area of the "law office[,] which was open to members of the public seeking legal assistance" and "where members of the public were generally welcome . . . ." *Id.* at 215, 631 S.E.2d at 57. However, this consent was rendered "void *ab initio* when he went into areas of the firm that were not open to the public so that he could commit a theft . . . ." *Id.*

Accordingly, we hold that the trial court's denial of defendant's motion to dismiss was proper because the State presented substantial evidence of a felonious breaking and entry sufficient to convince a rational trier of fact beyond a reasonable doubt of defendant's guilt.

[4] Defendant next contends that there was no felonious breaking or entering, and therefore the felonious larceny charge should have been dismissed. Defendant further argues that there was insufficient evidence to prove that defendant committed a larceny. As stated above, the State presented substantial evidence of each element of the charged offenses sufficient to convince a rational trier of fact beyond a reasonable doubt that defendant did commit a felonious breaking or entering. The issue of felonious larceny is addressed by N.C. Gen. Stat. § 14-72(b). That statute provides that "[t]he crime of larceny is a felony, without regard to the value of the property in question, if the larceny is . . . [c]ommitted pursuant to a violation of G.S. 14-51, 14-53, 14-54, 14-54.1, or 14-57." N.C. Gen. Stat. § 14-72(b) (2007). This Court has held that "[t]o convict a defendant of larceny, the State must show that the defendant: (1) took the property of another; (2) carried it away; (3) without the owner's consent; and (4) with the intent to deprive the owner of the property permanently." *State v. Watson*, 179 N.C. App. 228, 245-46, 634 S.E.2d 231, 242 (2006) (quotations and citations omitted). The State's evidence tended to show that: (1) Rywak observed defendant sitting in the library across the hall from her office; (2) Rywak left her office for the restroom; (3) approximately five minutes after visiting the restroom, Rywak returned and was greeted by defendant, who was standing in her office; (4) defendant had not been given permission to enter Rywak's office; and (5) upon entering her office, Rywak discovered that her pocketbook had been tampered with and money was missing. At trial and on appeal, the State presented substantial evidence of a felonious larceny sufficient to convince a rational trier of fact beyond a reasonable doubt of defendant's guilt. The trial court's denial of the motion to dismiss was therefore proper.

After a thorough review of the briefs and record, we find no error.

No error.

Judges McGEE and JACKSON concur.

STATE OF NORTH CAROLINA v. MARIO DEANDRE TAYLOR, DEFENDANT

No. COA07-391

(Filed 5 August 2008)

Kidnapping— during robbery—insufficient evidence of separate offense

The evidence was not sufficient to support convictions for second-degree kidnapping where defendant and others entered a McDonald's, made the patrons and workers lie down, and took the manager to the back to open the safe. The evidence establishes only the elements of robbery with the one added component of the victims being required to lie down, which was a mere technical asportation.

Appeal by defendant from judgments entered 14 July 1999 by Judge Donald Jacobs in Durham County Superior Court. Heard in the Court of Appeals 30 October 2007.

Attorney General Roy Cooper, by Assistant Attorney General Charlie E. Reece, for the State.

Jarvis John Edgerton, IV for defendant-appellant.

GEER, Judge.

Defendant Mario Deandre Taylor appeals from his convictions of one count of robbery with a dangerous weapon and 10 counts of second degree kidnapping. Defendant primarily challenges the trial court's denial of his motion to dismiss his second degree kidnapping charges, arguing that the State failed to produce sufficient evidence of confinement, restraint, or removal beyond that which was inherent in the robbery with a dangerous weapon. Because we agree with defendant that the State failed to meet its burden, as required by *State v. Fulcher*, 294 N.C. 503, 243 S.E.2d 338 (1978), and its progeny, of establishing an act of confinement, restraint, or removal separate and apart from the robbery, we vacate defendant's second degree kidnapping convictions.

Facts

The State's evidence tended to establish the following facts. On the evening of 14 February 1998, defendant and another man entered a McDonald's restaurant wearing masks. Defendant, who

held a 9mm pistol, ordered everyone to lie face down on the floor. When a cashier remained standing, defendant pointed his gun at her and again ordered her to lay down on the floor. Defendant and the other man took the restaurant manager to the back of the restaurant where the safe was located and ordered her to open it. A third man, who had subsequently entered the restaurant, remained in the lobby watching the customers and employees. The cashier, however, ran out of the restaurant.

After defendant and the second man finished collecting the cash from the safe, the three men ran out of the restaurant through a side door. The cashier saw the men leave the restaurant and identified defendant at trial as one of the perpetrators because he had been wearing the same clothes a few days earlier when he came into the restaurant to fill out an application.

Defendant was charged with one count of robbery with a dangerous weapon and 13 counts of second degree kidnapping. During the trial, the court dismissed two of the second degree kidnapping charges. The court dismissed the count relating to the manager because her asportation to the back of the restaurant to open the safe was "part and parcel" of the robbery. With respect to the second count, the court found that no evidence had been presented at all as to that alleged victim.

The jury convicted defendant of robbery with a dangerous weapon and 10 counts of second degree kidnapping; it acquitted him of one count of second degree kidnapping. At sentencing, the trial court made findings regarding aggravating and mitigating factors. As an aggravating factor, the court found that defendant had joined with more than one other person in committing the robbery with a dangerous weapon and the kidnapping, but had not been indicted for conspiracy. In mitigation, the court found that defendant had a support system in the community and that he had voluntarily cooperated with the police. The court concluded that the aggravating factors outweighed the mitigating factors and, therefore, imposed aggravated sentences of (1) 120 to 153 months imprisonment for the robbery with a dangerous weapon conviction, (2) 92 to 110 months for one of his kidnapping convictions (running consecutively), (3) 92 to 110 months for a second kidnapping conviction (running consecutively), and (4) 92 to 110 months for the remaining eight kidnapping convictions (running concurrently with the second kidnapping sentence). Each of defendant's kidnapping sentences included a 60-month firearm enhancement pursuant to N.C. Gen. Stat. § 15A-1340.16(A) (2007).

Defendant appealed in open court on 14 July 1999. While defendant was granted appellate counsel, his appeal did not progress for six years. We granted his petition for writ of certiorari on 21 February 2006.

Discussion

Defendant's primary argument on appeal is that the trial court erred in denying his motion to dismiss the second degree kidnapping charges. Defendant maintains that the State presented insufficient evidence of confinement, restraint, or removal separate from that which was inherent in the robbery with a dangerous weapon and, therefore, he cannot be convicted of both offenses under *State v. Fulcher*, 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978).

In *Fulcher*, our Supreme Court stated:

> 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.

The Supreme Court further clarified the "separate act" requirement in *State v. Irwin*, 304 N.C. 93, 103, 282 S.E.2d 439, 446 (1981), holding that removal of an employee at knifepoint from the front to the rear of a pharmacy to open the safe and obtain drugs was "an inherent and integral part of the attempted armed robbery," and, therefore, the removal was legally insufficient to convict the defendant of a separate charge of kidnapping. The Court also noted that the defendant did not expose the victim "to greater danger than that inherent in the armed robbery itself, nor [was the victim] subjected to the kind of danger and abuse the kidnapping statute was designed to prevent." *Id.* As a result, the Court concluded that the defendant's removal of the victim was "a mere technical asportation" requiring dismissal of the kidnapping charge. *Id.*

The Court more recently addressed this issue in *State v. Ripley*, 360 N.C. 333, 626 S.E.2d 289 (2006). In *Ripley*, the Court held:

> [A] trial court, in determining whether a defendant's asportation of a victim during the commission of a separate felony offense constitutes kidnapping, must consider whether the asportation was an inherent part of the separate felony offense, that is, whether the movement was "a mere technical asportation." If the asportation is a separate act independent of the originally committed criminal act, a trial court must consider additional factors such as whether the asportation facilitated the defendant's ability to commit a felony offense, or whether the asportation exposed the victim to a greater degree of danger than that which is inherent in the concurrently committed felony offense.

Id. at 340, 626 S.E.2d at 293-94.

Viewed in the light most favorable to the State, the evidence in this case indicates that defendant entered the McDonald's carrying a handgun, which he pointed at the customers and employees as he ordered them to lie face down on the floor. Defendant and another man found the manager and took her to the back of the restaurant to open the safe while a third man stood guard over the people on the floor.

The State contends that the robbery of the McDonald's occurred at the safe located in the back office of the restaurant, and, therefore, the restraint of the customers and employees in the lobby was unnecessary to the commission of the robbery. We, however, consider the present case to be controlled by *State v. Beatty*, 347 N.C. 555, 495 S.E.2d 367 (1998), in which the Supreme Court held that kidnapping charges, based on similar circumstances, should have been dismissed.

In *Beatty*, a group of men approached the owner of a restaurant outside an open door to the restaurant, put a gun to his head, and told him to go inside and open the safe. *Id.* at 557, 495 S.E.2d at 368. Once inside, the robbers saw two restaurant employees. One employee, Poulos, "was on his knees washing the floor at the front," while the second, Koufaloitis, "stood three to four feet from the safe cleaning the floor in the back." *Id.*, 495 S.E.2d at 368-69. At that point, "[o]ne robber put a gun to Poulos' head and stood beside him during the robbery. An unarmed robber put duct tape around Koufaloitis' wrists and told him to lie on the floor." *Id.*, 495 S.E.2d at 369.

The Supreme Court upheld the kidnapping conviction with respect to Koufaloitis, but not as to Poulos. *Id.* at 560, 495 S.E.2d at 370. The Court explained that "[w]hen defendant bound [Koufaloitis'] wrists and kicked him in the back, he increased the victim's helplessness and vulnerability beyond what was necessary to enable him and his comrades to rob the restaurant." *Id.* at 559, 495 S.E.2d at 370. On the other hand, "[w]ith regard to victim Poulos, the evidence shows only that one of the robbers approached the victim, pointed a gun at him, and stood guarding him during the robbery. The victim did not move during the robbery, and the robbers did not injure him in any way." *Id.* at 560, 495 S.E.2d at 370. The Court explained further: "The only evidence of restraint of this victim was the threatened use of a firearm. This restraint is an essential element of robbery with a dangerous weapon under N.C.G.S. § 14-87, and defendant's use of this restraint exposed the victim to no greater danger than that required to complete the robbery with a dangerous weapon." *Id.*

In this case, as in *Beatty*, the robbery took place at a safe in the back of a restaurant, while the victims were restrained in the front by another robber guarding them with a gun, without any of the victims being bound or injured in any way. Because the restaurant's occupants were not bound, once the robbery was complete and the perpetrators had run out of the restaurant, the occupants were not further restrained. *Compare State v. Morgan*, 183 N.C. App. 160, 167, 645 S.E.2d 93, 99 (2007) (upholding kidnapping conviction when "[t]he evidence shows that the three robbers bound the victims with duct tape, took money and cellular telephones, and left the victims bound when they left the hotel room"), *appeal dismissed and disc. review denied*, 362 N.C. 241, 660 S.E.2d 536 (2008).

The sole distinction between this case and *Beatty* is that the victims were required to lie down on the floor. In *Ripley*, 360 N.C. at 340, 626 S.E.2d at 294 (quoting *Irwin*, 304 N.C. at 103, 282 S.E.2d at 446), however, our Supreme Court concluded:

> [T]he asportation of the [victims] from one side of the motel lobby door to the other was not legally sufficient to justify defendant's convictions of second-degree kidnapping. The moment defendant's accomplice drew his firearm, the robbery with a dangerous weapon had begun. The subsequent asportation of the victims was "a mere technical asportation" that was an inherent part of the robbery defendant and his accomplices were engaged in.

We do not believe that defendant's order, at gunpoint, that the victims lie down on the floor is materially different than the *Ripley* robbers' order, also at gunpoint, that the victims move from outside the door to the lobby to inside the door. Accordingly, under *Ripley*, we hold that the act of requiring the victims to lie down is a mere technical asportation insufficient to sustain a charge of kidnapping separate from the robbery.

This conclusion is supported by this Court's decision in *State v. Ross*, 133 N.C. App. 310, 515 S.E.2d 252 (1999). In *Ross*, the record indicated "that, upon entering the apartment, [a robber] pointed the shotgun at [the two victims] and ordered them to step away from the apartment door and get on the floor." *Id.* at 313, 515 S.E.2d at 254. Although one of the victims backed from the living room into the kitchen before lying down, the Court held that the evidence was insufficient to establish a removal separate from the robbery when the robbers did not order the victim to move to the kitchen, but rather only ordered him to "back up and get on the floor." *Id.* The evidence of restraint or removal was no greater in this case.

The State, however, points to *State v. Brice*, 126 N.C. App. 788, 486 S.E.2d 719 (1997), a decision rendered a year before *Beatty*. In *Brice*, one defendant was in the bedroom robbing two male victims, while a second robber was outside the house demanding money from another male victim. A third robber was in the living room with the female victim. The third robber threatened the woman with a gun and ordered her to lie face down on the floor, causing her to become ill. *Id.* at 790, 486 S.E.2d at 720. This Court explained in *Ross* that "[i]n *Brice*, our Court held that terrorizing the woman in the living room was not an inherent part of the robbery taking place in the bedroom." *Ross*, 133 N.C. App. at 314, 515 S.E.2d at 255. As the Court acknowledged in *Brice*, this terrorization was not necessary to carry out the robbery of either the victims in the bedroom or the victim outside the house. *Brice*, 126 N.C. App. at 791, 486 S.E.2d at 720. We believe, however, that this case more closely resembles *Beatty* and *Ross*.

State v. Davidson, 77 N.C. App. 540, 335 S.E.2d 518 (1985), *disc. review denied*, 315 N.C. 393, 338 S.E.2d 882 (1986), also relied upon by the State, is likewise inapposite. In *Davidson*, the defendants entered a retail store, and, at gunpoint, took the store's occupants from the front of the store to a dressing room in the rear of the store; bound their heads, arms, and legs; took their valuables; and then took cash and merchandise from the store. *Id.* at 541, 335 S.E.2d at 519. In upholding the kidnapping convictions, this Court concluded:

"Removal of the victims to the dressing room [where none of the stolen property was kept] thus was not an inherent and integral part of the robbery." *Id.* at 543, 335 S.E.2d at 520. The "removal" was the critical factor.

The State, however, points to this Court's statement in *Davidson* that the removal "was a separate course of conduct designed to remove the victims from the view of passersby who might have hindered the commission of the crime." *Id.* The State contends that the conduct in this case necessarily must have been for the same purpose. In making this argument, the State overlooks the fact that there must still have been "a separate course of conduct." *Id.*

In this case, in contrast to *Davidson*, no removal occurred. The only conduct presented by the State as being apart from the robbery was the guarding of victims with a gun while face down on the floor. While the removal of the victims was not necessary to the robbery in *Davidson*, both the use of the firearm and the presence of the individual victims were necessary to the robbery with a dangerous weapon conviction. Under N.C. Gen. Stat. § 14-87(a) (2007), a person is guilty of robbery with a dangerous weapon if that person, "having in possession or with the use or *threatened use of any firearms* or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another or *from any place of business*, residence or banking institution or any other place *where there is a person or persons in attendance* . . . ." (Emphasis added.) Consistent with the statute, the State's indictments in this case alleged the threatened use of firearms and the taking of McDonald's property while the alleged kidnapping victims were present.

In sum, the State's evidence of kidnapping established only the elements of the crime of robbery with a dangerous weapon with the lone added component of the victims' being required to lie down on the floor. Under *Ripley*, that lone act is a mere technical asportation. As a result, unlike *Davidson*, the State presented no additional evidence of restraint, confinement, or removal beyond that necessary to commit the robbery.

We, therefore, hold that the evidence in the record is insufficient to support defendant's convictions for second degree kidnapping under *Fulcher*, and the trial court should have granted defendant's motion to dismiss those charges. Because we are vacating defendant's second degree kidnapping convictions, we do not address de-

fendant's additional arguments relating to those convictions. Defendant does not make any arguments on appeal regarding his robbery with a dangerous weapon conviction and thus, as to that conviction, we find no error.

Vacated in part; no error in part.

Judges WYNN and STEELMAN concur.

IN RE: E.S.

No. COA07-1054

(Filed 5 August 2008)

Criminal Law— transfer of juvenile for trial as adult—review—abuse of discretion standard

A superior court reviewing a district court's transfer of a juvenile for trial as an adult is limited to review for abuse of discretion and may not, as here, reweigh the evidence, decide which factors are more important, and reverse the district court on that basis.

Appeal by the State from order entered 24 March 2006 by Judge Ernest B. Fullwood in New Hanover County Superior Court. Heard in the Court of Appeals 7 February 2008.

Attorney General Roy Cooper, by Assistant Attorneys General Chris Z. Sinha and Kathleen U. Baldwin, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Matthew D. Wunsche, for juvenile-appellee.

GEER, Judge.

The State appeals from the superior court's order concluding that the district court erred in transferring E.S.'s juvenile delinquency case to superior court and remanding the case to district court. We agree with the State that the superior court effectively engaged in de novo review when it should have limited its review to a determination whether the district court abused its discretion by transferring the case. We, therefore, reverse.

Facts

On 13 January 2005, the State filed four juvenile petitions in New Hanover County District Court alleging that the juvenile was delinquent. The first petition asserted that the juvenile had committed first degree rape in that he had engaged in vaginal intercourse by force and against the will of the alleged victim and was aided and abetted by another person. The second petition claimed that the juvenile committed first degree kidnapping by unlawfully confining, restraining, and removing the alleged victim from one place to another without her consent and for the purpose of committing first degree rape. The third petition alleged that the juvenile committed felony breaking and entering by unlawfully, willfully, and feloniously breaking and entering a home under construction with the intent to commit a felony inside the building. The final petition alleged that the juvenile committed common law conspiracy by conspiring with two other individuals to commit first degree rape. On the date of the alleged offenses, 11 January 2005, the juvenile was 15 years old.

On 31 March 2005, the State moved to transfer the case from district court to superior court so that the juvenile could be tried as an adult. District Court Judge Shelly S. Holt first held a probable cause hearing on 31 May 2005 and, based on the evidence presented, found probable cause that the juvenile had committed the offenses alleged in the petitions. On 24 June 2005, Judge Holt conducted a hearing on the State's motion to transfer.

In support of its motion to transfer, the State presented expert testimony of a supervisor at the Department of Juvenile Justice, who recommended that the case be transferred given the violence of the alleged acts, the number of individuals involved, and the nature of the alleged crimes. The juvenile offered expert testimony from a former director of a juvenile sex offender treatment program, who had evaluated the juvenile and believed that resources were available within the juvenile system to treat and sanction the juvenile.

On 24 June 2005, Judge Holt entered an order stating:

> Having considered all evidence presented regarding the factors in G.S. 7B-2203(b), the Court finds that the protection of the public and the needs of the juvenile:
>
> . . . .
>
> . . . will be served by transfer of the case to Superior Court, and the case should be transferred for the following reasons: . . .

> This juvenile will be 16 in three months. There is a codefendant charged as an adult who is not much older than this juvenile and they should be tried in the same court. This juvenile has tested in the average to high average range, and is found in his recent psychological evaluation to have average to above average cognitive abilities. There is nothing about his intellectual functioning or mental capacity that lessens his culpability.
>
> These alleged offences [sic] were committed in an aggressive, violent, premeditated and willful manner. The evidence presented showed that the alleged victim was resistant to the advances made by the juvenile and the codefendant, that she repeatedly told them to stop and attempted to get away from the juvenile and his codefendant and that she was intimidated by the fact that this juvenile was with two other boys.
>
> The offenses that this juvenile is charged with are very serious and the protection of the public requires that he be tried as an adult along with his codefendant. All of these factors outweigh the lack of a prior juvenile record for the juvenile, the fact that he has a supportive family and the fact that the juvenile court has not previously attempted to work with this juvenile.

Based on these findings, Judge Holt transferred the case to New Hanover County Superior Court. The juvenile timely appealed to superior court from Judge Holt's decision.

On appeal, the superior court found, in an order entered on 24 March 2006, that the district court abused its discretion in transferring the case:

> The Court having reviewed the file, evidence, and the transcripts of the transfer hearing as well as having heard arguments by counsel, hereby finds that there has been an abuse of discretion as defined in N.C.G.S. §7B-2603 in the transfer of this matter from juvenile court to superior court under circumstances where:
>
> a. The juvenile had no prior contact with the juvenile or criminal system in this state or in any other state and there have been no prior attempts to rehabilitate the juvenile (the juvenile has not had any subsequent contact with the juvenile or criminal system since being released from custody which was on or about June 10, 2005, to the time of this hearing);

b. All the medical expert testimony indicates that the juvenile would benefit from treatment and rehabilitative efforts in the juvenile system and that the juvenile would best be served through the juvenile system;

c. All the medical expert testimony indicates that the juvenile's future risk to the community is low and that the juvenile's amenability to sanctions and treatments available through juvenile services is high;

d. The evidence on record indicates the juvenile is residing in a stable and intact home environment with his supportive parents as well as with his siblings, and grandmother.

Based on these findings, the superior court remanded the case to the district court for adjudication.

On 7 April 2006, the State filed a motion in superior court to stay further proceedings pending review by this Court. The superior court denied the motion on 12 April 2006. The State then filed a petition for writ of certiorari in this Court on 21 April 2006, along with a motion for a temporary stay and a petition for writ of supersedeas. This Court granted the temporary stay on 24 April 2006, but vacated it on 11 May 2006 upon denying the State's petitions for writ of certiorari and supersedeas.

On 25 May 2006, the State petitioned the North Carolina Supreme Court for writ of certiorari to review this Court's 11 May 2006 order. On 28 June 2007, the Supreme Court issued an order allowing the State's writ of certiorari

> for the limited purpose of vacating the Court of Appeals' order denying the [State]'s petition for writ of certiorari and remanding to the Court of Appeals for review on the merits in light of this Court's decision in *State v. Green*, 348 N.C. 588, 595, 502 S.E.2d 819, 823 (1998) and the Court of Appeals' decision in *In re Bunn*, 34 N.C. App. 614, 615-16, 239 S.E.2d 483, 484 (1977).

Although the Supreme Court denied the State's petition for writ of supersedeas, this Court allowed the State's petition on 3 August 2007.

<u>Discussion</u>

The sole issue before this Court is whether the superior court erred in its order reversing the district court's order of transfer. N.C. Gen. Stat. § 7B-2200 (2007) provides district courts with the authority

to transfer juvenile delinquency cases to superior court for the juvenile to be tried as an adult when the district court finds probable cause that the juvenile committed the alleged offense, and the juvenile was at least 13 at the time of the alleged offense.

N.C. Gen. Stat. § 7B-2203(b) (2007) sets out the factors to be considered in a transfer hearing:

> (b) In the transfer hearing, the court shall determine whether the protection of the public and the needs of the juvenile will be served by transfer of the case to superior court and shall consider the following factors:
>
> (1) The age of the juvenile;
>
> (2) The maturity of the juvenile;
>
> (3) The intellectual functioning of the juvenile;
>
> (4) The prior record of the juvenile;
>
> (5) Prior attempts to rehabilitate the juvenile;
>
> (6) Facilities or programs available to the court prior to the expiration of the court's jurisdiction under this Subchapter and the likelihood that the juvenile would benefit from treatment or rehabilitative efforts;
>
> (7) Whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner; and
>
> (8) The seriousness of the offense and whether the protection of the public requires that the juvenile be prosecuted as an adult.

N.C. Gen. Stat. § 7B-2203(b)(1)-(8). When the district court decides to transfer the case to superior court, the resulting "order of transfer *shall* specify the reasons for transfer." N.C. Gen. Stat. § 7b-2203(c) (emphasis added). *See In re J.L.W.*, 136 N.C. App. 596, 600 n.4, 525 S.E.2d 500, 503 n.4 (2000) ("[T]he juvenile court must consider eight enumerated factors pursuant to a transfer hearing and then specify the reasons for transfer if the case is transferred to superior court.").

Thus, the statute sets forth three requirements for the district court in making a ruling after a transfer hearing. First, the court must determine whether the protection of the public and the needs of the juvenile will be served by transfer of the case to superior court. Second, the court must consider eight specified factors. Third, if the

court decides to transfer the case, then the order must specify the reasons for that decision.

N.C. Gen. Stat. § 7B-2603 (2007) grants a juvenile the right to appeal to superior court any order transferring jurisdiction over a juvenile matter from the district court to superior court. Upon appeal, "[t]he superior court shall, within a reasonable time, review the record of the transfer hearing *for abuse of discretion* by the juvenile court in the issue of transfer." N.C. Gen. Stat. § 7B-2603(a) (emphasis added). The superior court "shall enter an order either (i) remanding the case to the juvenile court for adjudication or (ii) upholding the transfer order." N.C. Gen. Stat. § 7B-2603(c).

The two decisions cited by our Supreme Court in remanding this case for decision on the merits both emphasize that the superior court is limited to reviewing the district court's decision for an abuse of discretion. In *State v. Green*, 348 N.C. 588, 595, 502 S.E.2d 819, 823 (1998), *cert. denied*, 525 U.S. 1111, 142 L. Ed. 2d 783, 119 S. Ct. 883 (1999), the Supreme Court held that "[t]he decision to transfer a juvenile's case to superior court lies solely within the sound discretion of the juvenile court judge and is not subject to review absent a showing of gross abuse of discretion." This Court held likewise in *In re Bunn*, 34 N.C. App. 614, 616, 239 S.E.2d 483, 484 (1977): "[T]he decision on whether the case will be transferred to the Superior Court [lies] solely within the sound discretion of the District Court judge who conducts the probable cause hearing. The exercise of that discretion is not subject to review in the absence of a showing of gross abuse." It is settled that "an abuse of discretion is established only upon a showing that a court's actions 'are manifestly unsupported by reason,' " or " 'so arbitrary that it could not have been the result of a reasoned decision.' " *State v. T.D.R.*, 347 N.C. 489, 503, 495 S.E.2d 700, 708 (1998) (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 832 (1985)).

Here, the superior court's order identified the correct standard of review, but failed to properly apply that standard. After reciting the standard of review, the superior court made findings on the evidence relating to § 7B-2203(b)'s factors, repeating some of the findings of the district court and making additional findings on factors not relied upon by the district court. The superior court chose to give more weight than the district court did to the expert testimony addressing the facilities and programs available in the juvenile system and the likelihood that the juvenile would benefit from such treatment. The district court, however, found other factors to be more compelling

and entitled to greater weight, including the juvenile's age; his average to above average cognitive abilities; the aggressive, violent, premeditated, and willful manner in which the alleged crimes were committed; and the seriousness of the crimes.

A superior court reviewing an appeal of a transfer order may not, however, re-weigh the evidence, decide which factors are more important, and reverse the district court on that basis, as the superior court did here. Put simply, a superior court may not substitute its judgment for that of the district court. In this case, the superior court did not explain in what way the district court's decision was manifestly unreasonable. The superior court simply concluded, based on its de novo view of the evidence, that transfer was inappropriate. That approach does not properly apply an abuse of discretion standard of review.

The juvenile argues that the district court abused its discretion by failing to make specific findings of fact on each of the factors enumerated in N.C. Gen. Stat. § 7B-2203(b) and by considering the desirability of trying the juvenile and his "codefendant" in the same court, a factor not included in § 7B-2203(b). These alleged errors were not, however, set out in the superior court's order as its basis for the superior court's determination that the district court abused its discretion. Because the juvenile did not cross-assign error to the superior court's failure to address those concerns, these arguments cannot be a basis for upholding the superior court's decision. *See* N.C.R. App. P. 10(d) ("Without taking an appeal an appellee may cross-assign as error any action or omission of the trial court which was properly preserved for appellate review and which deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken."); *Harllee v. Harllee*, 151 N.C. App. 40, 51, 565 S.E.2d 678, 685 (2002) (holding that alternative basis for upholding decision below is not properly preserved for appellate review in absence of cross-assignment of error).

In sum, we hold that the trial court applied the wrong standard of review and erred as a matter of law. Accordingly, we reverse the superior court's order remanding the case to district court and remand for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Judges TYSON and STROUD concur.

JOY B. MURRAY, PLAINTIFF v. COUNTY OF PERSON; ET AL., DEFENDANTS

No. COA07-1260

(Filed 5 August 2008)

1. Appeal and Error— appealability—interlocutory orders—partial denial of summary judgment—governmental immunity

An appeal from the denial of summary judgment involving governmental immunity was interlocutory but properly before the Court of Appeals.

2. Immunity— public duty doctrine—suit in individual capacity

The public duty doctrine does not extend to government workers sued only in their individual capacities, and summary judgment was properly denied to defendants on that ground in an action against employees of a county health department arising from the failure of a septic system.

3. Immunity— public officers—health department employees not available

Public officers immunity was not available to health department employees in the positions of Environmental Health Specialist and Environmental Health Supervisor, and the trial court correctly denied summary judgment for defendants on that issue in an action arising from the failure of a septic system.

Appeal by defendants from judgment entered 24 July 2007 by Judge Richard W. Stone in Superior Court, Person County. Heard in the Court of Appeals 18 March 2008.

Alan S. Hicks, P.A., by Alan S. Hicks, for plaintiff-appellee.

Womble Carlyle Sandridge & Rice, PLLC, by James R. Morgan, Jr. and Robert T. Numbers, II, for defendants-appellants Clayton, Kelly, and Sarver.

WYNN, Judge.

The standard of review for a motion for summary judgment is whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law.[1] Here, the defendants argue the trial court erred by partially denying their

1. *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998).

motion for summary judgment because they are entitled to the protection of the public duty doctrine and public officers' immunity. Because we hold that neither the public duty doctrine nor public officers' immunity protects the defendants from liability, we affirm the trial court's partial denial of the defendants' motion for summary judgment.

On 4 September 2002, Herman Rouse, Plaintiff Joy Murray's contractor and builder, applied for an improvement permit from the Person County Health Department. On 6 November 2002, Defendant Adam Sarver, an Environmental Health Specialist for the Person County Health Department, conducted a site evaluation on Ms. Murray's property and issued an improvement permit approving the installation of an innovative wastewater treatment system on the property. The improvement permit stated that "[n]either Person County nor the Environmental Health Specialist warrants that the septic tank system will continue to function satisfactorily in the future or that the water supply will remain potable."

On 13 March 2003, an innovative wastewater treatment system was installed on Ms. Murray's property. On 19 March 2003, Mr. Sarver issued an Operation Permit, indicating that the system had been installed in compliance with statutory law.

The construction of Ms. Murray's home was completed in March 2003 and she moved into the home in April 2003. Shortly after she moved in, Ms. Murray noticed water surfacing on her property and she notified Mr. Rouse. Mr. Rouse visited Ms. Murray's property and informed her that she had a problem with her septic system.

Ms. Murray reported the problems with her wastewater system to the county, and over the next several months, Mr. Sarver, along with Defendant Harold Kelly, another Environmental Health Specialist, and Defendant Janet Clayton, an Environmental Health Supervisor, made numerous unsuccessful attempts to repair Ms. Murray's wastewater system. These attempts involved multiple inspections and observations of the wastewater system, the issuance of permits for the installation of a new line, and eventually, the installation of a new innovative system. However, the new innovative wastewater treatment system, installed in February 2004, also failed.

On 15 June 2006, Ms. Murray initiated this action against Person County and the Person County Health Department; and against Mr. Sarver, Ms. Clayton, and Mr. Kelly, individually and in their of-

ficial capacities. She alleged negligence, negligent misrepresentation, and negligent infliction of emotional distress in the issuance of permits for the installation and repair of her wastewater treatment system.

On 29 May 2007, Defendants filed a motion for summary judgment as to all of Ms. Murray's claims. The trial court heard Defendants' motion on 24 July 2007 and granted Defendants' motion as to all claims against Person County and the Person County Health Department; and Mr. Sarver, Ms. Clayton, and Mr. Kelly in their official capacities. The trial court also granted summary judgment on Ms. Murray's claim of negligent infliction of emotional distress. However, the trial court denied summary judgment as to Ms. Murray's claims for negligence and negligent misrepresentation against Mr. Sarver, Ms. Clayton, and Mr. Kelly in their individual capacities.

[1] On appeal, Mr. Sarver, Ms. Clayton, and Mr. Kelly (collectively "Defendants") argue the trial court erred by partially denying their motion for summary judgment. Specifically, Defendants contend that they are entitled to the protection of the public duty doctrine and public officers' immunity. Though interlocutory, Defendants' appeal from the denial of summary judgment is properly before this Court because appeals which present defenses of governmental or sovereign immunity, like the public duty doctrine or public officers' immunity, have been held by this Court to be immediately appealable as affecting a substantial right. *Schlossberg v. Goins*, 141 N.C. App. 436, 439, 540 S.E.2d 49, 52 (2000), *disc. review denied*, 355 N.C. 215, 560 S.E.2d 136 (2002); *Derwort v. Polk County*, 129 N.C. App. 789, 790-91, 501 S.E.2d 379, 380 (1998).

The standard of review from the denial of summary judgment is *de novo*. *Moody v. Able Outdoor, Inc.*, 169 N.C. App. 80, 83, 609 S.E.2d 259, 261 (2005). We review whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law. *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998). Though we view the evidence presented by the parties in the light most favorable to the non-movant, summary judgment is appropriate when "(1) an essential element of plaintiff's claim is nonexistent[,] (2) plaintiff cannot produce evidence to support an essential element of his claim, or (3) plaintiff cannot surmount an affirmative defense which would bar the claim." *Gibson v. Mutual Life Ins. Co. of New York*, 121 N.C. App. 284, 286, 465 S.E.2d 56, 58 (1996).

[2] Defendants first argue the trial court erred by denying summary judgment on the claims of negligence and negligent misrepresentation in their individual capacities because they are protected from liability by the public duty doctrine. We disagree.

The public duty doctrine "provides that governmental entities and their agents owe duties only to the general public, not to individuals, absent a 'special relationship' or 'special duty' between the entity and the injured party." *Stone v. North Carolina Dept. of Labor*, 347 N.C. 473, 477-78, 495 S.E.2d 711, 714 (citation omitted), *cert. denied*, 525 U.S. 1016, 142 L. Ed. 2d 449 (1998). "Because the governmental entity owes no particular duty to any individual claimant, it cannot be held liable for negligence . . . ." *Id.* at 482, 495 S.E.2d at 716. The purpose of the public duty doctrine is "to prevent an overwhelming burden of liability on governmental agencies with limited resources." *Id.* at 481, 495 S.E.2d at 716 (internal citations omitted).

Although the public duty doctrine was initially adopted in the context of municipal law enforcement, *Braswell v. Braswell*, 330 N.C. 363, 410 S.E.2d 897 (1991), *reh'g denied*, 330 N.C. 854, 413 S.E.2d 550 (1992), our Supreme Court has extended the public duty doctrine "to claims against the State under the Tort Claims Act," *Stone*, 347 N.C. at 482, 495 S.E.2d at 716, and "to state agencies required by statute to conduct inspections for the public's general protection." *Lovelace v. City of Shelby*, 351 N.C. 458, 461, 526 S.E.2d 652, 654, *reh'g denied*, 352 N.C. 157, 544 S.E.2d 225 (2000). Additionally, this Court has held that "the Health Department, an agent of [North Carolina Department of Environment and Natural Resources], is a state agency required [by statute] to inspect site for suitability of wastewater treatment systems before issuing improvement permits . . . and therefore may avail itself of the protection afforded by the public duty doctrine." *Watts v. North Carolina Dept. of Env't. and Natural Resources*, 182 N.C. App. 178, 182, 641 S.E.2d 811, 816 (2007), *disc. review granted*, ––– N.C. –––, 660 S.E.2d 899.[2]

However, our review of North Carolina case law has revealed no cases in which our courts have held that an employee of a health department is entitled to the protection of the public duty doctrine when sued *only* in his or her individual capacity in Superior Court.

2. We note that in *Watts*, the action was brought before the Industrial Commission against an employee of the Health Department, the Health Department, and North Carolina Department of Environment and Natural Resources; however, the Deputy Commissioner dismissed the claim against the employee, as he was not a proper party. *Watts*, 182 N.C. App. at 180, 641 S.E.2d at 815.

Our Supreme Court has explained: "A suit against a defendant in his individual capacity means that the plaintiff seeks recovery from the defendant directly; a suit against a defendant in his official capacity means that the plaintiff seeks recovery from the entity of which the public servant defendant is an agent." *Meyer v. Walls*, 347 N.C. 97, 110, 489 S.E.2d 880, 887 (1997).

Here, the only claims remaining against Defendants are in their individual capacities. Where a governmental worker is sued in his individual capacity, rather than applying the public duty doctrine, our courts have consistently applied public officers' immunity. *See Isenhour v. Hutto*, 350 N.C. 601, 609, 517 S.E.2d 121, 127 (1999) ("Once we determine the aggrieved party has sufficiently pled a claim against defendant in his or her individual capacity, we must determine whether that defendant is a public official or a public employee."); *Epps v. Duke Univ., Inc.*, 122 N.C. App. 198, 205, 468 S.E.2d 846, 851-52 (1996) ("To sustain the personal or individual capacity suit, the plaintiff must initially make a prima facie showing that the defendant-official's tortious conduct falls within one of the immunity exceptions[.]"); *EEE-ZZZ Lay Drain Co. v. North Carolina Dept. of Human Res.*, 108 N.C. App. 24, 28, 422 S.E.2d 338, 341 (1992) ("When a governmental worker is sued in his individual capacity, our courts have distinguished between whether the worker is an officer or an employee when assessing liability."). We hold that the public duty doctrine does not extend to government workers sued only in their individual capacities. Accordingly, this assignment of error is overruled, and we now turn to a discussion of public officers' immunity.

[3] Defendants next argue the trial court erred by denying summary judgment on the claims of negligence and negligent misrepresentation in their individual capacities because they are entitled to public officers' immunity. We disagree.

It is well established that "[p]ublic officers are shielded from liability unless their actions are corrupt or malicious[;]" however, public employees can be held personally liable for mere negligence. *EEE-ZZZ Lay Drain Co.*, 108 N.C. App. at 28-29, 422 S.E.2d at 341 (citing *Smith v. State*, 289 N.C. 303, 331, 222 S.E.2d 412, 430 (1976)), *overruled on other grounds*, *Meyer v. Walls*, 347 N.C. 97, 489 S.E.2d 880 (1997). In distinguishing between a public official and a public employee, our courts have held that "(1) a public office is a position created by the constitution or statutes; (2) a public official exercises a portion of the sovereign power; and (3) a public official exercises

discretion, while public employees perform ministerial duties." *Isenhour*, 350 N.C. at 610, 517 S.E.2d at 127. Additionally, "an officer is generally required to take an oath of office while an agent or employee is not required to do so." *Pigott v. City of Wilmington*, 50 N.C. App. 401, 403-04, 273 S.E.2d 752, 754, *cert. denied*, 303 N.C. 181, 280 S.E.2d 453 (1981).

This Court has previously determined that the positions of an Environmental Health Specialist and an Environmental Health Supervisor are public employees because the positions are not created by statute and they do not exercise sovereign power; rather, their duties are ministerial. *Block v. Cty. of Person*, 141 N.C. App. 273, 281-82, 540 S.E.2d 415, 421-22 (2000). Although *Block* was an appeal from the denial of a motion to dismiss and the current case is an appeal from a partial denial of a motion for summary judgment, we find the reasoning in *Block* persuasive. *See Northern Nat. Life Ins. Co. v. Lacy J. Miller Mach. Co., Inc.*, 311 N.C. 62, 76, 316 S.E.2d 256, 265 (1984) (holding that the Court of Appeals was not bound by the doctrine of *stare decisis* because the procedural issues in the case were substantially different from those in a similar case).

In *Block*, this Court stated:

> Although defendants cite a number of statutes contained in Chapter 130A (Public Health) of the North Carolina General Statutes, there is no statutory or constitutional scheme that creates the positions of Environmental Health Specialist or Environmental Health Supervisor for a county health department. Only the position of Director of a county health department is set forth by statute. Nor does it appear that defendants . . . exercise any sovereign power; rather, their duties are ministerial. Our courts have held that a supervisor of the Department of Social Services is a public employee. Similarly, a supervisor for the Health Department is a public employee, as is a specialist, who is a subordinate of the supervisor.

141 N.C. App. at 281-82, 540 S.E.2d at 421-22.

Although Defendants argue that they were acting as Registered Sanitarians, a position created by statute, we agree with the reasoning in *Block*, that "there is no statutory or constitutional scheme that creates the positions of Environmental Health Specialist or Environmental Health Supervisor for a county health department." *Id.*; *see also Hare v. Butler*, 99 N.C. App. 693, 700, 394 S.E.2d 231, 236 (1990)

(holding that three Department of Social Services positions—Protective Services Investigation Supervisor, Program Administrator for Child and Family Services, and Assistant Director—were public employees because their positions were not created by statute nor did they exercise any sovereign power). Additionally, there is no evidence in the record that Defendants took oaths of office. *See Pigott*, 50 N.C. App. at 403-04, 273 S.E.2d at 754. Accordingly, this assignment of error is overruled.

Affirmed.

Judges BRYANT and JACKSON concur.

FREE SPIRIT AVIATION, INC., AND GEORGE RONAN, PLAINTIFFS v. RUTHERFORD AIRPORT AUTHORITY, ET AL., DEFENDANTS

No. COA07-1034

(Filed 5 August 2008)

Immunity— public official—airport authority contract

Summary judgment for defendants was correctly denied on the issue of public official immunity in an action arising from an airport authority decision to not renew a Fixed Base Operator contract. Plaintiffs did not allege injury to themselves as distinct from the general public in their open meetings claim and did not seek compensation for an alleged violation of N.C.G.S. § 14-234(a)(1) so that public official immunity did not apply to such claims. Also, plaintiffs' claims for duress and wrongful interference with contract required malicious intent so that public official immunity was inapplicable to those claims.

Appeal by defendants from order entered 15 June 2007 by Judge Laura J. Bridges in Superior Court, Rutherford County. Heard in the Court of Appeals 21 February 2008.

Yelton, Farfour, McCartney, Lutz & Craig, P.A., by Sam B. Craig, for plaintiff-appellees.

Womble Carlyle Sandridge & Rice, PLLC, by Sean F. Perrin, for defendant-appellants.

STROUD, Judge.

Defendants appeal from an order denying summary judgment. Because we conclude that defendants have not met their burden of showing that the affirmative defense of public official immunity bars plaintiffs' claims, we affirm.

I. Background

Plaintiff George Ronan ("Ronan") is the president of corporate plaintiff Free Spirit Aviation, Inc. ("Free Spirit"). In November 1995, Free Spirit became the Fixed Base Operator ("FBO") at the Rutherford County Airport ("the Airport"). Free Spirit served as FBO at the Airport under a contract with the Rutherford Airport Authority ("the Authority") which included granting Free Spirit "the right to sell petroleum products" and the duty to sell them at "fair, reasonable, competitive, and nondiscriminatory prices[.]" On 13 January 2006 the Authority voted not to renew the FBO contract with Free Spirit and instead awarded the FBO contract to Leading Edge Aviation effective 1 March 2006.

On 27 January 2006, plaintiffs filed a complaint in Rutherford County Superior Court against the Authority; Rusty Washburn, Phillip Robbins, Alan Guffey, Don Greene, all individually ("the individuals") and as members of the Authority; and David Reno, as a member of the Authority. The gravamen of the complaint, discussed in more detail below, asserted that defendants wrongfully deprived plaintiffs of the privilege of serving as FBO at the Airport. The complaint sought to enjoin the Authority from performing the FBO contract granted to Leading Edge Aviation, and prayed for compensatory and punitive damages from the individuals.

Plaintiffs voluntarily dismissed the complaint against David Reno on or about 23 February 2006. The remaining defendants, the Authority and the individuals, filed a joint answer 18 December 2006, denying the material allegations of the complaint and asserting six affirmative defenses including the defense of public official immunity. The Authority and the individuals jointly moved for summary judgment on 2 May 2007.

On 23 May 2007, the trial court heard the motion for summary judgment. On 15 June 2007, the trial court entered an order denying the motion for summary judgment on the basis that factual questions remained as to the material issues. Defendants appeal.

II. Standard of Review

The denial of a motion for summary judgment is an interlocutory order which ordinarily would not be subject to immediate appellate review. *Snyder v. Learning Servs. Corp.*, 187 N.C. App. 480, 482, 653 S.E.2d 548, 550 (2007). Defendants contend that because their argument on appeal is the affirmative defense of public official immunity ("POI"), a substantial right is affected which is subject to immediate review. We agree.

Where the doctrine of public official immunity applies, the public official is immune from suit, not simply from any liability arising from a lawsuit. *Blevins v. Denny*, 114 N.C. App. 766, 769, 443 S.E.2d 354, 355 (1994). The right of a public official to be immune from suit, where applicable, is a substantial right. *Id.* The denial of a motion for summary judgment which is based on a defendant's assertion of public official immunity therefore affects a substantial right, subject to immediate review. N.C. Gen. Stat. § 1-277(a) (2007).

When the denial of a summary judgment motion is properly before this Court, as here, the standard of review is *de novo*. *Moody v. Able Outdoor, Inc.*, 169 N.C. App. 80, 83, 609 S.E.2d 259, 261 (2005). Summary judgment must be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c). In applying Rule 56, this Court has held that "[s]ummary judgment is appropriate . . . if the non-moving party is unable to overcome an affirmative defense offered by the moving party." *Griffith v. Glen Wood Co.*, 184 N.C. App. 206, 210, 646 S.E.2d 550, 554 (2007) (internal footnote omitted).

III. Analysis

The complaint alleged that four types of wrongful acts by the individuals entitle plaintiffs to relief: (1) discussion of the FBO contract in closed or secret meetings of the Authority in violation of N.C. Gen. Stat. § 143-318.9 ("the open meetings law"); (2) personal benefit from a contract made or administered on behalf of a public agency in violation of N.C. Gen. Stat. § 14-234(a)(1); (3) wrongful interference with plaintiffs' contract to operate the FBO at Rutherford County Airport; and (4) conspiracy to wrongfully interfere with plaintiffs' contract to operate the FBO at Rutherford County Airport. Plaintiffs alleged injury only to the citizens of Rutherford County resulting from violation of the open meetings law; alleged injury to the citizens of

Rutherford County resulting from the individuals' violation of N.C. Gen. Stat. § 14-234(a)(1), and specific injury to themselves resulting from defendant Don Greene's violation of N.C. Gen. Stat. § 14-234(a)(1); and specific injury to themselves for wrongful interference with contract and conspiracy to interfere with a contract. Plaintiffs added a "catch-all" provision at the end of the complaint asking that the individuals "be found personally financially liable due to their acts in willful violation of state law[.]"

On appeal, defendants argue only that the affirmative defense of POI bars the claims for violation of the open meetings law, violation of N.C. Gen. Stat. § 14-234(a)(1) and wrongful interference with contract. Plaintiffs contend that they have overcome the defense of POI because they alleged and forecast evidence that the individuals acted with malice.

POI bars a lawsuit seeking to recover compensation from a public official as an individual for injuries suffered as a result of his negligence in performing acts within the scope of his official duties. *Thompson Cadillac-Oldsmobile, Inc. v. Silk Hope Automobile, Inc.*, 87 N.C. App. 467, 469, 361 S.E.2d 418, 420 (1987), *disc. review denied*, 321 N.C. 480, 364 S.E.2d 672 (1988). Put another way, where a plaintiff seeks compensation from a public official as an individual for his official acts, the complaint "must allege and forecast evidence demonstrating that the offic[ial] acted maliciously, corruptly, or beyond the scope of duty." *Prior v. Pruett*, 143 N.C. App. 612, 623, 550 S.E.2d 166, 173-74 (2001), *disc. rev. denied*, 355 N.C. 493, 563 S.E.2d 572 (2002). A public official for purposes of applying the immunity doctrine is a person "whose position is created by the constitution or statutes of the sovereignty," *Cherry v. Harris*, 110 N.C. App. 478, 480, 429 S.E.2d 771, 772 (citation, quotation marks, brackets and ellipses omitted), *disc. review denied*, 335 N.C. 171, 436 S.E.2d 371 (1993), and who exercises discretion in the execution of "some portion of the sovereign power," *Cherry*, 110 N.C. App. at 480, 429 S.E.2d at 773 (citation and quotation marks omitted). The parties do not dispute that the individuals are all public officials.

We consider the claims *seriatim*. Plaintiffs do not allege that defendants' violation of the open meetings law caused injury for which they are entitled to compensation as persons distinct from the general public.[1] Therefore POI does not apply to the allegation of vio-

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1. In fact, the open meetings law does not allow for such recovery. *See* N.C. Gen. Stat. § 143-318.16 (allowing injunctive relief against violations of the open meetings

lation of the open meetings law and we conclude that defendants' reliance on it is misplaced.[2]

Likewise, plaintiffs do not allege injury to themselves or seek compensation resulting from violation of N.C. Gen. Stat. § 14-234(a)(1), except as to defendant Don Greene ("Greene"). As with the open meetings law, N.C. Gen. Stat. § 14-234 does not contemplate recovery of compensation by an individual citizen from a public official as an individual. Thus, to the extent that plaintiffs seek relief other than monetary compensation under N.C. Gen. Stat. § 14-234(a)(1), POI is not applicable to bar the claim.

Plaintiffs do allege injury to themselves on two of their claims, both arising from an allegation that defendant Greene demanded from plaintiff George Ronan, in a threatening manner, "[y]ou're gonna give us a discount on fuel or you're gonna lose." Plaintiffs' complaint alleges that Greene's demand and the subsequent discount offered by Free Spirit are evidence that (1) Greene extorted an improper benefit from plaintiffs through his position as a public official in violation of N.C. Gen. Stat. § 14-234(a)(1), and (2) Greene was speaking on behalf of all the individual defendants in an attempt to wrongfully interfere with plaintiffs' contract with the Authority to operate the FBO.

Though N.C. Gen. Stat. § 14-234 does not contemplate recovery of compensation by an individual, plaintiffs' complaint also expressly states a claim for extortion. While we are aware that two federal district courts which have considered the issue have concluded that "no [civil] cause of action for extortion exists under North Carolina law[,]"[3] *Delk v. ArvinMeritor, Inc.*, 179 F.Supp.2d 615, 626 (W.D.N.C. 2002); *Godfredson v. JBC Legal Group, P.C.*, 387 F.Supp.2d 543, 555 (E.D.N.C. 2005) ("[A] survey of the applicable North Carolina authority indicates that no civil cause of action exists for the tort of extortion."), we construe plaintiffs' complaint as a cause of action for duress for the sole purpose of determining whether or not it is barred by the affirmative defense of POI. *See Radford v. Keith*, 160 N.C. App.

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law); N.C. Gen. Stat. § 143-318.16A (allowing the superior court to declare an action taken in violation of the open meetings law to be "null and void").

2. We are aware that the trial court may award reasonable attorney's fees to the prevailing party in an action pursuant to N.C. Gen. Stat. § 143-318.16 or N.C. Gen. Stat. § 143-318.16A. N.C. Gen. Stat. § 143-318.16B (2005). However, the issue of whether POI applies to an award of attorney's fees under the statute is not before the Court in this appeal.

3. As the issue of whether a civil claim for extortion exists in North Carolina was not argued, we make no ruling either way on this issue.

41, 43-44, 584 S.E.2d 815, 817 (2003) ("Duress exists where one, by the unlawful act of another, is induced to make a contract or perform or forego some act under circumstances which deprive him of the exercise of free will." (Citation and quotation marks omitted.)), *aff'd per curiam*, 358 N.C. 136, 591 S.E.2d 519 (2004). An intentional wrongful act is an essential element of a claim for duress. *Id.* Greene's threatening demand for a discount, viewed in the light most favorable to the plaintiffs and drawing all reasonable inferences in plaintiffs' favor, *Carolina Bank v. Chatham Station, Inc.*, 186 N.C. App. 424, 427-28, 651 S.E.2d 386, 389 (2007), was intentional and wrongful, and therefore a malicious act. Because POI does not apply to claims based on malicious acts, POI does not bar plaintiffs' claim against Greene for duress.

Finally, defendants argue that POI bars plaintiffs' claim for wrongful interference with contract. Again, we disagree. Recovery of damages for injuries arising from wrongful interference with contract is a tort claim which is recognized in North Carolina. *United Laboratories, Inc. v. Kuykendall*, 322 N.C. 643, 661, 370 S.E.2d 375, 387 (1988). Malice is an essential element of a claim for wrongful interference with contract. *Id.* at 661, 370 S.E.2d at 387 (A claim for wrongful interference with contract must allege, *inter alia*, that "the defendant intentionally induce[d] the third person not to perform the contract . . . and in doing so act[ed] without justification[.]"); *see also Rhyne v. K-Mart Corp.*, 149 N.C. App. 672, 689, 562 S.E.2d 82, 94 (2002) (A "wrongful [act] done intentionally without just cause or excuse" is malicious. (Citation and quotation marks omitted.)), *aff'd*, 358 N.C. 160, 594 S.E.2d 1 (2004).

As we concluded above, Greene's demand for a fuel discount is evidence of an intentional wrongful act. Plaintiffs further alleged and forecast evidence that Greene appeared to be speaking for all the individual members of the Authority when he made his demand. Viewed in the light most favorable to plaintiffs, as required on defendants' motion for summary judgment, *Carolina Bank*, 186 N.C. App. at 427-28, 651 S.E.2d at 389, this statement is sufficient evidence of the individuals' malicious intent to interfere with Free Spirit's contractual right and duty to sell petroleum products at "fair, reasonable, competitive and nondiscriminatory prices" to survive summary judgment on the issue of POI.

Defendants have not shown that plaintiffs could not overcome the affirmative defense of POI as to any of plaintiffs' claims. *See Collingwood v. G. E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d

425, 427 (1989). Therefore, denial of their summary judgment motion was proper. Accordingly, we affirm the order of the trial court. We emphasize that we are not deciding on the merits of plaintiffs' claims. Defendants' sole issue on appeal is the applicability of POI and our holding is therefore strictly limited to the application of POI to plaintiffs' claims.

Affirmed.

Judges TYSON and GEER concur.

STATE OF NORTH CAROLINA v. FRANK TAYLOR, DEFENDANT

No. COA07-1398

(Filed 5 August 2008)

Search and Seizure— multiple dwellings on one property— warrant not sufficiently specific

The trial court correctly granted a motion to suppress cocaine and drug paraphernalia seized pursuant to a search warrant which described two dwellings on the property to be searched and the purchase of a controlled substance at that location by a confidential informant. When there are two dwellings described under a single address and in the absence of allegations about the target of the investigation, the supporting affidavit must allege facts sufficient to establish probable cause to search either or both buildings.

Appeal by the State of North Carolina from judgment entered 14 August 2007 by Judge Gregory A. Weeks in Sampson County Superior Court. Heard in the Court of Appeals 9 June 2008.

Roy Cooper, Attorney General, by William B. Crumpler, Assistant Attorney General, and Derrick C. Mertz, Assistant Attorney General, for the State.

Glover & Petersen, P.A., by James R. Glover, for defendant-appellee.

MARTIN, Chief Judge.

On 2 August 2006, the Sampson County Sheriff's Office began an investigation into activities at 3095 Brewer Road in Faison, North Carolina, after receiving a number of complaints about drug deals on the property. Between 2 August 2006 and 27 September 2006, a confidential informant ("CI") made six controlled purchases of cocaine under the supervision of Special Agent Kevin Perry of the Sampson County Sheriff's Office at the above address. Based on those purchases, Special Agent Perry submitted a search warrant application to a Sampson County magistrate, who issued a search warrant on 27 September 2006.

The search warrant application described two dwellings on the property to be searched: a "tan single wide mobile home located at 3095 Brewer Rd. Faison, NC 28341 and the single story wood frame house that is located directly behind the mobile home." The application further stated that the CI had "visited the described location at the direction and surveillance of this Applicant and while at the location . . . made a purchase of the controlled substance." The application did not identify the owner or the occupant of either dwelling. Additionally, Special Agent Perry stated in his affidavit that he had been a law enforcement officer for two years and that he found this CI to be reliable in the past. The warrant was executed on 28 September 2006, and defendant was found asleep in the single story wood frame house which contained cocaine and drug paraphernalia. Defendant was arrested and charged with possession of cocaine, maintaining a dwelling to keep controlled substances, possession of a firearm by a felon, and possession of drug paraphernalia.

On 24 April 2007, defendant filed a pretrial motion to suppress all evidence obtained as a result of the search. A hearing on the motion was held on 4 June 2007 in Sampson County Superior Court. At the hearing, defendant argued that the affidavit supporting the warrant application was insufficient to establish probable cause to search both residences at 3095 Brewer Road. On 9 August 2007, the trial court granted defendant's motion to suppress.

The trial court found that the affidavit supporting the warrant application was silent regarding where *specifically* on the premises and from whom the CI made the controlled purchases. Further, the trial court found that the affidavit lacked any facts regarding whether Special Agent Perry observed the CI enter either the mobile home or the wood frame house to make the controlled purchases of

cocaine. Based on those findings, the trial court concluded that the affidavit did not "implicate either of the described premises and there [was] nothing to implicate a particular person or persons connected to those premises." The State gave timely notice of appeal from the order.

The State's sole argument on appeal is that the trial court erred in granting defendant's motion to suppress evidence seized during the search of the premises. The State contends the affidavit accompanying the search warrant application contained allegations of fact which were sufficient to establish probable cause for the search warrant. We disagree.

On appeal, the State assigned error to several of the trial court's conclusions of law but none of its findings of fact. When a trial court's findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and are therefore binding. *See State v. Roberson*, 163 N.C. App. 129, 132, 592 S.E.2d 733, 735-36 (2004). Thus, the appellate court must review the trial court's order only to determine whether the findings of fact support the legal conclusions. *See id.*

N.C.G.S. § 15A-244 requires that an application for a search warrant must contain (1) a probable cause statement that the items will be found in the place described, and (2) factual allegations supporting the probable cause statement. *See* N.C. Gen. Stat. § 15A-244(2), (3) (2007). Further, "[t]he statements must be supported by one or more affidavits *particularly setting forth the facts and circumstances establishing probable cause* to believe that the items are in the places or in the possession of the individuals to be searched." N.C. Gen. Stat. § 15A-244(3) (emphasis added).

Our Supreme Court has adopted a totality of the circumstances test for magistrates to determine whether probable cause exists in a search warrant application. *See State v. Arrington*, 311 N.C. 633, 641, 319 S.E.2d 254, 259 (1984). Under the totality of the circumstances test, the magistrate must make a "practical, common sense decision whether, given all the circumstances set forth in the affidavit before him . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Id.* at 638, 319 S.E.2d at 257-58 (quoting *Illinois v. Gates*, 462 U.S. 213, 238, 76 L. Ed. 2d 527, 548 (1983)). The supporting affidavit is sufficient if it supplies reasonable cause to believe that the proposed search of the premises probably will reveal the presence of the items sought upon those

premises. *See id.* at 636, 319 S.E.2d at 256 (citing *State v. Riddick*, 291 N.C. 399, 230 S.E.2d 506 (1976)). Accordingly, "the duty of the reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . conclud[ing] that probable cause existed.' " *Id.* at 638, 319 S.E.2d at 258 (alteration in original) (quoting *Gates*, 462 U.S. at 238-39, 76 L. Ed. 2d at 548).

Courts have looked to a number of factors in determining whether the magistrate had a substantial basis for finding probable cause. One factor is whether the magistrate made reasonable inferences based on his experience, " 'particularly when coupled with common or specialized experience.' " *State v. Sinapi*, 359 N.C. 394, 399, 610 S.E.2d 362, 366 (2005) (quoting *State v. Riggs*, 328 N.C. 213, 221, 400 S.E.2d 429, 434 (1991)). This Court has also found a substantial basis when an investigating officer's supporting affidavit contained factual allegations that he conducted surveillance of "defendant's house, [and] he saw many people visiting the house for a short time and witnessed several hand-to-hand transactions between defendant and visitors to his house." *State v. Stokley*, 184 N.C. App. 336, 341, 646 S.E.2d 640, 644 (2007). Additionally, the procedure followed for a controlled purchase by a CI and alleged in sufficient detail has been deemed to provide a substantial basis to support an officer's affidavit. *See State v. Johnson*, 143 N.C. App. 307, 311, 547 S.E.2d 445, 448 (2001). In *Johnson*, a controlled purchase was defined as

> [a CI] being searched prior to entering a location by an officer to verify that no controlled substances, weapons, or currency [were] in his or her possession. The [CI was] observed going into, entering, exiting, and coming back to the target location by a surveillance officer. The controlled substances [were] then transferred to the officer by the [CI], and the [CI was] once again searched for contraband.

Id. at 311 n.2, 547 S.E.2d at 448, n.2.

Here, no facts were alleged in the affidavit that particularly set forth where on the premises the drug deals occurred. The affidavit merely stated that the CI "had visited *the described location*" and made controlled purchases of cocaine "while *at the location*," without particularly stating which, if any, of the two dwellings he entered to make the purchases. There were also no facts alleged in the affidavit that identified the defendant as the owner of either residence. Additionally, Special Agent Perry had only been working in law

enforcement for two years at the time he applied for the search warrant. He also failed to include facts regarding whether he observed the transactions between the CI and the seller himself, and did not establish the identity of the seller of the cocaine as defendant. Finally, Special Agent Perry's affidavit failed to identify the Sampson County Sheriff's Office procedure for controlled purchases of controlled substances and was silent as to whether he followed that procedure with the CI. Special Agent Perry merely stated that the CI had been proven reliable *in the past* by following the controlled purchase procedure, but did not allege that the procedure was followed *in the present investigation*, alleging only that "while at the location the [CI] made a purchase of the controlled substance. Immediately after leaving the location, the [CI] met with the applicant and turned over the controlled substance."

In support of its argument, the State misapplies the holding of *State v. Riggs*, 328 N.C. 213, 400 S.E.2d 429 (1991), to the facts of the present case. In *Riggs*, our Supreme Court held that factual allegations that drug deals took place on defendant's driveway established probable cause to search defendant's house. *See id.* at 220-21, 400 S.E.2d at 434. The Court found that the CI provided particular facts regarding the procedure used to transact the drug deals, specifically that the CI waited on the driveway while someone would go into the house and return with the drugs, which established a reasonable inference between the driveway and drugs in the residence. *See id.* at 221, 400 S.E.2d at 434.

However, unlike the premises in *Riggs* where there was only one dwelling to be searched, here there were two dwellings listed in the search warrant application. Therefore, the Court's reasoning about the inference between the driveway and the drugs in the residence in *Riggs* is not analagous to the facts of this case. Further, the *Riggs* affidavit particularly stated facts that the drug deals occurred on the driveway of the house. *Id.* at 215, 400 S.E.2d at 430-31. Those facts led the magistrate to the inference that drug deals on defendant's driveway would probably lead to drugs inside the house. *See id.* at 215, 400 S.E.2d at 431. Conversely, in the present case, no facts were alleged that particularly stated whether the drug deals occurred in either the mobile home or the wood frame house, or led to an inference that drugs would probably be found in the wood frame house.

Other jurisdictions that have dealt with this issue are in accord with our decision. The Seventh Circuit has held that searching two or

more apartments in the same building is the same as searching two or more separate houses and, therefore, probable cause must be established for each residence. *See United States v. Hinton*, 219 F.2d 324, 325-26 (7th Cir. 1955). An exception to this requirement is recognized where the separate dwellings are under the dominion or control of the target of the investigation. *Figert v. State*, 686 N.E.2d 827, 830 (Ind. 1997). However, in the absence of allegations about the target of the investigation, when there are two dwellings described under a single address, in order for the supporting affidavit to the warrant application to be sufficient, it must allege facts sufficient to establish probable cause to search either or both dwellings. *See*, *e.g.*, *State v. Marshall*, 939 A.2d 813 (N.J. Super. Ct. App. Div. 2008) (holding that it is insufficient for a warrant to describe the premises only by street number, or any other form of identification common to all of the dwellings when only one of the dwellings is subject to search). In the present case, there was no evidence in the record that established the ownership or occupancy of either the mobile home or the wood frame house, nor was there evidence in the record that established defendant as the target of the investigation.

Because there were no facts alleged that particularly supported the search of the wood frame house or the mobile home, no evidence presented regarding the ownership or control of the two dwellings, limited experience by the affiant in law enforcement, and a lack of a description of adequate surveillance of the controlled purchases, we conclude that the magistrate did not have a substantial basis for finding probable cause. Therefore, the trial court's order granting defendant's motion to suppress must be affirmed.

No Error.

Judges CALABRIA and STROUD concur.

EAGLE ENGINEERING, INC., PLAINTIFF v. CONTINENTAL CASUALTY COMPANY, DEFENDANT

No. COA07-1537

(Filed 5 August 2008)

Insurance— professional liability—claims made and reported policy—summary judgment

The trial court correctly affirmed summary judgment for defendant insurance company on plaintiff's claim under a professional liability policy where plaintiff did not make its claim within the required 60 days of the policy period. The parties had a plain, unambiguous contract which required that the claim arise during a covered policy period and be made within the policy period or 60 days afterwards.

Appeal by plaintiff from order entered 30 October 2007 by Judge Kimberly S. Taylor in Superior Court, Union County. Heard in the Court of Appeals 15 May 2008.

James, McElroy & Diehl, P.A. by Richard B. Fennell, for plaintiff-appellant.

Jones, Hewson & Woolard by Lawrence J. Goldman, for defendant-appellee.

STROUD, Judge.

Plaintiff appeals from order entered 30 October 2007 which granted defendant's motion for summary judgment. The dispositive question before this Court is whether the trial court erred in granting defendant's motion for summary judgment. For the following reasons, we affirm.

I. Background

On 27 February 2007, plaintiff Eagle Engineering, Inc. ("Eagle") filed a complaint against defendant Continental Casualty Company ("Continental"). Plaintiff alleged the following in the complaint:

> 7. Eagle purchased from Defendant a Professional Liability and Pollution Incident Liability Insurance Policy ("the Coverage Agreement") with policy number 11-405-03-06. The policy period for the Coverage Agreement was December 1, 2001, through December 1, 2004.

8. The Coverage Agreement provides, in pertinent part:

A. We will pay all amounts in excess of the deductible up to the limit of liability that you become legally obligated to pay as a result of:

1. a wrongful act; or

2. a pollution incident arising out of your activities or the activities of any person or entity for whom you are liable, that results in a claim anywhere in the world, provided that on the knowledge date set forth on the Declarations no officer, director, principal, partner or insurance manager knew or could reasonably have expected that a claim would be made.

B. A claim arising out of a wrongful act or pollution incident must be first made during the policy year or any applicable extended reporting period. A claim is considered first made when you receive notice of the claim or as set forth in accordance with Section VI. CONDITIONS, Item C., Your Rights and Duties in the Event of a Circumstance.

9. The Coverage Agreement also includes the following descriptive language of the type of coverage provided:

Your professional liability and pollution incident liability insurance policy is written on a "claims-made" basis and applies only to those claims first made against you while this insurance is in force. No coverage exists for claims first made against you after the end of the policy term unless, and to the extent, an extended reporting period applies.

10. Shea Homes, LLC ("Shea"), is a residential home builder that does business throughout North Carolina.

11. Shea filed counterclaims against Eagle in Union County Superior Court Case No. 03-CVS-02057 on March 8, 2004, which were amended August 9, 2004. The gravamen of Shea's counterclaims was that Eagle had improperly performed professional services in a Shea development and that this had led to property damage.

12. Eagle purchased similar insurance coverage from Defendant for the period from January 4, 2006, through January 4, 2007. The coverage language is identical to that set forth in the Coverage Agreement. Eagle was insured with a different carrier for the intervening period.

13. Eagle listed Shea's counterclaims as a pending lawsuit in its application for the 2006 policy year. Defendant accepted the business, and Eagle's premium.

14. Eagle began to ask Defendant to assume the defense and indemnification obligations surrounding Shea's counterclaims as early as November, 2005.

15. Defendant refused, contending that the Coverage Agreement required notice to be received during a policy year in order to trigger coverage.

16. Eagle resolved Shea's counterclaims on the eve of trial after failing to convince Defendant to indemnify against the counterclaims or even pick up the defense.

Plaintiff brought a cause of action against defendant for breach of contract.

On or about 9 May 2007, defendant filed an answer. On or about 17 August 2007, defendant filed a motion for summary judgment. An affidavit from James F. Alderson ("Alderson"), a claims consultant with Continental, referred to Exhibits A and B, Policy Declarations. Exhibit A is "[a] true and accurate copy of [the 11-405-03-06] policy" which ran from 1 December 2001 through 1 December 2004. Exhibit B is "[a] true and accurate copy of [the 27-620-29-33] policy" which ran from 4 January 2006 through 4 January 2007. Within Exhibit B is a "Conditions" section. This section provides,

B. Your Duties If There Is A Claim

If there is a claim, you must do the following:

1. promptly notify us in writing. . . .

The notice must be given to us within a policy year or within 60 days after its expiration or termination[.]

. . . .

N. Extended Reporting Period

1. Automatic Extended Reporting Period

If this Policy is canceled or non-renewed by either us or by the first Named Insured, we will provide an automatic, non-cancelable extended reporting period starting at the termination of the policy term if the first Named Insured has not obtained sim-

ilar coverage. This automatic extended reporting period will terminate after 60 days.

2. Optional Extended Reporting Period

If this Policy is canceled or non-renewed by either us or by the first Named Insured, then the first Named Insured shall have the right to purchase an optional extended reporting period. Such right must be exercised by the first Named Insured within 60 days of the termination of the policy term[.]

. . . .

4. Extended Reporting Period Limitations

No additional or optional extended reporting period shall apply to:

a. any claim or proceedings pending at the inception date of such extended reporting period[.]

The affidavit further provided,

5. Continental Casualty Company did not provide insurance to Eagle Engineering, Inc. from January 4, 2005 through January 4, 2006.

. . . .

9. From the information provided to the Continental Casualty Company by Eagle Engineering, Inc., the date of the claim for which Eagle Engineering seeks indemnification and a defense in this litigation was August 9, 2004. Notice of this claim was not submitted to CNA and Continental Casualty Company until October 5, 2006.

On 20 September 2007, S. Stephen Goodwin, Jr., trial counsel for Eagle Engineering in the case with Shea, filed an affidavit which stated, "Any delays on Eagles part were either inadvertent or the result of difficulty obtaining information." On this same date Frank L. "Skeet" Gray, III, P.E., a principle [sic] with plaintiff, also filed an affidavit stating, "[T]here was absolutely no purposeful intentional or deliberate decision by Eagle Engineering to delay notification to the Defendant."

On 30 October 2007, the trial court granted defendant's motion for summary judgment because "there is no genuine issue as

to any material fact that plaintiff did not provide notice of the claim within the policy period or within 60 days after the expiration of the policy period." Plaintiff appeals. The dispositive question before this Court is whether the trial court erred in granting defendant's motion for summary judgment. For the following reasons, we affirm.

II. Summary Judgment

Plaintiff argues that the trial court erred by granting summary judgment in favor of defendant. Plaintiff contends that

> Continental's position centers on its contention that the Policy at issue is a "claims made," rather than an occurrence policy. Continental's duties, then, depend on the definition of "claims made." A claims made policy generally restricts coverage to those claims which are made against the insured during the policy period. . . . A pure claims-made policy allows a claim to be presented after the policy period has expired. . . . A "claims made and reported" policy, on the other hand, engrafts a second requirement on to the definition of a covered claim. It must be both made to the insured and reported to the carrier within the policy period.

In *Digh v. Nationwide Mut. Fire Ins. Co.* this Court stated,

> 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.
>
> We begin by noting that insurance policies are considered contracts between two parties. It is the duty of the court to construe an insurance policy as it is written, not to rewrite it and thus make a new contract for the parties. Insurance contracts are construed according to the intent of the parties, and in the absence of ambiguity, we construe them by the plain, ordinary and accepted meaning of the language used.

Digh v. Nationwide Mut. Fire Ins. Co., 187 N.C. App. 725, 727-28, 654 S.E.2d 37, 39 (2007) (internal citations, internal quotation marks, brackets, and heading omitted). Furthermore,

> a mere disagreement between the parties over the language of the insurance contract does not create an ambiguity. Rather, no ambiguity exists unless, in the opinion of the court, the language of the policy is fairly and reasonably susceptible to either of the constructions for which the parties contend. Also, each provision of an insurance contract must be interpreted in view of the whole contract and not in isolation.

Pennsylvania Nat.'l Mut. Ins. Co. v. Strickland, 178 N.C. App. 547, 550, 631 S.E.2d 845, 847 (2006) (internal citations, internal quotation marks, ellipses, and brackets omitted).

Both Exhibit A, policy term of 1 December 2001 through 1 December 2004 ("hereinafter "Policy 1"), and Exhibit B, policy term of 4 January 2006 through 4 January 2007, (hereinafter "Policy 2") refer to the attached "Professional Liability Policy." The Professional Liability Policy provides in bold capitalized font at the top of the policy,

> Your professional liability and pollution incident liability insurance policy is written on a "claims-made" basis and applies only to those claims first made against you while this insurance is in force. No coverage exists for claims first made against you after the end of the policy term unless, and to the extent, an extended reporting period applies.

The Professional Liability Policy further provides that notice of a claim "must be given . . . within a policy year or within 60 days after its expiration or termination." Thus, the Professional Liability Policy requires plaintiff's claim to have both arisen during a covered policy term *and* to be reported within a covered policy term or within 60 days thereafter.

The exact date defendant was informed of plaintiff's claim is in contention, but was somewhere between November 2005 and October 2006. Plaintiff, however, contends, defendant was informed of the claim in November of 2005, and we will view the evidence in a light most favorable to plaintiff, the non-movant. *See Digh* at 727-28, 654 S.E.2d at 39.

A. Policy 1

As to Policy 1, neither November 2005 nor October 2006 falls within the policy term of 1 December 2001 through 1 December 2004 nor within 60 days thereafter. Therefore, pursuant to the plain language of the policy, Policy 1 does not provide coverage for plaintiff's claim.

B. Policy 2

As to Policy 2, Shea filed its counterclaims against plaintiff on 8 March 2004 and amended those claims 9 August 2004; 8 March 2004 and 9 August 2004 are not dates during which the 4 January 2006 through 4 January 2007 policy would have been "in force." Therefore, Policy 2 does not provide coverage for plaintiff's claim.

C. Policies 1 and 2

Viewing the contracts as a whole it is plain that plaintiff's claim must have arisen during a covered policy period *and* plaintiff was required to make its claim within a covered policy period or 60 days thereafter, which plaintiff failed to do. *See Digh* at 727-28, 654 S.E.2d at 39; *Pennsylvania Nat.'l Mut. Ins. Co.* at 550, 631 S.E.2d at 847 (2006). There is no ambiguity within the policy nor any merit to plaintiff's argument, and therefore this argument is overruled.

D. Prejudice

Furthermore, plaintiff contends that there are "genuine issues of material fact . . . as to whether defendant was prejudiced by the timing of the notice in this case." However, prejudice is irrelevant in light of the fact that the parties have a plain unambiguous contract setting out the terms of the agreement on this issue. *See Digh* at 727-28, 654 S.E.2d at 39; *Pennsylvania Nat.'l Mut. Ins. Co.* at 550, 631 S.E.2d at 847 (2006). This argument is without merit.

III. Conclusion

For the foregoing reasons, we affirm the trial court's granting of defendant's motion for summary judgment.

AFFIRMED.

Judges McCULLOUGH and TYSON concur.

DURHAM COUNTY, Plaintiff v. LYNN E. GRAHAM and FELICIA LENNON GRAHAM, Defendants

No. COA07-1158

(Filed 5 August 2008)

1. Appeal and Error— appealability—request for injunction dismissed—no further pending action

Plaintiff's appeal was not interlocutory where plaintiff's request for a mandatory injunction was dismissed for failure to join necessary parties and there was no longer any action pending.

2. Parties— necessary—current owner of landfill

The current owner of land was a necessary party to a county's action to obtain a mandatory injunction requiring the former landowners who had engaged in land-disturbing activity to restore the land, but the city was not a necessary party, and neither were the lien holders. Even though a zoning permit would be required to comply with the injunction, the city claims no interest in the property and is not at present necessary to determine the outcome between the parties. Augmentation of the land does not affect any rights that the lien holders may have in the subject property.

3. Injunctions— findings—failure to join necessary party

The trial court did not err by allegedly requiring evidence of defendants' ability to comply with an injunction; it did not in fact make that finding. The finding of which plaintiff complains was not an independent ground for dismissing the action, but was in support of the conclusion that plaintiff had not joined the necessary parties.

Appeal by plaintiff from an order entered 11 December 2006 by Judge Robert H. Hobgood and judgment entered 9 March 2007 by Judge Donald Stephens in Durham County Superior Court. Heard in the Court of Appeals 5 March 2008.

Office of the County Attorney, by Durham County Attorney S. C. Kitchen for plaintiff-appellant.

Roberti, Wittenberg, Lauffer, & Wicker, P.A., by Samuel Roberti, for defendant-appellees.

HUNTER, Judge.

Durham County ("plaintiff") appeals from the trial court's order dismissing without prejudice its prayer for mandatory injunctive relief against Lynn E. Graham and Felicia Lennon Graham ("defendants") on 9 March 2007. After careful consideration, we affirm in part and reverse in part.

On 27 August 2004, defendants obtained approval from plaintiff for a Land Disturbing Permit for property they owned—allowing defendants to use part of the property as a landfill. The permitted land disturbance required the disturbed area to be less than one acre, and the fill was to be kept out of the flood plain. On 31 March 2005, plaintiff issued to defendants a notice that they had disturbed land beyond one acre, including part of the flood plain. Additionally, plaintiff cited defendants as being in violation of local ordinances for failure to retain sediment on the site, lack of vegetative ground cover, and disturbing land in an area where vegetative ground cover could not be established due to steep slopes. Based on the alleged violations, plaintiff sought an injunction under N.C. Gen. Stat. § 113A-64.1 (2007), which entitles local governments responsible for the administration of local erosion and sedimentation control programs to require a person who engaged in land-disturbing activity to restore the waters and land where they failed to retain sediment.

Defendants took the position that they did not cause the excess disturbance or arrange for it. Instead, defendants asserted in their answer that they had abided by the permit and had not disturbed the land by more than one acre. According to defendants, others were dumping illegally on the property and defendants had called the police on multiple occasions to stop the unauthorized land disturbance of the property.

In acquiring the permit, defendants represented that they owned all of the land in question. However, defendants owned only a half interest in the land. Robert T. Perry and his wife, Willoree L. Perry, owned the other half interest. In 2006, Mr. Travis Bumpers took full ownership of the property, subject to a deed of trust, which was in foreclosure status. The property was thereafter deeded to U.S. Capital Inc., the lender and highest bidder at the foreclosure sale. At the time of the trial court's judgment, U.S. Capital was the owner of the property.

Plaintiff presents two issues for this Court's review: (1) whether the trial court erred in dismissing its motion for mandatory injunctive

relief for failure to join necessary parties; and (2) whether the trial court erred in dismissing its motion for mandatory injunctive relief for failure to present evidence of defendants' ability to comply with the injunction.

When a trial court sits as the finder of fact, its findings of fact will be binding on this Court when they are supported by competent evidence. *Shear v. Stevens Building 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*. *Id.*

[1] Before turning to the merits of plaintiff's arguments, defendants first argue that this appeal is interlocutory and therefore cannot be heard. "An order or judgment is merely interlocutory if it does not determine the issues but directs some further proceeding preliminary to final decree." *Greene v. Laboratories, Inc.*, 254 N.C. 680, 693, 120 S.E.2d 82, 91 (1961). In the instant case, plaintiff's request for a mandatory injunction was dismissed for the failure to join necessary parties; there is no longer any action pending. *See id.* (explaining an interlocutory order as one that "is subject to change by the court during the pendency of the action"). While we are aware that in some contexts rulings on mandatory joinder of parties may be interlocutory, those cases did not involve the dismissal of an action. *See*, *e.g.*, *N.C. Dep't of Transp. v. Stagecoach Village*, 360 N.C. 46, 47-48, 619 S.E.2d 495, 496 (2005) (an order joining necessary parties where the action was not dismissed was an interlocutory order); *Nello L. Teer Co. v. Jones Bros., Inc.*, 182 N.C. App. 300, 305, 641 S.E.2d 832, 837 (2007) (order denying joinder of parties is interlocutory). Here, because the trial court had issued its final decree on the issue, plaintiff's appeal is not interlocutory in nature.

I.

[2] Plaintiff first argues that the trial court committed reversible error in dismissing its motion for a mandatory injunction on the grounds that plaintiff had failed to join necessary parties. We disagree in part and agree in part.

Under N.C.R. Civ. P. 19, a party or parties must be joined where the non-party or parties are "united in interest" with either the plaintiff(s) or the defendant(s). N.C. Gen. Stat. § 1A-1, Rule 19 (2007). In this case, defendants asserted that plaintiff had failed to join necessary defendants before a judgment on a mandatory injunction could be granted. Failure to join a necessary party results in the judgment

being null and void. *Rice v. Randolph*, 96 N.C. App. 112, 113, 384 S.E.2d 295, 297 (1989). The trial court agreed, and in dismissing plaintiff's motion, ruled that the following parties were necessary: (1) the City of Durham; (2) the current property owners; and (3) all lien holders. Thus, we must determine whether any of the above-named parties were "united in interest" with defendants.

"A person is 'united in interest' with another party when that person's presence is necessary in order for the court to determine the claim before it without prejudicing the rights of a party before it or the rights of others not before the court." *Ludwig v. Hart*, 40 N.C. App. 188, 190, 252 S.E.2d 270, 272 (1979). In arguing that none of the above-named parties are necessary, plaintiff notes that it has independent statutory authority to require defendants to take affirmative action to fix any excess disturbances they may have caused. Specifically, the statute states that: "The . . . local government that administers a local erosion and sedimentation control program approved under G.S. 113A-60 may require *a person who engaged in a land-disturbing activity* . . . to restore the waters and land affected by the failure[.]" N.C. Gen. Stat. § 113A-64.1 (emphasis added).

Under the clear language of the statute, plaintiff was authorized to assert the mandatory injunction against defendants as they, according to plaintiff's complaint, were the persons authorized and responsible for the land-disturbing activity. Accordingly, under the statute, the relief plaintiff was seeking did not require the inclusion of any other party besides defendants. That, however, does not end our inquiry.

" 'The term "necessary parties" embraces all persons *who have or claim material interests in the subject matter* of a controversy, which interests will be directly affected by an adjudication of the controversy.' " *Wall v. Sneed*, 13 N.C. App. 719, 724, 187 S.E.2d 454, 457 (1972) (emphasis added) (citation omitted in original). In the instant case, it is undisputed that the subject matter of the controversy is the land in question. Our Supreme Court has held that "[a]n adjudication that extinguishes property rights without giving the property owner an opportunity to be heard cannot yield a 'valid judgment[]' " and required the non-party property owner to be joined. *Karner v. Roy White Flowers, Inc.*, 351 N.C. 433, 440, 527 S.E.2d 40, 44 (2000). Here, were the current property owner not joined as a party, his right to determine the legal use of his property would be abrogated. Thus, the current property owner, U.S. Capital, whose land could be substantially altered were the mandatory injunction to be enforced, has an

interest (the property) that would be directly affected by the adjudication of the controversy. *See Upchurch v. Upchurch*, 122 N.C. App. 172, 176, 468 S.E.2d 61, 63-64 (1996) (holding that a third party holding legal title to property is a necessary party in an action for equitable distribution); *Page v. Bald Head Ass'n*, 170 N.C. App. 151, 154, 611 S.E.2d 463, 465 (2005) (holding that all property owners affected by a residential use permit are necessary parties). We therefore conclude that the current property owner of the land in question is a necessary party.

We do not, however, find the City of Durham to be a necessary party. Were the mandatory injunction to be granted, defendants would have to petition the City of Durham for a zoning grant to comply with the trial court's order, but even if the City were to deny such a petition, defendants could then come back before the trial court and argue an inability to comply. *See In re T. J. Parker*, 177 N.C. 463, 468, 99 S.E. 342, 344 (1919) (inability to comply with a court order excuses non-compliance). In other words, the City of Durham claims no interest in the property. They might later become an interested party, were the trial court to grant plaintiff's injunction, but at present, they are not necessary to determine the outcome between the parties.

Additionally, we do not find the lien holders to be necessary parties in the current action. Even during a suit of foreclosure, lien holders are not necessary parties. *Davis v. Insurance Company*, 197 N.C. 617, 621, 150 S.E. 120, 122 (1929). We fail to see how the augmentation of land affects any rights that they may have in the subject property.

The trial court's ruling as to this issue is therefore affirmed in part and reversed in part.

II.

[3] Plaintiff next argues that the trial court committed reversible error in requiring evidence of defendants' ability to comply with an injunction. We disagree.

The trial court made only a finding of fact that defendants would be unable to comply with the order. That finding of fact was made to support its conclusion of law, that the trial court could not compel the current owner of the property, without being joined, to allow defendants onto the property to repair any damage. This is not, as plaintiff has characterized it, an independent ground on

which the trial court dismissed plaintiff's action without prejudice. Instead, the trial court dismissed plaintiff's action for failure to join necessary parties. Accordingly, plaintiff's assignments of error as to this issue are rejected.

Affirmed in part; reversed in part.

Judges ELMORE and STROUD concur.

MARK A. WARD, PLAINTIFF v. JETT PROPERTIES, LLC, DEFENDANT

No. COA08-104

(Filed 5 August 2008)

1. Pleadings— Rule 11 sanctions—complaint seeking injunction—damages or harm not alleged

The trial court did not err by granting Rule 11 sanctions for a pro se complaint seeking an injunction that did not allege damage or irreparable harm. Had plaintiff read the applicable law, he would have concluded that his complaint was not warranted by existing law and was insufficient to state a claim upon which relief could be granted.

2. Pleadings— Rule 11 sanctions—multiple claims against other tenants—improper purpose

The trial court did not err when granting Rule 11 sanctions by concluding that plaintiff's claims were filed for an improper purpose. Plaintiff suffered no actual harm, yet filed complaints against his landlord and other tenants living in his complex. Also indicative of improper purpose are the forty-two actions filed in the last six years, including one alleging identical conduct which was dismissed.

Appeal by plaintiff from an order entered 26 October 2007 by Judge William B. Reingold in Forsyth County District Court. Heard in the Court of Appeals 11 June 2008.

Mark A. Ward, plaintiff-appellant, pro se.

Hinsaw & Jacobs, LLP, by Robert D. Hinshaw, for defendant-appellee.

HUNTER, Judge.

Mark A. Ward ("plaintiff") appeals from an order granting Jett Properties, LLC's ("defendant") motion for sanctions pursuant to Rule 11 of the North Carolina Rules of Civil Procedure. After careful review, we affirm.

Plaintiff is a tenant residing in unit 21 of Buckeye Townhouses in Rural Hall, North Carolina. Defendant owns Buckeye Townhouses. In a separate action, initiated on 20 June 2007, plaintiff filed a complaint seeking injunctive relief for the alleged violation of restrictive covenants by defendant's other tenants. Plaintiff alleged "defendant's tenants engaged in a football slinging and kicking session within striking distance of plaintiff's vehicle" and abridged plaintiff's right to ingress and egress[1] by "darting out between parked vehicles on metal skooters[.]"

On 29 June 2007, defendant filed a motion to dismiss pursuant to North Carolina Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. The court granted defendant's motion to dismiss on 30 July 2007 as plaintiff's complaint "requested only injunctive relief and showed no actual damage and no substantial likelihood of irreparable harm[.]" Further, plaintiff "failed to show that he did not have an adequate remedy at law[.]" This Court affirmed the trial court's order granting defendant's motion to dismiss in an unpublished opinion. *Ward v. Jett Props., LLC*, 190 N.C. App. 208, ––– S.E.2d ––– (2008).

On 6 September 2007, defendant filed a motion for sanctions pursuant to Rule 11 contending that plaintiff intended merely to harass defendant and filed the action knowing that it was insufficient as a matter of law. Finding that the "instant lawsuit was filed knowing that the claims were not warranted by existing law and further were filed for an improper purpose," the trial court granted defendant's motion for sanctions on 26 October 2007. The Court also noted that plaintiff has filed at least forty-two actions in the past six years including a previous action alleging conduct identical to the instant case. The court awarded defendant the sum of $2,000.00 for attorney's fees and costs of the action; plaintiff timely filed an appeal on 20 November 2007.

Plaintiff contends that the trial court erred in granting defendant's motion for sanctions pursuant to Rule 11. The trial court's order

1. Plaintiff cites an article of the Buckeye Townhouses Declaration providing the right of "ingress and egress" upon said parking area.

granting defendant's motion for sanctions "is reviewable *de novo* as a legal issue." *Turner v. Duke University*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989). On appeal, the Court must determine "(1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence." *Id.* The appropriateness of the sanction imposed, however, is reviewed under an abuse of discretion standard. *Id.*

In pertinent part, Rule 11 provides:

> A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. . . . The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

N.C. Gen. Stat. § 1A-1, Rule 11(a) (2007). It is well established " '[t]here are three parts to a Rule 11 analysis: (1) factual sufficiency, (2) legal sufficiency, and (3) improper purpose. . . . A violation of any one of these requirements mandates the imposition of sanctions under Rule 11.' " *Static Control Components, Inc. v. Vogler*, 152 N.C. App. 599, 603, 568 S.E.2d 305, 308 (2002) (citation omitted).

In the instant case, the trial court granted defendant's motion for sanctions finding that "the instant lawsuit was filed knowing that the claims were not warranted by existing law and further were filed for an improper purpose, that is harassment of the Defendant and it's [*sic*] tenants[.]" As there is no issue as to the factual sufficiency of plaintiff's complaint, we begin by discussing legal sufficiency.

I. Legal Sufficiency

[1] Asserting that his complaint was based on extensive inquiry into the law and set forth a facially plausible legal theory, plaintiff contends that the trial court erred in granting defendant's motion for sanctions. We disagree.

This court has held a two-step analysis is required when examining the legal sufficiency of a claim subject to Rule 11 inquiry. Initially,

the court must determine the facial plausibility of the paper. "If the paper is facially plausible, then the inquiry is complete, and sanctions are not proper." *Mack v. Moore*, 107 N.C. App. 87, 91, 418 S.E.2d 685, 688 (1992). If the paper is not facially plausible, the second issue is whether, based on a reasonable inquiry into the law, the alleged offender "formed a reasonable belief that the paper was warranted by existing law, judged as of the time the paper was signed." *Id.* Rule 11 sanctions are appropriate where the offending party either failed to conduct reasonable inquiry into the law or did not reasonably believe that the paper was warranted by existing law. *Id.*

In the instant case, plaintiff's claim was not facially plausible as it was dismissed pursuant to Rule 12(b)(6) at trial. The dismissal was subsequently affirmed by our court as plaintiff "alleged no claim of actual damage or substantial likelihood of irreparable harm" and, consequently, did not state a claim upon which relief could be granted. *Ward*, 190 N.C. App. at ––, –– S.E.2d at –– (slip op. 4). Though "the mere fact that a cause of action is dismissed upon a Rule 12(b)(6) motion does not automatically entitle the moving party to have sanctions imposed[,]" *Harris v. Daimler Chrysler Corp.*, 180 N.C. App. 551, 561, 638 S.E.2d 260, 268 (2006), it is often indicative that sanctions are proper.

Plaintiff argues that he conducted a reasonable inquiry into existing law and, further, that the standard for a pro se litigant should be relaxed to account for the absence of a legal education. Supporting his claim of conducting reasonable inquiry, plaintiff asserts that he consulted a licensed attorney regarding the legal sufficiency of his complaint. Though the trial court made no findings regarding plaintiff's inquiry into the law, it concluded that plaintiff's claims had absolutely no basis in law as plaintiff alleged no claim of actual damage or substantial likelihood of irreparable harm. Thus, assuming a reasonable inquiry, the dispositive question is whether a reasonable person in plaintiff's position (i.e., a pro se plaintiff), after having read and studied the applicable law, would have concluded the complaint was warranted by existing law. *Mack*, 107 N.C. App. at 92, 418 S.E.2d at 688. In the present case, had plaintiff read the applicable law he would have concluded that his complaint was not warranted by existing law and was insufficient to state a claim upon which relief can be granted. *See Vest v. Easley*, 145 N.C. App. 70, 76, 549 S.E.2d 568, 574 (2001) ("[a] plaintiff is entitled to injunctive relief when there is no adequate remedy at law and irreparable harm will result if the injunction is not granted").

II. Improper Purpose

[2] Granting defendant's motion for sanctions, the trial court concluded plaintiff's claims "were filed for an improper purpose, that is harassment of the Defendant and it's [*sic*] tenants." Plaintiff asserts that the instant complaint is valid and meritorious and does not constitute harassment. We disagree.

Our Courts have held that "even if a paper is well grounded in fact and law, it may still violate Rule 11 if it is served or filed for an improper purpose." *Brooks v. Giesey*, 334 N.C. 303, 315, 432 S.E.2d 339, 345-46 (1993). Defined as any purpose other than one to vindicate rights or to put claims to a proper test, " 'an improper purpose may be inferred from the alleged offender's objective behavior.' " *Kohler Co. v. McIvor*, 177 N.C. App. 396, 404, 628 S.E.2d 817, 824 (2006) (citation omitted). Accordingly, "[u]nder Rule 11, an objective standard is used to determine whether a paper has been interposed for an improper purpose, with the burden on the movant to prove such improper purpose." *Mack*, 107 N.C. App. at 93, 418 S.E.2d at 689.

The movant's subjective belief that a paper has been filed for an improper purpose as well as whether the offending conduct did, in fact, harass movant is immaterial to the issue of whether the alleged offender's conduct is sanctionable. *Id.* Improper purpose may, however, be inferred from the service or filing of excessive, successive, or repetitive papers or from " 'continuing to press an obviously meritless claim after being specifically advised of its meritlessness by a judge or magistrate.' " *Id.* (citation omitted).

In the present case there exists a strong inference of an improper purpose by plaintiff. Plaintiff has suffered no actual harm, yet has filed complaints arising from the instant facts against both his landlord and other tenants living in his complex. Also indicative of plaintiff's improper purpose are the forty-two actions he has filed in the last six years, one of which alleged the identical conduct complained of in the present case and was dismissed.

As plaintiff's complaints in the instant action were not warranted by existing law and were filed with an improper purpose, we affirm the trial court's order granting defendant's motion for sanctions.

Affirmed.

Judges TYSON and JACKSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 5 AUGUST 2008

Case	County	Disposition
BRADLEY v. MAXIM HEALTHCARE SERVS. No. 07-1052	Indus. Comm. (I.C. NO. 483665)	Affirmed
BUTTERFIELD v. WILLIAMSON No. 07-1488	Polk (05CVS268)	Affirmed
CAROLINA POWER & LIGHT CO. v. ATLANTIC FORKS, L.L.C. No. 07-1347	Wake (04CVS14813)	Affirmed
CLARK v. CLARK No. 07-1205	Dare (04CVS43)	Affirmed
COUNTY OF DURHAM v. DAYE No. 07-1036	Durham (03CVS457)	Dismissed
DOSS v. TATUM No. 07-1426	Rockingham (06CVS2159)	Affirmed
EDMUNDSON v. LAWRENCE No. 08-83	Wilson (02CVS2318)	Reversed
EDWARDS v. HOLDEN No. 07-1454	Brunswick (07CVS1148)	Affirmed
FROST v. DOMINGUEZ No. 07-1429	Cumberland (97CVD6063)	Reversed
HALL v. CITY OF ASHEVILLE No. 07-1520	Buncombe (05CVS3804-05)	Affirmed
HAYWOOD COUNCIL ON AGING v. MATHIS No. 07-554	Haywood (06CVS1105)	Reversed and remanded. Dismissed as to Employee's appeal
IN RE D.G. No. 07-1459	Mecklenburg (07J31)	Affirmed
IN RE D.K.H. No. 07-1003	Mecklenburg (06J1368)	Affirmed in part, remanded in part
JOHNSON v. LUCAS No. 07-1084	Wake (97CVS5263)	Affirmed
LISK v. LISK No. 07-661	Anson (04CVS207)	Affirmed
LUCKY DUCKS, LTD. v. LEEDS No. 07-1469	Guilford (05CVS12589)	Affirmed

MANKES v. N.C. STATE EDUC. ASSISTANCE AUTH. No. 07-944	Wake (05CVS12349)	Affirmed
McHENRY v. INTERNATIONAL PAPER CO. No. 07-1449	Indus. Comm. (I.C. NO. 221276)	Affirmed
SALTER v. WILLIS No. 07-1059	Carteret (05CVS1142)	Reversed and remanded
SCHNEIDER v. HOFF No. 07-1209	Cabarrus (05CVD3157)	Affirmed in part, vacated and remanded with instructions in part
STATE v. BANDY No. 07-1380	Pitt (06CRS57738)	No error
STATE v. BANKS No. 07-1226	Cleveland (06CRS55875) (07CRS2403) (07CRS3126-27)	No error
STATE v. BARE No. 07-1565	Wilkes (07CRS50019-20) (07CRS50024) (07CRS50107) (07CRS50112)	No error
STATE v. BENNETT No. 07-1545	Forsyth (07CRS50340)	Affirmed
STATE v. BISHOP No. 07-1305	Sampson (06CRS2078) (06CRS4521) (06CRS50793-94)	No error
STATE v. BRIDGES No. 07-1326	Rutherford (05CRS50129)	No error
STATE v. JEFFRIES No. 07-1049	Buncombe (06CRS55554)	No error
STATE v. JENKINS No. 07-1006	Transylvania (06CRS1669-71) (06CRS1673-75)	No prejudicial error
STATE v. JONES No. 07-1308	Robeson (02CRS54457-58)	No error
STATE v. KARGES No. 07-1339	Gaston (07CRS9040)	Dismissed

Case	County	Disposition
STATE v. KETTER No. 07-1445	Mecklenburg (05CRS256470)	No error in trial; remanded for correction of clerical error
STATE v. KING No. 07-1504	Wayne (06CRS8042)	Dismissed
STATE v. LUGO No. 07-906	Macon (05CRS51668)	Affirmed in part, dismissed in part
STATE v. MACKEY No. 07-1086	Pitt (04CRS62798)	No error
STATE v. McCALL No. 07-1252	Columbus (05CRS463) (05CRS1013-14)	No error
STATE v. McNAIR No. 07-1067	Wake (06CRS8185) (06CRS25718)	No error
STATE v. PELHAM No. 07-1024	Brunswick (01CRS5561-64)	No error
STATE v. ROBINSON No. 07-1274	Duplin (06CRS3305) (06CRS50096)	No error
STATE v. SANDERS No. 07-1279	Durham (03CRS57288)	No error
STATE v. SIZEMORE No. 07-1489	Macon (05CRS50962-64)	No error
STATE v. VICK No. 07-1163	Edgecombe (06CRS51346)	No error
STATE v. VINCENT No. 07-1512	Wake (06CRS89568)	No error
STATE v. WATSON No. 07-1275	Wake (05CRS82876-77)	Affirmed in part, vacated in part and remanded in part
STATE v. WILLIAMS No. 07-1575	Robeson (00CRS18103) (00CRS14052) (00CRS14054-57)	No error
STATE v. WRIGHT-STOVER No. 07-1327	Mecklenburg (04CRS238171) (04CRS238173)	Affirmed
STATE v. YOUNG No. 07-1443	Iredell (05CRS57155-57)	No error

TELLADO v. N.C. DEP'T OF TRANSP. No. 07-1457	Catawba (06CVS13)	Reversed and remanded
WARD v. ENBODY No. 08-35	Forsyth (07CVD5516)	Affirmed
WILKIE-FISHER v. P.H. GLATFELTER/ECUSTA DIV. No. 08-79	Indus. Comm. (I.C. NO. 951842)	Affirmed

TAMITHA SHEPARD, BEATRICE PERRY, WILLIAM GMOSER, AND DEBRA ROSSETER, PLAINTIFFS v. BONITA VISTA PROPERTIES, L.P.; VICKIE L. SAFELY-SMITH, AS GENERAL PARTNER OF BONITA VISTA PROPERTIES, L.P.; VICKIE L. SAFELY-SMITH, TRUSTEE OF FVS TRUST, GENERAL PARTNER OF BONITA VISTA PROPERTIES, L.P.; AND, VICKIE L. SAFELY-SMITH, INDIVIDUALLY, DEFENDANTS

No. COA07-1095

(Filed 5 August 2008)

1. Appeal and Error— appellate rules violations—dismissal not required

The Court of Appeals denied plaintiffs' motion to dismiss defendants' appeal based on alleged violations of N.C. R. App. P. 28(b) because: (1) our Supreme Court has held that a party's failure to comply with a nonjurisdictional rule of appellate procedure, such as Rule 28(b), normally should not lead to dismissal of the appeal; and (2) to the extent defendants failed to comply with Rule 28(b), their noncompliance does not approach the level of a substantial failure or gross violation, and thus the court was not authorized to consider any sanction.

2. Utilities— campground furnishing electricity—public utility—overcharges

An RV campground owner was operating a public utility, and the trial court properly awarded damages to former tenants of the campground under the Public Utilities Act, where: (1) the owner charged the tenants more than the actual cost of electricity supplied to the campground by a power company; and (2) the owner's argument that the overcharges for electricity were not "willful" because the owner was ignorant of the proper way to calculate electricity charges was without merit. N.C.G.S. § 62-3(23)(h).

3. Unfair Trade Practices— treble damages—rental of campground spaces—disconnecting electricity—damage to RVs

The trial court did not err by awarding treble damages on plaintiffs' unfair and deceptive trade practices (UDTP) claims for damages to their RVs when defendant RV campground owner disconnected electrical service to the RVs, regardless of whether plaintiffs were residential tenants entitled to the protections of Chapter 42, because: (1) plaintiffs' UDTP claims were not dependent on proving violations of Chapter 42 and the evidence

supported their UDTP claims irrespective of any Chapter 42 violations; (2) the trial court's findings of fact supported its conclusions when defendant rented campground spaces to plaintiffs on a monthly basis and charged plaintiffs for electricity, these activities constituted business activities, defendant's acts were in or affecting commerce, and defendant's acts in interfering with and disconnecting plaintiffs' electricity were unfair at a minimum; and (3) plaintiffs' expert evidence showed the electrical interruptions caused damage to plaintiffs' RVs.

4. Costs; Unfair Trade Practices— attorney fees— reasonableness

Although the trial court did not abuse its discretion in an unfair and deceptive trade practices case by awarding attorney fees under N.C.G.S. § 75-16.1, the case is remanded for a determination of the reasonableness of the award because: (1) in order for the Court of Appeals to determine whether an award is reasonable, the record on appeal must contain findings of fact that support the award including findings regarding the time and labor expended, the skill required to perform the services rendered, the customary fee for like work, and the experience and ability of the attorney; and (2) the Court of Appeals was unable to determine from the trial court's findings whether the amount of the award was reasonable when the findings did not fully address the skill required to perform the legal services that were rendered or the experience and ability of plaintiffs' trial counsel. On remand, the trial court may include fees for services rendered at all stages of the litigation, including the appeal.

5. Contracts— breach of contract—compensatory damages— extra hours worked

The trial court did not err in a breach of contract case by concluding that plaintiff Rosseter was entitled to compensatory damages for the extra hours she worked as office manager for defendant's RV campground because: (1) the trial court's findings of fact established that the parties assented to the same thing in the same sense including that defendant agreed to pay Rosseter $6.00 for each hour Rosseter worked after eighty-six hours per month, and Rosseter initially accepted this compensation in the form of credits against her electricity charges and lot rental; (2) having been forced out of the campground by defendants' disruption of her electrical service, Rosseter was no longer able to accept her due compensation in this form; and (3) by the express terms of

the agreement, Rosseter was entitled to monetary compensation for hours worked for which she has not been compensated.

Judge TYSON concurring in part and dissenting in part.

Appeal by Defendants from judgment entered 5 April 2007 by Judge William C. McIlwain in Scotland County District Court. Heard in the Court of Appeals 5 March 2008.

Kurtz and Blum, PLLC, by Timothy E. Wipperman, for Plaintiffs-Appellees.

Van Camp, Meacham & Newman, PLLC, by Evelyn Mackrella Savage, for Defendants-Appellants.

STEPHENS, Judge.

Defendants appeal from the district court's judgment awarding $46,210.37 in damages and attorney's fees to Plaintiffs on claims of breach of North Carolina's Public Utilities Act, unfair and deceptive trade practices, and breach of contract. We affirm the awards of damages but remand for additional findings of fact concerning the award of attorney's fees.

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) (citation omitted). 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 this case, Defendants did not assign error to any of the trial court's findings, and, thus, the findings are presumed to be supported by competent evidence. *Koufman v. Koufman*, 330 N.C. 93, 408 S.E.2d 729 (1991); N.C. R. App. P. 10(a) ("[T]he scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal . . . ."). The findings establish the facts which follow.

In 2002, Defendant Vickie L. Safely-Smith, "as General Partner, and as Trustee of [Defendant] FVS Trust[,]" formed Defendant Bonita Vista Properties, L.P., in California. In October 2004, Bonita Vista acquired ownership of the Pine Lake RV Resort ("campground") located in Scotland County, North Carolina. Among other services, the campground rented spaces on which recreational vehicle ("RV")

operators could park and live in their RVs. The RV spaces were available to, among others, "monthly tenants." The campground also furnished electrical service to RV operators requiring such service, charging the operators "at the rate of .0971 per kilowatt hour." The campground received its electrical service from the Lumbee River Electric Membership Corporation ("Lumbee River EMC"). Lumbee River EMC charged the campground ".0858 per kilowatt hour for the first 800 hours of use and .0689 per kilowatt hour for the next 4200 hours of use." Safely-Smith was the campground's property manager.

On 3 May 2003, Plaintiffs William GMoser and Debra Rosseter, a married couple, "moved into [the campground,]" and lived there continuously through the time Bonita Vista became the campground's owner. The couple maintained "a single 40.5' by 9.5' RV mobile home" at the campground as their permanent and sole residence, paying $245.00 per month to Bonita Vista in "lot rent." Rosseter and GMoser plugged their RV into one of the campground's power sources and paid for electricity. When they moved in, Rosseter and GMoser gave Bonita Vista $30.00 as a deposit for two "gate openers[.]" Bonita Vista agreed to return the deposit if the openers were returned in working condition. Rosseter and GMoser told Safely-Smith that they intended to remain at the campground indefinitely.

Plaintiff Beatrice Perry "moved into [the campground]" on 23 October 2004. Perry lived in a "fifth-wheel" RV, a "trailer" which "require[s] a large pick-up truck to move or haul it." Perry's RV was her permanent and sole residence. Like Rosseter and GMoser, Perry paid Bonita Vista $245.00 per month as "lot rent[,]" plugged her RV into one of the campground's power sources, and told Safely-Smith that she intended to live at the campground indefinitely. Perry gave Bonita Vista $60.00 as a deposit for three gate openers.

Plaintiff Tamitha Shepard moved into the campground "with her family" on 31 March 2005. Like Perry, Shepard lived in a fifth-wheel RV which was her permanent residence. Like all of the other Plaintiffs, Shepard plugged her RV into one of the campground's power sources and paid a deposit for gate openers. Unlike the others, Shepard required daily use of the campground's bath house because the bathroom in her RV was not functioning properly. Initially, Shepard paid $245.00 in "lot rent[,]" but, on 1 July 2005, Shepard began paying $265.00 per month after she moved her RV to a different space at the campground. Shepard moved primarily due to "the availability of electricity and access to the bath house." Shepard told

Safely-Smith that she intended to live at the campground for one to three years.

All Plaintiffs "availed themselves of utilities and amenities" provided by the campground and received mail at the campground. Also, throughout their tenancies, Plaintiffs used propane from tanks located on the campground's property. Plaintiffs paid for the propane in the tanks at the beginning of their tenancies.

In November 2004, Rosseter began working as the campground's office manager. She agreed to work eighty-six hours per month in exchange for her monthly lot rent. In December 2004, Rosseter worked 102 hours. In 2005, Rosseter worked the following hours: January—80.5; February—166; March—142; April—281.5; May—87.5; June—67. In all, Rosseter worked 324.5 hours more than was required. Rosseter and Safely-Smith had several conversations concerning how Rosseter would be compensated for the extra time. In January 2005, "it was noted that another tenant was being paid [$6.00] per hour" for working at the resort, and Safely-Smith told Rosseter, "and that is what you will be paid." The parties intended that this rate of pay would be applied as a credit for electricity charges and lot rent. For the three months of April, May, and June 2005, Rosseter received a total of $250.01 as electricity credit. Rosseter's employment was terminated on 9 June 2005, but she received lot rental credit of $490.00 for July and August 2005.

Around 1 July 2005, Shepard began to notice that the conditions in the campground's bath house were deteriorating. On 19 August 2005, Shepard expressed her concerns over the bath house's conditions to Perry and Rosseter and then reported the conditions to the Scotland County Health Department. Following an inspection by the Health Department, Safely-Smith became upset and told Shepard that she would "fix" her and that she had to leave the campground.

The Scotland County Sheriff's Department responded to several calls in August 2005 from the campground regarding electricity "issues." On 18 August, Safely-Smith's husband placed a zip-tie on the power box supplying power to Rosseter's RV. On 28 August, Safely-Smith turned off Rosseter's power "at the main power box," and placed a padlock on the "pedestal." On 29 August, Rosseter "plugged into an old 30 amp power source" near her RV. Safely-Smith had Rosseter's power unplugged and had the old power source destroyed. On 30 August, Safely-Smith and an employee "began flipping breakers at the [campground], resulting in the electric power being turned on

and off at all [Plaintiffs' RVs]." Each RV was damaged as a result of the electrical service interruptions, and Plaintiffs moved out of the campground that day.

In September 2005, Perry returned Plaintiffs' gate openers to Safely-Smith in good working condition, but Safely-Smith refused to refund Plaintiffs' deposits. Also that month, Plaintiffs contacted Lumbee River EMC and learned that the campground had charged Plaintiffs more for electrical service than Lumbee River EMC charged the campground. On 2 November 2005, Plaintiffs' attorney sent Safely-Smith a letter demanding repayment for the alleged overcharges. Safely-Smith did not respond to the attorney's letter.

Plaintiffs filed a complaint on 17 January 2006. Plaintiffs alleged that Defendants committed unfair and deceptive trade practices, N.C. Gen. Stat. § 75-1.1 (2005), by: (1) interrupting and eventually disconnecting Plaintiffs' electrical service, (2) representing that the campground charged the same rate for electrical service as Lumbee River EMC charged the campground, and (3) refusing to refund Plaintiffs' gate opener deposits. Additionally, Plaintiffs alleged that Defendants' provision of electricity at a rate higher than the rate at which Defendants received the service from Lumbee River EMC constituted a violation of North Carolina's Public Utilities Act. N.C. Gen. Stat. §§ 62-1 to -333 (2005). Plaintiffs also set forth a claim for money owed for the value of the propane which Plaintiffs purchased but which remained in the campground's propane tanks. Finally, Rosseter alleged that Defendants breached their agreement to compensate her for the additional hours she worked as the campground's office manager.

Safely-Smith filed a *pro se* answer on 16 February 2006 and appeared *pro se* at a bench trial conducted between 27-29 June 2006. After Safely-Smith and Plaintiffs' attorney presented their closing arguments, the trial court stated:

> I'm gonna allow [Safely-Smith] . . . to take all of [the evidence] . . . to an attorney . . . then let an attorney research some of this law and file a brief with me about what [she] think[s] the law is and how it applies to [her] case.

Safely-Smith filed a *pro se* brief on 17 July 2006. Plaintiffs filed a motion to strike Defendants' brief on 21 July 2006. On 16 October 2006, the trial court held a hearing and announced its decision in the case.

In its judgment, signed and filed 5 April 2007, the trial court made the following conclusions of law:

> 1. That [] Rosseter and [] Safely-Smith had an oral agreement for additional compensation concerning hours worked beyond 86 hours per month.
>
> 2. . . . Rosseter is entitled to monetary damages for work done and not compensated.
>
> 3. That considering all the circumstances of Plaintiffs' tenancies, Plaintiffs were residential tenants who leased living spaces as their primary residences and Plaintiffs are entitled to assert claims under Article 5 and Article 2A of Chapter 42 of [the] North Carolina General Statutes.
>
> 4. That as a direct result of [] Safely-Smith's actions in cutting power to Plaintiffs' dwelling units, each Plaintiff suffered direct and consequential damages to their units.
>
> 5. That [] Safely-Smith's acts in removing electric power to Plaintiffs who were lawful tenants constitute a retaliatory eviction as set forth in N.C.G.S. 42-37.1—37.3.
>
> 6. That in delivering and furnishing electricity to Plaintiffs and charging an amount in excess of the actual cost of the electricity supplied to Plaintiffs, Defendants operated as a public utility as defined by N.C.G.S. 62-3(23).
>
> 7. That Defendants willfully charged Plaintiffs a rate for electricity in excess of that prescribed by Lumbee River EMC . . . and Defendants did not refund the same within thirty (30) days after written notice and demand by Plaintiffs' attorney.
>
> 8. That pursuant to N.C.G.S. 62-139, Plaintiffs are entitled to receive double the electric overcharges, plus ten dollars ($10.00) per day penalties.
>
> 9. That [] Safely-Smith's trespass, her attempts to wrongfully evict Plaintiffs without resort to judicial process and her willfully charging electric rates in excess of that prescribed by the North Carolina Utilities Commission pursuant to G.S. 62-139 constituted unfair or deceptive acts or practices in commerce within the meaning of N.C.G.S. 75-1.1.
>
> 10. That pursuant to N.C.G.S. Chapter 75-16, et[] seq., Plaintiffs are entitled to an award of treble damages and attorney fees . . . .

> 11. That Plaintiffs . . . are entitled to refunds of their deposits for gate openers returned in working condition . . . .

On Plaintiffs' Public Utilities Act claims, the trial court awarded double damages for the amount of overcharges paid by Plaintiffs. This award amounted to $72.14 for GMoser and Rosseter, $125.96 for Perry, and $59.50 for Shepard. The trial court also ordered Defendants to pay Plaintiffs $10.00 per day for every day between 2 December 2005 and 16 October 2006 as a penalty for the overcharges.[1] This award amounted to $3,180.00 each to GMoser and Rosseter, Perry, and Shepard. On Plaintiffs' unfair and deceptive trade practices claims, the trial court awarded damages in the amounts of $889.79 to Rosseter and GMoser, $1,534.60 to Perry, and $3,223.27 to Shepard, ordered these amounts trebled, and awarded $18,112.50 to Plaintiffs, collectively, in attorney's fees. The damage awards were calculated by totaling the amounts of damage caused to Plaintiffs' RVs as a result of the electrical service interference. On Rosseter's breach of contract claim, the trial court awarded $1,206.99 in uncompensated wages. Finally, the trial court awarded Plaintiffs the amounts they paid Defendants as gate opener deposits. Defendants timely appealed.

PLAINTIFFS' MOTION TO DISMISS APPEAL

[1] On 4 January 2008, Plaintiffs filed a motion to dismiss Defendants' appeal for alleged violations of Rule 28(b) of the Rules of Appellate Procedure, a rule which "governs the content of the appellant's brief." *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 198, 657 S.E.2d 361, 365 (2008). After Plaintiffs filed their motion to dismiss, our Supreme Court announced that a party's failure to comply with a nonjurisdictional rule of appellate procedure, such as Rule 28(b), "normally should not lead to dismissal of the appeal." *Id.* (citations omitted). Had *Dogwood* been announced before Plaintiffs filed their motion, we hazard to suggest that Plaintiffs would not have asked this Court to dismiss Defendants' appeal for the alleged violations. Surely Plaintiffs must agree that, to the extent Defendants failed to comply with Rule 28(b), Defendants' noncompliance does not approach the level of a "substantial failure"

1. The Public Utilities Act allows a court to impose a $10.00 per day penalty "for each day's delay" in refunding overcharges "30 days after written notice and demand of the person overcharged[.]" N.C. Gen. Stat. § 62-139(b) (2005). Defendants received Plaintiffs' written notice and demand on 2 November 2005, thirty days before 2 December 2005. The trial court announced its judgment in open court on 16 October 2006.

or "gross violation." *Id.* at 199, 657 S.E.2d at 366 (quotation marks omitted). Regardless, such is our opinion, and we, therefore, are not authorized to consider any sanction. *Dogwood*, 362 N.C. 191, 657 S.E.2d 361. Plaintiffs' motion is denied.

PUBLIC UTILITIES ACT

[2] Defendants argue that the trial court erred in awarding damages pursuant to the Public Utilities Act. That Act provides:

> Any public utility in the State which shall willfully charge a rate for any public utility service in excess of that prescribed by the Commission, and which shall omit to refund the same within 30 days after written notice and demand of the person overcharged, unless relieved by the Commission for good cause shown, shall be liable to him for double the amount of such overcharge, plus a penalty of ten dollars ($10.00) per day for each day's delay after 30 days from such notice or date of denial or relief by the Commission, whichever is later.

N.C. Gen. Stat. § 62-139(b). The Act defines a "public utility" as, among other things, a person or organization

> [p]roducing, generating, transmitting, delivering or furnishing electricity, piped gas, steam or any other like agency for the production of light, heat or power to or for the public for compensation[.]

N.C. Gen. Stat. § 62-3(23)(a)(1) (2005). The Act continues:

> The term "public utility" shall not include the resale of electricity by (i) a campground operated primarily to serve transient occupants, . . . provided that (i) the campground . . . charges no more than the actual cost of the electricity supplied to it, (ii) the amount of electricity used by each campsite . . . occupant is measured by an individual metering device, (iii) the applicable rates are prominently displayed at or near each campsite . . ., and (iv) the campground . . . only resells electricity to campsite . . . occupants.

N.C. Gen. Stat. § 62-3(23)(h) (2005).

Defendants first argue that the trial court erred in concluding that they were operating a "public utility." Defendants do not dispute that they were furnishing electricity to the public for compensation. Rather, Defendants contend that the campground was excluded from

the statutory definition because Plaintiffs presented no evidence of: (1) the actual costs Defendants incurred for the electricity supplied to the campground, (2) whether the amount of electricity used by each campsite occupant was measured by an individual metering device, and (3) whether the campground only resold electricity to campsite occupants. For the reasons set forth at the outset of this opinion, our review is limited to whether the trial court's findings of fact support its conclusion.

The trial court found:

> 85. That [] Safely-Smith charged tenants for the electricity at the rate of .0971 per kilowatt hour.
>
> . . . .
>
> 87. That Lumbee River EMC provided electricity to the [campground] as a Phase Three property, charging Defendants .0858 per kilowatt hour for the first 800 hours of use and .0689 per kilowatt hour for the next 4200 hours of use.

These unchallenged findings negate Defendants' contention. A campground furnishing electricity for compensation is excluded from the statutory definition only if it does not charge more than the actual cost of electricity supplied to it. N.C. Gen. Stat. § 62-3(23)(h). Defendants charged more than the actual cost of electricity supplied to the campground by Lumbee River EMC. We note that these findings are supported by evidence in the record on appeal. Defendant's argument is overruled.

Second, Defendants argue that even if they were operating as a public utility, it cannot be said that they "willfully" overcharged Plaintiffs for electricity because "Defendants were ignorant of the proper way to calculate [Plaintiffs'] electricity charges." This argument is meritless and, accordingly, is rejected.

UNFAIR AND DECEPTIVE TRADE PRACTICES

[3] Next, Defendants argue that the trial court erred in awarding treble damages on Plaintiffs' unfair and deceptive trade practices ("UDTP") claims. In both their appellate brief and their oral argument to this Court, Defendants argued at length that Plaintiffs' UDTP claims were dependent on an assertion that Plaintiffs were residential tenants entitled to the protections of North Carolina's landlord and tenant laws. N.C. Gen. Stat. ch. 42 (2005). Plaintiffs, however, before both the trial court and this Court, asserted that their UDTP claims

were not dependent on proving violations of Chapter 42 and that the evidence supports their UDTP claims irrespective of any Chapter 42 violation. We agree with Plaintiffs.

Section 75-1.1 creates a private cause of action for consumers. *Gray v. North Carolina Ins. Underwriting Ass'n*, 352 N.C. 61, 529 S.E.2d 676, *reh'g denied*, 352 N.C. 599, 544 S.E.2d 771 (2000). "The purpose of G.S. 75-1.1 is to provide a civil means to maintain ethical standards of dealings between persons engaged in business and the consuming public within this State and applies to dealings between buyers and sellers at all levels of commerce." *United Virginia Bank v. Air-Lift Assocs.*, 79 N.C. App. 315, 319-20, 339 S.E.2d 90, 93 (1986) (citing *Buie v. Daniel Int'l Corp.*, 56 N.C. App. 445, 448, 289 S.E.2d 118, 119, *disc. review denied*, 305 N.C. 759, 292 S.E.2d 574 (1982)). *See* N.C. Gen. Stat. § 75-1.1(b) (2005) (" '[C]ommerce' includes all business activities . . . ."). "Whether a trade practice is unfair or deceptive usually depends upon the facts of each case and the impact the practice has in the marketplace." *Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981) (citation omitted). "In order to establish a violation of N.C.G.S. § 75-1.1, a plaintiff must show: (1) an unfair or deceptive act or practice, (2) in or affecting commerce, and (3) which proximately caused injury to plaintiffs." *Id.* at 68, 529 S.E.2d at 681 (citing N.C. Gen. Stat. § 75-1.1(a) (1999); *First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 252, 507 S.E.2d 56, 63 (1998)). A person damaged by another's unfair or deceptive acts or practices is entitled to treble damages. N.C. Gen. Stat. § 75-16 (2005).

As stated above and as the dissent reiterates, our review is limited to whether competent evidence supports the trial court's findings and whether the findings support the court's conclusions of law. *Shear*, 107 N.C. App. 154, 418 S.E.2d 841. In its fourth conclusion of law, unchallenged by Defendants on appeal, the trial court concluded:

> 4. That as a direct result of [] Safely-Smith's actions in cutting power to Plaintiffs' dwelling units, each Plaintiff suffered direct and consequential damages to their units.

The trial court then concluded:

> 10. That pursuant to N.C.G.S. Chapter 75-16, et[] seq., Plaintiffs are entitled to an award of treble damages and attorney fees against [Defendants].

The trial court's findings of fact support these conclusions, and we agree with the trial court that Defendants are entitled to damages on their UDTP claims. The trial court found that Defendants rented campground spaces to Plaintiffs on a monthly basis and charged Plaintiffs for electricity. These activities undoubtedly constituted business activities; thus, Defendants' acts were in or affecting commerce. Furthermore, Defendants' acts in interfering with and disconnecting Plaintiffs' electricity were, at a minimum, unfair. *Marshall*, 302 N.C. at 548, 276 S.E.2d at 403 ("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.") (citation omitted). Finally, upon expert evidence presented by Plaintiffs, the trial court found that the electrical interruptions caused damage to Plaintiffs' RVs. Accordingly, the trial court properly awarded damages on Plaintiffs' UDTP claims regardless of whether Plaintiffs were residential tenants entitled to the protections of Chapter 42. Defendants' argument to the contrary is overruled.

[4] Defendants next argue that "[e]ven if the trial court properly concluded that Defendants' actions amounted to unfair or deceptive trade acts or practices, Plaintiffs are not entitled to an award of attorneys' fees." *See* N.C. Gen. Stat. § 75-16.1 (2005) (allowing for an award of attorney's fees in Chapter 75 actions). Defendants contend that there is no evidence in the record on appeal that "there was an unwarranted refusal by [Defendants] to fully resolve the matter which constitutes the basis of [the] suit." N.C. Gen. Stat. § 75-16.1(1) (2005). Defendants also contend that there is no evidence in the record to support the trial court's award of $18,112.50 as a reasonable attorney's fee.

"The purpose of attorneys fees in Chapter 75 . . . is to 'encourage private enforcement' of Chapter 75." *United Labs., Inc. v. Kuykendall*, 335 N.C. 183, 192, 437 S.E.2d 374, 380 (1993) (quoting *Marshall*, 302 N.C. at 549, 276 S.E.2d at 404) (footnote omitted). The award or denial of attorney's fees under section 75-16.1 is within the sole discretion of the trial court, *Borders v. Newton*, 68 N.C. App. 768, 315 S.E.2d 731 (1984), and a trial court may be reversed for abusing its discretion "only upon a showing that its actions are manifestly unsupported by reason." *Castle McCulloch, Inc. v. Freedman*, 169 N.C. App. 497, 504, 610 S.E.2d 416, 422 (citation omitted), *aff'd per curiam*, 360 N.C. 57, 620 S.E.2d 674 (2005). "The court must make specific findings of fact that the actions of the party charged with violating Chapter 75 were willful, that he refused to resolve the matter

fully, and that the attorney's fee was reasonable." *Barbee v. Atl. Marine Sales & Serv., Inc.*, 115 N.C. App. 641, 648, 446 S.E.2d 117, 122, *disc. review denied*, 337 N.C. 689, 448 S.E.2d 516 (1994). For this Court to determine whether an award is reasonable, the record on appeal must contain findings of fact that support the award. *Lapierre v. Samco Dev. Corp.*, 103 N.C. App. 551, 406 S.E.2d 646 (1991). "Appropriate findings include findings regarding the time and labor expended, the skill required to perform the services rendered, the customary fee for like work, and the experience and ability of the attorney." *Id.* at 561, 406 S.E.2d at 651 (citation omitted).

In the case at bar, the trial court found:

> 107. That because [] Safely-Smith willfully committed unfair and deceptive trade acts or practices in commerce within the meaning of N.C.G.S. 75-1.1 and there was an unwarranted refusal by [] Safely-Smith to fully resolve the matter which constitutes the basis of this suit, Plaintiffs are entitled to an award of reasonable attorney fees pursuant to N.C.G.S. 75-16.1.

This finding satisfies the trial court's obligation to find that Defendants "refused to resolve the matter fully[,]" *Barbee*, 115 N.C. App. at 648, 446 S.E.2d at 122, and as Defendants did not assign error to this finding, we presume the finding is supported by competent evidence. *Koufman*, 330 N.C. 93, 408 S.E.2d 729; N.C. R. App. P. 10(a). Thus, the trial court did not abuse its discretion in awarding attorney's fees.

However, we are unable to determine from the trial court's findings whether the amount of the award of attorney's fees was reasonable. The only findings that pertain to the reasonableness of the award are:

> 108. That [Plaintiffs' trial counsel] expended 103.5 hours in the representation of his clients and for preparation of this matter for trial.
>
> 109. That the amount of $18,112.50 is a reasonable amount for attorney fees considering the time and labor extended, the skill required to perform the legal services that were rendered and the experience and ability of [Plaintiffs' trial counsel], and said fee is the customary fee for like work.

These findings do not fully address the skill required to perform the legal services that were rendered or the experience and ability of

Plaintiffs' trial counsel. The trial court's decision to award attorney's fees is affirmed, but this case is remanded for additional findings of fact concerning the reasonableness of the amount of the fee.

Finally, we agree with Plaintiffs that "the trial court may include fees for services rendered at all stages of the litigation." *Cotton v. Stanley*, 94 N.C. App. 367, 370, 380 S.E.2d 419, 422 (1989) (citing *City Fin. Co. of Goldsboro v. Boykin*, 86 N.C. App. 446, 449, 358 S.E.2d 83, 85 (1987)). Because we remand this action to the trial court for additional findings, we also leave it to the trial court to address the issue of attorney's fees for the appeal.

ROSSETER'S EMPLOYMENT

[5] Finally, Defendants argue the trial court erred in concluding that Rosseter was entitled to compensatory damages for the extra hours she worked as the campground's office manager. Defendants acknowledge in their brief that Rosseter worked more than was "required[,]" but argue that the parties never had a meeting of the minds concerning how Rosseter would be compensated for the extra time. Thus, Defendants contend Rosseter is not entitled to anything more than she has already received.

"A contract is the agreement of two minds—the coming together of two minds on a thing done or to be done." *Williams v. Jones*, 322 N.C. 42, 49, 366 S.E.2d 433, 438 (1988) (quotation marks and citation omitted). "There is no contract unless the parties assent to the same thing in the same sense." *Id.* In this case, the trial court's findings of fact establish that the parties assented to the same thing in the same sense: Defendants agreed to pay Rosseter $6.00 for each hour Rosseter worked after eighty-six hours per month. Rosseter initially accepted this compensation in the form of credits against her electricity charges and lot rental. Having been forced out of the campground by Defendants' disruption of her electrical service, Rosseter was no longer able to accept her due compensation in this form. Accordingly, by the express terms of the agreement, Rosseter is entitled to monetary compensation for hours worked for which she has not been compensated. Defendants' argument is overruled.

The awards granted pursuant to the Public Utilities Act for the overcharging of electricity are affirmed. The awards of damages pursuant to Plaintiffs' unfair and deceptive trade practices claims are affirmed. The award of damages on Rosseter's breach of contract claim is affirmed. This matter is remanded for additional findings of fact concerning the award of attorney's fees.

AFFIRMED IN PART; REMANDED IN PART.

Judge McGEE concurs.

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

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

I concur with that portion of the majority's opinion to affirm the trial court's award of double damages to Tamitha Shepard, Beatrice Perry, William GMoser, and Debra Rosseter (collectively, "plaintiffs") for willful violations of the Public Utilities Act by Bonita Vista Properties, L.P. and Vickie Safely-Smith, as General Partner of Bonita Vista Properties, L.P., Trustee of FVS Trust, and individually, (collectively, "defendants"). I also concur with that portion of the majority's opinion to affirm the trial court's award to Debra Rosseter for wages she earned for hours worked as the campground's office manager and for which she was not compensated.

I disagree with that portion of the majority's opinion which affirms the trial court's award of treble damages and attorney's fees based upon plaintiffs' unfair and deceptive trade practices ("UDTP") claims. The trial court's conclusion of law stating that "[defendants'] trespass, [] attempts to wrongfully evict Plaintiffs without resort to judicial process and [] willfully charging electric rates in excess of that prescribed by the North Carolina Utilities Commission pursuant to G.S. 63-139 constituted unfair or deceptive trade practices in commerce within the meaning of N.C.G.S. 75-1.1" is erroneous as a matter of law. I vote to reverse the trial court's order in part and respectfully dissent.

I. Standard of Review

"The standard of review on appeal from a judgment entered after a non-jury trial is whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment." *Cartin v. Harrison*, 151 N.C. App. 697, 699, 567 S.E.2d 174, 176 (citation and quotation omitted), *disc. rev. denied*, 356 N.C. 434, 572 S.E.2d 428 (2002). The trial court's conclusions of law are reviewed *de novo*. *Humphries v. City of Jacksonville*, 300 N.C. 186, 187, 265 S.E.2d 189, 190 (1980).

II. Unfair and Deceptive Trade Practices

The majority's opinion holds plaintiffs are entitled to treble damages and an award of attorney's fees based upon their UDTP claims, regardless of whether plaintiffs were residential tenants entitled to protections under Article 2A and Article 5 of Chapter 42, commonly known as the Residential Rental Agreement Act ("RRAA"). I disagree.

Here, plaintiffs alleged four separate UDTP claims, three of which pertain to each individual plaintiff. Plaintiffs specifically alleged: (1) a landlord-tenant relationship existed between defendants and plaintiffs; (2) defendants' " 'self help' actions amounted to a constructive eviction[;]" (3) "[d]efendants' self-help actions to remove or attempt to remove [plaintiffs] from Pine Lake RV Resort, were contrary to the manner prescribed by North Carolina statute, and therefore [d]efendants are liable to [plaintiffs] for damages caused by [plaintiffs] removal or attempted removal[;]" and (4) "[d]efendants' eviction of [plaintiffs] from the leased premises without resort to judicial process constituted unfair and deceptive acts or practices in commerce." Plaintiffs also argued extensively to the trial court and in their appellate brief that N.C. Gen. Stat. § 42, *et seq.*, is applicable, plaintiffs are entitled to the protections contained therein, and violations thereof trigger recovery under the UDTP statute.

Plaintiffs alternatively purport to argue in their appellate brief that their UDTP claims "were not based upon the allegation that Plaintiffs were residential tenants protected under North Carolina landlord-tenant laws." Clearly, this assertion is incredulous after review of the allegations listed above and expressly asserted within plaintiffs' complaint.

It is well established that "[a] party is bound by his pleadings and, unless withdrawn, amended, or otherwise altered, the allegations contained in all pleadings ordinarily are conclusive as against the pleader. He cannot subsequently take a position contradictory to his pleadings." *Davis v. Rigsby*, 261 N.C. 684, 686, 136 S.E.2d 33, 34 (1964). Our Supreme Court has also stated: "It is axiomatic with us that a litigant must be heard here on the theory of the trial below and he will not be permitted to switch horses on his appeal. Nor may he ride two horses going different routes to the same destination." *Graham v. Wall*, 220 N.C. 84, 94, 16 S.E.2d 691, 697 (1941). Plaintiffs are barred from arguing on appeal that defendants' actions constituted UDTP based upon a legal theory not asserted in plaintiffs' complaint and tried in the district court. *Id.*

The majority's opinion asserts plaintiffs argued their UDTP claims were not dependent upon proving violations of Chapter 42 before the trial court. I disagree. Although plaintiffs' counsel made the bare statement to the trial court that "even if the Court would decide that there wasn't [a landlord-tenant relationship], that does not mean that the Plaintiff's [sic] case has now failed[,]" the substance and totality of plaintiffs' arguments are based upon defendants' violation of the RRAA. Even after plaintiffs' counsel made this statement, he extensively argued to the trial court that defendants' actions constituted "self-help constructive eviction" and presented the trial court with case law supporting the assertion that a violation of the RRAA equated to UDTP.

Further, the trial court expressly concluded as a matter of law:

> 3. That considering all the circumstances of Plaintiffs' tenancies, Plaintiffs were residential tenants who leased living spaces as their primary residences and Plaintiffs are entitled to assert claims under Article 5 and Article 2A of Chapter 42 of [t]he North Carolina General Statutes.
>
> . . . .
>
> 9. That Defendant Safely-Smith's trespass, her attempts to wrongfully evict Plaintiffs without resort to judicial process and her willfully charging electric rates in excess of that prescribed by the North Carolina Utilities Commission pursuant to G.S. 63-139 constituted unfair or deceptive acts or practices in commerce within the meaning of N.C.G.S. 75-1.1.

Under the applicable standard of review, this Court must only determine: (1) if competent evidence supports the trial court's findings of fact; (2) whether the findings of fact support the trial court's conclusions of law; and (3) whether the trial court's conclusions are erroneous as a matter of law. *Cartin*, 151 N.C. App. at 699, 567 S.E.2d at 176; *Humphries*, 300 N.C. at 187, 265 S.E.2d at 190.

Defendants failed to except to any of the trial court's findings of fact. Without exceptions taken, the dispositive issue on *de novo* review is whether the trial court's conclusions are correct as a matter of law. *See State v. Pickard*, 178 N.C. App. 330, 333, 631 S.E.2d 203, 206 (2006) ("Where an appellant fails to assign error to the trial court's findings of fact, the findings are presumed to be correct. . . . However, the trial court's conclusions of law are reviewed *de novo* and must be legally correct." (Citation and quotation omitted)). The

trial court awarded plaintiffs treble damages and attorney's fees on three alternative bases: (1) defendants' trespass; (2) defendants' violation of the RRAA; and (3) defendants' violation of the Public Utilities Act. We unanimously agree that defendants violated the Public Utilities Act, plaintiffs are entitled to double damages under this statute, and a violation of the Public Utilities Act cannot also serve as a basis to award treble damages and attorney's fees on plaintiffs' UDTP claims. As such, plaintiffs' UDTP claims must be based upon either defendants' alleged trespass or violation of the RRAA. On the record before us, neither of these claims, nor other alleged conduct, supports an award of treble damages or attorney's fees under the UDTP statute.

A. Trespass

Our Supreme Court has stated, "[i]t is elementary that trespass is a wrongful invasion of the possession of another. Furthermore, a claim of trespass requires: (1) possession of the property by plaintiff when the alleged trespass was committed; (2) an unauthorized entry by defendant; and (3) damage to plaintiff." *Singleton v. Haywood Elec. Membership Corp.*, 357 N.C. 623, 627, 588 S.E.2d 871, 874 (2003) (internal citations and quotations omitted).

Here, no evidence in the record shows defendants trespassed on any real property or chattel owned by plaintiffs. Nor is there any evidence that plaintiffs reimbursed defendants for the electricity they consumed during August 2005 when their occupancy at the campground ended. Record evidence tends to show that plaintiffs were *billed in arrears* for electricity consumed the previous month after defendants were billed by the electric company. Part of Rosseter's duties, as defendants' employee, was to invoice plaintiffs and others at the campground to reimburse defendants for electricity consumed the previous month.

Defendants merely disconnected plaintiffs' plug-in power drop cords from defendants' meter base and shut off the electricity to those connections at the end of the month. All plaintiffs left the campground the following day. Defendants were under no legal obligation to provide free electricity to plaintiffs. Defendants never entered any of plaintiffs' camper trailers, nor kept or converted any of plaintiffs' property or equipment. Defendants' actions on their private property and privately owned equipment cannot be construed as a trespass to plaintiffs' chattel or any other legally protected property interest. Further, camper trailers generally contain an independent and self-

contained means to generate electricity. Plaintiffs have failed to show all of the requisite elements to establish a claim of trespass.

Presuming *arguendo* a trespass in fact occurred, no North Carolina case law or statute supports the notion that an alleged trespass can be bootstrapped to support plaintiffs' UDTP claims and an award of treble damages and attorney's fees. The only remaining notion upon which plaintiffs' UDTP claims may rest is defendants' alleged violation of the RRAA.

B. Residential Rental Agreement Act

The RRAA was enacted in response to our Supreme Court's decision in *Spinks v. Taylor*, 303 N.C. 256, 278 S.E.2d 501 (1981), which specifically held that at common law, a landlord was permitted to employ peaceable self-help measures in repossessing leased premises. *See* Robert S. Thompson, *Landlord Eviction Remedies Act-Legislative Overreaction to Landlord Self-Help*, 18 Wake Forest L. Rev. 25, 25 (1982) ("Recently, . . . the North Carolina General Assembly altered the common-law rule in response to a court of appeals decision applying the *Mosseller* doctrine." (Citing *Spinks v. Taylor*, 47 N.C. App. 68, 266 S.E.2d 857 (1980), *rev'd in part*, 303 N.C. 256, 278 S.E.2d 501 (1981)).

Our General Assembly enacted Article 2A and Article 5 of Chapter 42 in order to "determine[] the rights, obligations, and remedies under *a rental agreement for a dwelling unit* within this State." N.C. Gen. Stat. § 42-38 (2005) (emphasis supplied). The plain and unambiguous language of the Act expressly limits the statute's applicability to "a rental agreement for a dwelling unit within this State" and enunciates the manner of ejectment residential landlords must employ when regaining possession of "a dwelling unit" from residential tenants, who breach their lease, or who hold over after their lease has expired. *See* N.C. Gen. Stat. § 42-25.6 (2005) ("It is the public policy of the State of North Carolina, in order to maintain the public peace, that a residential tenant shall be evicted, dispossessed or otherwise constructively or actually removed *from his dwelling unit* only in accordance with the procedure prescribed in Article 3 or Article 7 of this Chapter."). The RRAA expressly excludes "transient occupancy in a hotel, motel, or similar lodging" as well as "vacation rentals" from Chapter 42 summary ejectment protections. N.C. Gen. Stat. § 42-39 (2005).

The central issue then becomes whether paying for a recreational vehicle lot space at a campground constitutes "a rental agreement for

a *dwelling unit* in this State" pursuant to N.C. Gen. Stat. § 42-38, which would entitle plaintiffs to the protections accorded to residential tenants under the RRAA. (Emphasis supplied). In making this determination, this Court must recognize the Founding principle that "[s]tatutes in derogation of the common law . . . should be strictly construed" particularly where the "statute infringes upon common law property rights of others." *Wise v. Harrington Grove Cmty. Ass'n*, 357 N.C. 396, 401, 584 S.E.2d 731, 736 (2003) (quoting *Stone v. N.C. Dep't of Labor*, 347 N.C. 473, 479, 495 S.E.2d 711, 715, *cert. denied*, 525 U.S. 1016, 142 L. Ed. 2d 449 (1998) and *Turlington v. McLeod*, 323 N.C. 591, 594, 374 S.E.2d 394, 397 (1988)); *see also Bell v. Page*, 2 N.C. App. 132, 137, 162 S.E.2d 693, 696 (1968).

The term "dwelling unit" is not specifically defined within the RRAA. *See* N.C. Gen. Stat. § 42-40 (2005). However, the term "[p]remises" is defined as "a dwelling unit, including mobile homes or mobile home spaces, and the structure of which it is a part and facilities and appurtenances therein and grounds, areas, and facilities normally held out for the use of residential tenants." N.C. Gen. Stat. § 42-40(2). Plaintiffs argue that recreational vehicle lot spaces in a transient campground are analogous to "mobile home spaces." I disagree. The logical extension of plaintiffs' argument is that a person, who is sleeping in their motor vehicle as their "principle residence" and who parks that vehicle on someone else's property, cannot be compelled to vacate that parking space, unless the property owner, under the threat of treble damages and attorney's fees, resorts to judicial ejectment to remove them from the property. This arcane result cannot be what the General Assembly intended when it enacted the RRAA.

Plaintiffs cite *Baker v. Rushing* in support of their assertion that plaintiffs were residential tenants pursuant to the RRAA. 104 N.C. App. 240, 409 S.E.2d 108 (1991). In *Baker*, this Court found genuine issues of material fact existed regarding whether occupants of a hotel could be considered "residential tenants." *Baker*, 104 N.C. App. at 247, 409 S.E.2d at 112. This Court concluded that "[w]hether the plaintiffs . . . were residential tenants must be determined by looking at all of the circumstances[.]" *Id.*

However, the factual scenario in *Baker* is clearly distinguishable from the facts at bar. In *Baker*, the plaintiffs resided in an "apartment" which contained "either one or two bedrooms, a kitchen/living room and a separate bath" which clearly constitutes a "dwelling unit." *Id.*

Here, plaintiffs parked their recreational vehicle in a designated space on defendants' property.

Whether a recreational vehicle lot space can be equated to "a dwelling unit" under the RRAA appears to be an issue of first impression in North Carolina. In *Comeau v. Vergato*, the New Hampshire Supreme Court resolved a similar controversy. 823 A.2d 764 (N.H. 2003). In *Comeau*, the defendant was a vehicle campground owner, who rented parking spaces, equipped with utilities to campers on a year-round basis. 823 A.2d at 765. The plaintiff rented a space and lived on the defendant's property in a camper/trailer from March 2001 through January 2002. *Id.* Plaintiff allegedly owed back rent and the defendant, the defendant's son and a campground employee: (1) entered plaintiff's camper; (2) removed some of the plaintiff's property; and (3) placed a "For Sale" sign on the plaintiff's camper. *Id.*

The plaintiff filed a petition with the district court requesting the return of her property and argued that the defendant was a landlord subject to a statute, which prohibited "willfully seizing, holding or otherwise directly or indirectly denying a tenant access to and possession of such tenant's property, other than by proper judicial process." *Id.* (quoting RSA 540-A:3, III (Supp. 2002)). In New Hampshire, "[l]andlord" is statutorily defined as "an owner, lessor or agent thereof who rents or leases *residential premises including manufactured housing or space in a manufactured housing park* to another person." *Id.* at 766 (quoting RSA 540-A:1) (emphasis supplied). The district court found a landlord-tenant relationship based upon the duration of plaintiff's stay at the campground. *Id.* The dispositive issue before the New Hampshire Supreme Court was "whether the plaintiff's premises were 'residential' within the meaning of the statute." *Id.*

In determining this issue, the New Hampshire Supreme Court was required to engage in statutory construction. *Id.* The Court stated:

> the trial court overlooked the last clause of the definition for both "landlord" and "tenant," which states that "residential premises" includes "manufactured housing or space in a manufactured housing park." The inclusion of this phrase indicates that the legislature considered the form of the housing relevant in determining whether it is "residential." If the legislature intended the *duration* of the stay to be sufficient to establish a residence, it would be superfluous to include a specific *form* of housing within the ambit of the statute. Thus, the mere fact that the plaintiff

> lived on the defendant's property for a certain length of time did not establish a landlord-tenant relationship, and the trial court erred as a matter of law in ruling otherwise.
>
> Moreover, the definitions of both "landlord" and "tenant" specifically mention only one type of residential premises—manufactured housing. We believe it unlikely that the legislature intended "manufactured housing" to be just one of many examples of trailer and camper units encompassed within "residential premises." Elsewhere in the statutes, the legislature describes "manufactured housing" in exclusive terms, defining "manufactured housing" not to embrace "campers" and "recreational vehicles." Surely, if the legislature had intended campers and trailers to be residential premises, it would not have included as the sole example a type of residence that specifically excludes campers and trailers from its ambit.

Id. at 766-67 (emphasis original) (internal citations omitted).

The reasoning and holding in *Comeau* is particularly instructive to the case at bar. Here, our General Assembly specifically included mobile homes and mobile home spaces within the definition of "[p]remises" which is defined as "a dwelling unit." N.C. Gen. Stat. § 42-40(2). As the New Hampshire Supreme Court stated in *Comeau*, I also "believe it unlikely that the legislature intended ['mobile homes'] to be just one of many examples of trailer and camper units encompassed within [the term 'dwelling unit']." 823 A.2d at 767. Further, the definition of mobile homes for taxation purposes expressly excludes "trailers and vehicles required to be registered annually pursuant to Part 3, Article 3 of Chapter 20 of the General Statutes." N.C. Gen. Stat. § 105-316.7 (2005). A recreational vehicle is required to be registered under Part 3, Article 3 of Chapter 20. N.C. Gen. Stat. § 20-50 (2005). If the General Assembly intended for recreational vehicle lot spaces in a campground to be considered a "dwelling unit" pursuant to the RRAA, it would have expressly stated so in the statute.

Strictly construing Chapter 42 as in derogation of the common law, plaintiffs are not residential tenants under "a rental agreement for a dwelling unit" as provided in the RRAA and are not entitled to the judicial ejectment protections contained therein. N.C. Gen. Stat. § 42-38. Plaintiffs' "right" to park their recreational vehicle on defendants' campground was arguably nothing more than a revocable license. *See* 1 James A. Webster, Jr., Webster's Real Estate Law in

North Carolina § 15-39, at 753 (Patrick K. Hetrick & James B. McLaughlin, Jr. eds., 5th ed. 1999) ("A license is the least important of the rights in the lands of another. As a matter of fact, a license does not create 'rights' in land but gives one only a personal, revocable privilege to do an act or series of acts upon the land of another without conferring any estate or interest in the land. Hence, licenses are, in general, freely revocable by the licensor."). This assertion is supported by a registration card and not a lease being issued to each of the plaintiffs which stated the "property is privately owned and the management reserves the right to refuse service to anyone[.]"

Even if plaintiffs' stay on the campgrounds was construed to be a month-to-month tenancy, defendants provided plaintiffs with the statutorily required notice to quit their possession of defendants' property and were entitled to use peaceful self-help to unplug plaintiffs' electrical extension cords from defendants' meter bases and to shut off the power to those connections. *See* N.C. Gen. Stat. § 42-14 (providing in relevant part that a month-to-month tenancy may be terminated by a notice to quit of seven days); *see also Spinks*, 303 N.C. at 263, 278 S.E.2d at 505 ("[W]hile a landlord is permitted to use peaceful means to reenter and take possession of leased premises subject to forfeiture, he may not do so against the will of the tenant."). A party's lawful actions or peaceful self-help conduct is not an unfair and deceptive act and does not support recovery under the UDTP statute. The trial court erred as a matter of law by concluding plaintiffs were entitled to an award of treble damages and attorney's fees based upon a violation of the RRAA or any other claim alleged in plaintiffs' complaint.

III. Conclusion

I concur with that portion of the majority's opinion to affirm the trial court's award of double damages to plaintiffs based upon defendants' willful violations of the Public Utilities Act. I also concur with that portion of the majority's opinion to affirm the trial court's award of compensatory damages to Debra Rosseter based upon her breach of contract claim.

The trial court's conclusion of law that defendants' actions violated the UDTP statute based upon either: (1) defendants' alleged trespass; (2) a violation of the RRAA; or (3) a violation of the Public Utilities Act is erroneous as a matter of law. I vote to reverse the portion of the trial court's order awarding treble damages under the UDTP statute.

Because the trial court's order awarding attorney's fees is predicated upon plaintiffs' UDTP claims, that award must also be reversed. The majority's opinion correctly notes that the trial court's order and award of attorney's fees to plaintiffs is also fatally defective. I concur in part and respectfully dissent in part.

STATE OF NORTH CAROLINA v. CASSANDRA BOSTON AND CARRYNE SATTERWHITE

No. COA07-1364

(Filed 5 August 2008)

1. Jury— deliberations—instruction—*Allen* charge—plain error analysis

The trial court did not commit plain error in a first-degree arson case by instructing the jury on the *Allen* charge under N.C.G.S. § 15A-1235(c) regarding jury deliberations because: (1) N.C.G.S. § 15A-1235(c) does not require an affirmative indication from the jury that it is having difficulty reaching a verdict, nor does it require that the jury deliberate for a lengthy period of time before the trial court may give the *Allen* instruction; (2) N.C.G.S. § 15A-1235(c) provides that the trial court may give the *Allen* instruction if it appears to the judge that the jury is unable to reach a verdict; and (3) the trial court did not deprive defendant of a fair trial by concluding that after each one-to-two hour period of deliberation, the jury was having difficulty reaching a verdict and an *Allen* charge would be appropriate.

2. Jury— deliberations—instruction—multiple *Allen* charges—inquiry into numerical division—totality of circumstances review

A review of the totality of circumstances revealed that the trial court did not coerce a verdict in a first-degree arson case by its multiple *Allen* charges and inquiries into the jury's numerical division because: (1) the trial court never inquired as to whether the majority of the jury was in favor of guilt or innocence, and in fact, the trial court specifically asked the jury foreman not to provide this information to the trial court; the record gave no indication that the trial court ever appeared frustrated with the jury or annoyed by the jury's failure to reach a verdict; the trial court

never threatened to hold the jury until it reached a verdict; and it made no mention of the burden and expense of a retrial in the event the jury could not reach a verdict; (2) the record suggested that the trial court was simply trying to monitor the jury's progress so that it could plan recesses accordingly, and in fact, each of the trial court's inquiries and *Allen* charges either immediately preceded or followed a natural break in jury deliberations such as the lunch recess or evening recess; and (3) the trial court never interrupted jury deliberations merely to inquire as to the jury's numerical division or to repeat the *Allen* charge.

3. Judges— expression of opinion—repeated inquiries and *Allen* charges

The trial court did not impermissibly express an opinion as to the weight of the evidence in an arson case by its repeated *Allen* charges and inquiries into the jury's numerical division because: (1) the trial court gave facially neutral instructions in accordance with the language provided in N.C.G.S. § 15A-1235(b); and (2) the transcript did not indicate the trial court ever editorialized regarding the weight of the evidence during deliberations, nor was there any indication by the trial court that the jury's progress was inadequate given the evidence before it.

4. Constitutional Law— privilege against self-incrimination—pre-arrest silence—substantive evidence—harmless error

The admission of testimony by an accomplice and a detective in an arson case that defendant refused to speak with the police prior to her arrest violated defendant's Fifth Amendment privilege against self-incrimination where defendant did not testify at trial and the testimony was admitted as substantive evidence. However, this improper use of defendant's pre-arrest silence was harmless error because: (1) the jury would have reached the same verdict even had the trial court disallowed the contested testimony based on the overwhelming evidence of defendant's guilt; (2) the transcript revealed that any testimony relating to defendant's pre-arrest silence was de minimis; (3) accomplice's testimony of defendant's pre-arrest silence was in the context of explaining the sequence of events; (4) the detective's testimony regarding defendant's pre-arrest silence was not elicited by the State, but instead was a fleeting statement made by the detective during a long narrative recitation of the witness's prior statements to him; and (5) when considered with the State's other

substantial evidence of defendant's guilt, defendant's pre-arrest silence was simply not a significant or essential part of the State's case-in-chief.

5. Arson— first-degree—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant Boston's motion to dismiss the charge of first-degree arson, even though defendant contends the State presented inconsistent theories of her guilt, because: (1) while the victim's testimony and an accomplice's testimony do contain some inconsistencies, they are consistent as they relate to the elements of first-degree arson; (2) the accomplice's testimony regarding the circumstances surrounding the fire was sufficient to demonstrate that defendant Boston acted willfully and maliciously in setting the fire; (3) both witnesses identified the building burned as a dwelling house of another person, namely, the victim; (4) the victim testified that she was home at the time of the fire, and the accomplice did not contradict this testimony; (5) the accomplice identified defendant Boston as one of the people who started the fire, and the victim did not contradict this testimony; and (6) while the State's evidence did contain some nonmaterial discrepancies, these discrepancies were for the jury to consider when reaching a verdict.

Appeal by Defendant Cassandra Boston from judgment entered 18 May 2007 by Judge J.B. Allen, Jr. in Superior Court, Wake County. Appeal by Defendant Carryne Satterwhite from judgment entered 18 May 2007 by Judge J.B. Allen, Jr. in Superior Court, Wake County. Heard in the Court of Appeals 30 April 2008.

Attorney General Roy Cooper, by Assistant Attorney General W. Wallace Finlator, Jr., for the State.

Attorney General Roy Cooper, by Assistant Attorney General John A. Payne, for the State.

D. Tucker Charns for Defendant Cassandra Boston.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Kristen L. Todd, for Defendant Carryne Satterwhite.

McGEE, Judge.

A jury found Cassandra Boston (Defendant Boston) guilty on 18 May 2007 of first-degree arson. The trial court sentenced Defendant

Boston to a term of sixty-four months to eighty-six months in prison. A jury found Carryne Satterwhite (Defendant Satterwhite) guilty on 18 May 2007 of first-degree arson. The trial court sentenced Defendant Satterwhite to a term of sixty-four months to eighty-six months in prison. Defendants Boston and Satterwhite appeal.

Officer Michael Lindley (Officer Lindley) of the Cary Police Department testified that at 5:07 a.m. on 23 June 2006, he was dispatched to a structure fire at a house owned by Ivany Hockaday (Ms. Hockaday) in Cary, North Carolina. When Officer Lindley arrived at the house, he saw that the back porch of the house was on fire. Officer Lindley entered the house, found Ms. Hockaday inside with her three children, and helped them out of the house. Officer Lindley testified that Ms. Hockaday told him that around 4:45 a.m., she had heard someone banging on her front door. When Ms. Hockaday looked out her window, she observed a gray vehicle parked in front of her house. Ms. Hockaday saw a male in the driver's seat and three female passengers.

Ms. Hockaday testified at trial that Defendant Boston and Defendant Satterwhite (together, Defendants) were sisters. According to Ms. Hockaday, her family and Defendants' family had been feuding for approximately one year. The feud originally began as a conflict between Ms. Hockaday's young daughter and Defendants' younger sister, but eventually grew to involve various older family members. Ms. Hockaday testified that members of Defendants' family periodically slashed her car tires and threw eggs at her car. Ms. Hockaday also described a physical altercation between herself and Defendant Satterwhite that occurred a week before the fire. The altercation escalated to include dozens of people, and police were called to control the situation.

Ms. Hockaday testified that sometime between 4:00 a.m. and 4:30 a.m. on the morning of the fire, she was awakened by noises coming from the back of her house. According to Ms. Hockaday, she heard multiple female voices laughing, and also heard a thumping sound. Ms. Hockaday telephoned her husband, who told her to call the police. Ms. Hockaday then heard a loud knock at her front door. She looked out her front window and saw a light grey car parked outside. The car was driven by a male with three female passengers. Ms. Hockaday testified that she recognized the three females as Defendant Boston, Defendant Satterwhite, and another female named Faith Streeter (Ms. Streeter).

Ms. Hockaday testified that after speaking with her husband, she then called the police. The police informed Ms. Hockaday that they had already received a telephone call reporting that her house was on fire. Ms. Hockaday had not previously realized that her house was on fire. She then opened the back door to her house and discovered that her back porch was on fire. Ms. Hockaday unsuccessfully attempted to put out the fire, and police arrived at her house a short time later. The fire destroyed portions of Ms. Hockaday's back porch, roof, and siding. Ms. Hockaday later told police that she was "[one] hundred percent sure" that Defendants and Ms. Streeter were responsible for starting the fire.

Ms. Streeter testified at trial that she and Defendants had been friends for three or four months prior to the fire. Ms. Streeter also testified regarding the ongoing feud between Defendants' family and Ms. Hockaday's family in the months prior to the fire.

Regarding the alleged arson, Ms. Streeter testified that in the early morning hours of 23 June 2006, she was with a friend in an apartment complex near Defendants' apartment. Ms. Streeter's friend's vehicle was out of gasoline, so Ms. Streeter walked to a nearby gas station and filled a milk carton with gasoline. Ms. Streeter then walked back to her friend's apartment, but her friend was not home. Ms. Streeter then walked to Defendants' apartment and told them that she had purchased some gasoline. According to Ms. Streeter, Defendant Satterwhite suggested that they go to Ms. Hockaday's house. Defendants and Ms. Streeter then walked a short distance to Ms. Hockaday's house. Ms. Streeter and Defendant Satterwhite poured gas on Ms. Hockaday's back porch stairs. Defendant Boston then lit a piece of paper with a lighter and threw it on the porch stairs, igniting a fire. The three women watched the fire for approximately fifteen seconds, and then ran from the scene. Ms. Streeter testified that the three women were not laughing and were trying not to make any noise. Ms. Streeter also denied having been in a vehicle near Ms. Hockaday's house at any time immediately before or after the fire. Ms. Streeter later confessed her involvement to police and wrote a statement that generally corroborated her trial testimony.

Wake County Deputy Fire Marshal Charles Ottoway (Marshal Ottoway) testified at trial that he examined Ms. Hockaday's house following the fire. Marshal Ottoway testified that he believed that a flammable liquid had been poured on Ms. Hockaday's back porch before the fire started. Marshal Ottoway also testified that he smelled

a faint odor of gasoline coming from the burned portion of Ms. Hockaday's back porch.

Defendants' cases were joined for trial. A jury found Defendant Boston guilty on 18 May 2007 of one count of first-degree arson. The jury also found Defendant Satterwhite guilty on 18 May 2007 of one count of first-degree arson. Defendants appeal.

I.

Defendant Satterwhite raises three arguments on appeal, each concerning certain jury instructions given by the trial court after the jury began its deliberations.

The jury in this case began its deliberations around 11:12 a.m. on 17 May 2007. At 1:00 p.m., just before the lunch recess, the trial court asked the jury foreman if there was a numerical split among the jurors as to guilt or innocence. The jury foreman informed the trial court that the jury was split eleven-to-one.[1] At 2:30 p.m., following the lunch recess and before the jury resumed deliberations, the trial court instructed the jury as follows:

> Jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement if it can be done without violence to individual judgment. Each juror must decide the case for himself or herself, but only after an impartial consideration of the evidence with his or her fellow jurors.
>
> In the course of deliberation, a juror should not hesitate . . . to reexamine his or her own views and change his or her opinion if convinced it is erroneous, and no juror should surrender his or her honest conviction as to the weight or the effect of the evidence solely because of the opinion of his or her fellow jurors or for the mere purpose of returning a verdict.

See N.C. Gen. Stat. § 15A-1235(b)-(c) (2007). The trial court again inquired as to the jurors' numerical split prior to an afternoon recess at 3:45 p.m. At 4:00 p.m., the trial court again gave the jury the *Allen* charge, and the jury resumed deliberations. The trial court excused the jury for the evening recess at 5:00 p.m.

Before the jury resumed its deliberations on 18 May 2007, the trial court gave the jury the *Allen* charge a third time. The jury resumed its deliberations at 10:55 a.m., and reached a verdict around 11:20 a.m.

1. The jury foreman did not, however, disclose whether the eleven votes were in favor of guilt or innocence.

A.

[1] Defendant Satterwhite first argues that the trial court was not authorized to instruct the jury pursuant to N.C.G.S. § 15A-1235(c). Defendant Satterwhite did not object to the trial court's instructions at trial, and we therefore review the trial court's instructions for plain error. To find plain error, the error in a trial court's instructions to the jury must have been "so fundamental that it denied the defendant a fair trial and quite probably tilted the scales against [the defendant]." *State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993).

N.C.G.S. § 15A-1235(b) provides that a trial court may give the jury the *Allen* charge prior to jury deliberations. Further, under N.C.G.S. § 15A-1235(c), "[i]f it appears to the judge that the jury has been unable to agree, the judge may require the jury to continue its deliberations and may give or repeat the [*Allen*] instructions[.]" Defendant Satterwhite argues that the trial court had no authority to give the *Allen* charge because the jury had only been deliberating for a short time and had not indicated that it was having any difficulty reaching a verdict.

We disagree with Defendant Satterwhite's contentions. N.C.G.S. § 15A-1235(c) does not require an affirmative indication from the jury that it is having difficulty reaching a verdict, nor does it require that the jury deliberate for a lengthy period of time before the trial court may give the *Allen* instruction. Rather, N.C.G.S. § 15A-1235(c) provides that the trial court may give the *Allen* instruction "[i]f it appears to the judge" that the jury is unable to reach a verdict.

In this case, the jury had been deliberating for nearly two hours when the trial court first gave the *Allen* instruction. The jury then deliberated another seventy-five minutes before the trial court gave the second *Allen* instruction. The jury then deliberated another hour and took an evening recess before the trial court gave the third *Allen* instruction. Based on this record, it is possible that the trial court instructed the jury more frequently than was necessary to assist the jury in reaching a verdict. However, we do not believe that the trial court deprived Defendant Satterwhite of a fair trial by concluding that after each one-to-two hour period of deliberation, the jury was having difficulty reaching a verdict and an *Allen* charge would be appropriate under N.C.G.S. § 15A-1235(c). Defendant Satterwhite's assignment of error is overruled.

B.

[2] Defendant Satterwhite next argues that the trial court's multiple *Allen* charges and inquiries into the jury's numerical division impermissibly coerced a verdict. Defendant Satterwhite did not object to the trial court's instructions at trial, and we therefore review the trial court's instructions for plain error.

Our Supreme Court has held that "a charge which might reasonably be construed by a juror as requiring him to surrender his well-founded convictions or judgment to the views of the majority is erroneous." *State v. Alston*, 294 N.C. 577, 593, 243 S.E.2d 354, 364 (1978). To determine whether the trial court's instructions "forced a verdict or merely served as a catalyst for further deliberation," our Court "must consider the [totality of the] circumstances under which the instructions were made and the probable impact of the instructions on the jury." *Id.* at 593, 243 S.E.2d at 364-65. Our Courts also apply a totality-of-the-circumstances test when determining whether a trial court's inquiry into the jury's numerical division impermissibly coerced a verdict. *State v. Fowler*, 312 N.C. 304, 308, 322 S.E.2d 389, 392 (1984).

Factors relevant to these inquiries include: the length of time the jury had been deliberating, *State v. Beaver*, 322 N.C. 462, 465, 368 S.E.2d 607, 609 (1988); the number of times the trial court inquired into the jury's numerical division, *id.*; whether the trial court inquired as to whether the majority of the votes were in favor of guilt or innocence, *id.* at 464, 368 S.E.2d at 608; whether the trial court was respectful to the jury or conveyed to the jury that it was irritated at the jury's lack of progress, *id.*; whether the trial court threatened to hold the jury until it reached a verdict, *id.*; whether the jury reported to the trial court that it was deadlocked, *State v. Bussey*, 321 N.C. 92, 97, 361 S.E.2d 564, 567 (1987); whether the trial court mentioned the inconvenience or expense of a new trial in the event the jury became deadlocked, *Alston*, 294 N.C. at 593, 243 S.E.2d at 365; whether the trial court inquired into the jury's numerical division merely for purposes of scheduling recesses, *Fowler*, 312 N.C. at 309, 322 S.E.2d at 392; and whether the trial court was merely trying to determine whether the jury had made progress towards reaching a verdict. *Id.*

In this case, the trial court never inquired as to whether the majority of the jury was in favor of guilt or innocence. In fact, the trial court specifically asked the jury foreman not to provide this information to the trial court. The record gives no indication that the trial

court ever appeared frustrated with the jury or annoyed by the jury's failure to reach a verdict. Further, the trial court never threatened to hold the jury until it reached a verdict, and made no mention of the burden and expense of a retrial in the event the jury could not reach a verdict.

It is true that the jury never told the trial court that it was deadlocked. It is also true that the jury deliberated roughly four and one-half hours over a two-day span, and during this time, the trial court inquired as to the jury's numerical division two times and gave the *Allen* charge three times. However, the record suggests that the trial court was simply trying to monitor the jury's progress so that it could plan recesses accordingly. In fact, each of the trial court's inquiries and *Allen* charges either immediately preceded or followed a natural break in jury deliberations, such as the lunch recess or evening recess. The trial court never interrupted jury deliberations merely to inquire as to the jury's numerical division or to repeat the *Allen* charge. Based on the totality of these factors, we hold that the trial court did not coerce a verdict, and therefore did not deny Defendant Satterwhite a fair trial.

C.

[3] Finally, Defendant Satterwhite argues that the trial court impermissibly expressed an opinion as to the weight of the evidence by its repeated *Allen* charges and inquiries into the jury's numerical division. Specifically, Defendant Satterwhite contends that by its repeated interventions into the jury proceedings, the trial court "expressed that the evidence was clear and that a verdict should be easy to reach," and "implied that the jury was somehow inadequate for not realizing the simplicity of the case in front of it." Defendant Satterwhite did not object to the trial court's instructions at trial, and we therefore review the trial court's instructions for plain error.

"In evaluating whether a judge's comments cross into the realm of impermissible opinion, a totality of the circumstances test is utilized." *State v. Larrimore*, 340 N.C. 119, 155, 456 S.E.2d 789, 808 (1995). In the present case, the trial court gave facially neutral instructions in accordance with the language provided in N.C.G.S. § 15A-1235(b). The trial transcript does not indicate that the trial court ever editorialized regarding the weight of the evidence during jury deliberations. Likewise, the transcript does not reveal any implication on the trial court's part that the jury's progress was inadequate given the evidence before it. Given these factors, and given our findings discussed

in Part I.B. above, we hold that the trial court did not offer an impermissible opinion as to the weight of the evidence merely due to its repeated inquiries and *Allen* charges. The trial court therefore did not deny Defendant Satterwhite a fair trial. Defendant Satterwhite's assignments of error are overruled.

II.

Defendant Boston raises two issues on appeal. We consider each of Defendant Boston's issues in turn.

A.

[4] Defendant Boston first argues that the trial court erred by overruling her objection to certain portions of Ms. Streeter's testimony. Defendant Boston also argues that the trial court erred by permitting former Detective Thomas Doyle (Detective Doyle) of the Cary Police Department to testify regarding certain statements Ms. Streeter made to Detective Doyle.

During direct examination, Ms. Streeter testified that at 11:00 p.m. on 23 June 2006, she and Defendants met at a nearby Pizza Hut restaurant. Ms. Streeter then testified as follows:

> [THE STATE]: And while you were there at the Pizza Hut, is that—is that when the police arrived?
>
> [MS. STREETER]: Yes.
>
> . . . .
>
> [THE STATE]: Were you asked if you would be willing to go down and make a statement about what happened?
>
> [MS. STREETER]: I was asked to go downtown. I was ask[ed] to go for questioning, yes.
>
> [THE STATE]: Okay. And were [Defendant] Boston and [Defendant] Satterwhite also asked to go down for questioning?
>
> [MS. STREETER]: Yes.
>
> [THE STATE]: And what—
>
> [DEFENSE COUNSEL]: Objection.
>
> [THE COURT]: Overruled.
>
> . . . .

[THE STATE]: Did [Defendant] Boston agree to go downtown and answer the police's questions?

[MS. STREETER]: No.

. . . .

[THE STATE]: What did [Defendant] Boston tell the police?

[MS. STREETER]: That she had curfew.

[DEFENSE COUNSEL]: Objection, your Honor. May I be heard?

Defense counsel then argued outside of the jury's presence that it was improper for the State to elicit testimony regarding Defendant Boston's exercise of her right not to speak with police. The trial court again overruled Defendant Boston's objection and allowed Ms. Streeter to testify that Ms. Boston had refused to speak with police.

Later at trial, Detective Doyle testified that he had previously interviewed Ms. Streeter regarding the events of 23 June 2006. Detective Doyle indicated that during this interview, Ms. Streeter told him that when police confronted Defendant Boston at the Pizza Hut and asked her to come to the police station for questioning, Defendant Boston refused to speak with police.

Defendant Boston argues that introduction of this testimony violated her right against self-incrimination under the Fifth and Fourteenth Amendments to the United States Constitution, and under Article I, Section 23 of the North Carolina Constitution.

Defendant Boston relies on a number of cases for the proposition that the State's use of her silence was constitutional error. In *State v. Hoyle*, 325 N.C. 232, 382 S.E.2d 752 (1989), for example, the defendant was arrested for murder, advised of his *Miranda* rights, and declined to speak with police regarding the alleged murder. *Id.* at 234, 382 S.E.2d at 753. At trial, the defendant testified that the decedent had attacked him, that he had reached for his gun to defend himself, that the two men struggled for the gun, and that the gun accidentally discharged and hit the decedent. *Id.* The State then impeached the defendant by questioning him on cross-examination regarding his decision not to tell this story to police when police arrested him. *Id.* at 235-36, 382 S.E.2d at 753-54. Relying on *Doyle v. Ohio*, 426 U.S. 610, 49 L. Ed. 2d 91 (1976), our Supreme Court held that it was a violation of the defendant's Fourteenth Amendment due-process rights to use

his post-arrest and post-*Miranda*-warning silence for impeachment purposes. *Id.* at 236-37, 382 S.E.2d at 754; *see Doyle*, 426 U.S. at 617-19, 49 L. Ed. 2d at 97-98 (holding that when a defendant has been arrested and advised of his *Miranda* rights, the State has implicitly promised not to use the defendant's silence against him and therefore cannot impeach the defendant on cross-examination by questioning him about his silence); *see also State v. Shores*, 155 N.C. App. 342, 573 S.E.2d 237 (2002), *disc. review denied*, 356 N.C. 690, 578 S.E.2d 592 (2003) (holding that the State's use of the defendant's post-arrest and post-*Miranda*-warning silence for impeachment purposes violated his right to remain silent).

The State correctly notes, however, that in both *Hoyle* and *Shores*, the defendants had already been arrested and advised of their *Miranda* rights at the time they exercised their right to remain silent. In contrast, in the current case, Defendant Boston had not been arrested when she refused to speak with police. Therefore, according to the State, it was not a violation of Defendant Boston's Fifth or Fourteenth Amendment rights for the State to elicit testimony regarding her refusal to speak with police. While we agree with the State that the cases cited by Defendant Boston are inapposite, we reject the State's contention that Defendant Boston's pre-arrest silence was not constitutionally protected.

Whether the State may use a defendant's silence at trial depends on the circumstances of the defendant's silence and the purpose for which the State intends to use such silence. For example, a defendant's decision to remain silent following her arrest cannot be used as substantive evidence of her guilt of the crime charged. *State v. Ward*, 354 N.C. 231, 266, 555 S.E.2d 251, 273 (2001). Similarly, a defendant's decision not to testify at trial cannot be used as substantive evidence of her guilt. *Griffin v. California*, 380 U.S. 609, 615, 14 L. Ed. 2d 106, 110, *reh'g denied*, 381 U.S. 957, 14 L. Ed. 2d 730 (1965). However, if the defendant is not yet under arrest, the State may use the defendant's pre-arrest silence for impeachment purposes at trial. *Jenkins v. Anderson*, 447 U.S. 231, 240, 65 L. Ed. 2d 86, 96 (1980); *see also*, *e.g.*, *State v. Bishop*, 346 N.C. 365, 386, 488 S.E.2d 769, 780 (1997). If the defendant has been arrested but has not yet been informed of her *Miranda* rights, the State may use the defendant's silence for impeachment purposes. *Fletcher v. Weir*, 455 U.S. 603, 606-07, 71 L. Ed. 2d 490, 494 (1982) (per curiam). If the defendant has been arrested and has been informed of her *Miranda* rights, the State cannot use the defendant's silence for impeachment purposes. *Doyle*, 426

U.S. at 619, 49 L. Ed. 2d at 422; *see also Hoyle*, 325 N.C. at 236-37, 382 S.E.2d at 754.[2]

The situation presented by the current case, however, does not fit into any of the factual scenarios presented above. Here, the State used Defendant Boston's pre-arrest silence not to impeach her testimony, but rather as substantive evidence of her guilt.[3]

The United States Supreme Court has not previously determined whether the Fifth Amendment forbids the State's use of a defendant's pre-arrest silence for substantive, non-impeachment purposes. In *Jenkins*, the Court held that even if a defendant's pre-arrest silence is protected by the Fifth Amendment, impeachment by use of such silence does not violate the Fifth Amendment where the defendant testifies at trial. *Jenkins*, 447 U.S. at 238, 65 L. Ed. 2d at 94-95. However, the Court specifically declined to answer the question of whether a defendant's pre-arrest silence is constitutionally protected where the defendant continues to remain silent at trial:

> In this case, the [defendant] remained silent before arrest, but chose to testify at his trial. Our decision today does not consider whether or under what circumstances prearrest silence may be protected by the Fifth Amendment. We simply do not reach that issue because [our prior case law] clearly permits impeachment even if the prearrest silence were held to be an invocation of the Fifth Amendment right to remain silent.

Id. at 236 n.2, 65 L. Ed. 2d at 93 n.2.

North Carolina Courts likewise have not determined whether the Fifth Amendment protects a defendant's pre-arrest silence. A majority of federal circuit courts considering this question have held that such protection does exist. In *U.S. ex rel. Savory v. Lane*, 832 F.2d 1011 (7th Cir. 1987), for example, the state presented evidence that the defendant refused to speak with police when police attempted to question him regarding two murders committed the previous week. *Id.* at 1015. The prosecutor also commented on the de-

2. North Carolina courts have also held that even where the State's use of a defendant's silence to impeach the defendant's trial testimony is constitutionally permissible, the State, in order to use the defendant's silence in this manner, must also demonstrate that the defendant's prior silence amounted to a prior inconsistent statement. *See*, *e.g.*, *Bishop*, 346 N.C. at 386-87, 488 S.E.2d at 780-81.

3. The State's purpose in eliciting the challenged testimony was clearly not to impeach Defendant Boston's credibility or alibi. Defendant Boston did not testify at trial and presented no other evidence on her behalf.

fendant's pre-arrest silence during closing argument. *Id.* The United States Court of Appeals for the Seventh Circuit first noted that because the defendant did not testify at trial, the state's purpose in referring to the defendant's silence was not to impeach him, but rather to raise a substantive inference of his guilt. *Id.* at 1017. The Court then held that such use of the defendant's silence violated his Fifth Amendment rights:

> [*Griffin*] held that neither the prosecutor nor the court may invite the jury to draw an inference of guilt from an accused's failure to take the stand. . . .
>
> While it is true that *Griffin* involved governmental use of the defendant's silence at trial, rather than when initially questioned by police, . . . we do not believe th[is] factor[] make[s] a difference. The right to remain silent, unlike the [Sixth Amendment] right to counsel, attaches before the institution of formal adversary proceedings. . . . [W]e believe *Griffin* . . . applies equally to a defendant's silence before trial, and indeed, even before arrest.

Id.

Three other federal circuit courts are in accord with the Seventh Circuit's holding in *Savory*. *See Girts v. Yanai*, 501 F.3d 743, 752 (6th Cir. 2007), *reh'g denied*, 2008 U.S. App. LEXIS 3661 (2008), *petition for cert. filed* (U.S. May 19, 2008) (No. 07-1452) (holding that the prosecutor's statements concerning the defendant's pre-arrest silence were "improper" and "constitute[d] prosecutorial misconduct because [the defendant's] silence cannot be used against him as substantive evidence"); *Combs v. Coyle*, 205 F.3d 269, 283, *reh'g denied*, 2000 U.S. App. LEXIS 6843 (6th Cir. 2000), *cert. denied*, *Bagley v. Combs*, 531 U.S. 1035, 148 L. Ed. 2d 533 (2000) (holding that "the use of a defendant's prearrest silence as substantive evidence of guilt violates the Fifth Amendment's privilege against self-incrimination"); *United States v. Burson*, 952 F.2d 1196, 1201 (10th Cir. 1991), *cert. denied*, 503 U.S. 997, 118 L. Ed. 2d 411 (1992) (relying on *Griffin* to hold that "once a defendant invokes his right to remain silent," even if such invocation occurs pre-arrest, "it is impermissible for the prosecution to refer to any Fifth Amendment rights which [the] defendant exercised"); *Coppola v. Powell*, 878 F.2d 1562, 1568 (1st Cir. 1989), *cert. denied*, 493 U.S. 969, 107 L. Ed. 2d 383 (1989) (holding that where the defendant refused to confess to police prior to his arrest and did not testify at trial, the defendant "relied on the protection

guaranteed by the [F]ifth [A]mendment" and the prosecutor could not use such silence as evidence of guilt).

Three federal circuit courts have reached contrary conclusions. *See United States v. Oplinger*, 150 F.3d 1061, 1067 (9th Cir. 1998) (holding that admission of evidence regarding the defendant's refusal to discuss allegations of criminal activity with a work supervisor prior to his arrest "did not offend [the defendant's] privilege against self-incrimination under the Fifth Amendment or his right to due process under the Fourteenth Amendment"); *United States v. Zanabria*, 74 F.3d 590, 593 (5th Cir. 1996) (holding that the government may introduce evidence of, and comment on, a defendant's pre-arrest silence where such silence was not induced by government action); *United States v. Rivera*, 944 F.2d 1563, 1568 (11th Cir. 1991) (stating that "[t]he government may comment on a defendant's silence if it occurred prior to the time that he is arrested and given his *Miranda* warnings").

After careful consideration of this persuasive precedent, we agree with the view espoused by the United States Courts of Appeal for the First, Sixth, Seventh, and Tenth Circuits. Contrary to the State's assertion, it is clear that a defendant's Fifth Amendment right against self-incrimination, unlike a defendant's Fifth Amendment right to counsel, does not attach solely upon custodial interrogation. *See, e.g.*, *Kastigar v. United States*, 406 U.S. 441, 444, 32 L. Ed. 2d 212, 217, *reh'g denied*, 408 U.S. 931, 33 L. Ed. 2d 345 (1972) (noting that the privilege against self-incrimination "can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory"). Therefore, we hold that a proper invocation of the privilege against self-incrimination is protected from prosecutorial comment or substantive use, no matter whether such invocation occurs before or after a defendant's arrest.[4] *See Coppola*, 878 F.2d at 1565 (stating that it is a "basic principle" that "application of the [self-incrimination] privilege is not limited to persons in custody or charged with a crime; it may also be asserted by a suspect who is questioned during the investigation of a crime").

Likewise, we find the views of the Fifth, Ninth, and Eleventh Circuits unpersuasive for a number of reasons. In *Rivera*, the

4. While we hold that a defendant's pre-arrest silence is constitutionally protected, it remains clear that the State may use a defendant's pre-arrest silence for impeachment purposes if the defendant chooses to testify at trial. *See Jenkins*, 447 U.S. at 240-41, 65 L. Ed. 2d at 96. "After all, there is no constitutional right to commit perjury, which impeachment is designed to detect." *Savory*, 832 F.2d at 1017.

Eleventh Circuit cited *Jenkins* for its broad statement that "[t]he government may comment on a defendant's silence if it occurred prior to the time that he is arrested and given his *Miranda* warnings." *Rivera*, 944 F.2d at 1568. Reliance on *Jenkins* for this proposition is misplaced, as *Jenkins* merely permitted use of a defendant's pre-arrest silence for impeachment purposes and specifically declined to address the issue of substantive comment on a defendant's pre-arrest silence. Similarly, in *Zanabria*, the Fifth Circuit held that the Fifth Amendment did not protect the defendant's pre-arrest silence, but cited no authority to support its holding. *See Zanabria*, 74 F.3d at 593. Finally, we find the Ninth Circuit's decision in *Oplinger* distinguishable on its facts. In *Oplinger*, the defendant remained silent in response to accusations of criminal activity from his job supervisor, prior to any government involvement or investigation. *See Oplinger*, 150 F.3d at 1064. Therefore, according to the Ninth Circuit, the Fifth Amendment did not protect the defendant's silence because "the government made no effort to compel [the defendant] to speak[.]"[5] *Id.* at 1067.

The United States Supreme Court has directed that the Fifth Amendment privilege against self-incrimination "must be accorded liberal construction in favor of the right it was intended to secure." *Hoffman v. United States*, 341 U.S. 479, 486, 95 L. Ed. 1118, 1124 (1951). We have found no case in which the Supreme Court has construed the Fifth Amendment privilege against self-incrimination to allow the government's use of a defendant's silence as substantive evidence of his guilt, and we decline to adopt such a construction in the present case. We therefore hold that the trial court erred by allowing introduction of Ms. Streeter's and Detective Doyle's testimony regarding Defendant Boston's refusal to speak with police prior to her arrest.

We must now determine whether the constitutional error in Defendant Boston's trial was harmless beyond a reasonable doubt. *See* N.C. Gen. Stat. § 15A-1443(b) (2007). We may consider a number of factors in making this determination, including: whether the State's other evidence of guilt was substantial; whether the State emphasized the fact of Defendant Boston's silence throughout the trial; whether the State attempted to capitalize on Defendant Boston's silence; whether the State commented on Defendant Boston's silence during closing argument; whether the reference to Defendant Boston's si-

5. Because we find *Oplinger* distinguishable, we neither adopt nor reject the Ninth Circuit's reasoning in that case.

lence was merely benign or *de minimis*; and whether the State solicited the testimony at issue. *See*, *e.g.*, *State v. Elmore*, 337 N.C. 789, 792-93, 448 S.E.2d 501, 502-03 (1994); *State v. Alexander*, 337 N.C. 182, 196, 446 S.E.2d 83, 91 (1994).

Our review of the record leads us to conclude beyond a reasonable doubt that the jury would have reached the same verdict even had the trial court disallowed the contested testimony. To begin, the State's evidence of guilt apart from Defendant Boston's silence was overwhelming. The State established Defendant Boston's motive through detailed testimony from Ms. Hockaday and Ms. Streeter regarding a recent feud between Defendant Boston's family and Ms. Hockaday's family. Ms. Streeter, who admitted to helping Defendant Boston start the fire, gave a detailed and thorough account of Defendant Boston's involvement in the arson. Detective Doyle testified that Ms. Streeter's testimony was consistent with statements that she gave to Detective Doyle the day following the fire and the week of Defendant Boston's trial. Further, Marshal Ottoway testified that he believed the fire was started with a flammable liquid, which was consistent with Ms. Streeter's testimony concerning the fire.

In addition, the trial transcript reveals that any testimony relating to Defendant Boston's pre-arrest silence was *de minimis*. The State did elicit such testimony from Ms. Streeter, but did so in the context of asking Ms. Streeter to describe the complete sequence of events that took place at Pizza Hut on the evening of 23 June 2006. Detective Doyle's testimony regarding Defendant Boston's pre-arrest silence was not elicited by the State, but rather was a fleeting statement made by Detective Doyle during a long narrative recitation of Ms. Streeter's prior statements to him. The State did not make Defendant Boston's pre-arrest silence a recurring theme of its case at trial, and the State did not comment on such silence during closing argument. When considered with the State's other substantial evidence of Defendant Boston's guilt, it is clear that Defendant Boston's pre-arrest silence was simply not a significant or essential part of the State's case-in-chief. We therefore conclude that the trial court's error in admitting the challenged testimony was harmless beyond a reasonable doubt.

B.

[5] Finally, Defendant Boston argues that the trial court erred by denying her motion to dismiss the first-degree arson charge due to insufficiency of the State's evidence. According to Defendant

Boston, the State did not meet its burden because it presented inconsistent theories of her guilt. Specifically, Defendant Boston notes that Ms. Hockaday testified that shortly before the fire began, she heard noises and women laughing outside her home. Further, Ms. Hockaday testified that shortly after the fire began, she saw Defendant Boston in a vehicle outside of her house. In contrast, Ms. Streeter testified that she and Defendant Boston did not make any noise when starting the fire, and that she and Defendant Boston ran from Ms. Hockaday's house after they started the fire, rather than getting into a vehicle. Defendant Boston contends that the alleged arson could not have been committed pursuant to both of the State's theories of guilt, and therefore the State did not produce sufficient evidence of her guilt.

"On a defendant's motion for dismissal on the ground of insufficiency of the evidence, the trial court must determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Franklin*, 327 N.C. 162, 171, 393 S.E.2d 781, 787 (1990). Further, the elements of first-degree arson are: "(1) the willful and malicious burning (2) of the dwelling (i.e., inhabited) house of another; (3) which is occupied at the time of the burning." *State v. Scott*, 150 N.C. App. 442, 453, 564 S.E.2d 285, 293, *disc. review denied and cert. denied*, 356 N.C. 443, 573 S.E.2d 508 (2002).

While Ms. Hockaday's testimony and Ms. Streeter's testimony do contain some inconsistencies, they are consistent as they relate to the elements of first-degree arson. Ms. Streeter's testimony regarding the circumstances surrounding the fire was sufficient to demonstrate that Defendant Boston acted willfully and maliciously in setting the fire. Both Ms. Hockaday and Ms. Streeter identified the building burned as a dwelling house of another person, namely, Ms. Hockaday. Ms. Hockaday testified that she was home at the time of the fire, and Ms. Streeter did not contradict this testimony. Further, Ms. Streeter identified Defendant Boston as one of the people who started the fire, and Ms. Hockaday did not contradict this testimony. The factual issues raised by Defendant Boston, including whether or not Defendant Boston was laughing when she started the fire, and whether she ran or drove away from the crime scene, have no bearing on the elements of first-degree arson.

We therefore hold that the State presented consistent and sufficient evidence to support a conviction of first-degree arson. While the State's evidence did contain some non-material discrepancies, these discrepancies were for the jury to consider when reaching a verdict. Defendant Boston's assignment of error is overruled.

In Defendant Satterwhite's appeal we find no error.

In Defendant Boston's appeal we find no prejudicial error.

Judges ELMORE and JACKSON concur.

STATE OF NORTH CAROLINA v. BERNARD ROMEL LITTLE

No. COA08-82

(Filed 5 August 2008)

1. Evidence— prior crimes or bad acts—involuntary manslaughter—State's refusal to accept defendant's stipulation

The trial court did not abuse its discretion in an assault with a deadly weapon with intent to kill inflicting serious injury, possession of a firearm by a convicted felon, and discharging a firearm into occupied property case by allowing the State to present evidence of defendant's prior felony conviction for involuntary manslaughter and then failing to give a limiting instruction with respect to evidence of defendant's prior conviction when defendant made an offer to stipulate to his status as a felon because: (1) the State carries the burden of proof beyond a reasonable doubt in all criminal cases, and thus the State is not required to accept a stipulation in lieu of an element; (2) it cannot be said that admission of the record evidence of defendant's prior involuntary manslaughter conviction in lieu of defendant's stipulation to a prior felony conviction so risked unfair prejudice that it substantially outweighed the discounted probative value of the record of conviction in violation of Rule 403; (3) the admission did not amount to propensity evidence in violation of Rule 403 when evidence of defendant's prior felony conviction established an element of the crime charged which was possession of a firearm by a felon; and (4) a review of the record revealed that the

failure to give a limiting instruction did not amount to plain error, and in its final instruction the trial court stated the manner in which the evidence of prior conviction could be used.

2. Evidence— hearsay exceptions—present sense impression—excited utterance—regularly conducted activity—public records and reports

The trial court did not abuse its discretion in an assault with a deadly weapon with intent to kill inflicting serious injury, possession of a firearm by a convicted felon, and discharging a firearm into occupied property case by denying the admission of testimony from the SBI Special Agent about an unavailable witness's statements made several hours after the pertinent shooting while sitting in the agent's state issued vehicle outside the police department, even though defendant contends it was admissible under various hearsay exceptions, because: (1) the basis of the present sense impression exception under N.C.G.S. § 8C-1, Rule 803(1) is that closeness in time between the event and the declarant's statement reduces the likelihood of deliberate or conscious misrepresentation, and the record revealed the SBI Special Agent arrived to assist local law enforcement several hours after the pertinent incident and located and interviewed, at some point during the day, a witness who was not available at trial; (2) an excited utterance under N.C.G.S. § 8C-1, 803(2) is 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, and the witness's statements were not the product of a spontaneous reaction when the Special Agent testified that several hours separated the shooting and her interview with the witness; and (3) although defendant contends the testimony was admissible on the basis that the statement was taken as a part of the SBI's regularly conducted activity under N.C.G.S. § 8C-1, Rule 803(6) or was admissible as a public record and report under N.C.G.S. § 8C-1, Rule 803(8), SBI reports that are not admissible under the public record exception are not admissible as business records, the public records exception does not apply where the sources of information or other circumstances indicate lack of trustworthiness, and it cannot be said that the circumstances surrounding the witness's statement so minimized the risk of inaccuracy and imparted a sense of trustworthiness as to allow the Special Agent to testify to the witness's statement as evidence of the truth of the matter asserted.

3. Assault— deadly weapon with intent to kill inflicting serious injury—accomplice—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of assault with a deadly weapon with intent to kill inflicting serious injury under an accomplice theory even though defendant contends that there was insufficient evidence to show that he joined with one or more people in a common scheme or plan to commit a crime because: (1) there was sufficient evidence to conclude that defendant and another person shared an intent to use a gun to scare the victim; and (2) the evidence supported the theory that defendant aided by driving the SUV that chased the victim into the gas station parking lot where the other person shot the victim while defendant was present and acting in concert with the other person.

Appeal by defendant from judgments entered 17 August 2007 by Judge Phyllis Gorham in Sampson County Superior Court. Heard in the Court of Appeals 22 May 2008.

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

Stewart, Stewart, Munz & Assoc., by Ryan McKaig, for defendant-appellant.

BRYANT, Judge.

Defendant Bernard Little appeals from judgments and commitments entered 17 August 2007 in Sampson County Superior Court after a jury found defendant guilty of assault with a deadly weapon with intent to kill inflicting serious injury, possession of a firearm by a convicted felon, and discharging a firearm into occupied property. We find no error.

The evidence presented at trial tended to show that on the morning of 27 February 2006, Bruce Owens and defendant were riding in defendant's car when Owens called Elerico Howard. Owens informed Howard that Owens believed the brother of a man who allegedly robbed Howard was in the vicinity. Shortly thereafter, Howard met Owens and defendant at defendant's home, and all three men left in Howard's white SUV hoping to find the brother of the man that allegedly robbed Howard. At some point that morning, Howard received a tip that the alleged robber's brother, Kurtis Johnson, was

at a local Head Start child care facility. Defendant and his two companions drove to confront Johnson. They parked approximately two blocks from the Head Start, and Owens and Howard walked the rest of the way while defendant remained in the SUV. Near the Head Start, Owens saw Kurtis Johnson pull away in a white car. Owens pulled a handgun from his waistband and fired until he emptied the gun clip.

Unable to hit the car, Owens and Howard ran back to the SUV, climbed in through the hatchback, and sat in the back seat. Owens left his firearm there and took Howard's. Owens testified that he "wanted to have the gun and [he] was going to try to scare the victim up if [they] caught up with him."

Defendant, Owens, and Howard chased the white car into a parking lot at Tony's Amoco and Grill. Owens got out of the SUV and ran to the passenger side of the white car. The white car attempted to drive off. Owens fired through the white car's back window, and struck Kurtis Johnson in the face. The white car stopped; Owens returned to the SUV; and defendant, Howard, and Owens left the scene.

At 11:09 a.m., a 9-1-1 call was placed concerning shots fired at Tony's Gas and Grill. Several hours after the shooting, the North Carolina State Bureau of Investigation (SBI) was asked to assist local law enforcement, at which time, SBI Special Agent Kellie Eason reported to the scene. At some point during the day, Special Agent Eason located an eyewitness.

The witness was not available for trial, but on cross-examination, defendant attempted to elicit from Special Agent Eason the witness's statements. The trial court denied defendant the opportunity to question Special Agent Eason regarding the witness's statements on hearsay grounds.

So, with the jury excused, Special Agent Eason, on voir dire, made an offer of proof with regard to the witness's statements. Special Agent Eason testified that the witness stated a white car was "flying down the road" followed by an SUV. The driver jumped out of the SUV, ran up to the white car, and shot out the rear windshield and one of the rear side windows. Kurtis Johnson staggered out of the car. The witness called 9-1-1 and tried to plug Johnson's wounds. The witness asked the victim who did this and the victim said, "Bruce did it." The witness did not know how many people were in the SUV—maybe two or three.

Defendant was charged with, among other things, possession of a firearm by a convicted felon. At trial, the State offered evidence of defendant's prior felony conviction. Defendant objected on grounds of violating Rules of Evidence 403 and 404 but stipulated to the existence of a prior felony conviction. The trial court overruled defendant's objection, and the State presented evidence of defendant's prior conviction for involuntary manslaughter, a class F felony.

At the close of the State's evidence and at the close of all evidence, the trial court denied defendant's motions to dismiss the charges for insufficient evidence. A jury found defendant guilty of assault with a deadly weapon with intent to kill inflicting serious injury, discharging a firearm into occupied property, and possession of a firearm by a convicted felon. The trial court entered judgments and commitments on those charges. Defendant appeals.

On appeal, defendant raises three issues: whether the trial court erred by (I) allowing the State to present evidence of defendant's prior felony conviction, (II) denying the admission of testimony by SBI Special Agent Kellie Eason, and (III) denying defendant's motions to dismiss a charge.

I

[1] Defendant first questions whether the trial court erred by allowing the State to present evidence of defendant's prior felony conviction and then failing to give a limiting instruction with respect to evidence of defendant's prior conviction. Defendant argues that when he made an offer to stipulate to his status as a felon, the admission of evidence regarding his prior felony conviction was in violation of North Carolina Rules of Evidence, Rules 401, 402, 403, 404, and 609, as well both the United States Constitution and the North Carolina Constitution.

We note defendant did not argue constitutional error or error under Rules of Evidence 401, 402, or 609 at trial. Thus, those arguments are not preserved for our review. *See State v. Call*, 349 N.C. 382, 410, 508 S.E.2d 496, 514 (1998) (citation omitted); N.C.R. App. P. 10(b)(1) (2007). We review the remaining arguments to determine if there was an abuse of discretion. *See State v. Roache*, 358 N.C. 243, 284, 595 S.E.2d 381, 408 (2004). "A trial court abuses its discretion if its determination is manifestly unsupported by reason and is so arbitrary that it could not have been the result of a reasoned decision."

State v. Cummings, 361 N.C. 438, 447, 648 S.E.2d 788, 794 (2007) (internal and external citations and quotations omitted).

Under North Carolina Rules of Evidence, Rule 403, our General Assembly has stated that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C.R. Evid. 403 (2007).

The United States Supreme Court addressed a similar issue, in application of the Federal Rules of Evidence in *Old Chief v. United States*, 519 U.S. 172, 136 L. Ed. 2d 574 (1997).[1] The defendant in *Old Chief* was charged with assault with a deadly weapon and violating 18 U.S.C. § 922(g)(1), which prohibits possession of a firearm by anyone with a prior felony conviction. *Id.* The defendant had a previous felony conviction for assault causing serious bodily injury. *Id.*

In a pre-trial motion, the defendant requested an order from the district court restricting the prosecution from mentioning or offering into evidence the defendant's prior criminal convictions, "*except* to state that the Defendant has been convicted of a crime punishable by imprisonment exceeding one (1) year." *Id.* at 175, 136 L. Ed. 2d at 584. In turn, the defendant offered to stipulate, agree, and request that the district court instruct the jury he had been convicted of a crime punishable by imprisonment exceeding one year. *Id.* at 175, 136 L. Ed. 2d at 585. The district court denied the defendant's motion, and at trial, over objection, the prosecution submitted into evidence the defendant's prior judgment and commitment for assault causing serious bodily injury. *Id.* at 177, 136 L. Ed. 2d at 585. A jury found the defendant guilty on all charges. *Id.* at 177, 136 L. Ed. 2d at 586.

On review, the United States Supreme Court held the admission of the name and general character of the prior felony conviction were relevant, *Id.* at 178-79, 136 L. Ed. 2d at 586-87; but where the stipulation satisfied the element of a prior felony conviction "the risk of unfair prejudice did substantially outweigh the discounted probative value of the record of conviction, and it was an abuse of discretion to admit the record when an admission was available," *Id.* at 191, 136 L. Ed. 2d at 595.

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1. While "[t]he North Carolina Rules of Evidence mirror almost completely the Federal Rules of Evidence," *State v. Lamb*, 84 N.C. App. 569, 580 n.3, 353 S.E.2d 857, 863 n.3 (1987), non-constitutional decisions by the United States Supreme Court cannot bind or restrict how North Carolina courts interpret and apply North Carolina evidence law. *Id.* at 580, 353 S.E.2d at 863.

In *State v. Jackson*, 139 N.C. App. 721, 535 S.E.2d 48 (2000), *rev'd on other grounds*, 353 N.C. 495, 546 S.E.2d 570 (2001), this Court addressed a scenario similar to that in *Old Chief*. In *Jackson*, the defendant was convicted of carrying a concealed weapon, resisting a public officer, and with possession of a firearm by a convicted felon in violation of N.C. Gen. Stat. § 14-415.1(a). *Id.* As in *Old Chief*, the trial court denied the defendant's offer to stipulate to the bare fact of a prior felony conviction in lieu of presenting record evidence of his prior conviction to the jury. *Id.* at 728, 535 S.E.2d at 53. Under a plain error standard of review, this Court held the "defendant . . . was not charged with any attendant offenses similar to his prior conviction of voluntary manslaughter, thus reducing the potential of prejudice in comparison to *Old Chief*. Further, nothing in the record reflects the jury was informed [the] defendant's prior conviction in any way involved use of a firearm." *Id.* at 732, 535 S.E.2d at 55.

Here, defendant was charged with attempted first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, possession of a firearm by a convicted felon, and discharging a firearm into occupied property. At trial, the State offered evidence of defendant's prior criminal offenses. Defendant objected under Rules of Evidence 403 and 404 but stipulated to the existence of a prior felony. The trial court overruled defendant's objection, and the State admitted evidence of defendant's prior conviction for involuntary manslaughter, a class F felony. We note the State carries the burden of proof—beyond a reasonable doubt—in all criminal cases, and under our jurisprudence (because of that burden) the State is not required to accept a stipulation in lieu of an element. *See Old Chief*, 519 U.S. at 186-87, 136 L. Ed. 2d at 591-92 ("the prosecution is entitled to prove its case by evidence of its own choice, or, more exactly, that a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the Government chooses to present it").

"Involuntary manslaughter is the unlawful killing of a human being *without* malice, *without* premeditation and deliberation, and *without* intention to kill or inflict serious bodily injury." *State v. McCollum*, 157 N.C. App. 408, 412, 579 S.E.2d 467, 470 (2003) (citation omitted) (emphasis added). In the present case, defendant was charged with attempted first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, discharging a firearm into occupied property, and possession of a firearm by a convicted felon. On the facts of this case, we cannot say admission of the

record evidence of defendant's prior involuntary manslaughter conviction in lieu of defendant's stipulation to a prior felony conviction so risked unfair prejudice that it substantially outweighed the discounted probative value of the record of conviction. *Jackson,* 139 N.C. App. 721, 535 S.E.2d 48. Therefore, we cannot hold it was a violation of Rule 403 to admit the record evidence of defendant's felony conviction even though the admission was available.

Defendant also argues that the admission of his prior felony conviction amounted to propensity evidence in violation of Rules of Evidence, Rule 404. We disagree.

Under the Rules of Evidence, Rule 404(b), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes . . . ." N.C.R. Evid. 404(b) (2007). "We have held that Rule 404(b) is a rule of inclusion, subject to the single exception that such evidence must be excluded if its *only* probative value is to show that defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Williams*, 156 N.C. App. 661, 663, 577 S.E.2d 143, 145 (2003) (citations omitted) (original emphasis).

Here, evidence of defendant's prior felony conviction established an element of the crime charged, possession of a firearm by a convicted felon. Therefore, defendant's argument that admission of record evidence of his prior felony conviction amounts to propensity evidence, in violation of Rule 404, is overruled.

Defendant further argues the trial court's failure to give a limiting instruction as to the purpose of the evidence of defendant's prior conviction amounts to plain error.

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where [the error] is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.

State v. Cummings, 361 N.C. 438, 470, 648 S.E.2d 788, 807 (2007) (citation and emphasis omitted). Based on our review of the evidence provided in the record, we cannot say the failure of the trial court to give a limiting instruction regarding the purpose of the evidence of defendant's prior conviction amounts to plain error. Further, in its final instructions to the jury the trial court stated the manner in which the evidence of prior conviction could be used. Accordingly, defendant's assignment of error is overruled.

II

[2] Defendant next argues the trial court erred by denying the admission of testimony by SBI Special Agent Kellie Eason. Defendant argues the proffered testimony of Special Agent Eason was admissible because the testimony included exculpatory evidence and was subject to four exceptions to the hearsay rule: present sense impression, an excited utterance, regularly conducted activity exception, and public records and reports.

"The standard of review for this Court assessing evidentiary rulings is abuse of discretion. 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. Hagans*, 177 N.C. App. 17, 23, 628 S.E.2d 776, 781 (2006) (citations omitted).

Under North Carolina Rules of Evidence, Rule 801(c), 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.R. Evid. 801(c) (2007). "Hearsay is not admissible except as provided by statute or by these rules." N.C.R. Evid. 802 (2007). The United States Supreme Court has dictated broad standards governing the constitutionality of hearsay admissiona in criminal prosecutions, specifically that "[h]earsay must contain 'indicia of reliability.' " *State v. Roper*, 328 N.C. 337, 359, 402 S.E.2d 600, 613 (1991) (citations omitted). "[H]earsay statements that fall within a 'firmly rooted hearsay exception' inherently possess an 'indicia of reliability.' " *Id.* at 359, 402 S.E.2d at 613 (citations omitted). Under North Carolina Rule of Evidence 803, titled "Hearsay exceptions; availability of declarant immaterial," a present sense impression, an excited utterance, records of regularly conducted activity, and public records and reports "are not excluded by the hearsay rule." N.C.R. Evid. 803 (2007).

A present sense impression is "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." N.C.R. Evid. 803(1) (2007). But, "[t]here is no rigid rule about how long is too long to be 'immediately thereafter.' " *State v. Clark*, 128 N.C. App. 722, 725, 496 S.E.2d 604, 606 (1998) (citation omitted). Still, "[t]he basis of the present sense impression exception is that closeness in time between the event and the declarant's statement reduces the likelihood of deliberate or conscious misrepresentation." *State v. Smith*, 152 N.C. App. 29, 36, 566 S.E.2d 793, 798 (2002) (citation omitted).

In *State v. Clark*, this Court held that the witness's statements were admissible as a present sense impression where the declarant observed the defendant's behavior, walked next door to the witness's home, and disclosed what she observed. *Clark*, 128 N.C. App. at 724-25, 496 S.E.2d at 605-06. In *State v. Smith*, this Court held that where the declarant's statement was made the same day as the event described but after spending all afternoon with the police, the declarant's statement did not qualify as a present sense impression. *Smith*, 152 N.C. App. at 36, 566 S.E.2d at 799.

The record before us indicates that at 11:09 a.m., a 9-1-1 call was placed concerning shots fired at Tony's Gas and Grill. Several hours later, the SBI was asked to assist local law enforcement. SBI Special Agent Kellie Eason reported to the scene. At some point that day, Special Agent Eason located and interviewed a witness. The witness was not available at trial. The trial court precluded Special Agent Eason's hearing testimony. It was not an abuse of discretion to deny admission of the witness's statements as a present sense impression.

An excited utterance 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.R. Evid. 803(2) (2007). "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." *State v. Smith*, 315 N.C. 76, 86, 337 S.E.2d 833, 841 (1985) (citation omitted). While the time lapse between the startling event and declarant's statement traditionally determines whether the statement was spontaneously made, "the modern trend is to consider whether the delay in making the statement provided an opportunity to manufacture or fabricate the statement." *Id.* at 87, 337 S.E.2d at 841.

Again, Special Agent Eason testified that several hours separated the shooting and her interview with the witness. Clearly, the witness's statements were not the product of a "spontaneous reaction, not one resulting from reflection or fabrication." *Id.* at 86, 337 S.E.2d at 841. Therefore, it was not an abuse of discretion to deny admission of the witness's statement as an excited utterance.

Defendant also argues Agent Eason's testimony regarding the witness's statement was admissible as an exception to the exclusion of hearsay statements on the basis that the statement was taken as a part of the SBI's regularly conducted activity, under Rule of Evidence 803(6), or it was admissible as a public record and report, under Rule of Evidence 803(8).

Evidence recorded in the course of a regularly conducted activity, as defined under Rule 803(6), is not excluded by the hearsay rule where

> [a] memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

N.C.R. Evid. 803(6) (2007).

Likewise, a public record and report, as defined under Rule 803(8), is not excluded by the hearsay rule where

> [r]ecords, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law-enforcement personnel, or (C) in civil actions and proceedings and against the State in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

N.C.R. Evid. 803(8) (2007). But, SBI reports "that are not admissible under Exception (8)[, the public records exception,] are not admissible as business records under Exception (6). As a result, we must determine whether these reports are admissible under Rule 803(8) before we can decide whether they are admissible as business records." *State v. Forte*, 360 N.C. 427, 436, 629 S.E.2d 137, 144 (2006) (citation omitted).

The exception to the hearsay rule under Rule 803(8) does not apply where "the sources of information or other circumstances indicate lack of trustworthiness." N.C.R. Evid. 803(8) (2007). "[G]uarantees of trustworthiness are based on a consideration of the totality of the circumstances but only those that surround the making of the statement and that render the declarant particularly worthy of belief." *Roper*, 328 N.C. at 360, 402 S.E.2d at 613 (citation and internal quotations omitted).

Here, Special Agent Eason took the statement of a witness several hours after the shooting while sitting in Eason's state issued vehicle outside the Roseboro Police Department. We cannot say the circumstances surrounding the witness's statement so minimized the risk of inaccuracy and imparted a sense of trustworthiness as to allow Special Agent Eason to testify to the witness's statement as evidence of the truth of the matter asserted. *See* N.C.R. Evid. 803(6) (2007). Accordingly, defendant's assignment of error is overruled.

III

[3] Last, defendant argues the trial court erred by denying defendant's motion to dismiss the charge of assault with a deadly weapon with intent to kill inflicting serious injury under an accomplice theory for insufficient evidence. Defendant argues the State failed to present sufficient evidence that defendant joined with one or more people in a common scheme or plan to commit a crime.

"When a defendant moves to dismiss a charge against him on the ground of insufficiency of the evidence, the trial court must determine whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Garcia*, 358 N.C. 382, 412, 597 S.E.2d 724, 746 (2004) (citations and quotations omitted). "Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *State v. Harris*, 361 N.C. 400, 402, 646 S.E.2d 526, 528 (2007) (citation omitted). "As to whether substantial evidence exists, the question for the trial court is not one of weight,

but of the sufficiency of the evidence." *Id.* (citation omitted). To review the sufficiency of the evidence, "we view the evidence in the light most favorable to the State, resolving all conflicts in the evidence in favor of the State and giving it the benefit of all reasonable inferences. Moreover, circumstantial 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. Tirado*, 358 N.C. 551, 582, 599 S.E.2d 515, 536 (2004) (citations and quotations omitted).

Defendant was charged with assault with a deadly weapon with intent to kill inflicting serious injury. The trial court instructed the jury that "[i]f two or more persons join in a common purpose to commit a crime . . . each of them, if actually or constructively present, is guilty of that crime if the other person commits the crime." Our North Carolina Supreme Court has reasoned that

> where a defendant and a co-defendant shared a criminal intent and the co-defendant who actually committed the crime knew of the shared intent, if the defendant was in a position to aid or encourage the co-defendant when the co-defendant committed the offense, the defendant was constructively present and acting in concert with the co-defendant.

Id. at 582, 599 S.E.2d at 536 (citation omitted).

The evidence presented at trial tended to show that on the morning of 27 February 2006, Bruce Owens and defendant were riding with defendant in his car when Bruce Owens called Elerico Howard. Owens informed Howard that the brother of a man that allegedly robbed Howard was in the vicinity. Shortly thereafter, Howard met Owens and defendant at defendant's home, and all three men left in Howard's white SUV hoping to find this man. At some point, Howard received a tip that the brother of the alleged robber, Kurtis Johnson, was at a local Head Start child care facility. Defendant and his two companions drove toward the Head Start to confront Johnson. Defendant and his companions parked two blocks from the Head Start, and Owens and Howard walked the rest of the way from the SUV to the Head Start. When Owens saw Kurtis Johnson pull away in a white car, Owens pulled a handgun from his waistband and fired until he emptied the gun clip.

Unable to hit the car, Owens and Howard ran back to the vehicle, climbed in through the hatchback, and sat in the back seat. Owens

left his firearm there and took Howard's. Owens testified that he "wanted to have the gun and [he] was going to try to scare the victim up if [they] caught up with him."

Defendant, Owens, and Howard then chased the white car into a parking lot at Tony's Amoco and Grill. Owens got out of the SUV and ran to the passenger side of the white car. The white car attempted to drive off, and Owens fired through the back window striking Kurtis Johnson in the face. Owens returned to the SUV; and defendant, Howard and Owens left the scene.

We hold there is sufficient evidence for a jury to conclude that defendant and Bruce Owens shared an intent to use a gun to "scare the victim up." Because the evidence supports the theory that defendant aided by driving the SUV that chased Kurtis Johnson into the Amoco parking lot, where Owens shot Johnson, defendant was present and acting in concert with Owens. *See Tirado*, 358 N.C. at 582, 559 S.E.2d at 536. Accordingly, defendant's assignment of error is overruled.

No error.

Judges McCULLOUGH and STEPHENS concur.

IN THE MATTER OF THE SUMMONS ISSUED TO ERNST & YOUNG, LLP AND ALL SUBSIDIARIES, AFFILIATED AND ASSOCIATED ENTITIES

No. COA07-1219

(Filed 5 August 2008)

1. Appeal and Error— appealability—final judgment—substantial right

The trial court did not err by concluding an order to comply and order denying intervenor's motion to dismiss petitioner Secretary of Revenue's motion to compel E&Y to produce documents E&Y withheld as privileged were not appeals from interlocutory orders, because: (1) the order granting petitioner's application was a final judgment; and (2) even if it was not a final judgment, the denial of discovery orders asserting a statutory or common law privilege affects a substantial right.

2. Taxation— failure to issue civil summons, file complaint or serve process—jurisdiction—N.C.G.S. § 105-258

The trial court did not err in a tax audit case arising from the creation of tax shelters designed to reduce intervenor's state corporate income tax by denying intervenor's motion to dismiss petitioner Secretary of Revenue's application to compel E&Y to produce documents pursuant to an administrative summons that E&Y withheld as privileged, even though intervenor contends petitioner violated the North Carolina Rules of Civil Procedure by failing to issue a civil summons, file a complaint, or serve process on either E&Y or intervenor, because: (1) petitioner's failure to issue a summons and file a complaint did not void subject matter jurisdiction and warrant dismissal of petitioner's application; (2) any failure to file and serve a complaint by civil process as prescribed by the North Carolina Rules of Civil Procedure is not a jurisdictional defect since N.C.G.S. § 105-258 provides jurisdiction to the Wake County Superior Court upon application by the Secretary of Revenue; and (3) N.C.G.S. § 105-258(c) provides the procedure for service of any civil papers by the employees of the Department of Revenue; (4) intervenor did not contend that petitioner failed to follow the procedure prescribed in N.C.G.S. § 105-258.

3. Discovery— motion to compel documents withheld as privileged—motion to dismiss—sufficiency of evidence

The trial court did not err in a tax audit case arising from the creation of tax shelters designed to reduce intervenor's state corporate income tax by denying intervenor's motion to dismiss, based on a failure to state a claim, petitioner Secretary of Revenue's application to compel E&Y to produce documents pursuant to an administrative summons that E&Y withheld as privileged even though intervenor contends the pertinent application did not identify any return whose correctness petitioner was determining, any return he was constructing, any tax liability for any year he was determining or any tax he was trying to collect, because: (1) the summons and request for production referenced in the application specified the time period for which petitioner was seeking discovery and were attached to the application; and (2) the application contained specific facts sufficient to provide notice to E&Y of the nature of the claim.

4. Discovery— withheld documents—anticipation of litigation—work product privilege

It was unclear whether the trial court abused its discretion by granting petitioner Secretary of Revenue's application and issuing an order to comply with an administrative summons, and the case is remanded for an in camera review of the pertinent withheld documents to determine whether some of them are in fact privileged, because: (1) from the record on appeal, the Court of Appeals was unable to determine whether the withheld materials were created in anticipation of litigation; and (2) it was not clear whether the documents were subject to the work product privilege.

Appeal by intervenor from orders entered 15 June 2007 and 21 June 2007 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 17 March 2008.

Attorney General Roy Cooper, by Assistant Attorney General Gregory P. Roney, for the Secretary of the North Carolina Department of Revenue-appellee.

Alston & Bird LLP, by Jasper L. Cummings, Jr. and Robin L. Greenhouse, for intervenor-appellant.

CALABRIA, Judge.

Wal-Mart Stores, Inc. ("intervenor") appeals an order denying intervenor's motion to dismiss and an order compelling Ernst & Young, LLP ("E&Y") to comply with a North Carolina Department of Revenue Administrative summons. We affirm the order denying the motion to dismiss and remand for an *in camera* review to determine whether E&Y's documents are privileged.

In 1995, E&Y provided consulting services to intervenor to implement tax shelters designed to reduce state corporate income taxes. In 1996, E&Y also provided consulting services to establish real estate investment trusts ("REITs") to reduce intervenor's state corporate income tax liability. Intervenor restructured its operations and requested that E&Y analyze intervenor's litigation risks.

On 6 February 2007, the Secretary of Revenue ("petitioner") issued a summons to E&Y, pursuant to N.C. Gen. Stat. § 105-258, directing E&Y to appear, give testimony and produce books, papers, records or other data, relevant or material to the petitioner's inquiry

regarding Wal-Mart Stores, Inc. and subsidiaries, including all limited liability companies, trusts, regulated investment companies, and any other affiliated entities. The summons also requested production of all documents "created at any time regarding the creation or existence of the New Entities. . . ." Petitioner defined the "New Entities" as Wal-Mart Stores East, Inc., Wal-Mart Property Co., Wal-Mart Real Estate Business Trust, Sam's West, Inc., Sam's East, Inc., Sam's Property Co., and Sam's Real Estate Business Trust. Petitioner requested production of all documents created between January 1, 1990 and December 31, 2000 which are either not directed to a specific client or involve Wal-Mart "discussing the marketing of, sale of, risks of, implementation of, use of, benefits of, and/or tax savings of real estate investment trusts, regulated investment companies, trusts, and/or holding companies owning trusts" as well as all documents created between January 1, 1990 and January 31, 2005 "proposing or analyzing transactions that require the creation, elimination, and/or restructuring of entities within the Wal Mart corporate structure and that would produce federal and/or state tax savings."

On 11 April 2007, petitioner filed a verified "Application for an Order for the Production of Certain Books, Papers, Records, and other Data" ("the application"). Petitioner alleges it granted E&Y multiple extensions of time to produce the responses to the summons. E&Y produced tens of thousands of pages of documents. However, thousands of pages of documents were withheld on the basis of privilege. E&Y produced a privilege log for 760 of those withheld documents. Petitioner alleged that E&Y and intervenor had failed to show the withheld documents were subject to the work product privilege.

On 4 May 2007, intervenor moved to intervene and to dismiss petitioner's application for failure to comply with the Rules of Civil Procedure.[1]

On 23 May 2007, intervenor filed a Preliminary Statement asserting that the documents withheld are protected by the work-product privilege. Intervenor also submitted an Affidavit by David Bullington, Vice President of Taxes for Intervenor during the years at issue ("Bullington Affidavit") and a privilege log describing the

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1. Although the motion to dismiss referenced only Rule 12(b)(6) as grounds for dismissal, the factual allegations in the motion related to grounds under Rule 12 subsection (b)(1-6), and intervenor filed a "Clarification of Motion to Dismiss" to specify that intervenor intended to rely on North Carolina Rules of Civil Procedure, 12(b)(1-6) in its motion to dismiss on 5 June 2007.

date, author, recipient and summary of each contested document ("privilege log").

Judge Donald W. Stephens ("Judge Stephens") granted intervenor's motion to intervene and denied intervenor's motion to dismiss ("order denying motion to dismiss"). On 15 June 2007, Judge Stephens rejected intervenor's claim of work product privilege and ordered E&Y to comply fully with petitioner's summons within thirty days of the order ("Order to Comply"). Judge Stephens stayed execution of the Order to Comply on the condition that E&Y deposit the contested documents under seal. E&Y deposited the contested documents under seal on 16 July 2007. Intervenor appeals the Order to Comply and the order denying the motion to dismiss.

I. Interlocutory Appeal

[1] Petitioner argues the Order to Comply and order denying intervenor's motion to dismiss are interlocutory and not immediately appealable. We disagree.

"An order is interlocutory if it does not determine the entire controversy between all of the parties." *Abe v. Westview Capital*, 130 N.C. App. 332, 334, 502 S.E.2d 879 (1998). Interlocutory orders are generally not subject to immediate appeal. N.C. Gen. Stat. § 7A-27(b) (2007); N.C. Gen. Stat. § 1A-1, Rule 54(b); *Veazy v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). One exception is where the denial of an immediate appeal affects a substantial right. N.C. Gen. Stat. § 7A-27(d)(1) (2007); N.C. Gen. Stat. § 1-277(a) (2007).

Intervenor argues the order granting petitioner's application was a final judgment and even if not a final judgment, the denial of an appeal would affect a substantial right. We agree.

The only matter before the trial court was whether to grant petitioner's application to order E&Y to comply with the petitioner's summons. This controversy was resolved upon entry of the Order to Comply with petitioner's summons. Therefore, intervenor's appeal is from a final judgment.

The order denying the motion to dismiss is immediately appealable because "[u]pon an appeal from a judgment, the court may review any intermediate order involving the merits and necessarily affecting the judgment." N.C. Gen. Stat. § 1-278 (2007). The order denying intervenor's motion to dismiss was an intermediate order that involved the merits and affected the final judgment because if it

had been granted, the trial court would not have issued the Order to Comply.

In addition, we note that even if the appeal was not from a final judgment, appeals of discovery orders asserting a statutory or a common-law privilege affect a substantial right. *Evans v. United Servs. Auto. Ass'n*, 142 N.C. App. 18, 541 S.E.2d 782 (2001) (holding the common law privilege of attorney-client is equivalent to a statutory privilege and affects a substantial right) (citing *Sharpe v. Worland*, 351 N.C. 159, 522 S.E.2d 577 (1999)); *Isom v. Bank of Am., N.A.*, 177 N.C. App. 406, 628 S.E.2d 458 (2006) (discovery order that required bank to disclose documents concerning bank's dispute with check vendor despite bank's assertion that documents were protected by attorney-client privilege or work-product doctrine was immediately appealable because it affected a substantial right).

II. Motion to Dismiss

[2] Intervenor contends the trial court erred in denying the motion to dismiss because petitioner violated the North Carolina Rules of Civil Procedure by failing to issue a civil summons, file a complaint, or serve process on either E&Y or intervenor. We disagree.

A. Jurisdiction and Service of Process

Intervenor argues proceedings pursuant to N.C. Gen. Stat. § 105-258 should be treated as either a civil action or a special proceeding subject to the Rules of Civil Procedure.

Petitioner argues N.C. Gen. Stat. § 105-258 confers subject matter jurisdiction on the trial court to enforce the administrative summons. Petitioner contends the North Carolina Rules of Civil Procedure do not apply because the procedure for summons enforcement is a "differing procedure" governed by N.C. Gen. Stat. § 105-258 and § 5A-23(a).

A civil action is "an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment or prevention of a public offense." N.C. Gen. Stat. § 1-2 (2007); *see also Gillikin v. Gillikin*, 248 N.C. 710, 712, 104 S.E.2d 861, 863 (1958). "Every other remedy is a special proceeding." N.C. Gen. Stat. § 1-3 (2007).

We agree that the North Carolina Rules of Civil Procedure apply to actions brought under N.C. Gen. Stat. § 105-258. N.C. Gen. Stat.

§ 105-258(a) allows the Secretary of Revenue to examine data and summon persons to appear, produce documents, and testify under oath "for the purpose of ascertaining the correctness of any [tax] return, making a [tax] return where none has been made, or determining the liability of any person for a tax or collecting any such tax." N.C. Gen. Stat. § 105-258(a) (2007).

> If any person so summoned refuses to obey such summons or to give testimony when summoned, the Secretary may apply to the Superior Court of Wake County for an order requiring such person or persons to comply with the summons of the Secretary, and the failure to comply with such court order shall be punished as for contempt.

Id. N.C. Gen. Stat. § 105-258 (b-c) authorizes the department employees of the Secretary of Revenue to sign, verify and serve process for any civil papers in which the Secretary of Revenue is a party.

N.C. Gen. Stat. § 105-246, under the same subchapter and article as N.C. Gen. Stat. § 105-258, provides that: "All actions or processes brought in any of the superior courts of this State, under provisions of this Subchapter, shall have precedence over any other civil causes pending in such courts, and the courts shall always be deemed open for trial of any such action or proceeding brought therein." N.C. Gen. Stat. § 105-258 is a process brought under this Subchapter, and therefore is a civil action. *See also Charns v. Brown*, 129 N.C. App. 635, 502 S.E.2d 7 (1998) (concluding statute referring to "actions" to compel disclosure of public documents under N.C. Gen. Stat. § 132-9 are civil actions). We also note that our courts have applied the rules of civil procedure to statutes authorizing court orders to compel disclosure of certain documents. *See Carswell v. Hendersonville Country Club, Inc.*, 169 N.C. App. 227, 609 S.E.2d 460 (2005) (applying rules of civil procedure to N.C. Gen. Stat. § 55-16-04); *Charns*, *supra.*

Since we conclude N.C. Gen. Stat. § 105-258 is a civil action, the statute is subject to the rules of civil procedure, except to the extent the statute prescribes a different procedure. N.C. Gen. Stat. § 1A-1, Rule 1 (2007); N.C. Gen. Stat. § 1-393 (2007); *see Home Builders Ass'n of Fayetteville N.C., Inc. v. City of Fayetteville*, 170 N.C. App. 625, 630, 613 S.E.2d 521, 525 (2005) (declining to apply Rule 24(a) where conflicts with specific procedures set forth in N.C. Gen. Stat. § 160A-50); *Va. Electric and Power Co. v. Tillett*, 316 N.C. 73, 340 S.E.2d 62 (1986) (holding that private condemnation proceedings are special proceedings subject to the rules of civil procedure, to the

extent the rules do not conflict with specified procedures in the statute); *Charns*, 129 N.C. App. at 638, 502 S.E.2d at 9 ("[U]nless a statute states that a summons is not required or sets out a different procedure for serving a summons, Rule 4 applies.").

Our conclusion that N.C. Gen. Stat. § 105-258 is subject to the rules of civil procedure is supported by analogy to federal law. In *State v. Davis*, 96 N.C. App. 545, 386 S.E.2d 743 (1989), this Court noted that N.C. Gen. Stat. § 105-258 is "modeled after 26 U.S.C. 7602,[2] which enables the Internal Revenue Service to issue an administrative summons in aid of either civil or criminal tax investigations." *Id.*, 96 N.C. App. at 551, 386 S.E.2d at 746 (footnote added). Federal statute 26 U.S.C. § 7604 governs enforcement of a summons issued under 26 U.S.C. § 7602.[3] In *United States v. Powell*, 379 U.S. 48,

2. 26 U.S.C. 7602 reads in pertinent part:

(a) Authority to summon, etc.—For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

3. 26 U.S.C. § 7604 reads in pertinent part:

Enforcement of summons

(a) Jurisdiction of district court.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) Enforcement.—Whenever any person summoned under section 6420(e)(2), 6421(g)(2), 6427(j)(2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such per-

58, n. 18 (1964), the United States Supreme Court noted that because 26 U.S.C. § 7604(a) "contains no provision specifying the procedure to be followed in invoking the court's jurisdiction, the Federal Rules of Civil Procedure apply." Federal courts rely on the *Powell* test to apply the Federal Rules of Civil Procedure to the issuance of a summons under 26 U.S.C. 7602 and enforcement under 26 U.S.C. 7604, but where the statute sets forth a specific procedure, the Federal Rules of Civil Procedure do not apply. *See United States v. Salter*, 432 F.2d 697 (1st Cir. 1970) (applying the Federal Rules of Civil Procedure to attorney's request for discovery order filed in response to enforcement proceeding against the attorney); *see also United States v. Dick*, 694 F.2d 1117 (8th Cir. 1982) (concluding that although the Federal Rules of Civil Procedure require filing a complaint in order to invoke jurisdiction, because federal statute authorizes federal courts to enforce a summons, any process defect is not jurisdictional).

We agree with the reasoning of *Powell* and its application by the circuit courts. Petitioner's failure to issue a summons and file a complaint did not void subject matter jurisdiction and warrant dismissal of petitioner's application. We hold that any failure to file and serve a complaint by civil process as prescribed by the North Carolina Rules of Civil Procedure is not a jurisdictional defect because the statute provides jurisdiction to the Wake County Superior Court upon application by the Secretary of Revenue. *Dick*, *supra*; N.C. Gen. Stat. § 105-258(a); see also *Charns*, *supra; Va. Electric*, *supra; Home Builders*, *supra*. Furthermore, subsection (c) of N.C. Gen. Stat. § 105-258 provides the procedure for service of any civil papers by the employees of the Department of Revenue. Since intervenor does not contend that petitioner failed to follow the procedure prescribed in N.C. Gen. Stat. § 105-258, we conclude the trial court did not err in denying intervenor's motion to dismiss on the grounds of lack of jurisdiction or failure to serve process.

B. Failure to State a Claim

[3] Intervenor argues the application did not identify "any return whose correctness the Petitioner was determining, any return he was constructing, any tax liability for any year he was determining or

son, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

any tax he was trying to collect," and therefore failed to state a claim. We disagree.

Whether the trial court erred in denying the motion to dismiss is reviewed *de novo*. N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2007); *Holloman v. Harrelson*, 149 N.C. App. 861, 864, 561 S.E.2d 351, 353 (2002); *Little v. Atkinson*, 136 N.C. App. 430, 431, 524 S.E.2d 378, 379 (2000).

Intervenor argues the application does not identify any tax return or tax liability for any year, therefore the application fails to state a claim. Intervenor requests that this Court take judicial notice of an "Application For an Order for the Production of Certain Books, Papers, Records, and Other Data," pursuant to a summons served by the Secretary of Revenue on Dillard's, Inc. The summons in the Dillard's case specified the tax years which were the focus of the Secretary of Revenue's investigation. Intervenor argues the absence of "any such specifications" in the application renders it impossible for this or any court to determine whether E&Y had "knowledge in the premises." N.C. Gen. Stat. § 105-258(a). We disagree.

The "claim" at issue is the Secretary's request to the Wake County Superior Court to compel E&Y to produce documents E&Y withheld as privileged. Petitioner's application alleges the summons directed E&Y to appear, give testimony, and produce certain books, papers, records and other data relating to the tax liability of Wal-Mart Stores, Inc. Petitioner alleges E&Y withheld documents on the basis of privilege and produced a privilege log for only 760 of the withheld documents. The summons and request for production referenced in the application specify the time period for which petitioner was seeking discovery and are attached to the application. We conclude the application contains specific facts sufficient to provide notice to E&Y of the nature of the claim. *See Newberne v. Department of Crime Control & Pub. Safety*, 359 N.C. 782, 784, 618 S.E.2d 201, 203 (2005) (dismissal is proper when face of complaint reveals no law to support its claim, absence of facts to make it a sufficient claim, or discloses some fact necessary to defeat the claim). The trial court did not err in denying the motion to dismiss for failure to state a claim.

III. Order to Comply

[4] Intervenor next argues the trial court erred in granting petitioner's application and issuing an order to comply with the summons. Since it is unclear from the record whether the trial

court abused its discretion, we remand to the trial court for an *in camera* review.

A trial court's ruling on discovery orders is reviewed under an abuse of discretion standard. *Evans v. United Servs. Auto. Ass'n*, 142 N.C. App. 18, 27, 541 S.E.2d 782, 788 (2001). A party seeking protection under the work-product doctrine is required to show: (1) the material consists of documents or tangible things; (2) which were prepared in anticipation of litigation or for trial; (3) by or for another party or its representatives. *Evans*, 142 N.C. App. at 29, 541 S.E.2d at 789.

The work-product doctrine shields from discovery all materials prepared "in anticipation of litigation or for trial by or for another party or by or for that other party's consultant, surety, indemnitor, insurer, or agent . . . ." N.C. Gen. Stat. § 1A-1, Rule 26(b)(3) (2007). This includes documents prepared after a party secures an attorney and documents prepared under circumstances in which a reasonable person might anticipate a possibility of litigation. N.C. Gen. Stat. § 1A-1, Rule 26(b)(3) (2007); *Willis v. Duke Power Co.*, 291 N.C. 19, 229 S.E.2d 191 (1976). Materials prepared in the ordinary course of business are not protected by the work-product doctrine. *Willis supra*; *Diggs v. Novant Health, Inc.*, 177 N.C. App. 290, 628 S.E.2d 851 (2006). The test is "whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation." *Cook v. Wake County Hospital System*, 125 N.C. App. 618, 624, 482 S.E.2d 546, 551 (1997) (quoting 8 Wright, Miller and Marcus, *Federal Practice and Procedure: Civil*, § 2024 at 343 (1994)). The burden of whether the contested materials are privileged falls on the party asserting the privilege. *Wachovia Bank v. Clean River Corp.*, 178 N.C. App. 528, 631 S.E.2d 879 (2006).

Petitioner argues that because intervenor did not provide a document by document discussion of how each document relates to the litigation, the privilege log was not sufficient to support a contention that the documents were subject to the work product doctrine. Further, petitioner contends intervenor failed to meet its burden that the documents were created because of the prospect of litigation due to an actual or potential claim after an actual event. We disagree.

The work-product privilege is a qualified immunity that is an elastic concept. *Cook*, 125 N.C. App. at 623, 482 S.E.2d at 550. In *Cook*, this Court determined an accident report prepared by a hos-

pital employee in connection with a physician's fall was not prepared in anticipation of litigation because it was part of the hospital's policy to prepare such reports regardless of whether any litigation was anticipated. *Id.*, 125 N.C. App. at 625, 482 S.E.2d at 551-52.

Here, we are faced with the question of whether E&Y's documents relating to the tax restructuring reports were prepared in anticipation of litigation. At the hearing, intervenor presented the Bullington Affidavit alleging (1) the E&Y auditors prepared the non-disclosed documents pursuant to the 1996 and 2002 restructuring of intervenor and not for the purpose of assisting with tax return preparation; (2) this work was separate from E&Y's work as financial auditor; (3) separate invoices were submitted for this work; (4) Bullington anticipated the restructuring could result in litigation from various tax authorities because of past litigation and (5) the documents were not submitted in the ordinary course of business. Intervenor submitted a privilege log where a number of documents are described as containing "legal analysis" or "tax opinion."

From the record on appeal, we are unable to determine whether the withheld materials were created in anticipation of litigation. We remand for the trial court to review the documents *in camera* and determine whether some of the documents are in fact privileged. *See Diggs v. Novant Health, Inc.*, 177 N.C. App. 290, 311-12, 628 S.E.2d 851, 865 (2006) (remanding to determine if documents were created pursuant to company policy or in reasonable anticipation of litigation).

Petitioner argues that intervenor's failure to submit the documents for *in camera* review or to request review prejudiced its appeal on this issue. We disagree. In the cases cited by petitioner, it was clear from the record whether the trial court abused its discretion in either denying or granting the motion to compel disclosure. In *Fulmore v. Howell*, 189 N.C. App. 93, 657 S.E.2d 437, 443 (N.C. App. 2008), the party asserting protection failed to "explicitly state [which] documents they argue are protected" and did not offer "a specific explanation as to why the documents are protected." In *Midgett v. Crystal Dawn Corp.*, 58 N.C. App. 734, 294 S.E.2d 386 (1982), the defendant deleted portions of the document, and withheld one document on the basis that it could not be located. In *Miller v. Forsyth Mem'l Hosp., Inc.*, 174 N.C. App. 619, 621, 625 S.E.2d 115, 116 (2005) the trial court's analysis related to whether appellant proved denial of his motion to compel prejudiced him at trial.

Here, it is not clear from the record whether the documents are subject to the work product privilege. Intervenor offered specific reasons why the documents are protected, submitted a privilege log, and submitted an affidavit supporting its reasons for asserting privilege. A number of the documents described on the privilege log appear to be correspondence and legal analysis from a large law firm, Davis Polk & Wardwell. Accordingly, a remand for an *in camera* review is proper.

IV. Conclusion

We affirm the trial court's denial of intervenor's motion to dismiss and reverse and remand the order to compel for an *in camera* review.

Affirmed in part and remanded in part.

Chief Judge MARTIN and Judge GEER concur.

STATE OF NORTH CAROLINA v. SCOTT ANDREW CANADY, DEFENDANT

No. COA07-1278

(Filed 5 August 2008)

1. Firearms and Other Weapons— discharging firearm into occupied property—sufficiency of evidence—bullet hit exterior wall

The trial court did not err by denying defendant's motions to dismiss the charge of discharging a firearm into occupied property because: (1) contrary to defendant's assertion, the intent element in N.C.G.S. § 14-34.1 applies merely to the discharging and not to the eventual destination of the bullet; (2) there was evidence that supported the conclusion that defendant intended to discharge the gun, including witness testimony establishing that defendant made threatening statements about his willingness to shoot if he needed to and that he pointed the gun at a person's head or near his head, and defendant's own testimony showed that he fired down and away as to not hurt anyone; (3) although defendant contends there was insufficient evidence that he shot "into" the pertinent apartment when the bullet hit the exterior wall, the claim that the exterior walls of the apartment do not

constitute part of the enclosure is without legal merit since discharging a firearm into an enclosure does not have to mean through the wall of the enclosure; (4) photographs of the hole by the door and testimony of the bullet entering the wall provided substantial evidence to support a conclusion of defendant's guilt; and (5) the primary purpose and objective of the enactment of N.C.G.S. § 14-34.1 was the protection of the occupants of the building, and ruling that striking the exterior wall of the apartment was not "into" the apartment would contravene that purpose.

2. Firearms and Other Weapons— discharging firearm into occupied property—instruction—justification or excuse

The trial court did not commit plain error in a felony discharging a weapon into occupied property case by its instruction that in order to find defendant guilty, the jury had to find that defendant discharged the firearm "without justification or excuse, that is, in self-defense," even though defendant contends it led the jury to believe that self-defense was the only justification or excuse, because: (1) defendant presented no evidence of any justification or excuse other than self-defense at trial, and the absence of any evidence of another justification or excuse freed the trial court from having to leave the instruction open to other excuses; and (2) the issue of whether defendant accidentally fired was not a justification or excuse for shooting, but rather went to the element of intent.

3. Firearms and Other Weapons— discharging firearm into occupied property—instruction—meaning of "into"

The trial court's instruction in a prosecution for discharging a firearm into occupied property that "into" meant "into any part of the property structure" adequately conveyed to the jury that the outside wall is a part of the enclosure of the apartment and was not error.

4. Criminal Law— instruction—self-defense—duty to retreat

The trial court did not commit plain error in a felony discharging a weapon into occupied property case by failing to instruct the jury when giving the instruction on self-defense that defendant did not have a duty to retreat because: (1) even if the jury believed defendant was under a duty to retreat, defendant's testimony that he was unable to retreat would satisfy such a duty, thus making the instruction superfluous; (2) it was likely that

defendant did have a duty to retreat, making an instruction to the contrary incorrect, when there was evidence that defendant entered the fight voluntarily as evidenced by his telling another person not to be brave, and saying that this was a situation where somebody could get shot; (3) engaging in a verbal disagreement with threatening language did not indicate abandonment of the fight; (4) it was not necessary to determine whether defendant entered the fight voluntarily when, at most, defendant was facing a misdemeanor assault that did not entitle his use of a firearm in defense; (5) regardless of who started the altercation, defendant was required to retreat from the nonfelonious assault rather than escalate the incident through the use of a weapon; and (6) if anything, giving a more in-depth instruction on self-defense and duty to retreat would probably have damaged defendant's case.

5. Firearms and Other Weapons— discharging firearm into occupied property—sufficiency of indictment—knew or should have known property was occupied

An indictment in a felony discharging a weapon into occupied property case gave the trial court subject matter jurisdiction even though defendant contends it failed to allege the element that defendant knew or should have known that the property was occupied at the time he discharged the firearm because: (1) the Court of Appeals has already considered and rejected this argument; and (2) the indictment was couched in the language of N.C.G.S. § 14-34.1 and alleged all of the essential elements.

6. Firearms and Other Weapons— discharging firearm into occupied property—instruction—into occupied property

The trial court did not err in a felony discharging a weapon into occupied property case by instructing that "into" means "into any part of the property structure," because: (1) defendant waived his constitutional argument by failing to raise it at the trial level and failing to cite any constitutional authority in support of his argument; and (2) the Court of Appeals already concluded that there is no statutory basis for distinguishing between the interior and exterior parts of the walls of an enclosure.

Appeal by defendant from judgment entered 21 March 2007 by Judge Ronald L. Stephens in Wake County Superior Court. Heard in the Court of Appeals 16 April 2008.

Attorney General Roy Cooper, by Special Deputy Attorney General Victoria L. Voight, for the State.

George B. Currin for defendant.

ELMORE, Judge.

On the evening of 9 August 2004, Nicole Dobbins and her two roommates were entertaining some friends. The group consisted of the two roommates' boyfriends, Scott Schabot and Kyle Morin; the women's neighbor in apartment 204, Nicholas Siwy; and one of Dobbins' co-workers, Sean Hairr. Earlier that night, Dobbins had an argument with her boyfriend, Daniel Timmermans, about his alleged infidelity that resulted in her ending the relationship. Timmermans' testimony on this issue conflicts with Dobbins' testimony. He stated that they were engaged to be married, had not had a fight earlier that day, and that she was having a "girls' night" that night. He testified that he stopped by Dobbins' apartment around 10:00 or 11:00 p.m., where he saw that there was a "party" on her balcony. Timmermans then called Scott Andrew Canady (defendant) to come over to Dobbins' apartment, allegedly to join the party. Timmermans met defendant at the entrance to the apartment complex because defendant did not know exactly where Dobbins lived within the complex. Defendant then took Timmermans in his car to the apartment.

Upon arriving at Dobbins' apartment with defendant, Timmermans claims that he saw that "his fiancé was kissing another man" on the balcony. Defendant stayed at the bottom of the steps leading up to Dobbins' second floor apartment while Timmermans went upstairs to speak to Dobbins. There is conflicting testimony concerning a possible verbal and/or physical confrontation between Dobbins' friend, Schabot, and Timmermans as Timmermans tried to gain access to Dobbins' apartment to speak to her. Defendant then went up the stairs because he claimed that he heard a "commotion." Timmermans then asked defendant to wait there on the landing for him while he spoke to Dobbins. Timmermans knocked repeatedly on the apartment door and Dobbins eventually came out of the apartment. They went down the stairs to the parking lot to talk.

While the couple was talking, defendant remained on the staircase landing with Schabot and Morin, another of the guests at Dobbins' apartment. There is conflicting testimony concerning how many people were on the landing and where they were standing. Defendant testified that there were "five people" on the landing

and that they were blocking his access to the stairs. Timmermans testified that when he left the apartment to speak to Dobbins in the parking lot there were "about four or five people" on the breezeway. He also testified that when he looked up the staircase after hearing a gunshot there were "about seven people up top . . . of the steps." Schabot and Morin testified that they were the only ones on the landing with defendant and that defendant was standing at the top of the stairs. Siwy also testified that he went out onto the breezeway within twenty to thirty seconds after the gunshot and only Schabot and Morin were on the landing while "somebody" was walking down the stairs.

Schabot and Morin exchanged words with defendant, with Schabot asking if defendant was Timmermans' bodyguard and why he was there. Defendant told Schabot "not to be brave" when Schabot tried to look down the stairs to see how the conversation between Dobbins and Timmermans was going. The disagreement escalated and Schabot testified that defendant said that this "was a situation where somebody could get shot at or shot." Schabot then asked if defendant was going to shoot him, defendant responded that "if he needed to he would" and Schabot told him to do it. Defendant pulled out his gun, possibly from a holster, and pointed the gun at Schabot's head. Schabot repeated that defendant should shoot him and defendant fired his gun. The shot went past Schabot's head and lodged at head height somewhere behind the siding of the exterior wall beside Siwy's apartment.

Schabot and defendant continued accosting each other for "a couple of seconds" after the shot was fired. Then defendant returned the gun to its original location on his person and ran down the steps. Siwy immediately called the police and several police officers and the City/County Bureau of Identification responded at about 2:40 a.m.

Before Timmermans and defendant arrived at the apartment, Siwy left Dobbins' apartment to go to his apartment right across the breezeway. He went to order some late night pizza. He was unaware of the argument going on between defendant and Schabot and the conversation between Dobbins and Timmermans. After he found a pizza place that was still open, he began walking to the door to go get the pizza. He was about "ten steps from the door" when he heard the gunshot. Siwy testified that "[i]f it didn't hit the frame . . . it could have went right through the apartment and hit me when I was walking out."

On 21 March 2007, a jury found defendant guilty of the charge of felony discharging a firearm into occupied property. The trial court sentenced defendant to a suspended sentence of seventeen to thirty months and supervised probation for twenty-four months. Defendant filed notice of appeal with this Court two days later.

[1] Defendant's first assignment of error concerns his motions to dismiss the charge of discharging a firearm into occupied property. He claims that the motions should have been granted because there was insufficient evidence to support each element of the offense. Defendant alleges that there was insufficient evidence that he intentionally discharged the firearm at either Schabot or at Siwy's apartment and that he fired "into" the apartment.

"In ruling on a defendant's motion to dismiss, the trial court should consider if the state has presented substantial evidence on each element of the crime and substantial evidence that the defendant is the perpetrator." *State v. Replogle*, 181 N.C. App. 579, 580, 640 S.E.2d 757, 759 (2007) (citation and quotations omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Denny*, 361 N.C. 662, 664-65, 652 S.E.2d 212, 213 (2007) (citations and quotation omitted). "The evidence should be viewed in the light most favorable to the state, with all conflicts resolved in the state's favor. . . . If substantial evidence exists supporting defendant's guilt, the jury should be allowed to decide if the defendant is guilty beyond a reasonable doubt." *Replogle* at 581, 640 S.E.2d at 759 (citation and quotations omitted). "This is true even though the evidence may support reasonable inferences of the defendant's innocence." *State v. Everette*, 361 N.C. 646, 651, 652 S.E.2d 241, 244-45 (2007) (citation and quotations omitted).

When we consider the elements of the crime of discharging a firearm into occupied property, it becomes obvious that defendant's assertion of insufficient evidence of intent is irrelevant. "The elements of the offense [defendant is charged with] are (1) the willful or wanton discharging (2) of a firearm (3) into any building (4) while it is occupied." *State v. Jones*, 104 N.C. App. 251, 258, 409 S.E.2d 322, 326 (1991). Defendant contends that there was not "legally sufficient evidence that [d]efendant either intentionally discharged his firearm at Scott Schabot or at Apartment 204." However, this argument is irrelevant since the construction of the statute clearly shows that the intent element applies merely to the discharging, not to the eventual destination of the bullet.

> A person violates this statute if he intentionally, without legal excuse or justification, discharges a firearm into an occupied building with knowledge that the building is then occupied by one or more persons or when he has reasonable grounds to believe that the building might be occupied by one or more persons.

Id. (citation omitted).

Furthermore, our Supreme Court has stated that "[d]ischarging a firearm into a vehicle does not require that the State prove any specific intent but only that the defendant perform[ed] the act which is forbidden by statute. It is a general intent crime." *State v. Jones*, 339 N.C. 114, 148, 451 S.E.2d 826, 844 (1994) (citations omitted).

> There is no requirement that the defendant have a specific intent to fire *into* the occupied building, only that he . . . (1) intentionally discharged the firearm *at* the occupied building with the bullet(s) entering the occupied building, or (2) intentionally discharged the firearm at a person with the bullet(s) entering an occupied building.

State v. Byrd, 132 N.C. App. 220, 222, 510 S.E.2d 410, 412 (1999) (citations omitted). Morin and Schabot's testimony established that defendant made threatening statements about his willingness to shoot if he "needed to" and that he pointed the gun "at [Schabot's] head" or "near [Schabot's] head." Defendant's own testimony is that he "fired down and away as to not hurt anyone." This is evidence that clearly supports the conclusion that defendant did intend to discharge the gun. Any discrepancies in testimony are issues for the jury to decide and do not warrant dismissal. It was not an accidental firing, although he may not have intended for the bullet to come to rest in the wall of the apartment building.

Defendant also contends that there was insufficient evidence that he shot "into" the apartment. He points to the fact that an "apartment" has been held to be an "enclosure" under N.C. Gen. Stat. § 14-34.1 in *State v. Cockerham*, 155 N.C. App. 729, 735, 574 S.E.2d 694, 698 (2003).[1] His argument is that the exterior wall does not form part of

1. Defendant is being prosecuted under the 2003 version of the statute because the offense happened in 2004. The statute has since been substantially amended to include the broader word "dwelling" in addition to "enclosure" and assigns a higher felony level to shooting into a "dwelling" than into an "enclosure." N.C. Gen. Stat. § 14-34.1 (2007). It is possible that a prosecution under the newer version would result in the reclassification of an apartment as a "dwelling." Such a reclassification would not damage the precedential value of the other parts of *Cockerham* because it would not change the fact that apartments are covered by the statute, but would only result in a harsher sentence.

the enclosure. He claims that because apartments are "enclosures" they are to be conceptualized as separate entities inside of the larger structure, which consists of all the support and exterior parts of the apartment building. Therefore, striking the exterior wall is not striking the "enclosure" of the apartment. Furthermore, he argues that in order to be "into" the "enclosure," as the plain meaning of "into" is commonly understood, the bullet must penetrate an interior wall of the apartment, or enter the apartment.

The claim that the exterior walls of the apartment do not constitute part of the enclosure is without legal merit. In *State v. Watson*, the bullets "hit the side of the house" and "hit a window" and were deemed to have been fired "into" the house. 66 N.C. App. 306, 308, 311 S.E.2d 381, 382 (1984). Although *Watson* involves a "building" and not an "enclosure," we find that the hitting of the exterior in both cases is analogous.

Also, the plain meaning of "into" includes "against" as in "crashed *into* a tree." *American Heritage College Dictionary* 712 (3d Ed. 1997) (emphasis added). This sentence does not mean "crashed *through* a tree." Similarly, discharging a firearm "into" an enclosure does not have to mean "through" the wall of the enclosure. *Cockerham* included the following definitions of "enclosure": "[a]n area, object, or item that is enclosed. . . . Something that encloses, such as a wall or fence." *Cockerham* at 734, 574 S.E.2d at 698 (citation omitted) (emphasis omitted). The exterior wall is nonetheless a wall, which the bullet was fired against, thereby fulfilling the requirement of being fired "into" the enclosure. The photographs of the hole by the door and testimony of the bullet entering the wall provide substantial evidence to support a conclusion of defendant's guilt. Thus, there is sufficient evidence of this element to withstand defendant's motion to dismiss.

Even if we were to rule that striking the exterior wall of an apartment was not "into" the apartment for purposes of this statute, such a ruling would contravene the purpose of the statute. "The protection of the occupant(s) of the building was the primary concern and objective of the General Assembly when it enacted G.S. 14-34.1." *State v. Williams*, 284 N.C. 67, 72, 199 S.E.2d 409, 412 (1973). Defendant was standing on the second floor landing of an apartment building late at night, when people are most likely to be at home. He knew or should have known it was likely that there were people all around him in the apartments, whether below him, above him, or in front of him. Simply firing down, as he testified he did intentionally, into the first floor

breezeway, was not any safer a decision than to fire directly past the people in front of him on the second floor breezeway. Firing a gun in or around an apartment building is extremely dangerous given that the shooter could never actually know that such a discharge would not strike an occupant.

The fact that the bullet did not penetrate an interior wall of apartment 204 was fortuitous for defendant. His conduct was just as dangerous as that of a person in a similar situation who fired a bullet that *did* happen to pierce an interior wall of the apartment, rather than simply lodging in some exterior part of the building. This reasoning is in line with our previous decision in *Cockerham*, in which we held that "[a] person who fires a gun through a common wall of an apartment is engaged in the same mischief as a person shooting into the building from the outside." Thus, defendant's first assignment of error is overruled. 155 N.C. App. at 735, 574 S.E.2d at 698.

[2] Defendant assigns plain error to the jury instruction that in order for the jury to find him guilty, it had to find that he discharged the firearm "without justification or excuse, that is, in self-defense." Because defendant did not object to the instruction at trial, this assignment of error is reviewed under the plain error standard, which requires him to show that the alleged error "probably resulted in the jury reaching a different verdict than it otherwise would have reached." *State v. Leyva*, 181 N.C. App. 491, 499, 640 S.E.2d 394, 399 (2007) (citations and quotations omitted). The error must be "so fundamental that it denied the defendant a fair trial and quite probably tilted the scales against him." *State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993). He argues that this instruction led the jury to believe that self-defense was the only "justification or excuse" that could free him from criminal liability, foreclosing other justifications, such as accident.

However, defendant presented no evidence of any justification or excuse other than self-defense at trial. Defendant would have had the jury decide on its own what "justification or excuse" he could have had other than self-defense. In *State v. Hall*, we held that the trial court was not required to add "without justification or excuse" when the defendant did not offer sufficient evidence of self-defense or any other justification. 89 N.C. App. 491, 495-96, 366 S.E.2d 527, 529-30 (1988). Thus, the absence of any evidence of another justification or excuse, besides the self-defense evidence, frees the trial court from having to leave the jury instruction open to other such excuses.

Further, the issue of whether defendant accidentally fired is not a justification or excuse for shooting, but rather bears on the element of intent. If defendant had made a convincing showing that he accidentally discharged the weapon, the jury might not have found that he shot "willfully or wantonly" and thus could not be guilty of the crime charged. Thus, the addition of the limiting instruction "that is, in self-defense" was not plain error.

[3] Defendant claims that the trial court's instruction that "into" meant "into any part of the property structure" was reversible error because he insists that "into" must mean "entering." When reviewing jury instructions, "it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury." *State v. Blizzard*, 169 N.C. App. 285, 296-97, 610 S.E.2d 245, 253 (2005) (citation and quotations omitted).

As explained above, "into" can also mean "against." We have held in at least two other cases that the "into" element is satisfied when bullets damage the exterior of a building, even though there is no evidence that the bullets penetrated to the interior. *See State v. Hicks*, 60 N.C. App. 718, 719, 300 S.E.2d 33, 34 (1983) (upholding a conviction when nineteen bullet holes were found in the victim's house and nineteen or twenty rifle shells were found outside the house); *State v. Musselwhite*, 54 N.C. App. 68, 72, 283 S.E.2d 149, 152 (1981) (upholding a conviction when the defendant or "someone in his group definitely fired the shots which damaged the building".) Moreover, "[t]he protection of the occupant(s) of the building was the primary concern and objective of the General Assembly when it enacted G.S. 14-34.1," not merely to keep bullets from entering the inside of buildings. *Williams* at 72, 199 S.E.2d at 412. Punishing only people whose bullets successfully pierce the interior walls of an apartment does not serve this objective. A thwarted attempt is, in theory, as much a danger to the occupants as a successful one because the shooter cannot know that his rounds will not pierce the interior walls.

Although the exact phrasing of the instruction may not have been ideal, it does adequately convey that the outside wall is a part of the enclosure of the apartment. Therefore, this instruction was not error.

In his next assignment of error, defendant tries yet again to draw a distinction between the exterior wall of the apartment and the interior wall. He claims that failing to instruct the jury that it would have

to find that apartment 204 was an "enclosure" amounts to plain error. Without this instruction, defendant claims, the jury would not know that the State was required to prove that the bullet had to pierce an interior wall in order to be considered discharged "into" that enclosure. As we have already concluded, there is no such difference between the exterior and interior walls of the apartment, even taking into account the apartment's status as an "enclosure." Therefore, it was not plain error to fail to instruct otherwise.

[4] Next, defendant argues that it was plain error for the trial judge not to instruct the jury that defendant had no duty to retreat when giving the instruction on self-defense. He claims that without this instruction the jury may have believed that he was under some duty to try to run away before discharging his firearm. This argument is incorrect in at least two ways.

First, defendant testified that he was unable to retreat because he did not have clear access to the stairway because he was "surrounded by five grown men." He went on to state that he "fired a single round in order to be able to startle [Schabot], to get away." Thus, if the jury did believe that he was under a duty to retreat, this testimony would clearly show that he tried to retreat and was unable to do so, which would satisfy such a duty. This would make such an instruction superfluous, and as such, cannot have resulted in a different verdict, which means that this omission cannot amount to plain error.

Second, it is likely that defendant did have a duty to retreat, which would make an instruction to the contrary incorrect. "In [assaults made with non-deadly force] the person assaulted may not stand his ground and kill his adversary, if there is any way of escape open to him, although he is permitted to repel force by force and give blow for blow." *State v. Pearson*, 288 N.C. 34, 39, 215 S.E.2d 598, 602-03 (1975) (citations omitted).

> The right of self-defense is only available, however, to a person who is without fault, and if a person voluntarily, that is aggressively and willingly, enters into a fight, he cannot invoke the doctrine of self-defense unless he first abandons the fight, withdraws from it and gives notice to his adversary that he has done so.

State v. Skipper, 146 N.C. App. 532, 538-39, 553 S.E.2d 690, 694 (2001) (citations and quotations omitted). It is likely that defendant did enter this fight voluntarily, as evidenced by his telling Schabot "not to be brave" and saying that this "was a situation where somebody could

get shot at or shot." Engaging in the verbal disagreement with threatening language certainly does not indicate abandonment of the fight.

However, we do not have to decide whether defendant did enter the fight voluntarily. At most, defendant was facing a misdemeanor assault from Schabot, which does not entitle defendant to use a firearm in defense. All the evidence, even defendant's own testimony, shows that neither Schabot nor any other men on the landing were armed. Furthermore, he admits that only two of the five men that he claims were on the landing were behaving aggressively. "Regardless of who started the altercation, therefore, Defendant was required to retreat from the nonfelonious assault rather than escalate the incident through the use of a weapon." *State v. Allred*, 129 N.C. App. 232, 235, 498 S.E.2d 204, 206 (1998). If anything, giving a more in-depth instruction on self-defense and duty to retreat would probably have damaged defendant's case. Thus, failing to instruct the jury that defendant did not have a duty to retreat does not amount to plain error.

[5] Defendant next asserts that the indictment did not give the trial court subject matter jurisdiction because it failed to allege the essential element that he knew or should have known that the property was occupied at the time he discharged the firearm. An indictment must give "[a] plain and concise factual statement in each count which, without allegations of an evidentiary nature, *asserts facts supporting every element* of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant . . . of the conduct which is the subject of the accusation." N.C. Gen. Stat. § 15A-924(a)(5) (2007) (emphasis added). "[T]he purpose of an indictment . . . is to inform a party so that he may learn with reasonable certainty the nature of the crime of which he is accused . . . ." *State v. Coker*, 312 N.C. 432, 437, 323 S.E.2d 343, 347 (1984). "In general, an indictment couched in the language of the statute is sufficient to charge the statutory offense." *State v. Blackmon*, 130 N.C. App. 692, 699, 507 S.E.2d 42, 46 (1998).

First, this Court has already considered and rejected this argument:

> We think the holding in *Williams* pertaining to the accused's knowledge of occupancy relates to evidence required at trial and not to allegations required in the bill of indictment. Consequently, we hold that an indictment under G.S. 14-34.1 which, as in the instant case, charges the offense substantially in the words of the

> statute, contains allegations sufficient to apprise an accused of the offense with which he is charged and to enable the court to proceed to judgment.

State v. Walker, 34 N.C. App. 271, 274, 238 S.E.2d 154, 156 (1977) (citation omitted).

Second, the indictment here was clearly couched in the language of the statute and alleged all of the essential elements discussed above with respect to the motions to dismiss. It stated that defendant "unlawfully, willfully, wantonly and feloniously did discharge a Smith & Wesson .40 Cal PT 140 Millenium [sic], which is a firearm, into . . . Apartment 204 . . . , property that was occupied at the time of the offense by Nicholas Siwy." This covers the four elements that we listed in *Jones*. 104 N.C. App. at 258, 409 S.E.2d at 326. Thus, there was no defect in the indictment.

[6] Defendant last argues that the trial court's jury instruction that "into" means "into any part of the property structure" relieved the State of its burden of proving that defendant discharged a firearm into the "enclosure" located within the apartment building. He contends that this was a violation of his federal and state constitutional rights. This is yet another attempt to distinguish between the exterior and the interior walls of the apartment. We refuse to recognize such a distinction for the reasons stated previously.

Furthermore, in addition to failing to raise this constitutional question at the trial level, defendant cites no constitutional authority, federal or state, in support of this argument. Constitutional issues raised for the first time on appeal will not be considered. *State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988). Defendant claims that this was plain error because it had a probable impact on the jury's verdict. We do not find error here because, as already stated, the instructions amounted to an accurate description of the law. Nevertheless, the complete absence of any constitutional argument means that the assignment can only be evaluated for nonconstitutional violations that were properly preserved. *State v. Lloyd*, 354 N.C. 76, 87, 552 S.E.2d 596, 607 (2001). As we have stated already, we find no statutory basis for distinguishing between the interior and exterior parts of the walls of an enclosure. Accordingly, this assignment of error is overruled.

Having conducted a thorough review of the briefs and the record on appeal, we find no error.

No error.

Judges McGEE and JACKSON concur.

GUILFORD COUNTY ON BEHALF OF STELLA M. HOLT, PLAINTIFF v.
STEVEN D. PUCKETT, DEFENDANT

No. COA07-761

(Filed 5 August 2008)

Costs— child support—action on behalf of mother—defendant not child's father—attorney fees assessed against mother—order inequitable

The trial court's order requiring the mother to pay $750.00 of defendant putative father's attorney fees after he was excluded as the child's father in a paternity proceeding instituted by the county child support enforcement agency on behalf of the mother was inequitable and an abuse of discretion because the agency was the real party in interest, not the mother, since the suit was filed for the economic benefit of the agency; the mother was compelled to participate fully in the action, including naming the individual she believed was her child's biological father, or she would have faced the termination of her child support benefits or possible charges of contempt of court; there was no showing that the mother named defendant as the biological father maliciously, fraudulently, or in bad faith, and the fact that defendant was not in fact the child's father does not prove otherwise; and the fact that plaintiff agency was entitled to file the action is proof that the mother is a woman of limited means, as she was dependant on assistance from the agency for the support of her child. On remand, the trial court may, in its discretion, make findings of fact and conclusions of law determining whether plaintiff agency, not the mother, should bear any portion of defendant's attorney fees pursuant to the appropriate statutory authority.

Judge HUNTER dissenting.

Appeal by plaintiff from an order entered 27 March 2007 by Judge William K. Hunter in Guilford County District Court. Heard in the Court of Appeals 20 February 2008.

Guilford County Attorney's Office, by Deputy County Attorney Michael K. Newby, for plaintiff-appellant.

No brief for defendant-appellee.

JACKSON, Judge.

The Guilford County Child Support Enforcement Agency ("plaintiff") appeals—purportedly on behalf of Stella M. Holt ("Holt")—an order granting defendant's motion for attorney's fees. After careful review, we reverse and remand this matter to the trial court.

On 17 November 2005, plaintiff filed a complaint seeking to establish paternity, pursuant to North Carolina General Statutes, section 49-14 (2008), and current support, pursuant to North Carolina General Statutes, section 50-13.4 (2008), as well as to recover past paid public assistance from defendant for a juvenile whom Holt claimed was fathered by defendant. [R p. 34-36] On 29 August 2006, defendant filed a response denying paternity and counterclaiming for attorney's fees pursuant to North Carolina General Statutes, section 50-13.6 (2008), and by separate motion requested a paternity test be performed. The paternity test excluded defendant as the father, and the case was dismissed voluntarily by plaintiff on 28 November 2006. On 27 March 2007, the district court granted defendant's motion for attorney's fees, ordering Holt to pay $750.00 of defendant's more than $2,000.00 in accumulated attorney's fees. Plaintiff appeals.

In plaintiff's only argument on appeal, it contends that the trial court abused its discretion by ordering Holt to pay a portion of defendant's attorney's fees. We agree.

We note that the order by the district court purportedly awards attorney's fees to defendant pursuant to North Carolina General Statutes, section 50-13.6. That statute reads: "In an action or proceeding for the custody or support, or both, of a minor child, . . . the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit." This Court has stated explicitly that "[t]his statute does not apply to civil actions to establish paternity under G.S. 49-14. We can perceive no reasonable construction of G.S. 50-13.6 that would extend its coverage that far." *Smith v. Price*, 74 N.C. App. 413, 423, 328 S.E.2d 811, 818 (1985), *rev'd on other grounds by* 315 N.C. 523, 340 S.E.2d 408 (1986).

However, this Court also has stated explicitly that costs involved in prosecuting a paternity action may be awarded under North Carolina General Statutes, section 6-21(10), which states: "Costs in the following matters shall be taxed against either party, or apportioned among the parties, in the discretion of the court: . . . [i]n proceedings regarding illegitimate children under Article 3, Chapter 49 of the General Statutes." *See Napowsa v. Langston*, 95 N.C. App. 14, 26, 381 S.E.2d 882, 889 (1989) ("attorney's fees incurred in prosecuting paternity actions may not be awarded under Section 50-13.6, but may only be assessed as costs under Section 6-21(10)."). Award of attorney's fees as costs under section 6-21(10) is discretionary. N.C. Gen. Stat. § 6-21.

Plaintiff argues that assessing attorney's fees to Holt in the instant case is inequitable. Although we have been unable to find any precedent in this jurisdiction—or any other—addressing the peculiar fact situation presented in the instant case, we hold that the laws governing child support enforcement in this state, along with general principles of equity, do not support the assessment of attorney's fees against Holt. North Carolina General Statutes, section 110-128 (2008), states the purposes of Article 9 of the North Carolina General Statutes:

> The purposes of this Article are to provide for the financial support of dependent children; to enforce spousal support when a child support order is being enforced; to provide that public assistance paid to dependent children is a supplement to the support required to be provided by the responsible parent; to provide that the payment of public assistance creates a debt to the State; to provide that the acceptance of public assistance operates as an assignment of the right to child support; to provide for the location of absent parents; to provide for a determination that a responsible parent is able to support his children; and to provide for enforcement of the responsible parent's obligation to furnish support and to provide for the establishment and administration of a program of child support enforcement in North Carolina.

Because Holt was receiving child support benefits from plaintiff, plaintiff had both "the authority and the duty to pursue an action against the responsible parent for the maintenance of the child and recovery of amounts paid by the county for support of the child." *Settle v. Beasley*, 309 N.C. 616, 618, 308 S.E.2d 288, 289 (1983). Plaintiff filed the instant suit, and, notwithstanding the fact that the

suit purportedly was filed "on behalf of" Holt, plaintiff was the real party in interest, not Holt. The suit was filed for the economic benefit of plaintiff, not of Holt. *Id.* at 618-19, 308 S.E.2d at 289. Upon the filing of this action by plaintiff, Holt was required to assist plaintiff in the prosecution of the action, or face the termination of her child support benefits, and possible charges of contempt of court resulting in fines and jail time.[1] N.C. Gen. Stat. § 110-131 (2008); *see also Beasley*, 309 N.C. at 618, 308 S.E.2d at 289.

The dissent points out that Holt "is a named plaintiff in every document in the record on appeal." "[T]he courts will look beyond the nominal party whose name appears of record and consider the legal questions raised as they may affect the real party in interest." *Id.* at 618, 308 S.E.2d at 289. Furthermore, we do not, as the dissent suggests, indicate that only a real party in interest is subject to orders of the trial court. What we do hold, as is further addressed below, is that in this instance and on these facts, to hold Holt responsible for attorney's fees for an action she did not initiate, and in which she was required to participate, would be inequitable.

Plaintiff's claims against defendant constituted subrogation, pursuant to which plaintiff stepped into the shoes of Holt, and obtained all her rights and obligations in the action filed against defendant. *In re A Declaratory Ruling by the N.C. Comm'r of Ins. Regarding 11 N.C.A.C. 12.0319*, 134 N.C. App. 22, 24, 517 S.E.2d 134, 137 (1999); *Trustees of Garden of Prayer Baptist Church v. Geraldco Builders, Inc.*, 78 N.C. App. 108, 114, 336 S.E.2d 694, 697-98 (1985); *see also In re Parentage of I.A.D.*, 126 P.3d 79 (Wash. Ct. App. 2006).

"The doctrine [of subrogation] is one of equity and benevolence, and, like contribution and other similar equitable rights, was adopted from the civil law, and its basis is the doing of complete, essential and perfect justice between all the parties without regard to form, and its object is the prevention of injustice." *Jeffreys v. Hocutt*, 195 N.C. 339, 342, 142 S.E. 226, 227 (1928) (quotes and citation omitted); *see also Wallace v. Benner*, 200 N.C. 124, 130-32, 156 S.E. 795, 798-99 (1931). "It is a fundamental premise of equitable relief that equity regards as done that which in fairness and good conscience ought to be done." *Lankford v. Wright*, 347 N.C. 115, 118, 489 S.E.2d 604, 606 (1997) (quotes and citations omitted). "Equity regards substance, not form". *Id.* And equity "will not allow technicalities of procedure to defeat that which is eminently right and just". *Id.*

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1. Contrary to the assertion of the dissent, we do not "predict" this outcome, we merely point out that pursuant to statute, it is "possible."

Holt did not file the instant action, was not the real party in interest, and was compelled to participate fully in plaintiff's action, including naming the individual she believed was her child's biological father. There is no showing in the record that Holt named defendant as the biological father maliciously, fraudulently, or in bad faith. The fact that defendant was not, in fact, the child's father does not prove otherwise.

The dissent appears to equate naming defendant as the biological father in the action as proof of intentional deception on the part of Holt. We are not prepared to make that leap, and the trial court made no such finding of fact. The trial court did state in its third finding of fact that *defendant alleged* in an affidavit that he "is not now and never has been acquainted with [Holt]." This is not enough to constitute an adoption of the allegations of the defendant as facts by the trial court. *In re Anderson*, 151 N.C. App. 94, 96-97, 564 S.E.2d 599, 601-02 (2002). Therefore, the trial court's findings of fact do not support the dissents assertion that "[c]learly, the trial court believed defendant had no relationship with plaintiff mother, a finding that would justify an award of attorney's fees." As the trial court does not make any findings of fact concerning Holt's honesty, motivation or good faith in initially naming defendant as the biological father, and as it further makes no finding of fact in which it adopts defendant's assertion that he did not know Holt, we may not, as the dissent suggests, infer the trial court's opinion—one way or the other. *Id.* We hold that the assessment of attorney's fees to Holt was inequitable—neither right nor just.

By footnote, the dissent states: "there was nothing to prohibit plaintiff agency from contacting defendant when plaintiff mother named him as the father and instigating paternity testing at that time before filing an action against him." We are in complete agreement with the dissent on this point. Had plaintiff taken this course of action, neither defendant nor Holt would have been forced to participate in this action, and neither would have been assessed attorneys fees by the trial court. The dissent's observation lends support to the equity of holding that if attorney's fees are to be assessed to either of the "named" plaintiffs, it is more equitable that Guilford County, not Holt, bear that burden.

The very fact that plaintiff was entitled to file the instant action is proof that Holt is a woman of limited means, as she was dependant on assistance from plaintiff for the support of her child. In light of the stated purposes of Article 9, in particular "to provide for the financial

support of dependent children", the assessment of attorney's fees against Holt—who is not in a position to provide for her child without assistance—for an action filed by plaintiff, is not only inequitable, but contrary to the stated purposes of the Article which granted plaintiff the right and duty to file the action in the first place.[2]

We believe the dissent is correct in emphasizing our citation above, stating that equity requires 'the doing of complete, essential and perfect justice between *all the parties* without regard to form, and its object is the prevention of injustice.' " *Hocutt*, 195 N.C. at 342, 142 S.E. at 228 (emphasis added). We are in no manner ignoring the rights of defendant in this opinion. The trial court determined that it would be equitable for defendant to receive some compensation for his attorney's fees, and we do not quarrel with that determination. Our quarrel merely is with the trial court's choice of the source of that compensation.

We hold that the trial court abused its discretion, and reverse that portion of the trial court's order assessing $750.00 in attorney's fees to Holt, and remand to the trial court for further action in accordance with this holding. The trial court may, in its discretion, make findings of fact and conclusions of law determining whether plaintiff, not Holt, should bear any portion of defendant's attorney's fees, pursuant to the appropriate statutory authority.

Reversed and Remanded.

Judge HUNTER dissents in a separate opinion.

Judge BRYANT concurs.

HUNTER, Judge, dissenting.

Because I believe the trial court did not abuse its discretion in granting Steven D. Puckett's ("defendant") motion for attorney's fees against Stella M. Holt ("plaintiff mother"), I respectfully dissent.

I.

On 11 November 2005, the Guilford County Child Support Enforcement Agency ("plaintiff agency") filed a complaint seeking to

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2. The dissent misses our point concerning the "stated purpose of Article 9." We are not suggesting that Holt's financial support from plaintiff will be terminated, but that a mother who requires financial support to care for her child can ill afford to pay $750.00, and that were she forced to do so, it may well negatively impact that child, whose support is one of plaintiff's stated purposes for existing in the first place.

establish paternity and current support, as well as to recover past paid public assistance from defendant for a juvenile whom plaintiff mother claimed was fathered by defendant. On 10 August 2006, defendant requested a paternity test be performed, and on 12 August 2006, he filed a response denying paternity and counterclaiming for attorney's fees pursuant to N.C. Gen. Stat. § 50-13.6. The paternity test excluded defendant as the father, and the case was voluntarily dismissed by plaintiff agency on 28 November 2006. On 27 March 2007, the trial court granted defendant's motion for attorney's fees, ordering that plaintiff mother pay $750.00 of his more than $2,000.00 in accumulated attorney's fees. Plaintiff agency appeals on behalf of plaintiff mother.

II.

The majority holds that an award of attorney's fees under N.C. Gen. Stat. § 6-21(10) is inequitable, as there is no showing the plaintiff mother acted in bad faith in naming defendant as the father. However, because as the majority notes there is no precedent in this or any other jurisdiction addressing such a claim, plaintiff agency can cite to no law that requires bad faith be shown before such costs may be awarded.

The majority argues that the spirit of the laws governing child support enforcement as well as principles of equity forbid the trial court from holding plaintiff mother responsible for the attorney's fees incurred by defendant in defending her false claim of paternity. I disagree.

A. Party in interest

The majority makes much of the fact that the real party in interest in this case is in fact plaintiff agency, not plaintiff mother. While it is certainly true that any monetary recovery would go to plaintiff agency, the majority does not explain how this fact deprives the trial court of authority to grant defendant's motion as to her. Plaintiff mother is a named plaintiff in every document in the record on appeal, and obviously the reason defendant became involved in the case.[3] I have found no law to suggest that, because a named party is

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3. I note also that no party argued to this Court that plaintiff agency might be held responsible for attorney's fees, as the majority suggests. Further, there was nothing to prohibit plaintiff agency from contacting defendant when plaintiff mother named him as the father and instigating paternity testing at that time before filing an action against him.

not the real "party in interest," that party is immune from orders by the trial court.

Further, the law does not support the majority's dire prediction of fines and jail time for plaintiff mother had she not named defendant as the father of her child. Per statute, a parent *may* be found in contempt if she "fails or refuses" to aid in the search for a missing parent. N.C. Gen. Stat. § 110-131(a) (2007). *Settle v. Beasley*, 309 N.C. 616, 308 S.E.2d 288 (1983), the case much cited by the majority, describes this as "cooperat[ing] with the county in its efforts to get support from the father of the child." *Id.* at 619, 308 S.E.2d at 289. Nothing in our statutes, our case law, or the record indicates that plaintiff mother was in danger of imminent criminal sanctions and therefore forced to name someone—anyone—as the potential father to enable plaintiff agency to pursue a man wholly innocent of any involvement in this case. I would note further that neither of the two duties imposed on plaintiff mother by statute and common law—to aid in the search for the missing father and cooperate with the county in obtaining support from the father once identified—are furthered by the provision of untruthful information as to the potential father.

Finally, I fail to see how the stated purpose of Article 9—"to provide for the financial support of dependent children"—affects the issue before this Court: Whether plaintiff mother should be held responsible for $750.00 of defendant's attorney's fees. N.C. Gen. Stat. § 110-128 (2007). Plaintiff mother has been receiving financial support for her child from plaintiff agency, and nothing in the record suggests she will lose that support regardless of the outcome of this appeal.

B. Principles of equity

Before discussing how the principles of equity apply to this case, I first note that the awarding of attorney's fees in this case was in the discretion of the trial court. That discretion includes consideration not only of what is equitable under the specific circumstances of each case, but also the parties' ability to pay any judgment against them. The fact that plaintiff mother receives child support should not make her immune from an order by the trial court to pay $750.00 of defendant's attorney's fees—less than half the total costs he incurred—in defending himself from plaintiff mother's false accusations.

In discussing how plaintiff mother's rights were assigned to plaintiff agency via subrogation—an equitable doctrine—the majority cites to the following description of equity: " '[T]he doing of complete,

essential and perfect justice between all the parties without regard to form, and its object is the prevention of injustice.' " *Jeffreys v. Hocutt*, 195 N.C. 339, 342, 142 S.E. 226, 227 (1928) (citation omitted). The majority later states that the fact there "is no showing in the record" that plaintiff mother named defendant "maliciously, fraudulently, or in bad faith" and that defendant was not actually the father of the child at issue is, essentially, irrelevant to our inquiries. I cannot reconcile these two statements logically.

First, the record contains evidence from which the trial court could have inferred that plaintiff mother acted in bad faith in naming defendant. In his affidavit, filed on 8 September 2006, defendant testified after being duly sworn to this effect:

> 1. I am a citizen and resident of the State of Florida.
>
> 2. I was served with a Summons and Complaint in this action by certified [mail] on or about May 30, 2006.
>
> 3. I have never resided in High Point, North Carolina.
>
> 4. I am not now and never have been acquainted with [plaintiff mother].
>
> 5. I did not engage in an act of sexual intercourse within the State of North Carolina which could have resulted in the conception of the minor child who is the subject of this action.
>
> 6. I deny that I am the natural father of the child.
>
> 7. I request that the court order that the parties and child submit to genetic marker testing to establish that I am not the father of the minor child.

As noted above, that genetic marker testing established that defendant could not be the father of the minor child at issue.

In its order awarding attorney's fees to defendant, filed 27 March 2007, the trial court made the following findings of fact:

> 1. Plaintiff [agency] filed the instant action for child support on behalf of [plaintiff mother on] or about November 17, 2005, alleging that Defendant is the biological father of the minor child [name redacted].
>
> 2. Defendant timely filed a motion to dismiss and an answer denying the allegations of the complaint and requesting paternity testing.

> 3. Defendant further filed an Affidavit alleging that he has never resided in High Point, North Carolina; that he is not now and never has been acquainted with [plaintiff mother]; that he did not engage in an act of sexual intercourse within the State of North Carolina which could have resulted in the conception of the minor child who is the subject of this action; and that he is [not] the natural father of the child.
>
> 4. Thereafter, the parties and the minor child submitted to paternity testing. The results of the genetic marker test confirm that Defendant is not the father of the minor child.
>
> 5. The underlying action was voluntarily dismissed by [plaintiff agency] upon receipt of the test results.
>
> 6. Defendant is a resident of the State of Florida and was forced to retain counsel to defend him in this matter.
>
> 7. To date, Defendant has incurred attorney's fees in the amount of $2,018.75 in defense of Plaintiff[mother's] claims.
>
> 8. Defendant is an interested party, acting in good faith, who is without the means to defray the costs of defending this action.
>
> 9. [Plaintiff mother] should share in the expenses incurred by Defendant.

The record reflects no evidence that plaintiff mother had a good faith basis for naming defendant. Clearly, the trial court believed defendant had no relationship with plaintiff mother, a finding that would justify an award of attorney's fees.

Surely the principles of equity—" 'the doing of complete, essential and perfect justice *between all the parties* without regard to form, and its object is the prevention of injustice,' " *Jeffreys*, 195 N.C. at 342, 142 S.E. at 228 (citation omitted; emphasis added)—apply to defendant as well as to plaintiff mother. Defendant was, on no apparent basis, haled into court in a foreign state to be held responsible for a child that had no relation to him and forced to incur thousands of dollars in legal fees defending an entirely spurious action. It is surprising, therefore, that in all the majority's consideration of fairness to plaintiff mother, no mention of defendant's position is made.

I do not believe that the principles of equity required the trial court to ignore plaintiff mother's role in this suit, nor this Court to find that the trial court abused its discretion in doing so.

III.

Because I believe the trial court did not abuse its discretion in awarding reasonable attorney's fees against plaintiff mother, I would affirm.

STATE OF NORTH CAROLINA v. RANDY LEE SELLARS

No. COA04-289-2

(Filed 5 August 2008)

Sentencing— aggravating factors—knowingly created great risk of death to more than one person by means of weapon or device normally hazardous to lives of more than one person—*Blakely* error—harmless beyond reasonable doubt

The trial court committed harmless error beyond a reasonable doubt in a multiple assault with a firearm on a law enforcement officer, assault with a deadly weapon, assault with a deadly weapon inflicting serious injury, and discharging a firearm into occupied property case by considering evidence of aggravating factors not found by a jury or admitted by defendant because: (1) in regard to the finding that defendant committed the crime while on pretrial release under N.C.G.S. § 15A-1340.16(d)(12), defendant waived this issue under N.C. R. App. P. 28(b)(6) by failing to challenge it; and (2) in regard to the finding that defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person under N.C.G.S. § 15A-1340.16(d)(8), it was uncontroverted that defendant fired a semi-automatic weapon during his altercation with an officer, and a semi-automatic pistol in its normal use is hazardous to the lives of more than one person; a rational factfinder would find that a great risk of death was knowingly created to the lives of several people when defendant and police officers exchanged gun fire while customers were inside the store, customers ran from their cars into the store for safety when the shooting began, or they hid in their cars to avoid bullets; and even though defendant contends the trial court erred by presuming he was a reasonable person in order to find he know-

ingly created a great risk of death, the jury considered and rejected defendant's insanity defense.

Judge GEER dissenting.

On remand by order of the Supreme Court of North Carolina filed 19 December 2006 vacating in part and remanding the decision of the Court of Appeals, *State v. Sellars*, No. COA04-289, slip op. (Sept. 6, 2005), for reconsideration in light of *State v. Blackwell*, 361 N.C. 41, 638 S.E.2d 452 (2006). Defendant initially appealed from judgments entered 25 September 2003 by Judge James C. Spencer, Jr., in Alamance County Superior Court. Originally heard in the Court of Appeals 6 December 2004, reconsidered by the Court of Appeals on 21 May 2008.

Attorney General Roy Cooper, by Assistant Attorney General Hilda Burnett-Baker, for the State.

Jarvis John Edgerton, IV, for defendant-appellant.

CALABRIA, Judge.

The Supreme Court of North Carolina remanded this case for reconsideration. We hold the trial court's error was harmless beyond a reasonable doubt and preserve defendant's sentence as determined by the trial court.

The facts described in *State v. Sellers* [sic], 155 N.C. App. 51, 574 S.E.2d 101 (2002) are repeated in this opinion. The State's evidence showed that just before 2 a.m. on 28 October 1999, Randy Lee Sellars ("defendant") entered the Pantry Convenience Store in Graham, North Carolina and told the clerk to call the police because he needed to speak to a law man. Defendant wore a uniform with an insignia which read "Department of Justice, Federal Bureau of Prisons." He carried two guns, a 9 millimeter semi-automatic Ruger pistol, and a .380 Lorcin semi-automatic pistol. The clerk testified that defendant's eyes were "kind of shiney [sic]," "like he had been drinking alcohol." The clerk called 911 and told the operator a man with the Department of Justice carrying two guns wanted some Graham police officers to come to the store. Three officers responded. Officers Peter Acosta and Sam Ray ("Officer Acosta" and "Officer Ray" respectively) arrived in one police car and Officer Christopher Denny ("Officer Denny") arrived in a separate police car. When Officer Ray arrived, he pulled up next to defendant. Officer Acosta asked defendant through

Officer Ray's open window, what was up. Defendant responded "nothing much" and then asked them if they thought that justice had been done in the world that day. When Officer Acosta noticed defendant's gun (the Ruger), he exited the car, drew his weapon and maneuvered to the rear passenger side. He warned Officer Denny, who was also exiting his car, that defendant had a gun and told him to get him away from the car. Officers Acosta and Denny each told defendant to put down the gun. Defendant said "I'm immortal" and asked if they believed in God. Defendant then shot into the air, maneuvered himself in front of the car and began shooting into the front of the car where Officer Ray was sitting. Officer Acosta fired at defendant, and defendant shot back at Officer Acosta. Officer Ray partially exited the car and fired a shot at defendant. Defendant then fired into Officer Ray's car door. Officer Ray was hit in the chest, but was not injured because he was wearing a protective vest. Officer Denny was crouched behind his patrol car when defendant's bullet struck his hand, rendering him unable to fire his weapon. During a short pause in the exchange of fire, Officer Denny ran towards the back of the Pantry building.

The gunfire between the officers and defendant occurred while customers were inside the store. When the shooting began, the customers who were in their cars ran into the store for safety. One such individual, Nathaniel Newton, was sleeping in the backseat of a vehicle stopped at the gas pumps and was awakened by the gunshots. He testified, "I sat and I thought. I was like, well, bullets hit the gas pumps and something, they could blow up, and like I could run into the store and be a little safer . . . . I just ducked my head and ran." Another customer, Toby Overman, was preparing to leave the parking lot in his truck when the shooting started. He crouched down in the seat and then exited the truck. He saw defendant with his gun and held up his hands. He sought cover first behind an ATM machine, and then behind the Pantry building.

As defendant headed north on South Main Street, additional officers arrived. Officer Chris Anderson, with the assistance of a P.A. system, directed defendant to drop his weapon. Defendant waved his gun in their direction and said "Bring it on." The officers shot defendant and were able to restrain him with handcuffs. The entire incident lasted three to four minutes. Officer Acosta recalled defendant repeatedly yelled that he "was the son of God and wouldn't die."

According to defendant's evidence, he suffered from a mental illness. He was honorably discharged from the Air Force and re-

ceived a 30% mental disability rating. He had been taking medication but stopped before the incident. Four experts testified that in their opinion defendant did not know right from wrong at the time of the incident.

On 7 March 2001, the jury returned guilty verdicts for three counts of assault with a firearm on a law enforcement officer, one count of assault with a deadly weapon, one count of assault with a deadly weapon inflicting serious injury, and one count of discharging a firearm into occupied property. During sentencing, the trial court found as aggravating factors for all convictions that: (1) defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person; and (2) defendant committed the offenses while on pretrial release. The trial court found as mitigating factors for all convictions that defendant: (1) was suffering from a mental condition that was insufficient to constitute a defense but significantly reduced his culpability for the offenses; (2) was honorably discharged from the United States Air Force; (3) had a support system in his community; and (4) had a positive employment history or was gainfully employed. The trial court determined that the aggravating factors outweighed the mitigating factors and sentenced defendant in the aggravated range to four consecutive terms of a minimum of 31 months to a maximum of 47 months in the North Carolina Department of Correction.

I. Procedural History

Defendant appealed to this Court and in an opinion issued 31 December 2002, we found no error at trial but remanded the case for re-sentencing. *State v. Sellers* [sic], 155 N.C. App. 51, 574 S.E.2d 101 (2002). Upon re-sentencing, the trial court again found as aggravating factors that: (1) defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person; and (2) defendant committed the offenses while on pretrial release. The trial court determined that the aggravating factors outweighed the mitigating factors and re-sentenced defendant in the aggravated range to the same term of incarceration as his initial sentence. Defendant appealed.

In an opinion issued 6 September 2005, this Court applied *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004) and determined the trial judge's consideration of evidence of aggravating

factors not found by a jury or admitted by the defendant violated the Sixth Amendment to the Constitution and warranted re-sentencing. *State v. Sellars*, No. COA04-289, slip op. (Sept. 6, 2005). The case was remanded to the trial court for re-sentencing.

On 19 December 2006, the Supreme Court vacated our order to remand to the trial court and remanded to this Court for reconsideration in light of *State v. Blackwell*, 361 N.C. 41, 638 S.E.2d 452 (2006). *Blackwell* applied *Washington v. Recuenco*, 548 U.S. 212, 165 L. Ed. 2d 466 (2006) to hold that a *Blakely* error is subject to harmless error review and not reversible *per se*. *Blackwell*, 361 N.C. at 42, 638 S.E.2d at 453.

Since this Court already determined the failure of the State to submit the issue of aggravating factors to the jury was a *Blakely* error, *Sellars*, No. COA04-289, slip op. at 1, and once decided, this issue became the law of the case, *State v. Moore*, 276 N.C. 142, 145, 171 S.E.2d 453, 455 (1970), the remaining issue for this panel to decide is whether the error was harmless beyond a reasonable doubt. *Blackwell*, 361 N.C. at 45, 638 S.E.2d at 455.

II. Harmless Error Review

"In conducting harmless error review, we must determine from the record whether the evidence against the defendant was so 'overwhelming' and 'uncontroverted' that any rational fact-finder would have found the disputed aggravating factor beyond a reasonable doubt." *Blackwell*, 361 N.C. at 49, 638 S.E.2d at 458 (citing *Neder v. United States*, 527 U.S. 1, 9, 144 L. Ed. 2d 35, 47 (1999)). "The defendant may not avoid a conclusion that evidence of an aggravating factor is 'uncontroverted' by merely raising an objection at trial. Instead, the defendant must 'bring forth facts contesting the omitted element,' and must have 'raised evidence sufficient to support a contrary finding.' " *Id.*, 361 N.C. at 50, 638 S.E.2d at 458 (quoting *Neder*, 527 U.S. at 19, 144 L. Ed. 2d at 53) (internal citations omitted).

In his brief, defendant does not challenge the trial court's finding of the aggravating factor that he committed the crime while on pretrial release under N.C. Gen. Stat. § 15A-1340.16(d)(12). Therefore this assignment of error is deemed abandoned. N.C.R. App. P. 28(b)(6) (2007). We therefore examine whether a rational fact-finder would have found beyond a reasonable doubt that defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the

lives of more than one person. In imposing this factor under N.C. Gen. Stat. § 15A-1340.16(d)(8), the judge considers whether the weapon in its normal use is hazardous to the lives of more than one person and whether a great risk of death was knowingly created. *State v. Evans*, 120 N.C. App. 752, 758, 463 S.E.2d 830, 834 (1995) (citing *State v. Rose*, 327 N.C. 599, 605, 398 S.E.2d 314, 317 (1990)).

After reviewing the evidence, we conclude the trial court's finding amounted to harmless error beyond a reasonable doubt. It was uncontroverted that defendant fired a semi-automatic weapon during his altercation with Officer Ray. A semi-automatic pistol in its normal use is hazardous to the lives of more than one person. *State v. Antoine*, 117 N.C. App. 549, 551, 451 S.E.2d 368, 370 (1995). The evidence shows that defendant fired his weapon at the police officers and the police officers fired shots at the defendant while customers were inside the store. Some customers were in their cars when the shooting began and ran into the store for safety. Two customers testified they either hid in their cars or in the store to avoid the bullets. We conclude a rational fact-finder would find that a great risk of death was knowingly created to the lives of several people through defendant's actions.

Defendant argues the trial court erred in presuming the defendant was a reasonable person in order to find he knowingly created a great risk of death. Defendant contends evidence of his mental illness was unrebutted by the State and supports a conclusion that he did not act "knowingly." We disagree. Although defendant testified at the re-sentencing hearing that he did not know what happened that night, every person is presumed sane and the burden of proving insanity is on the defendant. *State v. Dorsey*, 135 N.C. App. 116, 118, 519 S.E.2d 71, 72 (1999). A diagnosis of mental illness is not conclusive on the issue of insanity. *State v. Leonard*, 296 N.C. 58, 65, 248 S.E.2d 853, 857 (1978). In this case, the jury considered the issue of whether defendant's actions were excused by the insanity defense and the jury did not find that defendant was insane. We conclude the trial court's finding of the aggravating factor was harmless beyond a reasonable doubt.

No error.

Chief Judge MARTIN concurs.

Judge GEER dissents in a separate opinion.

GEER, Judge, dissenting.

In this case, the trial court erred in failing to submit to a jury the following aggravating factor: "The defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person." N.C. Gen. Stat. § 15A-1340.16(d)(8) (2007). In *State v. Blackwell*, 361 N.C. 41, 49, 638 S.E.2d 452, 458 (2006) (quoting *Neder v. United States*, 527 U.S. 1, 9, 144 L. Ed. 2d 35, 47, 119 S. Ct. 1827, 1834 (1999)), *cert denied*, 550 U.S. 948, 167 L. Ed. 2d 1114, 127 S. Ct. 2281 (2007), our Supreme Court held that such *Blakely*[1] errors must be reviewed by the appellate courts to determine "whether the evidence against the defendant was so 'overwhelming' and 'uncontroverted' that any rational fact-finder would have found the disputed aggravating factor beyond a reasonable doubt." Based upon my review of the record, including the jury's verdict, I cannot conclude that the evidence was overwhelming or uncontroverted as to the aggravating factor, and I, therefore, respectfully dissent.

In *State v. Rose*, 327 N.C. 599, 605, 398 S.E.2d 314, 317 (1990) (emphasis added), our Supreme Court held that in order to find the aggravating factor at issue in this case, there are "two considerations: (1) whether the weapon in its normal use is hazardous to the lives of more than one person; and (2) whether a great risk of death was *knowingly* created." While *State v. Bruton*, 344 N.C. 381, 393, 474 S.E.2d 336, 345 (1996), seems to establish that a semiautomatic pistol "in its normal use is hazardous to the lives of more than one person," the issue still remains whether defendant knowingly created a great risk of death to more than one person. In order to establish that prong of the aggravating factor, the State would have to prove beyond a reasonable doubt that defendant (1) knowingly, (2) created a great risk of death, (3) to more than one person.

At the original trial and at the sentencing hearing, defendant presented evidence from four expert witnesses—two of whom were doctors from Dorothea Dix Hospital—regarding defendant's history of mental illness, including his discharge from the military with a 30% mental disability rating, his diagnosis as suffering from a psychotic disorder, his hospitalizations, and his psychotic symptoms. The evidence also indicated that defendant had ceased taking his medications—which included an antipsychotic drug, a mood stabilizer, and antidepressants—for the 10 months prior to the shooting. Each of the

1. *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403, 124 S. Ct. 2531 (2004).

expert witnesses testified with respect to the 28 October 1999 shooting incident that defendant had suffered a psychotic episode that interfered with his ability to know the difference between right and wrong. The State did not present any contrary expert evidence either at the original trial or at the resentencing hearing.

Although defendant did not testify at the original trial, he testified at the resentencing hearing. He explained that he had unsuccessfully been trying to get an appointment at the VA hospital to adjust his medications, but the first appointment he could obtain was for 1 November 1999, three days after the shooting. Defendant testified that he told doctors in 1999 that he was trying to get the police to kill him. He explained that he knew there was a police substation at the convenience store and went there because he thought "if I'm shooting a round off in the air or something and trying to get, hopefully they'll take me out, because the pain, my mental anguish was so much I couldn't bear it no more."

In light of the extensive evidence presented regarding defendant's state of mind—the focus of the aggravating factor—certainly, we cannot say that the evidence of the aggravating factor was uncontroverted. Nor, given the State's lack of expert testimony supporting its position, can I agree that the evidence in support of the aggravating factor was overwhelming.

The majority opinion bases its conclusion that the evidence meets the *Blackwell* standard on an assumption that the jury's rejection of the insanity defense during the original trial necessarily establishes the second prong of the aggravating factor's test. This assumption is contrary to both the record and the law of this State.

It is apparent from the jury's actual verdict that it found defendant's evidence of his mental status persuasive even though it did not believe that defendant had met his burden of proving insanity. Although, with respect to the two officers actually struck by defendant's bullets, the jury found defendant guilty of the general intent crime of assault with a firearm upon a law enforcement officer, it found defendant *not guilty* of attempted first degree murder. *See State v. Coble*, 351 N.C. 448, 449, 527 S.E.2d 45, 46 (2000) ("Therefore, to commit the crime of attempted murder, one must specifically intend to commit murder."). Likewise, the jury declined to find defendant guilty of assault with a deadly weapon with intent to kill inflicting serious injury, but, instead, found him guilty of assault with a deadly weapon inflicting serious injury.

In short, the jury specifically concluded that the State had failed to prove defendant acted with an intent to kill even though defendant had shot one officer in the chest three times. I believe that the jury's verdict indicates that there is a reasonable possibility that it would also have found that defendant did not knowingly create a risk of death to more than one person. This possibility is even stronger when one considers that a sentencing jury would have the benefit of defendant's testimony that he was attempting, in effect, to commit suicide.

The jury's rejection of the insanity defense does not, as a legal matter, conclusively establish the existence of the aggravating factor. As our Supreme Court observed in *State v. Cooper*, 286 N.C. 549, 565, 213 S.E.2d 305, 316 (1975), *overruled in part on other grounds by State v. Leonard*, 300 N.C. 223, 226 S.E.2d 631 (1980), a defendant's mental capacity may be a "crucial factor" with respect to a number of issues in a criminal case, including insanity, but the "test of sufficient mental capacity" will vary depending on the specific issue. I have found no authority that suggests that a jury's finding that a defendant failed to prove to its satisfaction that he was insane necessarily resolves the question whether the State has met its burden of proving beyond a reasonable doubt that defendant knowingly created a risk of death to more than one person. The evolution of our State's law regarding diminished capacity suggests, however, that a jury's rejection of the insanity defense is not conclusive.

It is now established in North Carolina that a defendant may offer evidence of diminished mental capacity not only to prove insanity, but also to negate the ability to form a specific intent. *See, e.g.*, *State v. Page*, 346 N.C. 689, 698, 488 S.E.2d 225, 231 (1997) ("A defendant is entitled to present evidence that a diminished mental capacity not amounting to legal insanity negated his ability to form the specific intent to kill required for a first-degree murder conviction on the basis of premeditation and deliberation."), *cert. denied*, 522 U.S. 1056, 139 L. Ed. 2d 651, 118 S. Ct. 710 (1998); *State v. Staten*, 172 N.C. App. 673, 685, 616 S.E.2d 650, 659 ("The defense of diminished capacity neither justifies nor excuses the commission of an offense, but rather negates only the element of specific intent, and the defendant could still be found guilty of a lesser included offense."), *appeal dismissed and disc. review denied*, 360 N.C. 180, 626 S.E.2d 838 (2005), *cert. denied*, 547 U.S. 1081, 164 L. Ed. 2d 537, 126 S. Ct. 1798 (2006); *State v. Williams*, 116 N.C. App. 225, 231, 447 S.E.2d 817, 821 (1994) ("The defense of diminished capacity applies to the element of specific

intent to kill which is an essential element of assault with a deadly weapon with intent to kill inflicting serious injury."), *appeal dismissed and disc. review denied*, 339 N.C. 741, 454 S.E.2d 661 (1995). If a jury may both reject an insanity defense and find that the State failed to prove specific intent because of a defendant's mental incapacity, I can see no reason why the same should not be true with respect to the aggravating factor in this case.

I do not believe that this Court's prior opinion in this case, *State v. Sellers*, 155 N.C. App. 51, 574 S.E.2d 101 (2002), holds otherwise. The prior panel simply concluded that "[w]here, as here, the jury has found defendant's evidence regarding insanity lacking, we find *there is sufficient evidence for a reasonable judge to find* that, despite the expert testimony to the contrary, defendant acted 'knowingly.' Therefore, the trial court did not err in finding this aggravating factor." *Id.* at 58, 574 S.E.2d at 106 (emphasis added). In other words, we previously held only that the evidence was sufficient to support a finding of the aggravating factor. Nothing in the opinion suggests that the rejection of the insanity defense mandated a finding of the aggravating factor. *See State v. Hurt*, 361 N.C. 325, 331, 643 S.E.2d 915, 919 (2007) (holding that although the evidence was such that "the jury *could have* found the [heinous, atrocious, and cruel] aggravator," it did not follow "that the jury necessarily *would have* found it beyond a reasonable doubt").

I believe *Hurt* controls. Although the evidence at trial meant that the original jury *could have* found defendant knowingly created a risk of death to more than one person, I cannot conclude beyond a reasonable doubt that the jury *would have* made this finding. Despite evidence that defendant shot one officer in the chest three times, the jury refused repeatedly to find that defendant acted with an intent to kill. How can this Court, without substituting its own view of the evidence, conclude beyond a reasonable doubt that a jury which did not believe defendant intended to kill would also find defendant knowingly created a risk of death to more than one person? Maybe the jury would have, but maybe it would not. I would, therefore, remand for a new sentencing hearing.

CAROL DALENKO, PLAINTIFF v. ROBERT A. COLLIER, JR., DEFENDANT

No. COA07-1404

(Filed 5 August 2008)

1. Civil Procedure— judgment entered out of session—untimely objection

The trial court did not err by entering judgment out of session in a case alleging misconduct by an arbitrator because plaintiff failed to lodge a timely objection, and her consent was presumed under N.C.G.S. § 1A-1, Rule 58 where the session was concluded at 12:00 noon on a Friday and plaintiff filed a written objection at 4:49 p.m. on that day.

2. Pleadings— Rule 11 sanctions—gatekeeper order—good faith reliance upon attorney certification

The trial court did not err in a case alleging misconduct by an arbitrator by imposing N.C.G.S. § 1A-1, Rule 11 sanctions against plaintiff even though she contends she relied in good faith upon the certification of an attorney because: (1) a certification by an attorney required by a prior gatekeeper order does not insulate plaintiff from Rule 11 sanctions; (2) plaintiff signed the amended complaint as a pro se plaintiff and not in conjunction with an attorney; (3) nothing in the record indicated that plaintiff objectively relied upon the attorney's certification to form a reasonable belief that she had a valid claim against defendant, but instead the amended complaint showed that plaintiff prepared it and submitted it to the attorney for review as required by the gatekeeper order; (4) the attorney did not suggest to plaintiff that she file the complaint; and (5) the position taken by plaintiff on appeal is directly contrary to that taken by her before the trial court.

3. Pleadings— Rule 11 sanctions—findings of fact—conclusions of law—collateral estoppel—judicial immunity

The trial court did not err in a case alleging misconduct by an arbitrator by imposing N.C.G.S. § 1A-1, Rule 11 sanctions even though plaintiff contends they were not supported by the findings of fact and conclusions of law because: (1) plaintiff's action was barred by collateral estoppel as a result of the entry of an order confirming the arbitrator's award in the pertinent prior case where plaintiff was afforded a full and fair opportunity to litigate these same issues; (2) plaintiff failed to assign error to specific

findings of fact and instead resorted to an impermissible broadside attack; (3) plaintiff's brief merely argued, without citation of case authority, that her complaint was not frivolous; (4) contrary to plaintiff's argument, there was nothing in the record indicating a letter from the arbitrator was ever before the judge in connection with the prior matter; and (5) plaintiff's action was barred by judicial immunity applicable to arbitrators since the complaint alleged conduct within the course and scope of the arbitration proceeding.

4. Constitutional Law— right to jury—Rule 11 sanctions

The trial court did not violate plaintiff's right to a trial in a case alleging misconduct by an arbitrator by imposing N.C.G.S. § 1A-1, Rule 11 sanctions without a jury because there is no right to a jury trial when considering the facts underlying a Rule 11 sanction.

5. Pleadings— Rule 11 sanctions—consideration of lesser sanctions—reasonableness of amount

The trial court did not err in a case alleging misconduct by an arbitrator by imposing N.C.G.S. § 1A-1, Rule 11 sanctions allegedly without considering lesser sanctions or making an inquiry into the reasonableness of the award of attorney fees because: (1) the trial court stated it considered all available sanctions; and (2) the order found as fact that the amount of attorney fees awarded to defendant was appropriate based upon the amount of work required by the case and the experience of defense attorneys.

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

Although plaintiff contends the trial court erred in a case alleging misconduct by an arbitrator by imposing N.C.G.S. § 1A-1, Rule 11 sanctions allegedly without giving plaintiff a right to be heard considering the amount of attorney fees, this assignment of error is dismissed because: (1) plaintiff cited no authority to support the contention as required by N.C. R. App. P. 28; (2) even assuming arguendo that the argument had been preserved, plaintiff failed to argue or show how the amount of attorney fees was in any manner unreasonable; and (3) the fact that the trial court rejected plaintiff's arguments does not mean that they were not considered.

Appeal by plaintiff from judgment entered 7 May 2007 by Judge Paul G. Gessner in Wake County Superior Court. Heard in the Court of Appeals 11 June 2008.

Carol Dalenko, pro se, plaintiff-appellant.

The Law Office of John T. Benjamin, Jr., P.A., by John T. Benjamin, Jr., for defendant-appellee.

PER CURIAM.

The trial court did not err in entering judgment out of session when plaintiff failed to timely object to such entry. The trial court did not err in imposing Rule 11 sanctions because a certification by an attorney required by a prior "gatekeeper order" does not insulate plaintiff from Rule 11 sanctions. Plaintiff's action was barred by collateral estoppel and by judicial immunity. The trial court did not err when it imposed Rule 11 sanctions on plaintiff without submitting this issue to a jury. The trial court did not err in deciding to award attorney's fees as a sanction under Rule 11 of the Rules of Civil Procedure when it considered lesser sanctions and the reasonableness of the fees.

I. Factual and Procedural Background

This case arises from a prior case, *Peden Gen. Contrs., Inc. v. Bennett*, 172 N.C. App. 171, 616 S.E.2d 31 (2005), *disc. rev. denied*, 360 N.C. 176, 626 S.E.2d 648 (2005). The defendant in that case, (Bennett) is the plaintiff in the instant case (Dalenko). The facts which gave rise to the *Peden* case are set forth in detail in our prior opinion. The parties to the *Peden* case consented to submit their disputes to binding arbitration, and their agreement provided that: "The arbitration award shall be binding as an official court ordered judgment and shall be final as to all claims between Peden and Bennett." The trial court in *Peden* affirmed the arbitration award. This Court affirmed the ruling of the trial court.

On 14 February 2007 plaintiff filed a *pro se* amended complaint in the instant case against Robert A. Collier, Jr. (defendant), who had been the arbitrator in the *Peden* case. The complaint set forth two claims, both of which arose out of allegations of misconduct by defendant as arbitrator in the *Peden* case. The claims were for (1) negligence and gross negligence; and (2) breach of contract. Appended to plaintiff's amended complaint was a document styled "Rule 11 Certification" signed by attorney Kevin P. Hopper. This doc-

ument recited that a pre-filing injunction was imposed against plaintiff by Superior Court Judge Narley L. Cashwell in 2001. The "certification" stated that Mr. Hopper had read the amended complaint, and that in his opinion, it complied with Rule 11 of the North Carolina Rules of Civil Procedure. It further stated that Mr. Hopper was not making an appearance as counsel for the plaintiff.

Defendant filed a motion to dismiss and for sanctions under Rule 11 of the Rules of Civil Procedure on 5 March 2007. These motions were heard by Judge Gessner on 18 April 2007. During the course of the hearing, plaintiff filed a notice of voluntary dismissal without prejudice. On 7 May 2007, Judge Gessner entered an order imposing sanctions against plaintiff pursuant to Rule 11, and awarding attorney's fees to defendant in the amount of $ 5,985.00. Plaintiff appeals.

II. Entry of Judgment Out of Session

[1] In her first argument, plaintiff contends that the trial court erred by entering its order out of session. We disagree.

N.C. Gen. Stat. § 1A-1, Rule 58 (2007) sets forth the procedure for entry of a civil judgment. It provides that:

> [C]onsent for the signing and entry of a judgment out of term, session, county, and district shall be deemed to have been given unless an express objection to such action was made on the record prior to the end of the term or session at which the matter was heard.

Id.

On 20 April 2007 at 4:49 p.m., plaintiff filed with the Clerk of Superior Court of Wake County a document styled "Notice of Objection to Entry Out of Session G.S. 1A-1, Rule 58." Plaintiff contends that since Judge Gessner's order was filed 7 May 2007, it was improperly entered due to her written objection.

Judge Gessner's order found as a fact that neither party objected to the entry of the order out of session or term at the 18 April 2007 hearing. It further found that the session for the week of 16 April 2007 was concluded at 12:00 noon on Friday, 20 April 2007, and that the session was already closed at the time that plaintiff filed her objection. Since plaintiff failed to assign error to this finding of fact, it is binding upon appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). Thus, plaintiff failed to lodge a timely objec-

tion to the entry of the order out of session, and her consent is presumed under Rule 58.

Further, we reject plaintiff's peculiar and unsupported assertion that "[i]t is generally accepted that the week long session of Superior Court closes at the end of the day on Friday, at 12:00 midnight, or more practically when the Clerk's office closes for business[.]"

This argument is without merit.

III. Insulation from Rule 11 Sanctions

[2] In her second argument, plaintiff contends that she is insulated from the imposition of Rule 11 Sanctions because she relied in good faith upon the certification of Mr. Hopper. We disagree.

Our review in this matter is hampered by the fact that, while Judge Cashwell's "gatekeeper order" of 2001 against plaintiff is referenced in Mr. Hopper's certification, it is not included in the record on appeal. It is the duty of an appealing party to ensure that all documents and exhibits necessary to the resolution of the appeal be presented to the appellate court. *McKyer v. McKyer*, 182 N.C. App. 456, 463, 642 S.E. 2d 527, 532 (2007). We decline to engage in speculation as to the contents of Judge Cashwell's order.

Plaintiff argues that Mr. Hopper's certification completely and absolutely insulated her from the imposition of Rule 11 sanctions. She cites the Supreme Court case of *Bryson v. Sullivan*, 330 N.C. 644, 412 S.E.2d 327 (1992). In that case plaintiffs and their counsel signed the complaint. The trial court imposed sanctions upon plaintiffs pursuant to Rule 11. The North Carolina Supreme Court held that the individual plaintiffs had relied in good faith upon the advice of their counsel that they had a valid claim. This was sufficient to establish plaintiff's "objectively reasonable belief in the legal validity of their claims." *Id.* at 662.

Bryson is distinguishable from the instant case. The certification explicitly states that Mr. Hopper was not plaintiff's attorney. Mr. Hopper reiterated this fact to Judge Gessner at one point during the hearing.

Rule 11 sanctions may be imposed against an attorney or party who signs a pleading.

> The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to

> the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law[.]

N.C. Gen. Stat. § 1A-1, Rule 11 (2007).

Plaintiff signed the amended complaint as a *pro se* plaintiff, not in conjunction with an attorney. Nothing in the record indicates that she relied upon Mr. Hopper's certification to determine that she had a valid claim against defendant. Rather, the amended complaint, on its face, shows that plaintiff prepared it and then submitted it to Mr. Hopper for review. This review was apparently required because of the prior "gatekeeper order" entered by Judge Cashwell. Mr. Hopper, as distinguished from the attorney in *Bryson*, did not suggest to plaintiff that she file the complaint. Nor does the record indicate that Mr. Hopper participated in the legal research, drafting, or filing of the complaint. Unlike *Bryson*, the record in this case does not support that plaintiff objectively relied upon Mr. Hopper to form a reasonable belief as to the legal validity of her claims against defendant.

Plaintiff seeks to turn the purpose of the "gatekeeper order" on its head. Her argument is essentially that if she gets an attorney to sign off on a certification, she can file any sort of action, regardless of its merit. As noted above, we do not have Judge Cashwell's order before us and cannot divine its terms, but clearly its purpose was not to insulate plaintiff from responsibility for her amended complaint under Rule 11. The trial courts cannot abdicate their duties and responsibilities under Rule 11 to a private attorney.

Finally, we note that the position taken by plaintiff on appeal is directly contrary to that taken by her before the trial court. In a document filed 20 April 2007, styled "Request for Judicial Notice," plaintiff asserted that the filing of the certification with her amended complaint "does not represent to the court that Judge Cashwell's pre-filing injunction in his June 27, 2001 Order in *Louis Dalenko v. Wake County DHS*, *et al.* (00-CVS-5994) is required in this unconnected dispute between different parties." What plaintiff contended was not applicable before the trial court she now seeks to have as her refuge on appeal. "[T]he law does not permit parties to swap horses between courts in order to get a better mount" in the appellate courts. *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E.2d 836, 838 (1934).

This argument is without merit.

IV. Findings of Fact and Conclusions of Law Supporting Rule 11 Sanctions

[3] In her third argument, plaintiff contends that the trial court erred in imposing Rule 11 sanctions because sanctions were not adequately supported by the trial court's findings of fact or conclusions of law. We disagree.

A trial court's decision to impose Rule 11 sanctions is reviewed *de novo* to determine whether the conclusions of law support the order, whether the findings of fact support the conclusions of law, and finally, if there is sufficient evidence to support the findings of facts. *Turner v. Duke University*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989).

The conclusions of law in Judge Gessner's order support the imposition of Rule 11 sanctions. N.C. Gen. Stat. § 1A-1, Rule 11 states that a sanction must be imposed when the document signed is not in accordance with the facts, not warranted by law, or is promulgated for an improper purpose. Judge Gessner concluded plaintiff's complaint was frivolous and not warranted by law.

Judge Gessner's order contained two ultimate findings of fact. *See Woodard v. Mordecai*, 234 N.C. 463, 67 S.E.2d 639 (1951). These are as follows: first, the trial court found that "[p]laintiff's claims in this matter are frivolous and have no basis in law or fact"; and second, that "[p]laintiff's claims in this matter are barred by the doctrine of collateral estoppel."

A. Collateral Estoppel

Judge Gessner held that plaintiff's claims were not warranted because they were barred by collateral estoppel as a result of the entry of an order confirming the arbitrator's award in *Peden*.

We note that plaintiff failed to assign error to specific findings of fact by the trial court, and instead resorts to a broadside attack on the order "that its findings are not supported by pleadings, submissions, evidence of record and arguments of the parties and do not support its conclusions . . ." We have repeatedly held that such an assignment of error does not preserve the issue for appellate review. *See, e.g. Wade v. Wade*, 72 N.C. App. 372, 375-76, 325 S.E.2d 260, 266 (1985); *Lancaster v. Smith*, 13 N.C. App. 129, 185 S.E.2d 319 (1971). Further, plaintiff's brief merely argues, without citation of case authority, that her complaint was not frivolous. *See Dogwood Dev. & Mgmt. Co.*,

LLC v. White Oak Transp. Co., 362 N.C. 191, 200, 657 S.E.2d 361, 367 (2008) (noting that "in certain instances noncompliance with a discrete requirement of the rules may constitute a default precluding substantive review."). We hold that Judge Gessner's findings of fact are binding upon this Court on appeal. N.C. R. App. P. 28 (2008).

The doctrine of collateral estoppel applies if the issues to be litigated in the current action are the same as those involved in a prior action and if these material, relevant and necessary issues were actually litigated in the prior action. *McInnis v. Hall*, 318 N.C. 421, 428, 349 S.E.2d 552, 557 (1986). Although mutuality of parties was traditionally required to invoke collateral estoppel, this requirement has been abandoned so long as "the party which is collaterally estopped had a full and fair opportunity to litigate the issue in an earlier action." *Id.* at 432, 349 S.E.2d at 559. In the instant case, plaintiff was the identical party in the *Peden* case.

Judge Gessner found that the claims brought by plaintiff in the instant case were identical to those decided at the confirmation hearing for the *Peden* arbitration. This finding is supported by the record.

In *Peden*, there was a hearing before the Honorable Donald W. Stephens in the Superior Court of Wake County concerning the confirmation of defendant's arbitration award on 29 September 2003. At that hearing, plaintiff sought to have the arbitration award vacated pursuant to the provisions of N.C. Gen. Stat. § 1-567.13 (2002)[1] based upon alleged misconduct of defendant as arbitrator. Plaintiff asserted partiality of the arbitrator, corruption, or misconduct prejudicing the rights of the parties to the arbitration. N.C. Gen. Stat. § 1-566.13 (2002). Judge Stephens confirmed the arbitration award, finding that:

> Upon careful evaluation of all the information presented to the Court under oath on behalf of Defendant to challenge, modify or set aside the arbitrator's award, the Court finds and concludes that Carol Bennett is totally and completely unworthy of belief. The Court does not believe any of Ms. Bennett's testimony. Her testimony is rejected in its entirety as incredible and having no credible basis in law or fact. She is completely unworthy of belief.

Judge Stephens then held that "[t]here is no credible evidence of record that the arbitrator's award was procured by corruption, fraud or undue means, or that the arbitrator engaged in misconduct, or

1. This statute was repealed by 2003 N.C. Sess. Laws ch. 345, effective 1 January 2004.

that he was not neutral or that he exceeded his powers. Therefore the arbitrator's award is confirmed and affirmed."

The claims raised by plaintiff in the instant case arise out of the identical arbitration award that was confirmed by Judge Stephens in *Peden*. Plaintiff alleged that defendant was not impartial because he had a "personal business interest in contracting"; that he was clearly biased because he did not rule entirely in plaintiff's favor; and that he did not allow her to call an expert witness in rebuttal. While plaintiff's claims are couched as actions in negligence and breach of contract, it is evident that the claims arose out of the same alleged conduct that took place in the context of the *Peden* arbitration.

We hold that because plaintiff was afforded a full and fair opportunity to litigate these same issues before Judge Stephens, and these issues were in fact ruled upon by Judge Stephens, Judge Gessner correctly ruled that plaintiff's claims were barred by collateral estoppel.

Plaintiff further argues that she did not have a fair opportunity to litigate her claims before Judge Stephens because of a letter written by defendant to the court. Following entry of the arbitration award, plaintiff wrote a letter to defendant, complaining about the arbitration award, and apparently requesting that she depose defendant. In response, defendant wrote a letter to plaintiff, with copies to the other parties and to Wake County Superior Court Judge Abraham P. Jones, who had been involved with the case when it went to arbitration. In relevant part, this letter stated:

> In reply to your inquiry about my availability to be deposed, I know of no provision for deposing the arbitrator absent an objective basis for such and I certainly would not be inclined to devote any additional time to the case until my past time and expenses are paid. In fifteen years of full time arbitrating and mediating all over North Carolina and in other states I have never been sought to be deposed and cannot conceive of any objective basis for it in this case. It would be an unnecessary and unjustified inconvenience and expense for all those involved.
>
> This dispute should have been resolved years ago and has already cost everyone involved far more in money, effort, time and frustration than can be rationally justified. It needs to end and everyone get on with their lives. . . .

There is nothing in the record that indicates that this letter was ever before Judge Stephens in connection with the *Peden* matter.

Further, even if it was, there is nothing in the letter that could possibly have prejudiced Judge Stephens at the arbitration confirmation hearing.

This argument is without merit.

B. Arbitrator Immunity

We further hold that plaintiff's claims were barred under the doctrine of judicial immunity which is applicable to arbitrators.[2]

The federal common law has long recognized that arbitrators are clothed with judicial immunity. *Howland v. United States Postal Service*, 209 F. Supp. 2d 586, 592 (W.D.N.C. 2002) (holding that judicial immunity extends not only to public officials but also to some private citizens, specifically arbitrators); *see also Austern v. Chicago Board Options Exchange, Inc.*, 898 F.2d. 882 (2nd Cir. 1990). Whether a private citizen is clothed with judicial immunity is based on a functionality test. *Burns v. Reed*, 500 U.S. 478, 499-500, 114 L. Ed. 2d 547, 567-68 (1991) (Scalia, J., concurring in part; dissenting in part) (explaining that private citizens acting as arbitrators are afforded judicial immunity when performing the function of resolving disputes between parties, or of authoritatively adjudicating private rights).

We find persuasive the reasoning contained in the case of *Shrader v. National Assoc. of Securities Dealers, Inc.*, 855 F. Supp. 122 (E.D.N.C. 1994), which applied North Carolina substantive law and held:

> The doctrine of judicial immunity is sufficiently well-developed under North Carolina substantive law to encompass the facts of this case and to afford the arbitrators and those in support thereof who are defendants in this case, arbitrator immunity, which will exempt them from civil liability for their activities as arbitrators within the course and scope of the arbitration proceeding.

Id. at 123-24.

We hold that in the *Peden* case, defendant was sitting as an arbitrator to resolve a dispute pending in the courts of Wake County.

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2. In 2003, the General Assembly enacted N.C. Gen. Stat. § 1-569.14(a) codifying judicial immunity for arbitrators. 2003 N.C. Sess. Laws ch. 345, § 5.2. This statute was effective 1 January 2004 and applied to agreements to arbitrate entered into after that date. Since the *Peden* arbitration agreement was entered into on 10 September 2002, the amendment is not applicable to this case.

Under the functionality test, defendant was entitled to judicial immunity and was immune from the claims asserted in the instant case. Plaintiff's complaint alleges conduct which was clearly within the course and scope of the arbitration proceeding. Plaintiff's claims were barred by arbitrator immunity, and the trial court correctly found them to be frivolous.

V. Imposition of Sanctions Without A Jury Trial

[4] In her fourth argument, plaintiff contends that the trial court violated her right to a trial by imposing Rule 11 sanctions without a jury. We disagree.

There is no right to a jury trial when considering the facts underlying a Rule 11 sanction. *Hill v. Hill*, 181 N.C. App. 69, 73, 638 S.E.2d 601, 604 (2007). This argument is without merit.

VI. Consideration of Lesser Sanctions by the Trial Court

[5] In her fifth argument, plaintiff contends that the trial court erred in imposing Rule 11 sanctions by not considering lesser sanctions or making an inquiry into the reasonableness of the award of attorneys fees. We disagree.

A trial judge, when imposing Rule 11 sanctions, must explain why the chosen sanction is appropriate and also why the amount of such is appropriate. *Davis v. Wrenn*, 121 N.C. App. 156, 160, 464 S.E.2d 708, 711 (1995). Judge Gessner sufficiently satisfied these demands in his order, which stated that he had considered "all available sanctions." The order further found as fact that the amount of attorney's fees awarded to defendant was appropriate based upon the amount of work required by the case and the experience of defendant's attorneys.

This argument is without merit.

VII. Amount of Attorney's Fees

[6] In her sixth argument, plaintiff contends that the trial court erred in imposing Rule 11 sanctions without giving her a right to be heard considering the amount of the award of attorney's fees. Plaintiff cites no authority to support this contention. As such, we treat this argument as abandoned. N.C. R. App. P. 28 (2008).

Even assuming *arguendo* that this argument has been preserved for our review, it is without merit. Plaintiff fails to argue or show to this Court how the amount of attorney's fees was in any manner

unreasonable. Defendant's counsel filed their affidavit for attorney's fees on 20 April 2007. The order was entered on 7 May 2007, although filings by plaintiff following the hearing indicate that there was a proposed order extant as of 20 April 2007, which contained the essential findings and conclusions made in the final order. In her filings, plaintiff objected to the amount of fees because some of the time spent by defendant's counsel dealt with the issue of judicial immunity and *res judicata*. This document shows that plaintiff did have the opportunity to present her objections to the amount of attorney's fees to the trial court. The fact that the trial court rejected plaintiff's arguments does not mean that they were not considered. Even if plaintiff was not afforded a hearing, she has failed to show prejudice arising from this asserted error.

This argument is without merit.

AFFIRMED.

Panel consisting of Judges McGEE, BRYANT, and STEELMAN.

CHARLES EGEN, EMPLOYEE, PLAINTIFF v. EXCALIBUR RESORT PROFESSIONAL, EMPLOYER, TRAVELERS INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA07-1204

(Filed 5 August 2008)

Workers' Compensation— notice sent by email—sending to agent rather than directly to attorney—excusable neglect

The Industrial Commission erred in a workers' compensation case by granting defendants' motion to dismiss and denying plaintiff's motion for reconsideration based on excusable neglect for failure to file the appeal within the fifteen-day period required by statute when the Commission emailed its opinion and award to plaintiff's attorney's employee rather than emailing it directly to plaintiff's attorney because: (1) although it was permissible for the Commission to serve notice to plaintiff's employee as his agent and to use email, all the surrounding circumstances showed that it was excusable neglect for the employee to assume she was blind copied in the email since her name did not appear on the "To" line, and to assume that her boss had actually been emailed the opinion and award as the "To" line was addressed to her boss

and another attorney; and (2) based on the employee's ten years of experience, the lack of any Commission rules regarding the use of email which could have put her on notice that an opinion and award may arrive by email, and the appearance of the email, it was excusable neglect for the employee to conclude that her boss had also been sent a copy of the email and for her not to realize that plaintiff's right to appeal would depend upon her delivery of the email to her boss.

Judge HUNTER concurring.

Appeal by plaintiff from orders entered 7 June and 23 July 2007 by the North Carolina Industrial Commission. Heard in the Court of Appeals 19 March 2008.

Bollinger & Piemonte, PC, by Bobby L. Bollinger, Jr., for plaintiff-appellant.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Samuel E. Barker, for defendant-appellees.

STROUD, Judge.

Deputy Commissioner Myra L. Griffin issued an opinion and award which, *inter alia*, denied plaintiff's claim for additional benefits. Plaintiff attempted to appeal the opinion and award to the Full Commission, and defendants filed a motion to dismiss the appeal as untimely. Plaintiff filed a motion for relief due to excusable neglect. Defendants' motion to dismiss was granted, and plaintiff filed a motion for reconsideration. Plaintiff's motion for reconsideration was denied. Plaintiff appeals both the granting of defendants' motion to dismiss and the denial of his motion for reconsideration. For the following reasons, we reverse and remand.

I. Background

On or about 26 April 2007, Deputy Commissioner Myra L. Griffin issued an opinion and award which, *inter alia*, denied plaintiff's claim for additional benefits. Deputy Commissioner Griffin's opinion and award was sent by email only to defendant's counsel and to a legal assistant in the office of plaintiff's counsel. The facts regarding the delivery of the opinion and award are not in dispute.

In a letter to the Industrial Commission ("Commission"), dated 16 May 2007, plaintiff's attorney, Bobby L. Bollinger, described the cir-

cumstances regarding his receipt of the opinion and award, in pertinent part, as follows:

> Please accept this letter as the Plaintiff's Notice of Appeal of the Opinion and Award filed on April 26, 2007 by Deputy Commissioner Griffin.
>
> Please note that I did not personally see the Opinion and Award until May 14, although it was apparently served exclusively by email on April 26, with that email being sent directly to defense counsel Sam Barker. However, that email was not sent directly to me, but rather to a clerical employee in my office who did not understand the significance of the email. I believe that the email to the Plaintiff should have been sent directly to me, rather than to a clerical employee, as the rules generally prevailing as to service of process require service on the attorney of record, not upon his clerical support staff. Furthermore, it is unfair to serve it directly on the lawyer for one party and not serve it at the same time directly on the lawyer for the other party. In the past, we have received unfavorable Opinions from the Commission by certified mail, return receipt requested. This one has yet to arrive in that fashion.

On or about 22 May 2007, defendants filed a motion to dismiss plaintiff's appeal because it was untimely. On or about 25 May 2007, plaintiff filed a response to defendants' motion to dismiss and also filed a motion for relief due to excusable neglect. In a letter dated 30 May 2007, defendants wrote to Chairman Lattimore and requested their letter serve as their response to plaintiff's response to defendants' motion to dismiss and to plaintiff's motion for relief. On 7 June 2007, Chairman Buck Lattimore issued an order granting defendants' motion to dismiss.

On or about 18 June 2007, plaintiff filed a motion for reconsideration along with an affidavit from Janice A. Craig ("Ms. Craig") which read in pertinent part,

> 1. I am a legal assistant employed by the law firm of Bollinger & Piemonte, PC.
>
> 2. On Thursday, April 26, 2007, I received an email from Cheryl Powell at the Industrial Commission, which appeared to be sent to Bobby Bollinger and Sam Barker attaching the Opinion and Award for the above-referenced case. Please see the attached Exhibit "A". The email stated that failure to acknowledge receipt

> will result in sanctions. I emailed back that we did, in fact, receive the email.
>
> 3. It appeared to me that that [sic] the email was sent to Mr. Bollinger and I was simply "blind copied" with the email because my name did not appear on the "To" line. Instead, the following are the only names that appear on the "To" line: "Bobby Bollinger; Sam Barker". See attached Exhibit "A".
>
> 4. Because I thought I had simply been "blind copied" and that the email had gone directly to Mr. Bollinger, I did not notify him that I had received the email. I know that Mr. Bollinger checks his email frequently throughout the day. Furthermore, neither the body of the email nor the attachment to it mentioned any deadlines for appeal rights. The usual notice that the Commission includes when it mails Opinions and Awards to us, Exhibit "C," was not included.
>
> 5. On May 15, Mr. Bollinger asked me to pull up the April 26 email. We then used the "properties" radio button to identify the email addresses to which the Commission had sent the email. This revealed that the email had been sent directly to Mr. Barker and directly to Janice Craig, but not to Mr. Bollinger. See Exhibit "B" attached hereto.
>
> I have worked with this firm for a decade. During this time, we have received many Opinions and Awards and other Orders from the Commission. This case is the <u>only</u> instance in the past ten (10) years that I am aware of in which we received an Opinion and Award by way of email.

On 23 July 2007, Chairman Buck Lattimore denied plaintiff's motion for reconsideration.

Plaintiff appeals both the granting of defendants' motion to dismiss and the denial of his motion for reconsideration. The issues before this Court are (1) whether the Commission erred by emailing its opinion and award to plaintiff's attorney's employee, rather than emailing it directly to plaintiff's attorney or using some alternative reliable means of notification, and (2) whether the Commission erred in denying plaintiff's motions for appropriate relief and reconsideration due to excusable neglect.

II. Motion to Dismiss

Plaintiff argues that the Commission erred

> by serving the unfavorable Deputy Commissioner Opinion and Award upon a clerical employee in plaintiff's counsel's office by email transmission, rather than directly to plaintiff's counsel or to plaintiff's counsel's office by certified mail, return receipt requested or some other obvious, reliable and effective means.

Chairman Buck Lattimore determined in his order granting defendants' motion to dismiss plaintiff's appeal that

> Janice Craig, plaintiff's attorney's legal assistant, received notice of the Opinion and Award by email on April 26, 2007[, and that] [p]laintiff's notice of appeal to the Full Commission was made twenty (20) days after receiving notice of the deputy commissioner's Opinion and Award. Therefore plaintiff's appeal to the Full Commission was not timely made pursuant to N.C. Gen. Stat. § 97-85.[1]

Plaintiff did not assign error to the determinations, noted *supra*, in the order, but rather argues that the Commission erred in the manner in which it served notice upon him, specifically by (1) notifying plaintiff's attorney's employee, rather than plaintiff's attorney directly and (2) using email as the means of providing notice.

A. Standard of Review

> Our review of a decision of the Industrial Commission is limited to determining whether there is any competent evidence to support the findings of fact, and whether the findings of fact justify the conclusions of law. The findings of the Commission are conclusive on appeal when such competent evidence exists, even if there is plenary evidence for contrary findings. This Court reviews the Commission's conclusions of law *de novo*.

Ramsey v. Southern Indus. Constructors Inc., 178 N.C. App. 25, 29-30, 630 S.E.2d 681, 685 (internal citations and internal quotation marks omitted), *disc. rev. denied*, 361 N.C. 168, 639 S.E.2d 652 (2006).

B. Notice to Plaintiff's Attorney's Employee

"An agent is one who, by the authority of another, undertakes to transact some business or manage some affairs on account of such other, and to render an account of it. He is a substitute, or deputy, appointed by his principal primarily to bring about business relations

1. *See* N.C. Gen. Stat. § 97-85 (2001) (requiring that appeal to the Full Commission must be made "within 15 days from the date when notice of the award shall have been given[.]").

between the latter and third persons." *SNML Corp. v. Bank*, 41 N.C. App. 28, 36, 254 S.E.2d 274, 279 (1979). "[T]he general agency doctrine holds the principal responsible for the acts of his agent[.]" *Ellison v. Gambill Oil Co., Inc.*, 186 N.C. App. 167, 175, 650 S.E.2d 819, 824 (2007) (citation, quotation marks, and ellipses omitted). Furthermore, in *Cornell v. Western and S. Life Ins. Co.*, this Court determined that notice of the deputy commissioner's opinion and award was effective when received via fax by the law firm, not by the individual attorney assigned to the case. 162 N.C. App. 106, 111, 590 S.E.2d 294, 298 (2004). As plaintiff does not argue that Ms. Craig was not his agent, but only that it was not proper to serve notice upon her, we conclude that the Commission could properly serve notice upon plaintiff's attorney through his employee, his agent. *See Ellison* at ——, 650 S.E.2d at 824; *Cornell* at 111, 590 S.E.2d at 297-98; *SNML Corp.* at 36, 254 S.E.2d at 279.

C. Notice via Email

Our research of relevant law reveals that plaintiff is correct in noting that "[t]here is nothing in the Worker's Compensation Act, or in the Industrial Commission's Rules for Workers' Compensation cases, that allows the Industrial Commission to serve Opinions and Awards on parties or their counsel by way of email." However, defendants are also correct in noting that "there is no rule prohibiting transmission of an Opinion and Award by way of email[.]"[2]

"N.C. Gen. Stat. § 97-80(a) . . . grants the Industrial Commission the power to make rules consistent with the Workers' Compensation Act in order to carry out the Act's provisions." *Jackson v. Flambeau Airmold Corp.*, 165 N.C. App. 875, 878, 599 S.E.2d 919, 921 (2004); *see* N.C. Gen. Stat. § 97-80(a) (2001) ("The Commission may make rules, not inconsistent with this Article, for carrying out the provisions of this Article.").

> The North Carolina Industrial Commission has the power not only to make rules governing its administration of the act, but also to construe and apply such rules. Its construction and application of its rules, duly made and promulgated, in proceedings pending before the said Commission, ordinarily are final and conclusive and not subject to review by the courts of this State, on an appeal from an award made by said Industrial Commission.

2. N.C. Gen. Stat. § 97-86 requires that awards from the Full Commission "be sent by registered mail or certified mail[.]" N.C. Gen. Stat. § 97-86 (2001).

Winslow v. Carolina Conference Ass'n, 211 N.C. 571, 579-80, 191 S.E. 403, 408 (1937). As the statutory language only requires *notice* of the opinion and award, *see* N.C. Gen. Stat. § 97-85, *see generally Cornell* at 111, 590 S.E.2d at 297 (determining notice of the opinion and award from deputy commissioner was proper when sent via fax), and as there is no rule expressly prohibiting the use of email for notification purposes, we conclude that the Industrial Commission did not err in notifying plaintiff's attorney of the opinion and award through email.[3]

However, we also note that when email is used as the means of communication for important documents within our judicial system and administrative bodies, there are normally clearly delineated rules or guidelines for its use, which often require acquiescence to email as a method of communication. *See, e.g.*, N.C. Gen. Stat. § 45-36.5(a)(2) (2007) ("A person gives a notification by . . . [s]ending it by facsimile transmission, electronic mail, or other electronic transmission to the recipient's address for giving a notification, but only if the recipient agreed to receive notification in that manner."); *Marolf Constr. Inc. v. Allen's Paving Co.*, 154 N.C. App. 723, 725, 572 S.E.2d 861, 862-63 (2002) ("The AAA's[, American Arbitration Association,] Construction Industry Rule 40 . . . provided for service . . . [w]here all parties and the arbitrator agree, notices may be transmitted by electronic mail (E-mail), or other method of communication."), *cert. denied*, 356 N.C. 673, 577 S.E.2d 625 (2003). At the very least, rules governing permissible means of notification usually state whether and under what circumstances email may be used. *See, e.g.*, N.C. Gen. Stat. §§ 47C-3-108, 58-35-85(a)-(b) (2007). Therefore, if the Commission has begun a practice of using email for purposes of notification regarding opinion and awards upon which appeal rights will depend, we strongly encourage the Commission to establish rules for the use of email, so that all parties and counsel can be aware of the possibility that they may receive important, time-sensitive documents in this manner.

D. Excusable Neglect

The order granting defendants' motion to dismiss stated it did not find excusable neglect. "[T]he Commission has the inherent power and authority, in its discretion, to consider defendant's motion for relief due to excusable neglect." *Allen v. Food Lion, Inc.*, 117 N.C. App. 289, 291, 450 S.E.2d 571, 572 (1994) (citing *Hogan v. Cone Mills*

3. No rule permits or prohibits the use of fax to provide notice of an opinion and award from a Deputy Commissioner, but such notice was approved by this Court in *Cornell*. *See Cornell* at 162 N.C. 111, 590 S.E.2d 297 (2004).

Corp., 315 N.C. 127, 337 S.E.2d 477 (1985)); *see generally* N.C. Gen. Stat. § 1A-1, Rule 60(b)(1) (2001). "Whether excusable neglect has been shown is a question of law, not a question of fact." *Equipment, Inc. v. Lipscomb*, 15 N.C. App. 120, 122, 189 S.E.2d 498, 499 (1972). "This Court reviews the Commission's conclusions of law *de novo*." *Ramsey* at 29-30, 630 S.E.2d at 685. "[W]hat constitutes excusable neglect depends upon what, under all the surrounding circumstances, may be reasonably expected of a party in paying proper attention to his case." *Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 425, 349 S.E.2d 552, 555 (1986). "Deliberate or willful conduct cannot constitute excusable neglect, . . . nor does inadvertent conduct that does not demonstrate diligence[.]" *Couch v. Private Diagnostic Clinic*, 133 N.C. App. 93, 103, 515 S.E.2d 30, 38 (internal citation omitted), *aff'd*, 351 N.C. 92, 520 S.E.2d 785 (1999).

Considering "all the surrounding circumstances . . . [and what] may be reasonably expected of a party in paying proper attention to his case" we conclude that it was excusable neglect for Ms. Craig (1) to assume she was blind copied in the email because her "name did not appear on the 'To' line," and (2) to assume that Mr. Bollinger had actually been emailed the opinion and award as the 'To' line was addressed to Bobby Bollinger and Sam Barker. *See Couch* at 103, 515 S.E.2d at 38; *Thomas M. McInnis & Assoc., Inc.* at 425, 349 S.E.2d at 555. Furthermore, Ms. Craig stated in her affidavit,

> I have worked with this firm for a decade. During this time, we have received many Opinions and Awards and other Orders from the Commission. This case is the <u>only</u> instance in the past ten (10) years that I am aware of in which we received an Opinion and Award by way of email.

(Emphasis in original). Based on her ten years of experience, the lack of any Commission rules regarding the use of email which could have put her on notice that an opinion and award may arrive by email, and the appearance of the email, it was excusable neglect for Ms. Craig to conclude that Mr. Bollinger had also been sent a copy of the email and for her not to realize that plaintiff's right to appeal would depend upon her delivery of the email to Mr. Bollinger. *See Couch* at 103, 515 S.E.2d at 38; *Thomas M. McInnis & Assoc., Inc.* at 425, 349 S.E.2d at 555. Therefore, the failure of Mr. Bollinger to file the appeal within the 15 day period required by statute was excusable neglect due to the actions of his agent. *See Ellison* at 175, 650 S.E.2d at 824; *Couch* at 103, 515 S.E.2d at 38; *Thomas M. McInnis & Assoc., Inc.* at 425, 349 S.E.2d at 555; *SNML Corp.* at 36, 254 S.E.2d at 279.

III. Conclusion

Though it was not error for the Commission to serve notice on plaintiff's attorney of the opinion and award of the deputy commissioner by email and through plaintiff's attorney's agent, *see* N.C. Gen. Stat. § 97-85; *Ellison* at 175, 650 S.E.2d at 824; *Cornell* at 111, 590 S.E.2d at 297; *SNML Corp.* at 36, 254 S.E.2d at 279, we do conclude that the Commission erred in not finding excusable neglect on the part of plaintiff's attorney for the reasons as stated above. Therefore, we reverse the order granting defendants' motion to dismiss and remand this case to the Full Commission for further proceedings not inconsistent with this opinion. As we are reversing the granting of defendants' motion to dismiss we need not address plaintiff's argument as to his motion for reconsideration.

REVERSED AND REMANDED.

Judge ELMORE concurs.

Judge HUNTER concurs in a separate opinion.

HUNTER, Judge, concurring.

I agree that the Industrial Commission's award and opinion must be reversed, but write separately because I would do so on different grounds.

As the majority notes, the two issues this appeal brought before us were (1) whether the Commission erred by emailing its opinion and award to plaintiff's attorney's employee, rather than emailing it directly to plaintiff's attorney or using some alternative reliable means of notification, and (2) whether the Commission erred in denying plaintiff's motions for appropriate relief and reconsideration due to excusable neglect. The majority reverses this case on the basis of the second issue; I would not reach the second, but rather reverse on the basis that email was not a valid form of communicating the Industrial Commission's ruling.

As the majority states, the Industrial Commission does have "the power to make rules consistent with the Workers' Compensation Act in order to carry out the Act's provisions." *Jackson v. Flambeau Airmold Corp.*, 165 N.C. App. 875, 878, 599 S.E.2d 919, 921 (2004); N.C. Gen. Stat. § 97-80(a) (2007) ("[t]he Commission may make rules, not inconsistent with this Article, for carrying out the provisions of

this Article"). Rule 803 of the Workers' Compensation Rules of the North Carolina Industrial Commission governs the procedure for any such new rule making:

> *Prior to* adopting, deleting, or *amending any Workers' Compensation Rule of the Industrial Commission which affects the substantive rights of parties, the Industrial Commission will give at least 30 days' notice of the proposed change in rules*. Such notice will be given by publishing, in a newspaper or newspapers of general circulation in North Carolina, notice of such proposed change. Such notice will include an invitation to any interested party to submit in writing any objection, suggestion or other comment with respect to the proposed rule change or to appear before the Full Commission at a time and place designated in the notice for the purpose of being heard with respect to the proposed rule change.

Workers' Comp. R. of N.C. Indus. Comm'n 803, 2008 Ann. R. N.C. 1063, 1092 (emphasis added). There is no question that such a process did not occur in this case. No formal rule was promulgated authorizing this previously unused method of communication; rather, this new method was employed with no prior notice to anyone, including the parties to whom it was sent. As such, no valid rule authorizing the use of email as a method of communication exists, and thus the Commission's authority to create such rules is irrelevant.

It is worth noting too that, N.C. Gen. Stat. § 97-86 (2007), which governs appeals from the Full Commission to this Court, allows *thirty* days from notice of the award and specifies that such notice must be "sent by registered mail or certified mail[.]" In contrast, per N.C. Gen. Stat. § 97-85 (2007), any appeal from the opinion and award of a deputy commissioner—as in this case—must be taken within fifteen days of the notice of the award. With the turnaround time between receipt and appeal halved, surely it is doubly important that the opinion and award from a deputy commissioner be communicated to the parties in the most reliable manner possible. The sudden use of a new method of communication—particularly one in which, as evidenced by this case, messages can so easily go astray—does not fit that description.

The majority states that, if emailing such opinions has become standard practice, "we strongly encourage the Commission to establish rules for the use of email[.]" Until such a rule is promulgated, however, the Full Commission may not simply select any method of

communication available and use it to convey the time-sensitive information contained in its opinion and award.

Thus, I would reverse this case based on the fact that the Industrial Commission has not promulgated a rule authorizing the use of email as a method of notifying parties of opinions and awards; I would therefore not reach the issue of excusable neglect.

STATE OF NORTH CAROLINA v. CHARLES JOSEPH McBENNETT, JR.

No. COA07-1282

(Filed 5 August 2008)

Search and Seizure— motion to suppress—unlawful entry into hotel room by police officers

The trial court erred in a felonious possession of a Schedule II controlled substance (cocaine) and felonious possession of a Schedule VI controlled substance (marijuana) case by denying defendant's motion to suppress evidence discovered in defendant's hotel room, and the order denying the motion to suppress is reversed, because: (1) although defendant had a general expectation of privacy in the room subject to exceptions for the entry of hotel staff and their agents to perform their duties even to the extent of entering the room without his express consent if necessary to perform those duties, the police officers' entry into defendant's room violated his expectation of privacy; (2) although it may be true that hotel management was not acting as an agent of the government at the time of entry into defendant's hotel room, such a determination was irrelevant since the law enforcement officers actually participated in the entry into defendant's room and the discovery and seizure of the evidence sought to be suppressed; (3) it was not hotel management's inspection of the room that resulted in discovery of the evidence; (4) a governmental search conducted without a search warrant is per se unreasonable unless it falls within a recognized exception, the State has not argued that exigent circumstances required the officers' entry nor does the evidence show exigent circumstances, and the plain view exception cannot apply when the officers' entry into the room violated the Fourth Amendment; and (5) defendant did not consent to the search or waive his rights when he did not open

the door to his hotel room voluntarily, but rather was coerced by hotel management.

Appeal by defendant from order entered 30 July 2007 and judgment entered 25 September 2007 by Judge J. Marlene Hyatt in Haywood County Superior Court. Heard in the Court of Appeals 28 April 2008.

Roy Cooper, Attorney General, by Derrick C. Mertz, Assistant Attorney General, and William B. Crumpler, Assistant Attorney General, for the State.

Bill J. Jones, Attorney at Law, P.A., by Bill Jones, for defendant-appellant.

MARTIN, Chief Judge.

Defendant was charged in bills of indictment with felonious possession of a Schedule II controlled substance (cocaine), felonious possession of a Schedule VI controlled substance (marijuana), misdemeanor possession of a Schedule III controlled substance (hydrocodone), and misdemeanor possession of drug paraphernalia. He moved to suppress evidence seized by police officers from a room which he had rented at the Quality Inn hotel in Maggie Valley. The trial court heard evidence and entered an order denying the motion to suppress. After preserving his right to appeal the denial of his motion to suppress, defendant entered pleas of guilty to the two felony charges, and the State dismissed the two misdemeanor charges. Defendant appeals from a judgment imposing a suspended sentence and placing him on probation.

Defendant's appeal raises a single issue: whether the evidence discovered in defendant's hotel room was the product of an unreasonable search and seizure in violation of the Fourth Amendment to the United States Constitution as applied to the states through the Fourteenth Amendment, and Article 1, Section 20 of the North Carolina Constitution. We hold that it was and reverse the order denying the motion to suppress.

The evidence offered at the suppression hearing tended to show that defendant checked into a room at the Quality Inn in Maggie Valley, North Carolina, on 12 August 2006 and arranged to stay at the hotel until 19 August, paying for the room in advance with his credit card. Defendant refused housekeeping services during his stay. On

the evening of 16 August 2006, defendant ordered room service. The waitress who delivered the room service reported to management that the room was in disarray.

Beth Reece owned the Quality Inn in Maggie Valley, and her stepson Chris Reece helped her manage the hotel, although he was not a paid employee. Upon receiving the report from the waitress on the morning of 17 August, Mr. Reece went to the room, knocked on the door, and when no one answered, he used the master key to unlock the door. The door opened only slightly before catching on the interior lock. Mr. Reece twice stated that he was "housekeeping" and asked defendant to open the door, and finally defendant responded that he did not need housekeeping. Mr. Reece then closed the door and went back to the office where he called Maggie Valley police and gave defendant's license plate number to Detective Archie Shuler. Detective Shuler told Mr. Reece to "[s]tay right where you are, we are on our way." Detective Shuler then informed Officer Jeff Mackey that:

> [H]e had received a report from Chris Reece stating that [defendant] was staying in a room at the Quality Inn and that he was familiar with [defendant], and . . . [Officer Mackey] asked him if he needed any assistance in going down there and speaking with [defendant], and [Detective Shuler] said just come on, go with me . . . .

Within five to ten minutes after Mr. Reece's call, Detective Shuler and Officer Mackey arrived at the hotel. Mr. Reece met with the officers and explained what had already transpired. Mr. Reece's plan was to try to gain access to the room, and the officers accompanied him. The parties did not discuss how they would try to gain access to the room. Mr. Reece knocked on the door to defendant's room several times, but no one answered. He opened the door with the master key, but the door caught on the interior lock. At that point, Officer Mackey stood in front of Mr. Reece, and Detective Shuler was at his side. Mr. Reece said twice, "This is the owner of the hotel, open up," but no one answered. At one point, Officer Mackey said, "Look, man, you just need to come to the door," but the officers did not recall ever identifying themselves as law enforcement. Then Mr. Reece said, "I'm going to count to ten. If you don't open up, we're busting the door down." Mr. Reece began counting, whereupon defendant said, "Hold on, I'm putting my pants on." Defendant came to the door and unlocked the interior lock; Officer Mackey then entered the room, followed by Mr. Reece and Detective Shuler. Upon entering the room, Officer Mackey saw marijuana and syringes on the dresser and a handgun on the bed.

He placed handcuffs on defendant within forty-five seconds after entering the room. Defendant was subsequently arrested for possession of the controlled substances and drug paraphernalia found inside the room. The officers had neither a search warrant nor an arrest warrant for defendant when they entered the room.

The trial court found facts generally consistent with the foregoing summary of the evidence and denied defendant's motion to suppress concluding that:

> 1. When a person engages a hotel room he gives implied or express permission to such persons as maids, janitors or repairman [sic] to enter his room in the performance of their duties.
>
> 2. Moreover, the owner of the hotel has not only apparent but actual authority to enter the room for some purposes, such as to view waste.
>
> 3. The only reason the officers were entering the room was because of the request of assistance from management of the hotel.

Defendant contends the trial court erred in concluding the officers' entry into the room was lawful.

"[A]n individual has both a state and federal constitutional right to freedom from unreasonable searches and seizures." *State v. Harris*, 145 N.C. App. 570, 580, 551 S.E.2d 499, 505-06 (2001) (citing U.S. Const. amend. IV.; N.C. Const. art. I, §§ 19, 20). "A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." *United States v. Jacobsen*, 466 U.S. 109, 113, 80 L. Ed. 2d 85, 94 (1984); *accord State v. Nance*, 149 N.C. App. 734, 738-39, 562 S.E.2d 557, 561 (2002). "The fourth amendment as applied to the states through the fourteenth amendment protects citizens from unlawful searches and seizures committed by the government or its agents. This protection does not extend to evidence secured by private searches, even if conducted illegally." *State v. Sanders*, 327 N.C. 319, 331, 395 S.E.2d 412, 420 (1990), *cert. denied*, 498 U.S. 1051, 112 L. Ed. 2d 782 (1991). Search and seizure by the government or its agents is unlawful if it is unreasonable, and:

> The governing premise of the Fourth Amendment is that a governmental search and seizure of private property unaccompanied by prior judicial approval in the form of a warrant is *per se* unreasonable unless the search falls within a well-delineated exception to the warrant requirement involving exigent circum-

> stances. Hence, when the State seeks to admit evidence discovered by way of a warrantless search in a criminal prosecution, it must first show how the former intrusion was exempted from the general constitutional demand for a warrant.

State v. Cooke, 306 N.C. 132, 135, 291 S.E.2d 618, 620 (1982) (citations omitted).

Application of these fundamental principles to the facts of this case require us to consider four questions. First, did the entry into defendant's hotel room constitute a "search"? Next, was the discovery of the evidence in the room the result of governmental action? If a governmental search was responsible for the discovery of the evidence, was the search and seizure reasonable under any recognized exception to the general requirement for a search warrant? Finally, did defendant at any point waive his right to Fourth Amendment protection?

I. Search

As noted above, whether a search has occurred depends on whether an individual's reasonable expectation of privacy was infringed. *Jacobsen*, 466 U.S. at 113, 80 L. Ed. 2d at 94; *Nance*, 149 N.C. App. at 738-39, 562 S.E.2d at 561. Status as an overnight guest creates a reasonable expectation of privacy in the home or dwelling where the guest is staying. *Minnesota v. Olson*, 495 U.S. 91, 96-97, 109 L. Ed. 2d 85, 93 (1990). "No less than a tenant of a house, or the occupant of a room in a boarding house, a guest in a hotel room is entitled to constitutional protection against unreasonable searches and seizures." *Stoner v. California*, 376 U.S. 483, 490, 11 L. Ed. 2d 856, 861 (1964) (citation omitted). Although an individual has a protected right to privacy in a hotel room, "[t]he law does not prohibit every entry, without a warrant, into a hotel room. Circumstances might make exceptions and certainly implied or express permission is given to such persons as maids, janitors or repairmen in the performance of their duties." *United States v. Jeffers*, 342 U.S. 48, 51, 96 L. Ed. 59, 64 (1951); *accord Stoner*, 376 U.S. at 489, 11 L. Ed. 2d at 861.

Defendant argues that he gave neither express nor implied consent to hotel management or staff to enter his room. To the contrary, defendant argues that by declining housekeeping services, he expressly did not consent to Mr. Reece's entry into the room. We believe, however, that as an implied condition of his staying at the hotel, he gave implied consent for agents of the hotel to perform their duties, even to the extent of entering the room without his express

consent if necessary to perform those duties. This must be so, for to conclude that defendant's stay in the hotel could render the owner powerless to perform those managerial duties and obligations required by law and relative to the safety and comfort of other guests at the hotel would defy logic. Accordingly, we conclude that defendant in this case had a general expectation of privacy in the room, subject to exceptions for the entry of hotel staff and their agents to perform their duties.

Furthermore, Mr. Reece's conduct was within the duties of hotel management. "An innkeeper . . . is required to exercise due care to keep his premises in a reasonably safe condition and to warn his guests of any hidden peril." *Page v. Sloan*, 281 N.C. 697, 702, 190 S.E.2d 189, 192 (1972). A proprietor of a hotel has a duty to safeguard his guests from injuries caused by criminal acts of third persons. *Murrow v. Daniels*, 321 N.C. 494, 501, 364 S.E.2d 392, 397 (1988); *see also Nelson v. Freeland*, 349 N.C. 615, 631, 507 S.E.2d 882, 892 (1998) (abolishing the distinction between invitees and licensees). "Liability for injuries may arise from failure of the proprietor to exercise reasonable care to discover that [criminal] acts by third persons are occurring . . . coupled with failure to provide reasonable means to protect his patrons from harm or give a warning adequate to enable patrons to avoid harm." *Murrow*, 321 N.C at 501, 364 S.E.2d at 397. Consequently, Mr. Reece had a duty to keep his hotel in a reasonably safe condition and to exercise reasonable care to discover criminal acts that might cause harm to other guests.

Therefore, we conclude, as did the trial court, that the implied permission which defendant gave to agents of the hotel to enter the room in the performance of their duties clearly included the permission for Mr. Reece to inspect the room for damage or for conditions which might pose a risk of harm to other guests. However, this implied permission to enter was limited to agents of the hotel in the performance of their duties and was an exception to defendant's general expectation of privacy which applied to others, including law enforcement, who were not performing duties on behalf of the hotel.[1] Because the officers' entry into defendant's room violated his expectation of privacy, we conclude their entry amounted to a search, although Mr. Reece's entry did not.

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1. We note that the officers' duty to keep the peace, discussed later in this opinion, is not a duty owed by the hotel which is being performed by law enforcement; rather, it is a duty owed by law enforcement to the general public which, in this case, includes the hotel owner. *See State v. Gaines*, 332 N.C. 461, 472, 421 S.E.2d 569, 574 (1992) (recognizing law enforcement officers' common law duty to keep the peace).

II. Governmental Actor

Defendant argues that the evidence was discovered through the activity of law enforcement, which cannot be negated by Mr. Reece's involvement in gaining entry to defendant's room. The State argues that the trial court correctly attributed the discovery of the evidence to Mr. Reece's entry into the room and characterizes the activities as a private search. The State's characterization is erroneous from two standpoints. First, as discussed in the previous section, Mr. Reece's entry into defendant's hotel room was not a "search" for purposes of the Fourth Amendment. Second, the discovery of the evidence did not result from Mr. Reece's private activity as an agent of the hotel inspecting the room, but rather from the officers' entry into the room.

The State cites *State v. Sanders*, 327 N.C. at 334, 395 S.E.2d at 422, which points out that a determination of whether a private person acts as an agent of the state when conducting a private search requires a "totality of the circumstances" analysis. "Factors to be given special consideration include the citizen's motivation for the search or seizure, the degree of governmental involvement, such as advice, encouragement, knowledge about the nature of the citizen's activities, and the legality of the conduct encouraged by the police." *Id.* The State contends that under this test, Mr. Reece was not acting as an agent of the government and instead was acting as a private citizen. Furthermore, as a private actor, the Fourth Amendment does not apply to his actions and would not render the evidence inadmissible. *Id.* at 331, 395 S.E.2d at 420. Although it may be true that Mr. Reece was not acting as an agent of the government, such a determination is irrelevant because the law enforcement officers in this case actually participated in the entry into defendant's room and the discovery and seizure of the evidence sought to be suppressed. Regardless of whether the Fourth Amendment applies to Mr. Reece's activity, its protections unquestionably apply to the conduct of the officers. *See id.*

Furthermore, it was not Mr. Reece's inspection of the room that resulted in the discovery of the evidence. Officer Mackey entered the room first, and spotted the evidence on the dresser and the bed. He testified that upon entering the room:

> A[.] Well, I was talking to [defendant] and just explaining we're just going to come in, look around, make sure everything is okay, and then you saw the marijuana on the dresser, and I pointed that

> out to . . . Detective Shuler, and then I turned to the right in between the beds, and that's when I saw a handgun laying there on the bed.
>
> Q[.] What happened then?
>
> A[.] At that point I turned around, I pointed at the marijuana, I pointed at the gun, and that's when I told [defendant] that we needed to put some handcuffs on him . . . .

Detective Shuler's testimony corroborated Officer Mackey's testimony of what transpired when they entered the room. Governmental conduct clearly resulted in the discovery of the evidence, not Mr. Reece's activity as a private citizen.

III. Exceptions to the Warrant Requirement

Because the governmental search was not conducted pursuant to a warrant, it is *per se* unreasonable unless it falls within a recognized exception. *See Cooke*, 306 N.C. at 135, 291 S.E.2d at 620. The State argues that the warrantless search was reasonable under the plain view exception to the Fourth Amendment because the officers' entry into defendant's room was a lawful exercise of their duty to keep the peace. We reject this argument.

The "plain view" exception involves three elements:

> [I]n *Coolidge v. New Hampshire*, 403 U.S. 443, 29 L. Ed. 2d 564, *reh'g denied*, 404 U.S. 874, 30 L. Ed. 2d 120 (1971), the U.S. Supreme Court held that the police may seize without a warrant the instrumentalities, fruits, or evidence of crime which is in "plain view" if three requirements are met. First, the initial intrusion which brings the evidence into plain view must be lawful. *Id.* at 465, 29 L. Ed. 2d at 582. Second, the discovery of the incriminating evidence must be inadvertent. *Id.* at 469, 29 L. Ed. 2d at 585. Third, it must be immediately apparent to the police that the items observed constitute evidence of a crime, are contraband, or are otherwise subject to seizure. *Id.* at 466, 29 L. Ed. 2d at 583.

State v. Williams, 315 N.C. 310, 317, 338 S.E.2d 75, 80 (1986). With regard to the first requirement that the intrusion be lawful, "[i]t is, of course, an essential predicate to any valid warrantless seizure of incriminating evidence that the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed." *Horton v. California*, 496 U.S. 128, 136, 110 L. Ed. 2d 112, 123 (1990).

The officers' entry in this case was not lawful. Although "[a]t common law, a law enforcement officer had the duty to keep the peace at all times," *Gaines*, 332 N.C. at 472, 421 S.E.2d at 574, such a duty cannot diminish defendant's protected right to privacy. We revisit the U.S. Supreme Court's language from *Stoner*: "No less than a tenant of a house, or the occupant of a room in a boarding house, a guest in a hotel room is entitled to constitutional protection against unreasonable searches and seizures. *That protection would disappear if it were left to depend upon the unfettered discretion of an employee of the hotel.*" *Stoner*, 376 U.S. at 490, 11 L. Ed. 2d at 861 (emphasis added) (citations omitted). Thus, a hotel manager's choices about when and how to exercise his rights and perform his duties, regardless of whether they may cause a breach of the peace, cannot strip the occupant of his right to privacy or excuse law enforcement from complying with the requirements of the Fourth Amendment. "[T]he Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Payton v. New York*, 445 U.S. 573, 590, 63 L. Ed. 2d 639, 653 (1980); *see also Stoner*, 376 U.S. at 490, 11 L. Ed. 2d at 861 (finding that the entry into a hotel room is analogous to the entry into a house). The State has not argued that exigent circumstances required the officers' entry, nor does the evidence of record show exigent circumstances. Without such circumstances, the officers' entry into the room violated the Fourth Amendment, and the plain view exception cannot apply. *See Horton*, 496 U.S. at 136, 110 L. Ed. 2d at 123. Accordingly, we conclude that the search was unreasonable and violated defendant's rights under the Fourth Amendment.

IV. Waiver

The last question we must consider is whether defendant at any time waived his Fourth Amendment rights. We first note that the hotel owner or staff could not consent on defendant's behalf to a search of his room. *Stoner*, 376 U.S. at 489, 11 L. Ed. 2d at 860. The State contends that defendant waived his rights directly by consenting to the search when he unlocked the interior lock and opened the door after Mr. Reece threatened to break down the door. First, it is unclear whether defendant even knew that law enforcement was present because the officers did not identify themselves as such. Regardless of that fact, defendant clearly did not consent to entry into his room because he did not open the door voluntarily but rather under the coercion of Mr. Reece.

> [T]he Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion was applied, the resulting "consent" would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed.

Schneckloth v. Bustamonte, 412 U.S. 218, 228, 36 L. Ed. 2d 854, 863 (1973); *accord State v. Glaze*, 24 N.C. App. 60, 62, 210 S.E.2d 124, 126 (1974). In the case before us, Mr. Reece's threat was explicit, and it clearly coerced defendant to open the door; therefore, we conclude defendant did not consent to the search or waive his rights.

Reversed and remanded.

Judges BRYANT and ARROWOOD concur.

STATE OF NORTH CAROLINA v. LEDARIUS MONTREAL BANKS

No. COA07-842

(Filed 5 August 2008)

1. Evidence— character—peaceful and law-abiding citizen

The trial court erred in a second-degree murder case by denying defendant the opportunity to provide character evidence that he was a peaceful and law-abiding citizen, and defendant is entitled to a new trial, because: (1) evidence that defendant possessed the character trait of being law-abiding is nearly always relevant in a criminal case; (2) the evidence presented a close case as to whether defendant committed the homicide in self-defense; (3) even if the jury found defendant had not acted in self-defense, the introduction of this evidence might have influenced the jury to convict defendant of voluntary manslaughter rather than second-degree murder; and (4) defendant demonstrated a reasonable possibility that, had the trial court not committed this error, the result at trial would have been different.

2. Appeal and Error— preservation of issues—issue not addressed when new trial already granted

Defendant's argument that the trial court committed constitutional error by precluding him from introducing evidence

regarding certain character traits does not need to be addressed in light of the fact that the Court of Appeals already held that defendant was entitled to a new trial.

3. Criminal Law— instruction—self-defense—defendant as the aggressor

The trial court did not commit plain error in a second-degree murder case by instructing the jury that defendant could not claim self-defense if he was the aggressor in the fight because the record indicated the evidence was sufficient to support an instruction regarding defendant acting as an aggressor including that: (1) defendant happened upon the victim, stopped his car, exited his car, and advanced toward the victim; (2) although defendant retreated from the victim when the victim fired shots in defendant's direction, defendant again began to advance toward the victim after the victim had ceased shooting; (3) as he advanced, defendant continued to demand the victim return defendant's gun; and (4) thereafter defendant shot and killed the victim.

4. Homicide— second-degree murder—sufficiency of evidence—malice

The trial court did not err by submitting the charge of second-degree murder to the jury, even though defendant contends there was insufficient evidence of malice, because: (1) the intentional use of a deadly weapon which causes death gives rise to an inference that the killing was done with malice and is sufficient to establish murder in the second-degree; (2) the State presented evidence that defendant retrieved a gun from his vehicle, intentionally fired the gun at the victim, and killed him; and (3) although the State's evidence showed defendant may have acted in imperfect self-defense, the State also put forward additional evidence that defendant acted with malice when he killed the victim, including that they had been arguing over the course of the night, the two had fought over defendant's gun, defendant approached the victim's car to demand his gun, defendant walked toward the victim with a rifle after the victim had ceased firing his weapon, and defendant shot and killed the victim with the rifle.

Appeal by defendant from judgment entered 13 February 2007 by Judge William C. Griffin, Jr., in Nash County Superior Court. Heard in the Court of Appeals 12 December 2007.

Attorney General Roy Cooper, by Special Deputy Attorney General Karen E. Long, for the State.

Marilyn G. Ozer for defendant appellant.

McCULLOUGH, Judge.

Defendant appeals from judgment entered after a jury verdict of guilty of second-degree murder. We determine the trial court committed prejudicial error and remand for a new trial.

FACTS

On 18 February 2005, Mance Hargrove Battle drove a Grand Marquis with passengers Dwayne Parker, Antwone Parker, and Ledarius Banks ("defendant") from Rocky Mount, North Carolina, to visit a dance club in Greenville, North Carolina. In the trunk of the car was a gun belonging to defendant. While outside the club, the young men became involved in an altercation with the bouncers after being denied admission to the club. Police later arrived on the scene and asked the young men if they wanted to press charges against the bouncers, but the young men declined. Before the young men left the club to return to Rocky Mount, Mr. Battle asked defendant for his gun so he could "shoot the club." The defendant, however, refused.

The four young men then drove back to Rocky Mount. On the way, Mr. Battle stopped the car, opened the trunk, and retrieved defendant's gun from the trunk of the car. Defendant asked Mr. Battle to return his gun, but Mr. Battle refused. After arriving in Rocky Mount, the young men picked up a fifth passenger and then visited a liquor house. The men left the liquor house after 1:00 a.m. on 19 February 2005. Outside the liquor house, Mr. Battle told defendant that he would not return defendant's gun unless defendant fought him. The two men then fought over the weapon. After fighting, Mr. Battle, still in possession of the gun, left with Antwone Parker. Defendant and Dwayne Parker walked to Dwayne's grandmother's house.

When the two men reached Dwayne's grandmother's house, Dwayne called Mr. Battle and asked Mr. Battle to meet them at Dwayne's house. Defendant and Dwayne then drove to Dwayne's house. A short time later, Mr. Battle stopped his car at Dwayne's house to allow Antwone Parker to exit. Mr. Battle did not return defendant's gun. Dwayne advised defendant that he should wait until

the next day to request his weapon and asked if defendant would drive him to the store to purchase more cigarettes.

On the way to the store, defendant and Dwayne Parker happened upon Mr. Battle at a stop sign. The two men followed Mr. Battle's car until Mr. Battle's vehicle came to a stop. Defendant stopped his vehicle as well, and defendant and Mr. Parker approached Mr. Battle. Defendant and Mr. Battle began to argue, and Mr. Battle reached into his car and retrieved a gun. Mr. Battle approached the other two men and fired the gun at the ground. Mr. Battle then began to raise his gun, but before he could fire the weapon he was pushed by Mr. Parker. As a result, Mr. Battle's shot was directed away from defendant.

After Mr. Battle began shooting, defendant returned to his car to recover a rifle. Defendant subsequently approached Mr. Battle and demanded Mr. Battle return his gun. Both men had their guns drawn. Defendant fired his rifle at Mr. Battle, hitting him six times and causing him to stagger backward and fall to the ground. Mr. Battle died of these injuries shortly thereafter.

On 11 April 2005, defendant was indicted for the first-degree murder of Mance Battle and the felonious discharge of a firearm. Defendant gave notice of his intention to present the defense of self-defense on 15 December 2006. On 12 February 2007, defendant was tried before a jury in Nash County Superior Court. Defendant was convicted of second-degree murder on 13 February 2007. Defendant filed notice of appeal on 19 February 2007.

I.

[1] Defendant first argues the trial court erred by denying defendant the opportunity to put forward evidence of pertinent character traits. According to defendant, the trial judge's refusal to admit this evidence amounted to prejudicial error. Thus, defendant argues, he is entitled to a new trial. We agree.

Generally, "[e]vidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion[.]" N.C. Gen. Stat. § 8C-1, Rule 404(a) (2007). However, an exception is provided for an accused, who may present evidence of a pertinent trait of his character in an attempt to prove he acted in accord with this trait. N.C. Gen. Stat. § 8C-1, Rule 404(a)(1). Our Supreme Court has previously held that the use of the word "pertinent," in the context of Rule 404(a)(1), is "tantamount to relevant." *State v. Squire*, 321 N.C. 541, 547-48, 364

S.E.2d 354, 357-58 (1988). "Thus, in determining whether evidence of a character trait is admissible under Rule 404(a)(1), the trial court must determine whether the trait in question is relevant; i.e., whether it would 'make the existence of any fact that is of consequence to the determination of the action' more or less probable than it would be without evidence of the trait." *Squire*, 321 N.C. at 547-48, 364 S.E.2d at 357-58; N.C. Gen. Stat. § 8C-1, Rule 401 (2007). Evidence that defendant possesses the character trait of being law-abiding is "nearly always relevant in a criminal case," and may be proved directly rather than by implication. *Squire*, 321 N.C. at 548, 364 S.E.2d at 358. "Evidence of other character traits which are general in nature may be likewise admissible under Rule 404(a)(1) provided that the traits are relevant in the context of the particular proceedings." *Id.* Further, although these traits may be general in nature, they are no less relevant than specific traits of character. *Id.* at 549, 364 S.E.2d at 359. Indeed, our Supreme Court noted in *Squire* that "evidence of character traits which are general in nature may be the deciding factor in the determination of the defendant's guilt or innocence. Thus, an accused should not be prohibited from introducing this potentially exculpatory evidence." *Id.*

In the case *sub judice*, defendant was charged with the crimes of first-degree murder and felonious discharge of a firearm. At trial, defendant sought to show his actions, which resulted in the death of Mr. Battle, were performed in self-defense. In support of this assertion, defendant sought to elicit witness testimony concerning his character as a peaceful and law-abiding person. The trial court, however, precluded this testimony from being given pursuant to an objection by the State.

On review, we hold the trial court erred in precluding defendant from introducing evidence regarding his character traits of peacefulness and law-abidingness. Further, we hold that under N.C. Gen. Stat. § 15A-1443(a) (2007) the trial court's error in precluding this evidence resulted in prejudice to defendant. According to N.C. Gen. Stat. § 15A-1443(a), errors relating to rights, other than under the Constitution of the United States, are prejudicial "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." Here, as in *Squire*, the evidence presented a close case as to whether defendant committed the homicide in self-defense. *Squire*, 321 N.C. at 549, 364 S.E.2d at 359. At trial, defendant put forward evidence of the victim's violent be-

havior only hours before the homicide took place. After being denied admittance to the club, Mr. Battle asked defendant to borrow his gun, proclaiming his desire to "shoot the club." Despite defendant's refusal to give his gun to Mr. Battle, Mr. Battle acquired defendant's gun and would not return the weapon. During the final confrontation between defendant and Mr. Battle, in which defendant again tried to retrieve his gun, defendant approached Mr. Battle unarmed. It was only after Mr. Battle fired in defendant's direction that defendant retrieved a weapon to return fire. Thus, evidence that defendant was generally a peaceful and law-abiding person, which defendant clearly could have offered, might have weighed heavily in the jury's determination of whether the defendant acted in self-defense. In addition, even if the jury found defendant had not acted in self-defense, the introduction of this evidence might have influenced the jury to convict defendant of voluntary manslaughter rather than second-degree murder.

The trial court's preclusion of evidence regarding defendant's peaceful and law-abiding character prevented defendant from offering evidence of two character traits which were both relevant and admissible. Moreover, defendant has demonstrated a reasonable possibility that, had the trial court not committed this error, the result at trial would have been different. Therefore, we hold defendant was prejudiced by this error and award defendant a new trial.

II.

[2] Defendant further argues the trial judge committed constitutional error by precluding defendant from introducing evidence regarding pertinent character traits. Because we held in the above argument that the preclusion of this evidence entitles defendant to receive a new trial, we do not address this argument. *See State v. Hayes*, 188 N.C. App. 313, 315-16, 655 S.E.2d 726, 728 (2008).

III.

[3] Defendant next argues the trial court committed plain error by instructing the jury on the application of self-defense in cases where the defendant is the aggressor. We disagree.

The instructions given by a trial judge should be supported by evidence produced at trial. *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973), *cert. denied*, 418 U.S. 905, 41 L. Ed. 2d 1153 (1974). If a defendant assigns error to these instructions, but failed to

object at trial, "the alleged error is subject to review for plain error only." *State v. Smith*, 188 N.C. App. 207, 213, 654 S.E.2d 730, 735 (2008). "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." *State v. Pate*, 187 N.C. App. 442, 445, 653 S.E.2d 212, 215 (2007).

In the instant case, defendant argued he should be excused from the murder charges against him because he acted in self-defense. Our Supreme Court has previously held:

> "A defendant is entitled to an instruction on perfect self-defense as an excuse for a killing when it is shown that, at the time of the killing, the following four elements existed:
>
> (1) it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and
>
> (2) defendant's belief was reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness; and
>
> (3) defendant was not the aggressor in bringing on the affray, i.e., he did not aggressively and willingly enter into the fight without legal excuse or provocation; and
>
> (4) defendant did not use excessive force, i.e., did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm."

State v. Mize, 316 N.C. 48, 51, 340 S.E.2d 439, 441 (1986) (citations omitted). At the close of the trial, the court provided instructions regarding self-defense to the jury. Included among these instructions was the following charge:

> The Defendant would not be guilty of any murder or manslaughter if he acted in self-defense as I have just defined it to be, and if he was not the aggressor in bringing on the fight and if he did not use excessive force under the circumstances. If the Defendant voluntarily and without provocation entered the fight, he would be considered to be the aggressor unless he, thereafter, attempted to abandon the fight and gave notice to the deceased

> that he was doing so. One enters a fight voluntarily, if he uses towards his opponent abusive language, which, considering all the circumstances, is calculated and intended to bring on a fight.

Defendant did not object to any of these instructions.

On appeal, defendant argues the trial judge committed plain error by instructing the jury that if defendant was the aggressor in the fight he could not claim self-defense. According to defendant, insufficient evidence was presented at trial to support this instruction. We are unpersuaded by defendant's contention. A review of the record reveals that defendant happened upon Mr. Battle, stopped his car, exited his car, and advanced toward Mr. Battle. Although defendant retreated from Mr. Battle when Mr. Battle fired shots in defendant's direction, defendant again began to advance toward Mr. Battle after Mr. Battle had ceased shooting. As he advanced, defendant continued to demand that Mr. Battle return his gun. Thereafter, defendant shot and killed Mr. Battle. From this evidence, the record indicates the trial court was presented with sufficient evidence to support an instruction regarding defendant acting as an aggressor. Therefore, we hold the trial court did not err in its instruction of the jury.

IV.

[4] Defendant also argues the trial court incorrectly submitted the charge of second-degree murder to the jury. According to defendant, the State presented insufficient evidence of malice to sustain a conviction for second-degree murder. We disagree.

In the case at bar, defendant was charged with first-degree murder. At the close of the State's evidence, and again at the close of all the evidence, defendant made a motion to dismiss the charges against him claiming the evidence presented at trial was insufficient to support these charges. Defendant's motions were denied by the trial court. In his instructions to the jury, the trial judge included instructions on first-degree murder, second-degree murder, and voluntary manslaughter. After deliberating, the jury found defendant guilty on the charge of second-degree murder. Defendant subsequently moved for a new trial on the grounds that the verdict went against the greater weight of the evidence. The trial court denied this motion as well. On appeal, defendant contends the trial court erred in denying his motion to dismiss and his motion for a new trial because the evidence was insufficient to support a conviction for second-degree murder.

"In determining the sufficiency of the evidence to withstand a motion to dismiss and to be submitted to the jury, the trial court must determine 'whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense.' " *State v. Squires*, 357 N.C. 529, 535, 591 S.E.2d 837, 841 (2003) (citation omitted), *cert. denied*, 541 U.S. 1088, 159 L. Ed. 2d 252 (2004). We have previously defined substantial evidence as "such relevant evidence as is necessary to persuade a rational juror to accept a conclusion." *Id.* When ruling on a defendant's motion to dismiss, the trial court must review the evidence in the light most favorable to the state and determine whether the evidence is sufficient to get the case to the jury. *State v. Andujar*, 180 N.C. App. 305, 309, 636 S.E.2d 584, 588 (2006). "Generally, a new trial motion is addressed to the sound discretion of the trial judge, and unless his ruling is clearly erroneous or an abuse of discretion, it will not be disturbed on appeal." *State v. Lyles*, 94 N.C. App. 240, 248, 380 S.E.2d 390, 395 (1989).

"The elements of second-degree murder . . . are: (1) the unlawful killing, (2) of another human being, (3) with malice, but (4) without premeditation and deliberation." *State v. Fowler*, 159 N.C. App. 504, 511, 583 S.E.2d 637, 642, *disc. review denied*, 357 N.C. 580, 589 S.E.2d 355 (2003); N.C. Gen. Stat. § 14-17 (2007). Our Supreme Court has held that the " '[i]ntent to kill is not a necessary element of second-degree murder, but there must be an intentional act sufficient to show malice.' " *State v. Rich*, 351 N.C. 386, 395, 527 S.E.2d 299, 304 (2000) (quoting *State v. Brewer*, 328 N.C. 515, 522, 402 S.E.2d 380, 385 (1991)). "The intentional use of a deadly weapon which causes death gives rise to an inference that the killing was done with malice and is sufficient to establish murder in the second degree." *State v. Brewington*, 179 N.C. App. 772, 776, 635 S.E.2d 512, 516 (2006). Even though such an inference is permissible, the State continues to bear the burden of showing defendant committed an unlawful killing. *State v. Carter*, 254 N.C. 475, 479, 119 S.E.2d 461, 464 (1961). Where the State's evidence establishes a complete defense, the trial court should grant a defendant's motion for dismissal. *Id.*; *State v. Fulcher*, 184 N.C. 663, 665, 113 S.E. 769, 770 (1922).

Here, the State presented evidence that defendant retrieved a gun from his vehicle and intentionally fired the gun at the victim, killing him. Thus, the State presented sufficient evidence for the jury to infer malice on the part of defendant. Defendant argues, however, that

while this evidence may give rise to an inference of malice, the evidence put forward by the State necessarily establishes imperfect self-defense as a matter of law. Upon a further review of the record, we find this argument is without merit. "An imperfect right of self-defense is . . . available to a defendant who reasonably believes it necessary to kill the deceased to save himself from death or great bodily harm even if defendant (1) might have brought on the difficulty, provided he did so *without* murderous intent, and (2) might have used excessive force." *State v. Mize*, 316 N.C. at 52, 340 S.E.2d at 441-42. Defendant is correct in asserting that the evidence put forward by the State is sufficient to show that defendant may have acted in imperfect self-defense. However, contrary to defendant's contention, the State put forward additional evidence that defendant acted with malice when he killed Mr. Battle. The State presented evidence showing, *inter alia*, defendant and Mr. Battle had been arguing over the course of the night, the two had fought over defendant's gun, defendant approached Mr. Battle's car to demand his gun, defendant walked toward Mr. Battle with a rifle after Mr. Battle had ceased firing his weapon, and defendant shot and killed Mr. Battle with the rifle. Therefore, we hold the trial court was presented with substantial evidence that defendant was guilty of second-degree murder. Accordingly, we find no error in the trial court's denial of defendant's motions.

New trial.

Judges STEELMAN and GEER concur.

IN THE MATTER OF: D.G.

No. COA07-402

(Filed 5 August 2008)

Juveniles— modification of prior dispositional order— changed circumstances

The trial court did not err in a first-degree sex offense on a child case by modifying a juvenile's prior dispositional order from a Level II placement in a residential sex offender program to a Level III indefinite commitment to a youth development center not to exceed his nineteenth birthday because: (1) there was com-

petent evidence to support the trial court's finding that due to a lack of funding under State and Federal law, the prior placement was no longer available to the undocumented alien juvenile; and (2) once the trial court found there was no available funding for the juvenile's residential sex offender treatment, it had no option but to grant the State's motion to modify its prior dispositional order under N.C.G.S. § 7B-2600(a) in light of changed circumstances.

Judge WYNN dissenting.

Appeal by juvenile from order entered 24 May 2006 by Judge Robert M. Brady in District Court, Burke County. Heard in the Court of Appeals 30 October 2007.

Attorney General Roy Cooper, by Assistant Attorney General Anne M. Middleton, for the State.

Glover & Petersen, P.A., by Ann B. Petersen, for juvenile-appellant.

STEELMAN, Judge.

Where the trial court's finding of fact challenged by the juvenile is supported by competent evidence in the record, it is binding on appeal. The trial court did not err in modifying the prior dispositional order as to the juvenile.

I. Factual and Procedural Background

Juvenile petitions were filed against D.G., alleging that he had committed the offenses of crime against nature, indecent liberties between children, assault on a handicapped person, and first-degree sex offense on a child. On 18 August 2005, D.G. admitted the allegations in the juvenile petition as to the first-degree sex offense charge. This was based upon D.G. having anal intercourse with a five-year-old boy when D.G. was fifteen years of age. Upon D.G.'s admission of the first-degree sex offense charge, the State dismissed the other three juvenile petitions. At the time of the admission, D.G. was 15 years of age.

The trial court received a recommendation from Burke County Department of Social Services ("DSS") and Foothills Area Authority ("Foothills") that D.G. be placed in a DSS sex offender residential treatment facility. At that point in the hearing, counsel for DSS advised the court:

> Our concern is that he is an illegal alien; therefore, there is no state funding available. And any treatment facility would have to be borne totally by the tax payers of Burke County. I don't know what Your Honor was contemplating whether our continued custody is necessary or not, but I would just to make the Court aware of the possible funding issue if he is placed in a residential facility.

The court was then assured by Nancy Mulholland, counselor from the Department of Juvenile Justice, that D.G.'s legal status had "little to do" with the availability of funding and that he was eligible for funding "due to a loophole in the legality of eligibility" and that state funds were available. Based upon these representations, the trial court entered a disposition order with a Level II disposition. This order directed that D.G. be placed in a residential sex offender treatment facility.

On 22 February 2006, a motion for review was filed, stating that D.G. was placed in a sex offender treatment facility on 26 September 2005, but that "funds were no longer available for this placement." Since the victim resides in the home, D.G. could not be returned there. The court counselor sought guidance from the court.

On 4 April 2006, D.G. filed a motion to compel the State of North Carolina to provide him with sex offender treatment. The motion alleged that on 31 March 2006, Foothills Mental Health terminated funding for D.G.'s placement in Hands Up Homes and that without funding he was unable to remain there. On 6 April 2006 a response was filed by Burke County. This response attached a copy of a letter from counsel for Foothills, stating that under federal law, D.G. was not a "qualified alien" and that it could not provide funding for "custodial sex offender treatment." This letter was based upon an opinion obtained from the Office of the North Carolina Attorney General.

On 27 April 2006, a hearing was held before Judge Brady on the motion to review and the motion to compel. During the course of the hearing, D.G. waived formal notice of a motion to amend or modify the prior dispositional order, but opposed any modification. The trial court denied the motion to compel the State to provide funding for D.G.'s residential sex offender treatment and modified the prior adjudication order to provide for a Level III disposition and committed D.G. to a Youth Development Center for an indefinite commitment not to exceed his nineteenth birthday. D.G. appeals.

II. Analysis

In his only argument on appeal, D.G. contends that the trial court erred in modifying the dispositional order from a Level II placement in a residential sex offender program to a Level III indefinite commitment to a Youth Development Center. We disagree.

Standard of review

On appeal, our standard of review of the trial court's findings is whether they are supported by competent evidence. *Pineda-Lopez v. N.C. Growers Ass'n*, 151 N.C. App. 587, 589, 566 S.E.2d 162, 164 (2002). "If the court's factual findings are supported by competent evidence, they are conclusive on appeal, even though there is evidence to the contrary." *Id.* (citations omitted). We review challenges to the trial court's conclusions of law *de novo*. *In re D.H., C.H., B.M, C.H. III*, 177 N.C. App. 700, 703, 629 S.E.2d 920, 922 (2006) (citation omitted).

Availability of Funding

D.G. first argues that the trial court erred in finding "[t]hat due to a lack of funding pursuant to State and Federal law said placement is no longer available to the Juvenile." We disagree.

There is competent evidence in the record to support the trial court's finding. Representatives of Burke County DSS and Foothills advised the court that they had explored and exhausted all avenues of funding for D.G.'s residential sex offender treatment, and due to federal law, there was none available. Counsel for D.G. acknowledged this, and then stated to the court: ". . . Your Honor can order the county to pay. I agree with Mr. Kuehnert [counsel for Burke County] with regards to the argument about the US Statute applying to the county funds also. The bottom line is that roughly $128,000 a year placement. If Your Honor orders the county to pay it, the county is going to request that the department find $128,000 in its budget to cover this individual's placement and that's like three or four positions at the department." The only statement to the contrary at the hearing was from Tim Randolph, a resource broker for Meridian Behavioral Services, who stated anecdotally that there were similar cases in other counties that were being funded by the State.

We hold that there was competent evidence to support the trial court's finding:

9. That due to a lack of funding pursuant to State and Federal law said placement is no longer available to the Juvenile.

Thus, this finding is conclusive on appeal. *Pineda-Lopez* at 589, 566 S.E.2d at 164.

Further, this finding supports the following conclusions of law by the trial court:

1. That the State of North Carolina, Burke County and Foothills Area Programs cannot be compelled to provide services in the nature of a Level 3 placement for the Respondent Juvenile, D.G. who is an undocumented alien.

2. That the Respondent Juvenile has failed to show that the parties named above have willfully failed to comply with the Court's prior Dispositional Order and that none of the said parties are in contempt.

<u>Change in Dispositional Order</u>

Once the trial court found that there was no available funding for D.G.'s residential sex offender treatment, it had no option but to grant the State's motion to modify its prior dispositional order. Modifications of dispositional orders are governed by N.C. Gen. Stat. § 7B-2600(a):

> Upon motion in the cause or petition, and after notice, the court may conduct a review hearing to determine whether the order of the court is in the best interests of the juvenile, and the court may modify or vacate the order in light of changes in circumstances or the needs of the juvenile.

N.C. Gen. Stat. § 7B-2600(a) (2007).

This statute clearly states that a prior order can be modified or vacated in light of changes in circumstances, and is not tied exclusively to the needs of the juvenile.

The trial court initially ordered residential sex offender treatment based upon erroneous information provided to it at the dispositional hearing. When this was brought to the trial court's attention, it correctly ruled that it could not compel the provision of the residential sex offender treatment in violation of federal law. Once this decision was reached, the court had no alternative but to modify the dispositional order. These facts constituted a change in circumstance within the intent and meaning of N.C. Gen. Stat. § 7B-2600(a), and the trial court properly modified the dispositional order.

AFFIRMED.

Judge HUNTER concurs.

Judge WYNN dissents in a separate opinion.

WYNN, Judge, dissenting.

This case goes to one of the most basic questions in our democratic system: which branch of government should decide fundamental policy questions affecting our citizenry. Here, the majority would substitute its judgment for that of the executive or legislative branch as to what funding and treatment are available to a juvenile who appears to be an unauthorized immigrant who has been convicted of a sexual offense. Indeed, it may well be that the majority is correct in its conclusion that the federal government would not permit funds to be used to treat juvenile sex offenders who are unauthorized immigrants to this country. Nevertheless, because such a decision should not be made by the judiciary in the absence of clear administrative or statutory law, I dissent.

It is undisputed that there is no definitive legislative or executive ruling that interprets the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) and explicitly disallows the type of treatment being provided to this juvenile as an impermissible public benefit. However, in the instant case, such a finding is a necessary prerequisite to concluding that a "change of circumstances" has occurred, sufficient to merit modifying the disposition. Here, the record discloses that the juvenile was undergoing sex offender treatment when Burke County sought to demonstrate that there had been a "change of circumstances" in his situation, namely, that federal funding would be cut off if the treatment was provided to him. In affirming the trial court's finding to that effect, the majority states that, "[t]here is competent evidence in the record to support the trial court's finding" "[t]hat due to a lack of funding pursuant to State and Federal law [the juvenile's Level III] placement is no longer available to the Juvenile." In fact, the record contains no such evidence.

To the contrary, the trial court's findings of fact specifically state that "the various agencies responsible for [D.G.'s] placement *alleged* that there were insufficient funds"; that the State and County "*argued* that they are precluded by State and Federal law from using Federal funds to provide [the previously ordered] placement"; and that "due

to a lack of funding pursuant to State and Federal law said placement is no longer available to the Juvenile." (Emphasis added). Such "allegations" and "arguments" do not constitute evidence. Rather, these findings are mere recitations of the State and Burke County DSS positions, as well as that of the Foothills Area Program attorney.

Significantly, the sole document in the record indicating that the juvenile's treatment would be disallowed under PRWORA as a state or local public benefit provided to an immigrant who appears to be unauthorized is the letter from the Foothills Area Program attorney expressing his opinion on the matter. However, contrary to the majority's characterization that this letter was "based upon an opinion obtained from the Office of the North Carolina Attorney General," the memorandum from the Attorney General's office explicitly states that it is only an "advisory letter" that has "not been reviewed and approved in accordance with procedures for issuing an Attorney General's opinion." Thus, the memorandum has no legal force or effect.

Moreover, while the trial court designated as a finding of fact that, "due to a lack of funding pursuant to State and Federal law said placement is no longer available to the Juvenile," that determination is instead a conclusion of law. As noted herein, that conclusion is not supported by findings of fact based on competent evidence, as no evidence in the record before us shows that either state or federal funding has been cut off for, or due to, the placement of this juvenile. Indeed, there has been no legal determination that sexual offender treatment is an impermissible "public benefit" within the meaning of PRWORA, and this Court should decline to make such a ruling based only on allegations and arguments, which do not constitute evidence.

Rather, these types of policy decisions are best left to the other two branches of government, as the judiciary is simply not equipped—nor intended—to undertake the balancing of relative interests necessary to make such determinations. Here, for instance, the decision to provide sex offender treatment to juveniles who are unauthorized immigrants requires weighing that cost against other policy priorities, such as public health and safety. Significantly, the Attorney General's memorandum acknowledged this conflict between a possible benefit provided with the purpose of protecting the public:

> . . . It would appear that providing psychiatric treatment would be a benefit unless one of the exceptions applies.

> A person who is a danger to himself or herself would appear to fit the definition of an emergency medical condition and thus be able to be treated under that exception. A person who is a danger to others does not appear to meet any stated exception. *However, it seems to me that, if the commitment is for the purposes of public safety, any benefit received by the person is incidental to the protection of the public.*

(Emphasis added). Thus, the Attorney General recognized that the legislature or executive branch may decide to allow a public benefit such as funding for sex offender treatment if the *commitment is for the purposes of public safety*. Again, the policy determination as to what type of funding should be available to county departments should not be made by the Courts.

The facts of this case illustrate the competing policy considerations at issue in such a decision. According to the record, after coming to the United States at the age of fourteen, the juvenile in question attended public high school in Burke County for one year while living with a paternal uncle and his wife. The juvenile has numerous other relatives living in the Burke County area and few remaining ties to his home country of Guatemala, as his father was murdered in Valdese, North Carolina, shortly after immigrating here after the juvenile's mother abandoned the family when the juvenile was four years old. Perhaps most significantly, the juvenile's paternal uncle was in the process of adopting him when the juvenile committed the sexual assault.

The record before us makes no mention of what will happen to the juvenile after he completes his disposition or turns eighteen. If the juvenile is not deported and instead returns to live in Burke County, then his treatment as a sexual offender is even more critical from the perspective of the public safety of our citizens. All parties agree that the juvenile was cooperative and responding extremely well to the treatment prior to being taken out of Hands Up Homes and the initiation of this action.

Again, these facts demonstrate that the disposition of this juvenile necessitates a determination of whether the sexual offender treatment is an impermissible "public benefit" or simply a benefit that is "incidental to the protection of the public." Judicial prudence requires us to leave these policy questions to our legislative and executive branches of government, as their constitutional role is to estab-

lish and administer laws that weigh and balance such competing interests. Our role is to apply the law, not to make it.

In sum, because the majority's holding constitutes an impermissible advisory opinion on the availability of state and federal funding for a juvenile in these circumstances, I dissent. Judicial restraint dictates that we refrain from acting in the stead of our legislative and executive officials. For that reason, I certify this question to provide an appeal as a matter of right to our Supreme Court. *See* N.C. Gen. Stat. § 7A-30(2) (2007) (providing an appeal of right to the Supreme Court "from any decision of the Court of Appeals rendered in a case [i]n which there is a dissent.").

ELM ST. GALLERY, INC., WILLIAM B. HEROY, ANNA R. HEROY, INDIVIDUALLY AND D/B/A HEROY STUDIOS AND OLD PHOTO SPECIALISTS, INC., PLAINTIFFS v. ROBERT M. WILLIAMS AND SHELIA V. WILLIAMS, DEFENDANTS

No. COA08-10

(Filed 5 August 2008)

1. Negligence— fire damage—causation—mere conjecture, surmise, and speculation—summary judgment

The trial court did not err in a negligence case arising from fire damage by granting defendants' motion for summary judgment on the issue of the cause of the fire because: (1) plaintiffs' assertion that the evidence pointed to an electrical fire originating from the right rear of defendants' building was a mere conjecture, surmise, and speculation as to the cause of the fire; (2) the record was devoid of any evidence tending to support plaintiffs' assertion when an inspector and two other experts were unable to determine the origin of the fire; and (3) plaintiffs failed to establish any inference that the alleged negligence by defendants was the actual or proximate cause of their injury.

2. Negligence— fire damage—proximate cause—delay taking corrective action to remedy condition—summary judgment

The trial court did not err in a negligence case arising from fire damage by granting defendants' motion for summary judgment on the issue of whether defendants negligently delayed taking corrective action to remedy the condition of their building after the fire occurred because: (1) assuming arguendo that plain-

tiffs could establish a duty and breach thereof, plaintiffs failed to produce any evidence tending to show or raise any inference that defendants' alleged negligence was the proximate cause of plaintiffs' injury; (2) speculation or mere conjecture would be required to determine whether the damage to plaintiffs' building resulted from defendants' delay in the demolition, plaintiffs' repairs to their building, or from some other source; and (3) plaintiffs' unsubstantiated and contradictory allegations were insufficient to establish any inference that defendants' alleged negligence was the actual or proximate cause of plaintiffs' injury.

Appeal by plaintiff from order entered 14 August 2007 by Judge John O. Craig, III in Guilford County Superior Court. Heard in the Court of Appeals 21 May 2008.

Butler & Quinn, P.L.L.C., by W. Rob Heroy, for plaintiff-appellants.

Smith, James, Rowlett & Cohen, L.L.P., by Norman B. Smith, for defendant-appellees.

TYSON, Judge.

Elm St. Gallery, Inc., William and Anna Heroy, individually and d/b/a Heroy Studios and Old Photo Specialists, Inc. (collectively, "plaintiffs") appeal from an order entered granting Robert and Shelia Williams' (collectively, "defendants") motion for summary judgment. We affirm.

I. Background

Elm St. Gallery, Inc. is the owner of property located at 320 South Elm Street, Greensboro, North Carolina ("plaintiffs' building"). Defendants formerly owned property located at 324 South Elm Street ("defendants' building"), which adjoined plaintiffs' building by a shared party wall. On 24 October 2003, a fire occurred in defendants' unoccupied building.

At the time of the fire, William and Anna Heroy owned a photography business located on the first floor of plaintiffs' building. The second and third floors of plaintiffs' building were rented as residential apartments. As a result of the fire, plaintiffs' building sustained damage and the photography business and residential tenants were required to vacate the premises.

Plaintiffs commenced repairs and renovations to the party wall and to their building. Plaintiffs demanded defendants demolish the remnants of their building to facilitate plaintiffs' repairs. Defendants allegedly expressed an intent to comply with plaintiffs' requests, but failed to do so.

Due to defendants' inaction in demolishing the remnants of their building, the City of Greensboro issued a demolition order. On 21 February 2005, defendants sold their property to a third party, who subsequently demolished the building.

On 13 June 2006, plaintiffs filed an unverified complaint and alleged defendants had negligently maintained their building in such a condition that caused or contributed to the start and spread of the fire. On 16 June 2006, plaintiffs' filed an amended complaint and further alleged defendants negligently delayed taking corrective action to remedy the condition of their building after the fire. Defendants filed an answer, denied all of plaintiffs' allegations, and raised the affirmative defenses of: (1) contributory negligence; (2) *res judicata*; and (3) failure to mitigate damages.

On 26 April 2007, defendants moved for summary judgment on all of plaintiffs' claims. Plaintiffs also filed a motion for summary judgment regarding defendants' counterclaim. However, no counterclaim was asserted in defendants' original answer and no amended answer is included as part of the record on appeal.

The trial court granted plaintiffs' motion for summary judgment regarding defendants' counterclaim. The trial court also granted defendants' motion for summary judgment on all of plaintiffs' claims contained in their amended complaint. Plaintiffs appeal.

II. Issues

Plaintiffs argue genuine issues of material fact exist and the trial court erred by granting defendants' motion for summary judgment.

III. Summary Judgment

Plaintiffs argue the trial court erred by granting defendants' motion for summary judgment because genuine issues of material fact exist regarding: (1) the cause of the fire and (2) whether defendants negligently delayed taking corrective action to remedy the condition of their building after the fire occurred. 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 of 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

Our Supreme Court has "emphasized that summary judgment is a drastic measure, and it should be used with caution[,]" especially in negligence cases in which a jury ordinarily applies a reasonable person standard to the facts of each case. *Williams v. Power & Light Co.*, 296 N.C. 400, 402, 250 S.E.2d 255, 257 (1979) (citation omitted). Summary judgment has been held to be proper in negligence cases "where the evidence fails to show negligence on the part of defendant, or where contributory negligence on the part of plaintiff is established, or where it is established that the purported negligence of defendant was not the proximate cause of plaintiff's injury." *Hale v. Power Co.*, 40 N.C. App. 202, 203, 252 S.E.2d 265, 267 (citation omitted), *cert. denied*, 297 N.C. 452, 256 S.E.2d 805 (1979).

1. Causation

[1] Our Supreme Court has addressed the issue of causation in several cases that involve negligence actions arising from fire damage. *See Snow v. Power Co.*, 297 N.C. 591, 256 S.E.2d 227 (1979); *Phelps v. Winston-Salem*, 272 N.C. 24, 157 S.E.2d 719 (1967); *Maharias v. Storage Co.*, 257 N.C. 767, 127 S.E.2d 548 (1962). In both *Maharias* and *Phelps*, our Supreme Court affirmed judgments, which dismissed the plaintiffs' negligence claims based upon a lack of evidence tending to show a causal link between the defendants' alleged negligence and the origin of the fire. 257 N.C. at 767-68, 127 S.E.2d at 549; 272 N.C. at 24, 157 S.E.2d at 719.

In *Maharias*, a fire originated at the defendant's warehouse and caused significant damage to the plaintiff's adjacent restaurant and the contents within. 257 N.C. at 767, 127 S.E.2d at 549. An Assistant Fire Chief inspected the defendant's building and opined that it was possible the fire had been caused by spontaneous combustion of a pile of furniture-polishing rags, but that "[the] fire could have happened from any one of a number of causes." *Id.* Our Supreme Court held that non-suit entered at the close of the plaintiff's evidence was proper because "[t]he evidence raised a mere conjecture, surmise and speculation as to the cause of the fire." *Id.* at 768, 127 S.E.2d at 549. Our Supreme Court further stated, "[a] cause of action must be based on something more than a guess." *Id.*

In *Phelps*, the plaintiffs were tenants in a building owned and operated by the City of Winston-Salem. 272 N.C. at 25, 157 S.E.2d at 720. A fire originated in the defendant's building and destroyed a substantial amount of the plaintiffs' belongings. *Id.* at 26, 157 S.E.2d at 720. The plaintiffs alleged the defendant had negligently allowed combustible materials to accumulate in the building and had failed to provide fire safety equipment. *Id.* at 26, 157 S.E.2d at 721. The fire chief and the captain in charge of the Fire Prevention Bureau both testified they were unable to determine the cause of the fire. *Id.* at 27, 157 S.E.2d at 721. Applying the reasoning in *Maharias*, our Supreme Court held that the cause of the fire was "unexplained" and stated:

> [p]roof of the burning alone is not sufficient to establish liability, for if nothing more appears, the presumption is that the fire was the result of accident or some providential cause. There can be no liability without satisfactory proof, by either direct or circumstantial evidence, not only of the burning of the property in ques-

> tion but that it was the proximate result of negligence and did not result from natural or accidental causes.

Id. at 31, 157 S.E.2d at 724 (citation omitted). Our Supreme Court further stated that the plaintiff bears the burden to "affirmatively fix [responsibility] upon the defendant by the greater weight of the evidence." *Id.* at 28, 157 S.E.2d at 722.

Several years later in *Snow*, our Supreme Court limited the holdings in *Maharias* and *Phelps* to the particular facts presented in both cases and acknowledged that the circumstances in *Snow* presented a "very different factual context." 297 N.C. at 598, 256 S.E.2d at 232. In *Snow*, the plaintiffs filed a negligence action against Duke Power Company and alleged a fire originated at a faulty electrical meter attached to a barn. *Id.* at 597, 256 S.E.2d at 232. The plaintiffs presented evidence tending to show:

> (1) that the fire originated at a point where the wiring connecting the weatherhead to the meter box was "hot" with electrical current; (2) that the initially compact and concentrated nature of the flames was consistent with an electrical fire; [and] (3) that the fire took some time to spread from the front of the barn—where the "hot wires" were located—to the back of the barn.

Id. at 598, 256 S.E.2d at 232. The plaintiffs also presented evidence which tended to negate the likelihood of other causes of the fire. *Id.*

Our Supreme Court affirmed the trial court's denial of the defendant's motion for a directed verdict on the theory of *res ipsa loquitur* and stated "[i]f the facts proven establish the more reasonable probability that the fire was electrical in origin, then the case cannot be withdrawn from the jury though all possible causes have not been eliminated." *Id.* at 597, 256 S.E.2d at 232.

Plaintiffs argue that *Snow* is "controlling." We disagree and find the factual backgrounds and analyses presented in *Maharias* and *Phelps* to be directly on point with the facts at bar.

Here, Greensboro Fire Department Inspector Myron E. Kenan ("Inspector Kenan") arrived at the scene of the fire and observed the building fully engulfed in flames. After the fire was extinguished, the building was deemed unsafe to enter. An investigation could not be immediately completed to determine the cause or origin of the fire. A month later, on 25 November 2003, Inspector Kenan returned to the site and conducted his investigation. Inspector Kenan discovered a

portion of the second floor was severely damaged and opined that the fire had originated in the right rear corner of that floor. Further investigation revealed "three generations of electrical wiring design" within the building.

Inspector Kenan photographed and examined all of the electrical panels located in the vicinity of the damaged portion of the second floor. Inspector Kenan's report specifically stated that he "did not find any prevalent indications of an electrical cause of the fire. However, with the extent of fire damage [he] [could not] determine that this fire was not electrical in nature."

Another member of the investigation team, "who ha[d] extensive knowledge of electrical service and equipment[,]" agreed with Inspector Kenan's findings. The fire investigation report further stated, "In addition to not being able to deduct all possible accidental causes[,] I cannot make a determination that this fire was or was not incendiary in nature." The cause of the fire was ultimately listed as "undetermined."

Although our Supreme Court has acknowledged that "the origin of a fire may be established by circumstantial evidence[,]" it has also stated, "[w]hether the circumstantial evidence is sufficient to take the case out of the realm of conjecture and into the field of legitimate inference from established facts, must be determined in relation to the attendant facts and circumstances of each case." *Snow*, 297 N.C. at 597, 256 S.E.2d at 232 (citations and quotations omitted). Here, plaintiffs' assertion that the evidence points to "an electrical fire originating from the right rear of [d]efendants' building" is "a mere conjecture, surmise and speculation as to the cause of the fire." *Maharias*, 257 N.C. at 768, 127 S.E.2d at 549.

The record is completely devoid of any evidence tending to support plaintiffs' assertion. Inspector Kenan and two other experts were unable to determine the origin of the fire. Plaintiffs' unsubstantiated and self-serving allegation that immediately prior to the fire, defendants' rear gutters *could have* allowed water to come into contact with electrical wiring is insufficient to submit the issue of defendants' negligence to the jury. *See Phelps*, 272 N.C. at 31, 157 S.E.2d at 724 ("In order to go to the jury on the question of defendant's negligence causing the fire, plaintiffs must not only show that the fire *might* have been started due to the defendant's negligence, but must show by reasonable affirmative evidence that it *did* so originate." (Emphasis original)).

Plaintiffs have failed to establish any inference that the alleged negligence by defendants was the actual or proximate cause of their injury. Because "[a] cause of action must be based on something more than a guess[,]" the trial court properly granted defendants' motion for summary judgment regarding this issue. *Maharias*, 257 N.C. at 768, 127 S.E.2d at 549. This assignment of error is overruled.

2. Corrective Action

[2] Plaintiffs also argue genuine issues of material fact exist regarding whether defendants negligently delayed taking corrective action to remedy the condition of their building after the fire occurred. Plaintiffs assert "water was seeping into Plaintiffs' property on account of Defendants' failure to demolish or repair what remained of their building[,]" which impeded repairs to the first floor of plaintiffs' building and caused a loss of potential rental income.

"In order to prevail in a negligence action, plaintiffs must offer evidence of the essential elements of negligence: duty, breach of duty, proximate cause, and damages." *Camalier v. Jeffries*, 340 N.C. 699, 706, 460 S.E.2d 133, 136 (1995) (citation omitted). Presuming *arguendo*, that plaintiffs could establish a duty and breach thereof, plaintiffs have once again failed to produce any evidence tending to show or to raise any inference that defendants' alleged negligence was the proximate cause of plaintiffs' injury.

It is a well established principle that "all damages must flow directly and naturally from the wrong, and that they must be certain both in their nature and *in respect to the cause from which they proceed.*" *People's Center, Inc. v. Anderson*, 32 N.C. App. 746, 748, 233 S.E.2d 694, 696 (1977) (citation omitted) (emphasis supplied). "[N]o recovery is allowed when resort to speculation or conjecture is necessary to determine whether the damage resulted from the unlawful act of which complaint is made or from some other source." *Id.* at 748-49, 233 S.E.2d at 696 (citation omitted).

During William Heroy's deposition he testified, "[a]ccording [to] the inspector, the water intrusion from [defendants'] existing building there penetrated the walls top to bottom." Plaintiffs' attorney also wrote a letter to defendants that asserted the condition of defendants' building after the fire was "allowing water runoff onto the property at 320 S. Elm Street[.]"

Plaintiffs have presented no evidence to support these allegations. The record on appeal contains no sworn affidavit from plain-

tiffs' supposed inspector nor any inspection report. The record is also completely devoid of any other evidence that tends to establish that defendants' delay in demolishing and/or repairing their building caused the moisture problems of which plaintiffs now complain.

Further, William Heroy, perhaps unknowingly, contradicted his earlier allegations by testifying that at the time of his deposition, the "water intrusion" was continuing to impact reconstruction even after the total demolition of defendants' former building was completed. Viewing the evidence in the light most favorable to plaintiffs, the trial court properly granted defendants' motion for summary judgment because speculation or conjecture would be required to determine whether the damage to plaintiffs' building resulted from defendants' delay in the demolition, plaintiffs' repairs to their building, or from some other source. *People's Center, Inc.*, 32 N.C. App. at 748-49, 233 S.E.2d at 696.

Plaintiffs' unsubstantiated and contradictory allegations are insufficient to establish any inference that defendants' alleged negligence was the actual or proximate cause of plaintiffs' injury. The trial court properly entered summary judgment in favor of defendants. This assignment of error is overruled.

IV. Conclusion

Plaintiffs failed to establish defendants' purported negligence, before or after the fire, provided a causal connection to plaintiffs' alleged damages. The trial court properly granted defendants' motion for summary judgment. The trial court's order is affirmed.

Affirmed.

Judges HUNTER and JACKSON concur.

STATE OF NORTH CAROLINA v. JOSHUA MONTEZ TUCK

No. COA07-697

(Filed 5 August 2008)

1. Discovery— cross-examination—referencing police report not produced during discovery—remand for findings

The trial court abused its discretion in a robbery with a dangerous weapon case by allowing the State during cross-examination of a defense witness to reference a police report that had not

been produced to defendant during discovery because: (1) the pertinent discovery statute, N.C.G.S. § 15A-903(a)(1), provided that the State's files that must be made available to defendant upon request, including defendant's statements, codefendants' statements, witness statements, investigating officers' notices, results of tests and examinations, or any other matter or evidence obtained during the investigation of the offenses alleged to have been committed by defendant; (2) in the instant case the statement was made by a one-time codefendant who later became a witness for defendant, and there was ample evidence the witness would be called to testify, thus putting the State on notice that information related to that witness would need to be turned over; (3) had defense counsel been made aware of the witness's prior inconsistent statement through a proper discovery disclosure, she might have engaged in an entirely different trial strategy including one that did not involve the witness testifying at all; and (4) when one piece of evidence that was not turned over to defendant after a proper request for it has the potential to fundamentally alter a defense strategy, the Court of Appeals may find prejudice. The case is remanded for an evidentiary hearing to determine when the investigating agency or prosecutor discovered or should have discovered the statement, and when they were aware or should have been aware of its relation to the charges brought against defendant.

2. Damages and Remedies— restitution—amount—sufficiency of evidence

The trial court erred in a robbery with a dangerous weapon case by ordering defendant to pay restitution in the amount of $1,500.00, and the case is remanded to the trial court for a new sentencing hearing, because: (1) although the trial court was not required to make findings of fact in this case, no evidence was presented indicating the appropriate amount of restitution; (2) although the prosecutor told the trial court that when the coparticipant pled guilty his sentence included $1,500 in restitution to the victim, prosecutorial statements are not evidence; and (3) there was no testimony from the victim or any other evidence presented at trial or sentencing to support the restitution amount.

Appeal by defendant from judgment entered 23 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 A. Cooper, III, by Special Deputy Attorney General Kay Linn Miller Hobart, for the State.

Irving Joyner for defendant-appellant.

HUNTER, Judge.

Joshua Montez Tuck ("defendant") appeals from a judgment entered upon a jury verdict finding him guilty of robbery with a dangerous weapon. Defendant was sentenced to a minimum term of sixty-four months' and a maximum term of eighty-six months' imprisonment. Defendant was also ordered to pay restitution. After careful consideration, we remand to the trial court to find facts regarding an alleged discovery violation and for resentencing.

The State presented evidence tending to show that in the early morning hours of 31 July 2006, Nazeeth Ewais was working as Director of Operation for Biraeh Security Services at the Longview Shopping Center ("the shopping center") in Raleigh, North Carolina. Mr. Ewais patrolled the shopping center in his vehicle. At around 1:00 a.m., as he sat eating his dinner in his vehicle, he observed two men walking across the parking lot. One of the men pointed a gun at Mr. Ewais and told him to get out of his vehicle and walk backwards. The other man walked to the driver's side, entered the vehicle, and picked up the keys. The man with the gun entered on the passenger side and they drove away.

The police located the van and gave chase. Ultimately, the van crashed, at which point the driver attempted to flee. The police secured the driver, Julius Cofield, but did not see a second individual occupying or fleeing the vehicle.

Ewais identified Cofield at the police station as one of the assailants. After reviewing a photo line-up of Cofield's known associates, Ewais then identified defendant as the second man who had robbed him. Defendant was thereafter charged with robbery with a dangerous weapon.

Based on the incident described above, Cofield was also charged with and pled guilty to robbery with a dangerous weapon, speeding to elude arrest, and assault on a law enforcement officer. Cofield testified on behalf of defendant at defendant's trial. Cofield stated that he alone had stolen the van and defendant was not with him. His testimony was consistent with his initial statements to police after he was arrested.

On direct examination, Cofield testified that he did not know defendant. On cross-examination, the prosecutor impeached Cofield with a statement that he had made on 30 July 2006, the day before the commission of the alleged crime, in which he told Officer Brian Neighbors that he knew defendant. Cofield's statement was formalized in a field interview report later that day. Defendant objected to its use at trial because the field interview report was not turned over to defendant after his timely request for discovery. The State argued that it was not in violation of the discovery statute as it had just received the document from the police moments before the cross-examination of Cofield.

Defendant presents the following issues for this Court's review: (1) whether the trial court erred in determining that the State was in compliance with the discovery statute, and (2) whether the trial court erred in requiring defendant to pay restitution.

I.

[1] Defendant argues the trial judge committed prejudicial error by allowing the State during cross-examination of a defense witness to reference a police report that had not been produced to defendant during discovery. We remand to the trial court to make factual findings as to this issue.

A trial court's rulings on discovery matters are reviewed for an abuse of discretion. *State v. Shannon*, 182 N.C. App. 350, 357, 642 S.E.2d 516, 522 (2007). An abuse of discretion will be found where the ruling was so arbitrary that it cannot be said to be the result of a reasoned decision. *Id.* " 'When discretionary rulings are made under a misapprehension of the law, this may constitute an abuse of discretion.' " *Id.* (quoting *Gailey v. Triangle Billiards & Blues Club, Inc.*, 179 N.C. App. 848, 851, 635 S.E.2d 482, 484 (2006)).

It is now well settled in North Carolina that the right to discovery is a statutory right. *Shannon*, 182 N.C. App. at 358, 642 S.E.2d at 522. The discovery statute in place at the time of defendant's trial provided in pertinent part that:

> (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 prose-

> cution 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. . . . Oral statements shall be in written or recorded form[.]

N.C. Gen. Stat. § 15A-903(a)(1) (2007) (emphasis added).[1]

The statute is clear as to what the term "file" includes: "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." N.C. Gen. Stat. § 15A-903(a)(1).[2] In the instant case, the statement was made by a one time co-defendant who later became a witness for defendant. Moreover, there was also ample evidence that the State was aware that Cofield would be called to testify, putting the State on notice that information related to Cofield would need to be turned over. Specifically, defendant's attorney stated during *voir dire* that "[w]e fully signaled to the State by the served witness list that we intended to call Julius Cofield and verbally at every point in this case." The prosecutor also stated that, "I certainly was aware that [defendant] intended to call Mr. Cofield."

The prosecutor, however, argued that she was "not aware of [any] requirement under the discovery statute . . . to provide to [defendant] evidence that impeaches [his] witness." The State was incorrect: The discovery statute, as stated above, quite clearly requires the State to turn over, *inter alia*, co-defendant and witness statements. Here, we have a statement made by a witness who was, at one time, a co-defendant. Clearly, the subject matter of the statement is within the term "file." That, however, does not end our inquiry.

Co-defendant and witness statements that have yet to be discovered by the State are not part of the "file" for purposes of the

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1. This statute has been amended subsequent to the 2005 version of the discovery statute cited in this opinion; however, this was the applicable law at the time of the trial.

2. The term "statement" includes assertions made to a State investigatory agency, whether those assertions are written, recorded, or oral. *Shannon*, 182 N.C. App. at 360, 642 S.E.2d at 524. There is no dispute as to whether Cofield's assertions were "statements" under the statute.

discovery statute. *State v. James*, 182 N.C. App. 698, 703-05, 643 S.E.2d 34, 37 (2007). It is partially on this ground that the State argues that this information was not part of the "file." However, once discoverable information is obtained, under N.C. Gen. Stat. § 15A-907 (2007), the State has a "continuing duty to disclose any evidence or witnesses discovered prior to or during trial." *James*, 182 N.C. App. at 703, 643 S.E.2d at 37. In the instant case, the State argues that it complied with this statute because the prosecutor turned over the document when she was handed it by the detective—in essence, arguing that it was not part of the "file" until the prosecutor received it. However, the requirement to disclose the "file" to defendant applies to "*all law enforcement and prosecutorial agencies*[.]" N.C. Gen. Stat. § 15A-903(a)(1) (emphasis added). Thus, for the purposes of the discovery statute the State is both the law enforcement agency and the prosecuting agency. Accordingly, the State would be in violation of the discovery statute if: (1) the law enforcement agency or prosecuting agency was aware of the statement or through due diligence should have been aware of it; and (2) while aware of the statement, the law enforcement agency or prosecuting agency should have reasonably known that the statement related to the charges against defendant yet failed to disclose it.

In the instant case, the trial court did not make a determination as to either issue. Instead, the trial court determined that the prior inconsistent statement was appropriate for impeachment purposes, an issue with which there is no dispute. The issue was whether the State complied with the discovery statute. There being no determination by the trial court on this critical issue, this Court remands for findings as to whether the State complied with N.C. Gen. Stat. § 15A-903(a)(1).

Finally, the State contends that even if there was a discovery violation, the evidence was such that defendant was not prejudiced. This determination is made based on the fact that Cofield's cell phone contained defendant's number. However, had defense counsel been made aware of Cofield's prior inconsistent statement through a proper discovery disclosure, she might have engaged in an entirely different trial strategy, one that did not involve Cofield testifying at all. Where one piece of evidence that was not turned over to defendant after a proper request for it has the potential to fundamentally alter a defense strategy, this Court may find prejudice. *See State v. Castrejon*, 179 N.C. App. 685, 695, 635 S.E.2d 520, 526 (2006), *appeal dismissed and disc. review denied*, 361 N.C. 222, 642

S.E.2d 709 (2007) (holding that "[l]ast minute or 'day of trial' production to the defendant of discoverable materials the State intends to use at trial is an unfair surprise and may raise constitutional and statutory violations").

Because there are insufficient findings by the trial court for this Court to determine whether the State complied with the discovery statute, we remand for an evidentiary hearing to determine when the investigating agency or prosecutor discovered or should have discovered the statement, and when they were aware or should have been aware of its relation to the charges brought against defendant.

II.

[2] Defendant argues the trial court erred when it ordered defendant to pay restitution. We agree.

Restitution awarded " 'by the trial court must be supported by evidence adduced at trial or at sentencing.' " *State v. Shelton*, 167 N.C. App. 225, 233, 605 S.E.2d 228, 233 (2004) (unsworn statement by prosecutor insufficient to support restitution amount) (quoting *State v. Wilson*, 340 N.C. 720, 726, 459 S.E.2d 192, 196 (1995)); *State v. Calvino*, 179 N.C. App. 219, 223, 632 S.E.2d 839, 843 (2006) (prosecutorial statements alone, without stipulation by defendant, did not support restitution awarded); *State v. Replogle*, 181 N.C. App. 579, 584, 640 S.E.2d 757, 761 (2007) (unsworn statements by prosecutor are not evidence); *State v. Cousart*, 182 N.C. App. 150, 154, 641 S.E.2d 372, 375 (2007) (amount of restitution was supported by witness testimony); *State v. Riley*, 167 N.C. App. 346, 349-50, 605 S.E.2d 212, 215 (2004) (amount of restitution was supported by witness testimony). "However, '[w]hen . . . there is some evidence as to the appropriate amount of restitution, the recommendation will not be overruled on appeal.' " *State v. Davis*, 167 N.C. App. 770, 776, 607 S.E.2d 5, 10 (2005) (alteration in original; citation omitted) (restitution award for $180.00 not disturbed where the victim testified that the money stolen from her pocketbook was between $120.00 and $150.00 dollars in cash and another witness involved in the robbery testified the pocketbook contained $240.00 in cash).

The statute governing determination of restitution explicitly states that "the court is not required to make findings of fact or conclusions of law on these matters." N.C. Gen. Stat. § 15A-1340.36(a) (2007). We agree with the State that the trial court was not required to make findings of fact in this case. However, we disagree that the

evidence at trial or sentencing was sufficient to support the restitution award.

At trial, no evidence was presented indicating the amount of restitution. At the sentencing phase, the prosecutor told the trial court that when Cofield pled guilty, his sentence included $1,500.00 in restitution to the victim. The trial court then ordered defendant to pay, as a condition of post-release supervision, if applicable, or from work release earnings, if applicable, restitution and attorneys' fees. The judgment referenced an attached restitution sheet which was incorporated by reference. The restitution worksheet indicated defendant was jointly and severally liable with Cofield for $1,500.00 in restitution.

Prosecutorial statements are not evidence. *Replogle*, 181 N.C. App. at 584, 640 S.E.2d at 761. Since there was no testimony by the victim or any other evidence presented at trial or sentencing to support the restitution amount of $1,500.00, we remand for a new sentencing hearing.

Since we remand to the trial court for further proceedings, we need not reach defendant's argument that "[t]he failure to sign the order is an independent basis for vacating this restitution order." Defendant's remaining assignments of error not brought forward on appeal are dismissed.

III.

In conclusion, we remand for the trial court to make factual findings to determine whether the State complied with the discovery statute. Because there was no evidence presented as to restitution, we also remand to the trial court for a new sentencing hearing.

Remanded.

Judges CALABRIA and STROUD concur.

[191 N.C. App. 776 (2008)]

STATE OF NORTH CAROLINA v. JAMEL SHERROD, DEFENDANT

No. COA07-1071

(Filed 5 August 2008)

Probation and Parole— revocation—possession of explosive device—firearm ammunition

The trial court erred by revoking defendant's probation for being in possession of an explosive device because: (1) firearm ammunition alone, absent a means to discharge it, is not an explosive device under N.C.G.S. § 15A-1343(b)(5); and (2) the term "explosive device" under N.C.G.S. § 15A-1343(b)(5) includes only those objects which may reasonably be interpreted as weapons in and of themselves.

Appeal by defendant from judgment dated 6 March 2007 by Judge Jerry Braswell in Wayne County Superior Court. Heard in the Court of Appeals 4 March 2008.

Attorney General Roy Cooper, by Assistant Attorney General Thomas M. Woodward, for the State.

Michelle FormyDuval Lynch for defendant-appellant.

BRYANT, Judge.

Jamel Sherrod (defendant) appeals from a judgment revoking his probation for being in possession of an "explosive device." Because we hold that firearm ammunition alone is not an "explosive device" as connoted in North Carolina General Statute 15A-1343(b)(5), we reverse defendant's conviction.

Facts

Defendant pled guilty to possessing cocaine with intent to sell or deliver on 11 December 2006 and was given a suspended sentence of ten to twelve months on condition that he satisfy the terms of his probation for thirty-six months. As a special condition, defendant was sentenced to the Intensive Supervision Program, and he informed the probation office of his temporary residence at his uncle's house in Fremont, North Carolina.

On 22 January 2007, six weeks after defendant's conviction, Probation Officer Merwyn Smith conducted an unannounced curfew

check at the Fremont location. Upon pulling his car into the driveway, Officer Smith watched defendant leave the doorway and close the door behind him on his way inside the house. Officer Smith knocked on the door asking to speak to defendant, but was greeted only by having the door slammed in his face twice. Officer Smith contacted the sheriff's department regarding defendant's suspicious behavior, and a decision was made to conduct a warrantless search pursuant to the special terms of defendant's probation.

Two sheriff's deputies arrived at the residence to assist, and defendant led them to his bedroom. In his drawer chest, a grocery bag was discovered containing .45 caliber hollow point bullets, a separate box of bullets missing several rounds, and a high capacity gun magazine containing about twenty-five nine millimeter bullets.

No firearms were found in defendant's living area, but a further search revealed a shotgun in the hall closet. Defendant's uncle claimed ownership, and no other firearms were found on the premises. Officer Smith filed a violation report the same day, and alleged defendant had breached a regular condition of his probation requiring him to "[p]ossess no firearm, explosive device or other deadly weapon."

A hearing was held on 5 and 6 March 2007 regarding the allegations of the report, and the trial court found that defendant was in constructive possession of an "explosive device" in violation of the regular terms of his probation. Judgment was announced in open court on 6 March 2007, and notice of appeal was given thereafter.

Defendant raises two assignments of error on appeal: (I) whether the trial court abused its discretion in revoking defendant's probation by finding him in possession of an "explosive device" when no evidence was offered to support a finding that a bullet is an "explosive device"; and, (II) whether the trial court erred in convicting defendant of a probation violation for possessing an "explosive device" when insufficient written findings were made to support such a conclusion. Because we hold that firearm ammunition, by itself, does not qualify as an "explosive device" as a matter of law under the first assignment of error, we need not address defendant's second assignment of error.

Standard of Review

Findings made in support of revoking probation must be supported by competent evidence, and will not be disturbed on appeal

without a showing that the trial court committed a "manifest abuse of discretion." *State v. Guffey*, 253 N.C. 43, 45, 116 S.E.2d 148, 150 (1960). Alleged violations of probationary conditions need not be proven beyond a reasonable doubt, rather, the evidence need only be sufficient to reasonably satisfy the judge in the exercise of his sound discretion that a valid condition of the suspended sentence has been violated. *State v. Tennant*, 141 N.C. App. 524, 526, 540 S.E.2d 807, 808 (2000). Probation will only be revoked if the State satisfies its burden of proof to show that defendant either willfully violated a term of probation or violated a condition without lawful excuse. *State v. Lucas*, 58 N.C. App. 141, 145, 292 S.E.2d 747, 750 (1982).

I

This appeal illustrates the balance between the trial court's obligation to punish a defendant's abuse of the grace extended to him and a defendant's right to rely on the terms of his probation. *State v. Hewett*, 270 N.C. 348, 352-53, 154 S.E.2d 476, 479 (1967). In this case, irrespective of defendant's actions, the abuse alleged does not rise to the level of a probation violation within the terms of the agreement between defendant and the State.

Our examination must begin by noting that the General Assembly has not defined "explosive device" within Chapter 15A, and other definitions of "explosive device" within our code are limited such that they do not apply to N.C.G.S. § 15A-1343. *See* N.C. Gen. Stat. § 14-50.1 (2007) (definition of "explosive or incendiary device or material" limited to Art. 13 of Ch. 14); N.C. Gen. Stat. § 14-72(b)(3) (2007) (separate definition of the term "explosive or incendiary device or substance" limited to section); N.C. Gen. Stat. § 14-288.20(a)(3) (2007) (term "explosive or incendiary device" limited to section). Therefore, absent a definition, it is unclear whether firearm ammunition of the type seized in this case qualifies as an "explosive device" under the regular term of probation contained in N.C.G.S. § 15A-1343(b)(5). As a result, our analysis of legislative intent will be guided by principles of statutory construction set forth by our North Carolina Supreme Court. *In re Banks*, 295 N.C. 236, 239-40, 244 S.E.2d 386, 389 (1978).

A. Statutory Construction

"If the language of the statute is ambiguous or lacks precision, or is fairly susceptible of two or more meanings, the intended sense of it may be sought by the aid of all pertinent and admissible considerations." *Abernethy v. Commissioners*, 169 N.C. 631, 636, 86 S.E. 577,

580 (1915). Proper considerations include "the law as it existed at the time of its enactment, the public policy of the State as declared in judicial opinions and legislative acts, the public interest, and the purpose of the act." *Kendall v. Stafford*, 178 N.C. 461, 469, 101 S.E. 15, 16 (1919).

Regarding criminal statutes in particular, our Supreme Court has held that the purpose of a statute will not:

> be extended by implication so as to embrace cases not clearly within its meaning. If there be reasonable doubt arising as to whether the acts charged to have been done, are within its meaning, the party of whom the penalty is demanded is *entitled to the benefit of that doubt. . . . [I]t must always be taken that penalties are imposed by the legislative authority only by clear and explicit enactments.* That is, the purpose to impose the penalty must clearly appear. Such enactments . . . must be construed strictly together, but as well . . . in the light of reason.

Hines & Battle v. Wilmington & W. R. Co., 95 N.C. 434, 438 (1886) (emphasis added). Moreover, statutes should be sensibly rather than liberally construed, and their meaning kept within the limits of what the words themselves allow. *Grocery Co. v. R. R.*, 170 N.C. 241, 243, 87 S.E. 57, 58 (1915). Because of these constrictions, where the existence of an omission by the legislature facilitates the exoneration of accused individuals, it is not the role of this Court to supply a remedy by "resort[ing] to strained constructions of criminal statutes." *State v. Massey*, 103 N.C. 356, 360, 9 S.E. 632, 633 (1889).

B. History of the Regular Conditions of Probation

The House Committee on Courts and Administration of Justice (the Committee) first considered the contents of what later became the current form of N.C.G.S. § 15A-1343(b)(5) in 1983. H. COMM. ON COURTS AND ADMIN. OF JUSTICE, Meeting Minutes at 1 (N.C. Apr. 12, 1983)[Meeting]. House Bill 455, otherwise titled "An Act to Establish Uniform Regular and Special Conditions of Probation," was proposed as part of a comprehensive effort by the Courts Commission (the Commission) to increase consistency, efficiency, and predictability in the North Carolina court system. REPORT OF THE COURTS COMM. TO THE N.C. GEN. ASSEMBLY (1983). Among other reforms, the purpose of the legislation was to provide to the trial court a set of regular conditions to be routinely imposed and a set of special conditions to be discretionarily imposed. *Id.* at 29.

One of the regular conditions proposed by the Commission and adopted into the first draft of H.B. 455 specified:

> [a]s [a] regular condition[] of probation, a defendant must: . . . (6) [p]ossess no firearm, destructive device or other dangerous weapon without the written permission of the court.

REPORT, *supra*, at App. K. At a meeting held on 12 April 1983, the Committee sent this condition along with the rest of H.B. 455 to the University of North Carolina Institute of Government (the IOG)[1] for further study. Meeting, *supra*, at 2.

On 25 April 1983, the IOG sent its recommendations back to the Committee, and proposed that the regular condition in issue be revised to state that defendant must "[p]ossess no firearm, explosive device or other deadly weapon listed in G.S. 14-269 without the written permission of the court." Memorandum from Jim Drennan, Institute of Government, to Robert Hunter, N.C. House Representative (Apr. 25, 1983) (on file with the Legislative Library of the N.C. General Assembly). In explaining why the language of this particular condition was changed, the IOG stated plainly: "[t]he regular condition prohibiting *possession of weapons* is rewritten to provide greater clarity[.]" *Id.* at 1 (emphasis added).

In May 1983, the IOG's version of H.B. 455 was adopted in its entirety by the Committee. H. COMM. ON COURTS AND ADMIN. OF JUSTICE, Meeting Minutes at 1 (N.C. May 3, 1983). Thereafter, the bill successfully navigated the labyrinth of the legislative process while retaining the exact language of the weapons provision proposed by the IOG, which remains the language at issue in this case. *See* N.C. Gen. Stat. § 15A-1343(b)(5) (2007).

C. Analysis

While the characterizations of the IOG, the Commission, and the Committee are hardly dispostive or binding on this Court, their comments nevertheless provide much needed historical context to the creation of N.C.G.S. § 15A-1343(b)(5). Specifically, it may reasonably be explicated from the legislative history that, from its inception to codification, the section in question was not meant to

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1. The Institute of Government, established in 1931 to provide support to North Carolina's state and local governments, became part of the University of North Carolina in 1942, and was subsumed into the U.N.C. School of Government in 2001. The 75th Anniversary of the School of Government. http://www.sog.unc.edu/75/index.htm.

include anything outside the category of "weapons." While we realize that reasonable minds may infer the section to include only "deadly weapons" in light of the surrounding terms "firearm" and "other deadly weapon listed in G.S. 14-269," we choose to apply a lower threshold for this analysis.

As apparent from the language proposed by the IOG, the purpose of N.C.G.S. § 15A-1343(b)(5) was not to include every type of weapon capable of creating some risk of harm. To the contrary, the language was narrowed to provide greater specificity as to what types of weapons would provoke the trial court's intervention in response to a probationer's offense. Accordingly, we similarly limit the term "explosive device" to include only those objects which may reasonably be interpreted as a "weapon" in and of themselves.

The term "weapon" is also not defined in Chapter 15A, and is subject to different interpretations within our statutes as well. *Cf.* N.C. Gen. Stat. § 14-269.2(a)(4) (2007) (bullets excluded from enumerated list of weapons); N.C. Gen. Stat. § 14-315(a) (2007) ("pistol cartridge" listed as weapon if sold to minor). However, "weapon" is generally defined as either "[a]n instrument of attack or defense in combat, as a gun or sword," *The American Heritage Dictionary* 1528 (3d ed. 1997), or "an instrument of offensive or defensive combat[;] something to fight with[;] something (as a club, sword, gun, or grenade) used in destroying, defeating, or physically injuring an enemy." *Webster's Third New International Dictionary Unabridged* 2589 (1993). Therefore, we conclude that firearm ammunition, absent a means to discharge it, does not qualify as a "weapon." Applying this limitation to N.C.G.S. § 15A-1343(b)(5), we similarly conclude that bullets in themselves are not included within the term "explosive device."

In this case, neither the history nor the actual language of N.C.G.S. § 15A-1343(b)(5) require us to include bullets within the definition of "explosive device," and it is not the role of this Court to contemplate creative scenarios by which firearm ammunition alone may somehow be used as a "weapon" within these definitions. *Massey*, 103 N.C. at 360, 9 S.E. at 633. Rather, we are bound by precedent to sensibly construe terms to remain within their meaning, and to resolve ambiguity in criminal statutes in favor of the defendant. *Grocery Co.*, 170 N.C. at 243, 87 S.E. at 58; *Hines & Battle*, 95 N.C. at 438.

Defendant argues that firearm ammunition does not qualify as an "explosive device" as the term is defined in North Carolina General

Statutes sections 14-50.1,[2] 14-72,[3] and 14-288.20.[4] Though perhaps this is a tempting approach to the issue, the General Assembly has nevertheless limited the scope of these definitions to their respective articles and sections. Because our holding is able to rest on the statute at issue, we decline to apply these sections outside the ambit of their stated purpose.

Based on the foregoing, we hold firearm ammunition does not qualify as an "explosive device" under N.C.G.S. § 15A-1343(b)(5), and conclude that the trial court erred in finding defendant in possession of an "explosive device" and revoking his probation as a result. Accordingly, the judgment is reversed.

REVERSED.

Judges WYNN and JACKSON concur.

STATE OF NORTH CAROLINA v. TIMOTHY CORNELL McDONALD

No. COA07-710

(Filed 5 August 2008)

1. Appeal and Error— preservation of issues—failure to raise constitutional issues at trial—waiver

Although defendant contends the trial court deprived him of his state and federal constitutional due process right by precluding his use of the defenses of voluntary intoxication and diminished capacity in an attempted first-degree murder and assault

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2. " '[E]xplosive or incendiary device or material' means nitroglycerine, dynamite, gunpowder, other high explosive, incendiary bomb or grenade, . . . or any other destructive incendiary or explosive device . . . used for destructive explosive or incendiary purposes against persons or property, when . . . some probability [exists] that such instrument . . . will be so used[.]" N.C.G.S. § 14-50.1.

3. " '[E]xplosive or incendiary device or substance' shall include any explosive or incendiary grenade or bomb; any dynamite, blasting powder, nitroglycerin, TNT, or other high explosive; or any device, . . . or quantity of substance primarily useful for large-scale destruction of property[.]" N.C.G.S. § 14-72(b)(3).

4. " '[E]xplosive or incendiary device' means (i) dynamite and all other forms of high explosives, (ii) any explosive bomb, grenade, missile, or similar device, and (iii) any incendiary bomb or grenade, fire bomb, or similar device[.]" N.C.G.S. § 14-288.20(a)(3).

with a deadly weapon with intent to kill inflicting serious injury case, this assignment of error is dismissed because defendant failed to raise these constitutional issues at trial, and thus, they are waived.

2. Discovery— sanction for violations—precluded defenses—voluntary intoxication—diminished capacity

The trial court did not abuse its discretion by precluding defendant's use of the defenses of voluntary intoxication and diminished capacity as a discovery violation sanction under N.C.G.S. § 15A-910 in an attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury case because: (1) although defendant was not allowed to assert these defenses, he was allowed to assert the defenses of duress and accident which were not disclosed under N.C.G.S. § 15A-905; and (2) the trial court's decision to allow defense to use two defenses demonstrated that it affirmatively exercised its discretion and precluded only those defenses that would have prejudiced the State.

3. Constitutional Law— effective assistance of counsel—failure to give notice of defenses of diminished capacity and voluntary intoxication

Defendant was not deprived of his state and federal constitutional right to effective assistance of counsel based on his attorney's failure to give notice to the State that he intended to assert the defenses of diminished capacity and voluntary intoxication in an attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury case because: (1) defendant failed to present substantial evidence of either voluntary intoxication or diminished capacity; and (2) there was no reasonable probability that the alleged error affected the outcome of the trial.

Appeal by defendant from judgments entered 1 September 2006 by Judge Robert H. Hobgood in Durham County Superior Court. Heard in the Court of Appeals 4 February 2008.

Attorney General Roy A. Cooper, III, by Assistant Attorney General K.D. Sturgis, for the State.

Glover & Petersen, P.A., by Ann B. Petersen, for defendant-appellant.

STEELMAN, Judge.

Where the imposition of sanctions by the trial court was not an abuse of discretion, and when defendant does not show that his counsel's performance was deficient or that any alleged deficiency was prejudicial, a new trial is not warranted.

I. Factual and Procedural Background

Cynthia Greene (Greene) and Timothy McDonald (defendant) were not married, but had a child together, Justin Greene. The relationship between Greene and defendant had deteriorated over the years due to the fact that defendant continued to live with his wife and children. On Sunday, 11 September 2005, defendant decided that Justin would go to his church to watch his daughter in a play. He went to Greene's church, without any prior notice, and demanded that Justin leave with him. An argument ensued in the church parking lot. The result of this argument was that defendant shot Greene seven times with a handgun and then fled with Justin to his church. Police arrived, and at one point defendant used Justin as a shield. Eventually defendant released the child and surrendered to police. In a statement to police, defendant asserted that the shooting was accidental.

Prior to the commencement of the trial on 28 August 2006, defendant entered pleas of guilty to five misdemeanor offenses arising out of the 11 September 2005 incident: going armed to the terror of the people; assault on a female; misdemeanor child abuse; assault inflicting serious injury with a minor present; and assault with a deadly weapon with a minor present. Defendant proceeded to trial before a jury on two felony charges: attempted first degree murder and assault with a deadly weapon with intent to kill inflicting serious injury. The jury found defendant guilty of the two felony charges. The misdemeanor charges were consolidated into two judgments and defendant was sentenced to two consecutive terms of 150 days imprisonment. On the felony charges, the trial court found defendant to be a prior felony record Level II, and sentenced defendant to an active term of 90 to 117 months imprisonment for the assault charge, and a second active sentence of 170 to 213 months imprisonment was imposed for the attempted first degree murder charge. Defendant appeals.

II. Preclusion of Defenses

In his first argument, defendant contends that the trial court abused its discretion and deprived him of his state and federal con-

stitutional due process right in precluding his use of the defenses of voluntary intoxication and diminished capacity as a discovery violation sanction. We disagree.

On the afternoon of the first day of trial, the State moved for an order precluding defendant from asserting any of the defenses covered by N.C. Gen. Stat. § 15A-905(c) on the ground that defendant had not responded to the State's reciprocal motions for discovery and for notice of defenses. Defense counsel stated that defendant intended to assert the defense of accident, and professed to be unaware of the State's motion for reciprocal discovery, suggesting that such a motion may have been served on defendant's prior counsel. The State produced four or five separate motions requesting notice of defenses, including some that had been served on defendant's trial counsel. The trial judge requested that defendant state for the record any defense that defendant intended to assert. Defense counsel stated that defendant intended to assert the defenses of accident and duress. The trial judge then specifically enumerated each of the other defenses set forth in N.C. Gen. Stat. § 15A-905(c)(1) that defendant would be precluded from asserting. At that time, defense counsel stated that defendant also wished to assert the defenses of diminished capacity and voluntary intoxication. The State objected to the assertion of any of the defenses listed in the statute on the basis of untimeliness and undue prejudice. The trial judge ruled that the defense would be permitted to assert the defenses of accident and duress, but was barred from asserting any other defense.

A. Preservation

[1] Defendant contends he was deprived of his right to due process under the state and federal constitutions and his constitutional right to present a defense.

Constitutional issues must be raised at trial. *State v. Tirado*, 358 N.C. 551, 571, 599 S.E.2d 515, 529 (2004). Since defendant failed to raise this issue at trial, he has waived appellate review based on constitutional grounds. *See id.*

B. Abuse of discretion

[2] Defendant next contends that the trial court abused its discretion in precluding him from asserting the defenses of voluntary intoxication and diminished capacity.

N.C. Gen. Stat. § 15A-905 provides that, if the State requests notice of defenses, defendant must provide notice of his or her in-

tent to use the defenses of "alibi, duress, entrapment, insanity, mental infirmity, diminished capacity, self-defense, accident, automatism, involuntary intoxication, or voluntary intoxication." N.C. Gen. Stat. § 15A-905(c) (2007). If defendant does not comply with § 15A-905, the trial court may apply various sanctions, listed in N.C. Gen. Stat. § 15A-910:

(1) Order the party to permit the discovery or inspection, or

(2) Grant a continuance or recess, or

(3) Prohibit the party from introducing evidence not disclosed, or

(3a) Declare a mistrial, or

(3b) Dismiss the charge, with or without prejudice, or

(4) Enter other appropriate orders.

N.C. Gen. Stat. § 15A-910(a) (2007). "Which of the several remedies available under that statute should be applied in a particular case is a matter within the trial court's sound discretion, not reviewable on appeal in the absence of a showing of an abuse of discretion." *State v. Morrow*, 31 N.C. App. 654, 658, 230 S.E.2d 568, 571 (1976), *cert. denied*, 297 N.C. 178, 254 S.E.2d 37 (1979), *overruled on other grounds*, 312 N.C. 198, 321 S.E.2d 864 (1984).

Defendant contends that his mental state at the time of the shooting was the central issue of the trial, and that precluding the defense of diminished capacity "went to the core of the defendant's challenge to the State's proof of the critical elements of the two felonies." Defendant argues that there is "more than a reasonable possibility" that the result of the trial would have been different had he been able to assert the defenses.

The record reveals that, although the trial court did not allow defendant to assert the defenses of voluntary intoxication or diminished capacity, defendant was allowed to assert the defenses of duress and accident, which were not disclosed pursuant to N.C. Gen. Stat. § 15A-905. The State acknowledged to the trial court that it had anticipated the accident defense. Further, unlike the diminished capacity and voluntary intoxication defenses, the defense of duress would not require substantial preparation on the part of the State, including the engagement of experts.

The trial court's decision to allow defendant to use two defenses demonstrates that it affirmatively exercised its discretion

and precluded only those defenses that would have prejudiced the State. We hold that the trial court's imposition of sanctions pursuant to N.C. Gen. Stat. § 15A-910 was not arbitrary and was not an abuse of discretion.

This argument is without merit.

III. Ineffective Assistance of Counsel

[3] In his second argument, defendant contends that he was deprived of his state and federal constitutional right to effective assistance of counsel when his attorney failed to give notice to the State that he intended to assert the defenses of diminished capacity and voluntary intoxication. We disagree.

A criminal defendant is guaranteed the right to be represented by counsel, and this right has been interpreted as the right to effective assistance of counsel. *United States v. Cronic*, 466 U.S. 648, 654, 80 L. Ed. 2d 657, 665 (1984). To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 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." *Id.* at 694, 80 L. Ed. 2d at 698. "[I]f a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient." *State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 248-49 (1985).

In the instant case, defendant cannot satisfy the two-part *Strickland* test. Even assuming *arguendo* that defense counsel erred by failing to give notice of the intent to rely on the diminished capacity and voluntary intoxication defenses, defendant cannot show that there is a reasonable probability that the outcome of the trial would have been different but for this alleged deficiency.

> To satisfy his burden in establishing voluntary intoxication as a defense to negate premeditation and deliberation, defendant must show substantial evidence that his mind and reason were so completely intoxicated and overthrown as to render him utterly

> incapable of forming a deliberate and premeditated purpose to kill. More importantly, the evidence must show that *at the time of the killing*, defendant was so intoxicated that he could not form specific intent. Evidence tending to show only that defendant drank some unknown quantity of alcohol over an indefinite period of time before the murder does not satisfy the defendant's burden of production.

State v. Long, 354 N.C. 534, 538, 557 S.E.2d 89, 92 (2001) (citations and quotations omitted). An instruction on diminished capacity is warranted where "evidence of defendant's mental condition is sufficient to cause a reasonable doubt in the mind of a rational trier of fact as to whether the defendant was capable of forming the specific intent to kill the victim at the time of the killing." *State v. Clark*, 324 N.C. 146, 163, 377 S.E.2d 54, 64 (1989).

Although defendant contends that he was entitled to a voluntary intoxication defense, the evidence at trial showed that on 10 September 2005, the night before the shooting, defendant drank one-half pint to a pint of liquor, took three Ambien sleeping pills, and smoked a joint of marijuana. The next morning, "after this wore off," defendant was able to get up and get dressed for church. Investigator A.C. Janes, who took a statement from defendant immediately after he was taken into custody, testified that defendant did not appear intoxicated, confused or sleepy, and appeared to be in possession of all of his faculties.

Defendant points to no evidence which he claims he was precluded from offering at trial. Even assuming *arguendo* that defendant had additional evidence of his intoxication or diminished capacity, we are unable to review this due to the fact that it was not preserved in the record for our review. *See State v. Simpson*, 314 N.C. 359, 370, 334 S.E.2d 53, 60 (1985).

Based on the evidence presented at trial, the record reveals that defendant would not have been able to satisfy his burden of showing voluntary intoxication. Given the time differential between the time defendant ingested the substances and the time of the offense, defendant had a sufficient amount of time to become sober before the shooting occurred. Defendant presented no toxicology expert, and no evidence suggests the degree of defendant's intoxication, if any, at the time of the shooting. Additionally, defendant woke up the morning of the shooting, got dressed, and drove to church. These actions show that he could think rationally, and was not so

intoxicated at the time of the shooting that he was "utterly incapable" of forming specific intent.

Likewise, the evidence presented of defendant's mental condition at the time of the shooting was insufficient to support a diminished capacity defense. *See Clark* at 163, 377 S.E.2d at 64.

Defendant failed to present substantial evidence of either voluntary intoxication or diminished capacity, and we hold that there is no reasonable probability that the alleged error of defense counsel affected the outcome of the trial. *See Braswell* at 563, 324 S.E.2d at 249.

This argument is without merit.

Defendant has failed to argue his remaining assignments of error, and they are deemed abandoned. N.C.R. App. P. Rule 28(b)(6) (2008).

NO ERROR.

Chief Judge MARTIN and Judge STEPHENS concur.

JOSEPH CALVIN WILSON, PLAINTIFF v. BARBARA BILTCLIFFE WILSON, DEFENDANT

No. COA07-1524

(Filed 5 August 2008)

1. Civil Procedure— summary judgment hearing—notice

The trial court did not err in a divorce case by concluding defendant wife received adequate and proper notice of the summary judgment hearing, even though defendant contends the notice of hearing only stated the date and not the time of the hearing, because: (1) defendant failed to show that she did not receive notice of hearing on plaintiff's motion for summary judgment at least ten days prior to the hearing as required by N.C.G.S. § 1A-1, Rule 56(c); and (2) plaintiff's notice of hearing was adequate in light of N.C.G.S. § 1A-1, Rule 56(c).

2. Divorce— absolute—subject matter jurisdiction—personal jurisdiction—proper notice and service

The district court did not lack subject matter jurisdiction and personal jurisdiction even though defendant wife contends she was not properly served with the summons and complaint prior

to the trial court's entry of absolute divorce because: (1) in regard to subject matter jurisdiction, the court found that plaintiff had been a citizen and resident of North Carolina for more than six months next preceding the institution of this action, and plaintiff and defendant have lived separate and apart for more than one year without resuming the marital relationship; (2) in regard to personal jurisdiction, plaintiff filed an affidavit of service by certified mail on 7 June 2007; (3) plaintiff's verified complaint contained allegations consistent with the trial court's order and was properly treated as an affidavit; and (4) competent evidence supported the court's unchallenged findings of fact.

Appeal by defendant from judgment entered 23 August 2007 by Judge Ben S. Thalheimer in Mecklenburg County District Court. Heard in the Court of Appeals 11 June 2008.

No brief filed by plaintiff.

Barbara Biltcliffe Wilson, pro-se, for defendant-appellant.

TYSON, Judge.

Barbara Biltcliffe Wilson ("defendant") appeals from judgment entered, which granted Joseph Calvin Wilson ("plaintiff") an absolute divorce from defendant. We affirm.

I. Background

Plaintiff and defendant were married on or about 14 June 1964 and separated on 30 July 2001. On 13 April 2006, plaintiff filed a verified complaint in which he sought "the bonds of matrimony heretofore existing between [p]laintiff and [d]efendant be dissolved, and that [p]laintiff and [d]efendant be granted an absolute divorce from each other." Plaintiff failed to achieve service of process on defendant after the issuance of summonses on 13 April 2006, 24 May 2006, 11 September 2006, 5 December 2006, 28 February 2007, and 24 April 2007.

On 1 August 2007, plaintiff alleged service of process was accomplished on 22 May 2007 and moved for summary judgment. The hearing for summary judgment was held 20 August 2007. The district court granted plaintiff an absolute divorce from defendant and filed its judgment on 23 August 2007. Defendant appeals.

II. Issues

Defendant argues the district court erred when it entered its judgment because: (1) defendant was not given proper notice of the summary judgment hearing and (2) the trial court lacked jurisdiction.

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. Notice

[1] Defendant asserts she did not receive adequate and proper notice of the summary judgment hearing because the notice of hearing only stated the date and not the time of the hearing. We disagree.

Motions for summary judgment are governed by Rule 56 of the North Carolina Rules of Civil Procedure. N.C. Gen. Stat. § 1A-1, Rule 56 (2007). "The motion shall be served at least 10 days before the time fixed for the hearing." N.C. Gen. Stat. § 1A-1, Rule 56(c). "Although Rule 56 makes no direct reference to notice of hearing, this Court has held that such notice also must be given at least ten (10) days prior to the hearing." *Barnett v. King*, 134 N.C. App. 348, 350, 517 S.E.2d 397, 399 (1999) (citing *Calhoun v. Wayne Dennis Heating & Air Cond.*, 129 N.C. App. 794, 800, 501 S.E.2d 346, 350 (1998), *disc. rev. denied*, 350 N.C. 92, 532 S.E.2d 524 (1999)).

Here, plaintiff filed his motion for summary judgment and notice of hearing on 1 August 2007. The notice of hearing states "that on the

20th day of Aug[ust], 2007 the [p]laintiff will request the Judge presiding in Courtroom No. 8110 of the Civil Courts Building to grant the relief requested in [p]laintiff's Motion for Summary Judgment, namely entry of a Judgment of Absolute Divorce." Attached to both the motion and notice were certificates of service signed by plaintiff's counsel on 31 July 2007.

Defendant has failed to show that she did not receive notice of hearing on plaintiff's motion for summary judgment "at least ten (10) days prior to the hearing." *Barnett*, 134 N.C. App. at 350, 517 S.E.2d at 399. Plaintiff's notice of hearing was adequate and proper in light of Rule 56(c) of the North Carolina Rules of Civil Procedure. This assignment of error is overruled.

V. Service of Process

[2] Defendant argues the district court lacked subject matter and personal jurisdiction because she was not properly served with the summons and complaint prior to the trial court's entry of absolute divorce. We disagree.

A. Subject Matter Jurisdiction

"The district court division is the proper division without regard to the amount in controversy, for the trial of civil actions and proceedings for . . . divorce . . . ." N.C. Gen. Stat. § 7A-244 (2005). "In North Carolina, subject matter jurisdiction for divorce involves not only bringing the matter in the correct court, but also the court's finding residence by one of the parties for the requisite length of time and verification of the pleadings." 2 Suzanne Reynolds, *Lee's North Carolina Family Law* § 7.25, at 88 (5th ed. 1999) (citations omitted); *see also* N.C. Gen. Stat. §§ 50-6, -8 (2005).

Here, plaintiff filed a verified complaint with the Mecklenburg County District Court. The district court found: (1) "[p]laintiff has been a citizen and resident of the State of North Carolina for more than six months next preceding the institution of this action[]" and (2) "[p]laintiff and [d]efendant have lived separate and apart for more than one year next preceding the institution of this action without resuming the marital relationship." The district court's findings are supported by plaintiff's verified complaint, which may be treated as an affidavit. *See Page v. Sloan*, 281 N.C. 697, 705, 190 S.E.2d 189, 194 (1972) ("A verified complaint may be treated as an affidavit if it (1) is made on personal knowledge, (2) sets forth such facts as would be admissible in evidence, and (3) shows affirmatively that

the affiant is competent to testify to the matters stated therein." Citations omitted)).

The district court properly exercised jurisdiction over the subject matter of the parties' divorce action. N.C. Gen. Stat. §§ 7A-244, 50-6, 50-8. This assignment of error is overruled.

B. Personal Jurisdiction

Defendant asserts the district court did not acquire personal jurisdiction over her. We disagree.

> In any action commenced in a court of this State having jurisdiction of the subject matter and grounds for personal jurisdiction as provided in G.S. 1-75.4, the manner of service of process within or without the State shall be as follows:
>
> (1) Natural Person.—Except as provided in subsection (2) below, upon a natural person by one of the following:
>
> . . . .
>
> c. By mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the party to be served, and delivering to the addressee.

N.C. Gen. Stat. § 1A-1, Rule 4(j) (2007).

> Where the defendant appears in the action and challenges the service of the summons upon him, proof of the service of process shall be as follows:
>
> . . . .
>
> (4) Service by Registered or Certified Mail.—In the case of service by registered or certified mail, by affidavit of the serving party averring:
>
> a. That a copy of the summons and complaint was deposited in the post office for mailing by registered or certified mail, return receipt requested;
>
> b. That it was in fact received as evidenced by the attached registry receipt *or other evidence satisfactory to the court of delivery to the addressee*; and
>
> c. That the genuine receipt *or other evidence of delivery is attached.*

N.C. Gen. Stat. § 1-75.10 (2007) (emphasis supplied).

Here, plaintiff filed an affidavit of service by certified mail on 7 June 2007. The affidavit stated that "copies of a Civil Summons and Complaint were deposited in the U.S. Post Office for mailing by certified mail, return receipt requested, addressed to [defendant] . . . ." Attached to plaintiff's affidavit was: (1) a receipt for certified mail which showed item number 7160 3901 9848 8335 2054 was mailed on 3 May 2007 and (2) a track/confirm sheet from the U.S. Post Office which indicated item number 7160 3901 9848 8335 2054 was delivered to and signed for by defendant on 22 May 2007 at 11:36 a.m.

It is clear from plaintiff's affidavit of service by certified mail and attachments thereto with defendant's signature appearing thereon that the summons and complaint were personally served upon defendant pursuant to Rule 4(j)(1)(c) of the North Carolina Rules of Civil Procedure.

Our holding is also consistent with other jurisdictions, which have held service to be sufficient when reviewing facts similar to those at bar. *See In re Estate of Riley*, 847 N.E.2d 22, 27 (Ohio Ct. App. 2006) ("A signed return receipt constitutes evidence of delivery pursuant to Civ.R. 4.1(A), but the rule does not bar introduction of other evidence to establish certified mail delivery." (Citation omitted)); *see also Lauer v. City of New York*, 656 N.Y.S.2d 93 (1997); *compare Connally v. Connally*, 233 S.W.3d 168, 171-72 (Ark. App. 2006) ("We see no evidence in the record that [the defendant] signed for the package or that the [third party] was [the defendant's] authorized agent, and, during oral argument, [the plaintiff's] counsel could not direct us to any such evidence. We therefore agree with the trial court that [the defendant] was not served by commercial delivery.").

The district court properly exercised personal jurisdiction over defendant. This assignment of error is overruled.

VI. Sufficiency of the Evidence

N.C. Gen. Stat. § 50-6 states:

> Marriages may be dissolved and the parties thereto divorced from the bonds of matrimony on the application of either party, if and when the husband and wife have lived separate and apart for one year, and the plaintiff or defendant in the suit for divorce has resided in the State for a period of six months.

In its order granting plaintiff an absolute divorce from defendant, the district court found: (1) "[p]laintiff has been a citizen and resident

of the State of North Carolina for more than six months next preceding the institution of this action[]" and (2) "[p]laintiff and [d]efendant have lived separate and apart for more than one year next preceding the institution of this action without resuming the marital relationship." These findings are supported by allegations asserted in plaintiff's verified complaint.

"A verified complaint may be treated as an affidavit if it (1) is made on personal knowledge, (2) sets forth such facts as would be admissible in evidence, and (3) shows affirmatively that the affiant is competent to testify to the matters stated therein." *Page*, 281 N.C. at 705, 190 S.E.2d at 194 (citations omitted). Here, plaintiff's verified complaint meets the elements articulated by our Supreme Court in *Page*, contains allegations consistent with the trial court's order and was properly treated as an affidavit. 281 N.C. at 705, 190 S.E.2d at 194.

Further, defendant has not assigned any error to these findings. "Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal." *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) (citations omitted). Uncontradicted and competent evidence supports the district court's findings of fact, which in turn support its conclusion to grant plaintiff an absolute divorce from defendant.

VII. Conclusion

Defendant received adequate and proper notice of the hearing on plaintiff's motion for summary judgment "at least ten (10) days prior to the hearing." *Barnett*, 134 N.C. App. at 350, 517 S.E.2d at 399; N.C. Gen. Stat. § 1A-1, Rule 56(c).

The district court of Mecklenburg County properly exercised subject matter and personal jurisdiction over the parties' divorce action and defendant, respectively. Competent evidence supports the district court's unchallenged findings of fact. The district court found and concluded plaintiff had met all statutory requirements and properly granted plaintiff an absolute divorce from defendant. The judgment appealed from is affirmed.

Affirmed.

Judges HUNTER and JACKSON concur.

STATE OF NORTH CAROLINA v. ERIC THERNELL OAKMAN

No. COA07-929

(Filed 5 August 2008)

1. Child Abuse and Neglect— felonious child abuse—plain error analysis—instruction—additional theory of intentional assault proximately resulting in serious bodily injury

The trial court did not commit plain error in a felonious child abuse case by allegedly instructing the jury on a theory of guilt not alleged in the indictment, even though defendant contends the instructions included the theory of intentional injury but impermissibly included an additional theory of intentional assault which proximately resulted in serious bodily injury, because: (1) the intent to commit the act is the gravamen of the offense, and whether defendant intended the assault and not the serious bodily injury was immaterial; (2) the trial court instructed the jury it could find defendant guilty of felonious child abuse if it found that he intentionally inflicted a serious bodily injury to the child or intentionally assaulted the child which proximately resulted in serious bodily injury; and (3) the instruction did not provide the jury with a materially distinct ground to find defendant guilty.

2. Child Abuse and Neglect— felonious child abuse—plain error analysis—instruction—intent—culpable or criminal negligence

The trial court did not commit plain error in a felonious child abuse case by instructing the jury that it could find the requisite intent supporting the charge through actual intent to inflict injury or culpable or criminal negligence from which such intent may be implied because: (1) contrary to defendant's contention, there is no authority requiring a showing of actual intent or a mens rea greater than culpable or criminal negligence to convict for felonious child abuse, and culpable or criminal negligence may satisfy the intent requirement of felonious child abuse; and (2) the evidence tended to show that defendant shook the child in such a manner as to inflict upon the child a subdural hematoma and bilateral retinal hemorrhages.

Appeal by defendant from judgment entered 8 February 2007 by Judge Russell J. Lanier, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 20 February 2008.

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

Russell J. Hollers, III for defendant-appellant.

BRYANT, Judge.

Defendant appeals from a judgment entered after a jury verdict found him guilty of felonious child abuse. We find no error in the jury instructions and therefore affirm the judgment of the trial court.

The evidence presented at trial tended to show that Defendant Eric Oakman fathered two children with Sharee Baldwin. When Ms. Baldwin was at work, defendant cared for the children. After some time, one of the children, a three month old, appeared to sleep less and cry more often. The child began to experience seizures, and Ms. Baldwin took the child to the hospital.

Dr. Ronald Murray Perkin, Chief of Pediatrics at Pitt County Memorial Hospital and Director of the Children's Hospital, testified that the child suffered from a fractured wrist; old and new subdural hematomas; and bi-lateral retinal hemorrhaging, as a result of being severely shaken. Dr. Elaine Cabinum-Foeller, an expert in pediatric medicine and child abuse, also concluded that "somebody hurt [the child]" on more than one occasion.

New Hanover County Superior Court issued an indictment against defendant alleging "defendant . . . unlawfully, willfully, and feloniously did intentionally inflict serious bodily injury, subdural hematoma and bi-lateral retinal hemorrhages" on the child.

At trial, police officer Alejandra Sotelo, a juvenile investigator with the Wilmington Police Department and Rich Ohmer, a social worker with the New Hanover County Department of Social Services, testified to statements defendant made during a pre-trial interview. Ohmer and Officer Sotelo testified that defendant said he was working in his house, but the child would not stop crying. He tried to silence the child and admitted that he "[h]andled [the child] too hard, he was too soft for [defendant] to be handling, . . . [defendant] didn't realize [he] made him like that." Defendant stated that, "[he] got agitated and [he] put [the child] down rough . . . [He] was too rough with him. [He] didn't mean to hurt [the child] . . . [he] thought he was strong like [defendant] but he[] [was] too little."

The trial judge instructed the jury that for them to find defendant guilty of felonious child abuse, they must find defendant "intention-

ally inflicted serious bodily injury to the child or intentionally assaulted the child which proximately resulted in serious bodily injury . . . ." The trial court further instructed that the jury could find the requisite intent supporting felonious child abuse through "actual intent to inflict injury or culpable or criminal negligence from which such intent may be implied." The jury found defendant guilty. The trial court entered judgment and commitment against defendant for felonious child abuse and placed him in the custody of the North Carolina Department of Corrections for a minimum term of 100 months to a maximum term of 129 months. Defendant appeals.

Defendant presents two issues on appeal: (I) Whether the trial court erred in instructing the jury on a theory of guilt not stated in the indictment; and (II) whether the instructions allowed the jury to convict defendant without finding an element of the crime.

I

[1] Defendant argues the trial court erred in instructing the jury on a theory of guilt not alleged in the indictment. The indictment charged defendant with "intentionally inflict[ing] serious bodily injury" to the child. Defendant, who did not object at trial, argues on appeal that the jury instructions included the theory of "intentional injury" as stated in the indictment and impermissibly included an additional theory of "intentional assault which proximately resulted in serious bodily injury." We disagree.

A defendant who does not object to jury instructions at trial will be subject to a plain error standard of review on appeal. *State v. Goforth*, 170 N.C. App. 584, 587, 614 S.E.2d 313, 315 (2005).

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where [the error] is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.

State v. Cummings, 361 N.C. 438, 470, 648 S.E.2d 788, 807 (2007) (emphasis and brackets in original) (citation omitted). "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. Smith*, 162 N.C. App. 46, 51, 589 S.E.2d 739, 743 (2004) (citation omitted). "[T]he failure of the allegations to conform to the equivalent material aspects of the jury charge represents a fatal variance, and renders the indictment insufficient to support that resulting conviction." *State v. Williams*, 318 N.C. 624, 631, 350 S.E.2d 353, 357 (1986) (citation omitted). But, in determining whether a variance is fatal, we must be mindful of the purposes served by the indictment, including that of enabling the defendant to prepare for trial. *See State v. Farrar*, 361 N.C. 675, 677, 651 S.E.2d 865, 866 (2007) (citation omitted).

Under North Carolina General Statute section 14-318.4(a3), titled "Child abuse a felony,"

> [a] parent or any other person providing care to or supervision of a child less than 16 years of age who intentionally inflicts any serious bodily injury to the child or who intentionally commits an assault upon the child which results in any serious bodily injury to the child, or which results in permanent or protracted loss or impairment of any mental or emotional function of the child, is guilty of a Class C felony.

N.C. Gen. Stat. § 14-318.4(a3) (2006). The evil the legislature seeks to prevent is the performance of a act upon a child, by one charged with the care of the child, inflicting serious bodily injury. *See Id.* § 14-318.4(a3); *see also State v. Hartness*, 326 N.C. 561, 567, 391 S.E.2d 177, 180 (1990) (with the crime of indecent liberties the evil the legislature sought to prevent was the performance of any immoral, improper, or indecent act in the presence of a child for the purpose of gratifying sexual desire). Defendant's intent to commit the act is the gravamen of the offense. *See Hartness*, 326 N.C. at 567, 391 S.E.2d at 180. Whether defendant intended the assault and not the serious bodily injury is immaterial. *See id.*; *see also State v. Chapman*, 154 N.C. App. 441, 445, 572 S.E.2d 243, 246 (2002) ("felonious child abuse does not require the State to prove any specific intent on the part of the accused.") (citation and quotations omitted).[1]

1. "Specific-intent crimes are crimes which have as an essential element a specific intent that a result be reached." *State v. Pierce*, 346 N.C. 471, 494, 488 S.E.2d 576, 589 (1997) (citation and internal quotations omitted).

Here, the indictment charges defendant with felony child abuse. It states "defendant . . . unlawfully, willfully, and feloniously did intentionally inflict serious bodily injury" to his child in violation of N.C.G.S. § 14-318.4(a3). The trial court instructed the jury they could find defendant guilty of felonious child abuse if they found that defendant "intentionally inflicted a serious bodily injury to the child or intentionally assaulted the child which proximately resulted in serious bodily injury . . . ."

This jury instruction did not provide the jury with a materially distinct ground on which to find defendant guilty. Defendant has failed to show plain error, and we overrule this assignment of error.

II

[2] Defendant next questions whether the trial court erred by instructing the jury that it could find the requisite intent supporting felonious child abuse through "actual intent to inflict injury *or* culpable or criminal negligence from which such intent may be implied." (Emphasis added). Citing *State v. Jones*, 353 N.C. 159, 538 S.E.2d 917 (2000), for the proposition that felonious child abuse requires a showing of "actual intent on the part of the perpetrator," *Id.* at 168, 538 S.E.2d at 925, defendant contends the trial court's instructions were in error because the crime of felonious child abuse cannot be proven by culpable or criminal negligence. We disagree.

As previously stated, because defendant failed to object to the jury instructions during trial, we review for plain error. *See Goforth*, 170 N.C. App. at 587, 614 S.E.2d at 315.

Our Supreme Court has stated that in proving felonious child abuse "[t]he State is not required to prove that the defendant specifically intended that the injury be serious." *Pierce*, 346 N.C. at 494, 488 S.E.2d at 589 (citations, internal quotations, and brackets omitted). Moreover, the State is not required to prove any specific intent on the part of the accused. *Chapman*, 154 N.C. App. at 445, 572 S.E.2d at 246. "Specific-intent crimes are crimes which have as an essential element a specific intent that a result be reached." *Pierce*, 346 N.C. at 494, 488 S.E.2d at 589 (citations and internal quotations omitted).

"General-intent crimes are crimes which only require the doing of some act." *Id.* And, though general intent or specific intent crimes require a level of actual intent greater than culpable or criminal negligence, *Jones*, 353 N.C. at 167, 538 S.E.2d at 924, culpable negligence can satisfy the intent requirement for certain crimes, *Id.* at 168-69, 538

S.E.2d at 925. *See State v. Eason*, 242 N.C. 59, 65, 86 S.E.2d 774, 778 (1955) (culpable negligence implying intent sufficient to uphold conviction for assault with a deadly weapon); *State v. Sudderth*, 184 N.C. 753, 114 S.E. 828 (1922) (culpable negligence can sustain a conviction of manslaughter).

"Culpable or criminal negligence has been defined as such recklessness or carelessness, proximately resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others." *Jones*, 353 N.C. at 165, 538 S.E.2d at 923 (citation omitted). Defendant argues *Jones* stands for the proposition that felonious child abuse requires a showing of "actual intent on the part of the perpetrator." *Id.* at 168, 538 S.E.2d at 925. However, *Jones* analyzes the *mens rea* required for a conviction of first-degree murder under the felony murder rule and which felonies can support such conviction. *Jones*, 353 N.C. 159, 538 S.E.2d 917. In doing so, *Jones* includes felonious child abuse in a catchall grouping of felonies that, if serving as an underlying felony *for purposes of the felony murder rule*, must be proven with a *mens rea* of specific intent. This does not imply a conviction for felonious child abuse is limited to a showing of actual intent when it is not the predicate offense to first degree murder under the felony murder rule. *Jones* does not hold as defendant would argue, and we do not find any authority which requires a showing of actual intent or a *mens rea* greater than culpable or criminal negligence to convict for felonious child abuse.

As previously discussed, the evil the legislature seeks to prevent with a statute punishing felonious child abuse is the performance of an act upon a child, by one charged with the care of the child, which inflicts serious bodily injury. *See* N.C.G.S. § 14-318.4 (2006). We hold culpable or criminal negligence may satisfy the intent requirement of felonious child abuse.

In the present case, the trial court instructed the jury that

> [i]ntent may be actual intent to inflict injury or culpable or criminal negligence from which such intent may be implied. Culpable or criminal negligence is defined as such recklessness or carelessness proximately resulting in injury as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others.

The evidence presented at trial tended to show defendant shook the child in such a manner as to inflict upon the child a subdural

hematoma and bilateral retinal hemorrhages. Defendant has failed to show plain error, and accordingly, we overrule this assignment.

No error.

Judges HUNTER and JACKSON concur.

NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, PLAINTIFF v. KONSTANTIN MNATSAKANOV, LIANA MNATSAKANOV, AMIRAN MNATSAKANOV AND MELISSA C. MCCALISTER, DEFENDANTS

No. COA07-1004

(Filed 5 August 2008)

1. Appeal and Error— preservation of issues—appellate rules violations—assignments of error abandoned

Defendant's assignments of error that violated N.C. R. App. P. 28(b)(6) were not considered and were deemed abandoned.

2. Insurance— homeowners—effective date of restriction—dog bite

The trial court erred by entering summary judgment for plaintiff insurance company because a genuine issue of material fact existed as to whether a restriction of coverage for a homeowners policy for any occurrence caused by insured's dog became effective on the date the restriction was signed by the insured or on the date of the policy's renewal and thus whether the policy covered a claim under the homeowners policy for a dog bite that occurred after the restriction was signed but before the renewal date.

Appeal by defendant from order entered 2 May 2007 by Judge Linwood O. Foust in Mecklenberg County Superior Court. Heard in the Court of Appeals 20 February 2008.

Baucom, Claytor, Benton, Morgan & Wood, P.A., by Rex C. Morgan, for plaintiff-appellee.

Price, Smith, Hargett, Petho & Anderson, by Wm. Benjamin Smith, for defendant-appellant.

BRYANT, Judge.

Defendants Konstantin Mnatsakanov, Liana Mnatsakanov, Amiran Mnatsakanov, and Melissa McCalister appeal from an order granting summary judgment for Nationwide Mutual Fire Insurance Company. For the reasons stated herein, we reverse and remand this case to the trial court.

On 15 July 2005, Konstantin Mnatsakanov received a letter from Nationwide notifying him that his Homeowner's Policy would not renew on 31 October 2005 because he had a Rottweiler dog on the premises. On 15 July 2005, Konstantin Mnatsakanov met with Nationwide agent Gary Griffith and requested that his policy not be cancelled on 31 October 2005 but that it be renewed. After contacting Nationwide Underwriting, Griffith advised Konstantin that the policy would be renewed if Konstantin agreed to a restriction of coverage for any occurrence caused by his dog as set forth on the "Restriction of Individual Policies" (Endorsement H-7030A). Konstantin agreed to the restriction. Both he and Griffith signed the "Restriction of Individual Policies" on 15 July 2005. The "Restriction of Individual Policies," (H-7030-A) exempted from coverage any claim brought against the insured "caused by any animal, owned or in the care of the insured." However, the restriction did not state an effective date.

Melissa McCalister filed a claim for personal injuries that occurred 13 October 2005 when she was bitten by a dog owned by the Mnatsakanovs. The Mnatsakanovs requested coverage under the Nationwide policy for the claim asserted by McCalister. Nationwide filed a Declaratory Judgment action naming the Mnatsakanovs and McCalister as defendants and asking the trial court to determine if the insurance policy covered McCalister's claim. Nationwide thereafter moved for summary judgment asking the trial court to find as a matter of law that the policy excluded coverage for the dog bite injury suffered by McCalister on the Mnatsakanov's property.

The trial court found that the effective date of the "Restriction of Individual Policies" was 15 July 2005, the date it was signed by Nationwide Policyholder Konstantin Mnatsakanov and Nationwide agent Gary Griffith. The trial court found that in exchange for agreeing to the restriction, Nationwide promised not to cancel the Mnatsakanov's policy on 31 October 2005 but renew the Policy for another year. The trial court found that Nationwide's agreement to not cancel the Mnatsakanov's policy on 31 October 2005 and renew

the policy for another year constituted adequate consideration for the Restriction of Individual Policies signed by Mr. Mnatsakanov and Nationwide Agent Griffith.

Based on those findings, the trial court concluded that the effective date of the modification of the Nationwide Policy as set forth in the "Restriction of Individual Policies" was 15 July 2005; the renewal of the policy from 31 October 2005 through 31 October 2006 constituted adequate consideration for the 15 July 2005 modification of the policy; and the language set forth in the "Restriction of Individual Policies" effectively excluded any liability coverage or medical payments coverage for injuries sustained by McCalister. On these grounds, the trial court granted summary judgment in favor of Nationwide.

Konstantin Mnatsakanov, Liana Mnatsakanov, Amiran Mnatsakanov and Melissa McCalister (collectively "defendants") appealed.

Defendants present six issues on appeal: whether the trial court committed reversible error by (I) granting summary judgment for Nationwide; (II) finding as fact that the effective date of the endorsement of the "Restriction of Individual Policies" was 15 July 2005; (III) finding as fact that Nationwide agreed not to cancel the Mnatsakanov's policy in exchange for signing the restriction on 15 July 2005; (IV) finding that no coverage existed for Melissa McCalister's injury claim; (V) concluding that the effective date of the restriction on the policy was 15 July 2005; and (VI) finding that the renewal of the policy was consideration for restricting the policy on the date it was signed.

[1] Because the dispositive issue is whether there was a genuine issue of material fact as to the effective date of the endorsement of the "Restriction of Individual Policies," and because many of defendant's other issues violate our appellate rules, we do not reach those other issues. *See* N.C.R. App. P. 28(b)(6) (2007) ("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, are deemed abandoned").

Standard of Review

Where a motion for summary judgment has been granted, the two critical questions on appeal are whether, on the basis of the materials presented to the trial court, (1) there is no genuine issue of material

fact, and (2) the moving party is entitled to judgment as a matter of law. *North River Ins. Co. v. Young*, 117 N.C. App. 663, 667, 453 S.E.2d 205, 208 (1995).

> 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). Moreover, the evidence presented by the parties must be viewed in the light most favorable to the non-movant. *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998). "Review of summary judgment on appeal is necessarily limited to whether the trial court's conclusion as to these questions of laws were correct ones." *Young*, 117 N.C. App. at 667, 453 S.E.2d at 208. Hence, the standard of review of an order granting summary judgment is de novo. *Diggs v. Novant Health, Inc.*, 177 N.C. App. 290, 294, 628 S.E.2d 851, 855 (2006).

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[2] Defendants argue the trial court erred by finding and concluding that the effective date of the "Restriction of Individual Policies" was 15 July 2005. We agree.

"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." *Gould Morris Elec. Co. v. Atlantic Fire Ins. Co.*, 229 N.C. 518, 520, 50 S.E.2d 295, 297 (1948). "It is essential to the formation of any contract that there be mutual assent of both parties to the terms of the agreement so as to establish a meeting of the minds." *Creech v. Melnik*, 347 N.C. 520, 527, 495 S.E.2d 907, 911-12 (1998). "This rule of contract law is founded on the proposition that there can be no contract without a meeting of the minds." *Cunningham v. Brown*, 51 N.C. App. 264, 270, 276 S.E.2d 718, 723 (1981). "Whether mutual assent is established and whether a contract was intended between parties are questions for the trier of fact." *Creech*, 347 N.C. at 527, 495 S.E.2d at 911.

In the instant case, defendants contend that the "Restriction of Individual Policies" was written to apply beginning on 31 October 2005, the renewal date of the policy. There was no indication on the "Restriction of Individual Policies" form as to when the exclusion would take effect. Nationwide agent Griffith testified in his deposi-

tion that "the practice of Nationwide would be to send a letter to the insured letting him know that his coverage is continued." Griffith stated he knew Nationwide had the ability to non-renew a policy, but not whether they had the right to cancel the policy immediately. When asked if there was any correspondence regarding renewal of coverage, he said, "renewal notices may or may not be in the file [for the Mnatsakanovs]." Agent Griffith also testified that he "could not answer for Nationwide if it was a requirement that the exclusion take effect in July for a renewal date in October."

To the contrary, Nationwide argues that the "Restriction of Individual Policies" was effective on 15 July 2005, the day Konstantin Mnatsakanov signed the exclusion. Nationwide argues Konstantin Mnatsakanov understood verbally and in writing, that the agreement was effective immediately. In his deposition, Agent Griffith testified that "it was explained to Mr. Mnatsakanov that effective immediately, 15 July 2005, there is no coverage for the dog, and he verbally expressed that he understood." Moreover, Griffith testified that "Konstantin Mnatsakanov was informed by the underwriter while he was in the office that if he was willing to sign an endorsement provided by Nationwide, which he understood completely, there would be no coverage with his signature for any liability involving the dog." In summary, Nationwide argues that Griffith's testimony provided that the exclusion signed 15 July 2005 was effective immediately because "the dog was a danger to society; [to] families living around the Mnatsakanovs; the sooner that Konstantin understood what would be covered and not covered, the better he understood it took place immediately."

Because the "Restriction of Individual Policies" excluded any liability for a claim or suit brought against an insured for any occurrence involving a dog and its effective date bears upon the determination that the Mnatsakanov's Nationwide insurance policy covers damages for the dog bite injury to McCalister, we believe a genuine issue of material fact exists as to when the "Restriction of Individual Policies" was effective. Accordingly, we reverse the trial court's grant of summary judgment and remand for further proceedings.

Reversed and remanded.

Judges HUNTER and JACKSON concur.

IN RE: WILL OF FANNIE J. HARTS

No. COA07-1523

(Filed 5 August 2008)

1. Appeal and Error— appealability—lack of subject matter jurisdiction—untimely appeal

The Court of Appeals did not have subject matter jurisdiction in a contested will case to consider caveator's purported appeal from a judgment and order filed 21 May 2007, and the appeal related to the 21 May 2007 judgment is dismissed, because: (1) there was nothing in the record indicating that caveator was not properly served with a copy of the judgment within the prescribed period under N.C.G.S. § 1A-1, Rule 3; and (2) caveator did not file notice of appeal until 10 August 2007, which was over two months after the judgment.

2. Appeal and Error— appealability—timely appeal

Caveator's notice of appeal on 10 August 2007 of the order taxing caveator with costs and attorney fees in a contested will case did not violate the thirty day mandate because it was entered on 24 July 2007.

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

Although caveator contends that the trial court abused its discretion in a contested will case by taxing all costs and $25,000 in attorney fees to caveator, this assignment of error is dismissed because caveator failed to make any substantive argument, or cite any law, supporting his argument as required by N.C. R. App. P. 28(b)(6).

Appeal by caveator from judgment and order entered 17 May 2007 and order entered 24 July 2007 by Judge Russell J. Lanier, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 14 May 2008.

Terry B. Richardson, for caveator-appellant.

Carter & Carter, P.A., by James Oliver Carter, for propounder-appellee.

JACKSON, Judge.

Fannie Harts (decedent) died testate 19 March 2004. In her will, she left a few minor specific bequests, then disposed of the remainder of her estate through a residuary clause. Fifty percent of her residuary went to Vernie and Woodruff Allen (propounders), ten percent went to decedent's sister, Julia Thompson (Thompson), and the remainder was divided equally among four churches. Decedent's will was executed on 5 February 2004, and served to revoke an earlier will, executed on 20 March 1999, which would have left decedent's entire estate to Thompson. Thompson filed a caveat to decedent's will, executed on 16 August 2004, alleging the 5 February 2004 will was procured through the undue influence of the propounders, and that decedent lacked the testamentary capacity to legally execute it. Thompson died 4 September 2005, and by order filed 6 September 2006, the trial court ordered Robert Pugh ("caveator") to be substituted as caveator. By motion filed 24 May 2006, propounders moved for summary judgment. Summary judgment was denied by order filed 6 June 2006. The instant cause was heard before a jury at the 30 April 2007 civil session of New Hanover County Superior Court. At the close of caveator's evidence, propounders moved in open court for directed verdict, and the trial court granted the directed verdict on the issues of testamentary capacity and undue influence. The sole remaining issues for the jury were whether the contested will had been executed according to the requirements of North Carolina law, and whether the document presented by propounders was the will of decedent.

The jury answered "yes" to both these issues on 3 May 2007. The trial court entered its judgment and order 21 May 2007, including both its directed verdict and the jury verdict, but the trial court did not address the issues of costs and attorneys fees at that time. The parties' motions for costs and attorney's fees were heard 25 June 2007. By order filed 24 July 2007, the trial court awarded propounders costs in the amount of $6,228.05, and attorney's fees in the amount of $25,000.00. On 10 August 2007 caveator filed his notice of appeal for both the 21 May 2007 judgment and order, and the 24 July 2007 order.

[1] The dispositive issue for the majority of caveator's issues on appeal is whether this Court has jurisdiction to consider his purported appeal from the judgment and order filed 21 May 2007. We are constrained to hold that we do not.

Subject matter jurisdiction may not be waived, and this Court has the power and the duty to determine issues of jurisdiction *ex mero motu*, and to dismiss an appeal if we find it lacking. *Reece v. Forga*, 138 N.C. App. 703, 704-05, 531 S.E.2d 881, 882 (2000). Rule 3 of the North Carolina Rules of Appellate Procedure states in relevant part:

> Appeal in civil cases—How and when taken.
>
> (a) *Filing the notice of appeal.* Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties within the time prescribed by subdivision (c) of this rule.
>
> . . . .
>
> (c) *Time for taking appeal.* In civil actions and special proceedings, a party must file and serve a notice of appeal:
>
> (1) within 30 days after entry of judgment if the party has been served with a copy of the judgment within the three-day period prescribed by Rule 58 of the Rules of Civil Procedure . . . .

There is nothing in the record on appeal indicating that caveator was not properly served with a copy of the judgment within the prescribed three-day period. Failure to adhere to the dictates of Rule 3 requires dismissal of the appeal:

> In order to confer jurisdiction on the state's appellate courts, appellants of lower court orders must comply with the requirements of Rule 3 of the North Carolina Rules of Appellate Procedure. Appellate Rule 3 is jurisdictional and if the requirements of this rule are not complied with, the appeal must be dismissed. This Court cannot waive the jurisdictional requirements of Rule 3 if they have not been met. Under Rule 3(a) of the Rules of Appellate Procedure, a party . . . may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties in a timely manner. This rule is jurisdictional.

Henlajon, Inc. v. Branch Hwys., Inc., 149 N.C. App. 329, 331, 560 S.E.2d 598, 600-01 (2002) (internal citations and quotations omitted); *see also Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 197-98, 657 S.E.2d 361, 365 (2008).

[2] Because caveator did not file notice of appeal until 10 August 2007—over two months after the 21 May 2007 judgment—this notice of appeal is in violation of Rule 3 and requires dismissal of the appeal insofar as it relates to that 21 May 2007 judgment. Because the trial court's order taxing caveator with costs and attorney's fees was entered on 24 July 2007, caveator's notice of appeal did not violate the thirty day mandate for that order, and this Court has jurisdiction to decide those issues.

We note that in the recent case of *McClure v. County of Jackson*, 185 N.C. App. 462, 648 S.E.2d 546 (2007), this Court addressed the apparent confusion at the trial level as to whether an appeal from a judgment of the trial court divested that court of jurisdiction to consider the issues of costs and attorney's fees until after the appeal had run its course. The *McClure* Court held that it did,[1] opining:

> While we understand that the interests of judicial economy would clearly be better served by allowing the trial court to enter an order on attorney's fees and then having the matter come up to the appellate courts as a single appeal, we cannot create jurisdiction for the trial court to enter the award of attorney's fees in violation of N.C. Gen. Stat. § 1-294. When faced with the possibility of an award of attorney's fees, the better practice is for the trial court to defer entry of the written judgment until after a ruling is made on the issue of attorney's fees, and incorporate all of its rulings into a single, written judgment. This will result in only one appeal, from one judgment, incorporating all issues in the case.

McClure, 185 N.C. App. at 471, 648 S.E.2d at 551-52. Though we understand it might be desirable for an appellant to wait until all issues, including attorney's fees, have been settled before entering notice of appeal—to facilitate a speedier final resolution of all matters in his action, and for simplification of the appellate process—*McClure* did not address the requirements of Rule 3; this Court has no authority to alter the requirements of the Appellate Rules of this State; and we have no choice but to dismiss when the jurisdictional requirements of Rule 3 have not been met. *Henlajon*, 149 N.C. App. at 331, 560 S.E.2d at 600-01. In the instant case, when the judgment was entered before the issues of costs and attorney's fees had been settled, the only

1. Except in limited circumstances, e.g., caveat cases. *See McClure*, 185 N.C. App. at 462, 648 S.E.2d at 551; *In re Will of Dunn*, 129 N.C. App. 321, 329-30, 500 S.E.2d 99, 104-05 (1998).

course of action was for caveator to appeal the 21 May 2007 judgment pursuant to the dictates of Rule 3.

We note, because this is a will caveat case, the trial court may have had jurisdiction to decide the costs and fees issues if caveator had properly appealed from the 21 May 2007 judgment, and that appeal was still pending, *McClure*, 185 N.C. App. 462, 471-72, 648 S.E.2d at 551; *see also Dunn*, 129 N.C. App. at 329-30, 500 S.E.2d at 104-05. However, in most situations, the trial court must wait until a case has been remanded from the appellate courts to address costs and attorney's fees, if they were not addressed as part of the initial judgment. *McClure*, 185 N.C. App. at 471, 648 S.E.2d at 550. We strongly agree with the *McClure* Court that "the better practice is for the trial court to defer entry of the written judgment until after a ruling is made on the issue of attorney's fees, and incorporate all of its rulings into a single, written judgment." *Id.* at 471-72, 648 S.E.2d at 551-52. This course of action will serve to eliminate a host of jurisdictional traps and black holes at both the trial and appellate levels.

[3] In caveator's fourth and fifth arguments, for which timely notice of appeal was filed, he contends the trial court erred in taxing all costs, and $25,000.00 in attorney's fees, to him. We disagree.

The taxing of costs and the awarding of attorney's fees in caveat proceedings are within the discretion of the trial court. *Dunn*, 129 N.C. App. at 330, 500 S.E.2d at 105.

In his brief, caveator makes general statements concerning the merits of his case. He does not, however, make any substantive argument, nor cite any law, supporting his argument that the trial court abused its discretion in these matters. This constitutes a gross violation of Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure, and subjects these arguments to dismissal.

APPEAL DISMISSED.

Judges McGEE and ELMORE concur.

IN THE MATTER OF: K.W.

No. COA07-1472

(Filed 5 August 2008)

Juveniles— delinquency—subject matter jurisdiction—failure to file petitions within mandatory period

The trial court lacked subject matter jurisdiction in a juvenile delinquency case arising out of injury to personal property, and the judgment is vacated, because: (1) the juvenile court counselor failed to file the petitions within the period mandated by N.C.G.S. § 7B-1703(b); and (2) although the statute allows an extension of fifteen additional days at the discretion of the chief court counselor, the record failed to demonstrate that the chief court counselor granted such an extension.

Appeal by juvenile from an order entered 5 September 2007 by Judge John B. Carter, Jr. in Robeson County District Court. Heard in the Court of Appeals 1 April 2008.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Daniel S. Hirschman, for the State.

Richard Croutharmel, for juvenile respondent-appellant.

JACKSON, Judge.

K.W. ("the juvenile") appeals from an order of the trial court entered 5 September 2007 adjudicating the juvenile delinquent. For the following reasons, we vacate the 5 September 2007 order.

The instant case involves injury to personal property—two automobiles owned by Lady Cummings—on 13 May 2007, with which the juvenile was charged. The matter was referred to the North Carolina Department of Juvenile Justice and Delinquency Prevention. The juvenile court counselor prepared petitions, which were verified by the investigating officer on 26 June 2007, and received by the juvenile court counselor for review that same date. The juvenile court counselor filed the petitions on 12 July 2007, sixteen days after they were verified.

On 5 September 2007, the trial court adjudicated the juvenile delinquent and ordered the juvenile (1) to be placed on twelve months of juvenile probation; (2) to cooperate with services recommended by the juvenile court counselor; (3) to pay $500.00 in restitu-

tion if he qualifies and is eligible for the restitution program; (4) not to have contact with Lady Cummings, or Amy Cummings and Howard Pearce (two additional witnesses who were in Lady Cummings' home at the time of the vandalism), or their real or personal property; and (5) to submit to drug and alcohol testing. The juvenile filed timely notice of appeal.

On appeal, the juvenile first contends that the trial court lacked subject matter jurisdiction to adjudicate him delinquent on the grounds that the juvenile court counselor failed to file the petitions within the period mandated by statute. We agree.

"The timely filing of a petition seeking judicial action is jurisdictional." *In re J.B.*, 186 N.C. App. 301, 303, 650 S.E.2d 457 (2007). "In reviewing a question of subject matter jurisdiction, our standard of review is *de novo*." *In re K.A.D.*, 187 N.C. App. 502, 503, 653 S.E.2d 427, 428 (2007). With respect to delinquency actions, this Court recently explained that:

> The pleading in a juvenile action is the petition alleging delinquency or dependency. An action in juvenile court is commenced by the filing of a petition in the clerk's office or by a magistrate's acceptance of a petition for filing when the clerk's office is not open. When a juvenile court counselor receives a complaint regarding a juvenile, the counselor is required to evaluate the complaint and determine whether a petition should be filed. The counselor is required to make this determination within fifteen days of receipt of the complaint, with an extension for a maximum of fifteen additional days at the discretion of the chief court counselor, thereby giving the counselor a maximum total of thirty days. [I]f the juvenile court counselor determines that a complaint should be filed as a petition, the counselor shall file the petition as soon as practicable, but in any event within 15 days after the complaint is received, with an extension for a maximum of 15 additional days at the discretion of the chief court counselor. Thus, the petition must be filed within, at a maximum, thirty days after receipt of the complaint.

J.B., 186 N.C. App. at 302, 650 S.E.2d at 458; *see also* N.C. Gen. Stat. § 7B-1703 (2007).

In the instant case, the petitions were filed sixteen days after the juvenile court counselor received the complaint—one day beyond the statutory fifteen days mandated by North Carolina General Statutes, section 7B-1703(b). Although the statute allows an exten-

sion of fifteen additional days at the discretion of the chief court counselor, *see Id.*, the record in the instant case fails to demonstrate that the chief court counselor granted such an extension.

One of the stated purposes of our Juvenile Code is: "To provide uniform procedures that assure fairness and equity; that protect the constitutional rights of juveniles, parents, and victims; and that encourage the court and others involved with juvenile offenders to proceed with all possible speed in making and implementing determinations required by this Subchapter." N.C. Gen. Stat. § 7B-1500(4) (2008). Concerning the evaluation of complaints filed in juvenile court, the Juvenile Code mandates:

> (a) The juvenile court counselor shall complete evaluation of a complaint within 15 days of receipt of the complaint, with an extension for a maximum of 15 additional days at the discretion of the chief court counselor. The juvenile court counselor shall decide within this time period whether a complaint shall be filed as a juvenile petition.
>
> (b) Except as provided in G.S. 7B-1706 [which is not relevant to the instant case], if the juvenile court counselor determines that a complaint should be filed as a petition, the counselor shall file the petition as soon as practicable, but in any event within 15 days after the complaint is received, with an extension for a maximum of 15 additional days at the discretion of the chief court counselor. The juvenile court counselor shall assist the complainant when necessary with the preparation and filing of the petition, shall include on it the date and the words "Approved for Filing", shall sign it, and shall transmit it to the clerk of superior court.

N.C. Gen. Stat. § 7B-1703 (2008). Failure to comply with the requirements of this statute divests the trial court of jurisdiction, and thus any order of disposition entered following a violation of the requirements of section 7B-1703 must be vacated. *J.B.*, 186 N.C. App. at 302-03, 650 S.E.2d at 458.

The State argues that because the petition was filed within thirty days of the receipt of the complaint, the trial court had jurisdiction to decide the matter. The State's position would require us to presume the chief juvenile court counselor exercised his or her discretion to extend the fifteen-day period mandated by the statute to the maximum thirty-day period allowed by the statute with no evidence to support that presumption. Were we to adopt the State's reading of section

7B-1703, and presume a proper exercise of discretion without any proof of such, and thus without any means of determining whether that discretion has been abused, we would eviscerate the language of 7B-1703 mandating the filing of the petition within fifteen days of filing the complaint. The State's interpretation effectively would extend the fifteen-day mandate to thirty days, without any means to check the chief counselor's discretion, in contravention of the express language of 7B-1703.

We must give full effect to the plain language of a statute. *In re R.L.C.*, 361 N.C. 287, 292, 643 S.E.2d 920, 924 (2007) (citations omitted). Furthermore, in interpreting a statute, we must presume the legislature meant for every word and provision to have meaning, and that our interpretation, if possible, does not render any provision meaningless. *In re Robinson*, 172 N.C. App. 272, 275, 615 S.E.2d 884, 887 (2005) (citations omitted).

Construing 7B-1703 in its entirety, as we must, we hold that the chief juvenile court counselor is required to provide some indication that he or she properly exercised discretion in extending the fifteen-day period mandated to the thirty-day maximum, and do so in a manner which allows the trial and appellate courts of this state some meaningful review of that decision. Because the juvenile court counselor failed to file the petition within the fifteen-day period following the filing of the complaint as mandated by 7B-1703, the trial court lacked jurisdiction to decide this matter. We must, therefore, vacate the disposition order entered in the instant case.

VACATED.

Judges WYNN and BRYANT concur.

EULA P. STREET, PLAINTIFF v. BASIL W. STREET, DEFENDANT

No. COA07-1452

(Filed 5 August 2008)

1. Appeal and Error— appealability—denial of summary judgment—final judgment on merits

Plaintiff's arguments in a divorce case regarding the order denying her claim for summary judgment were not considered because the Court cannot consider an appeal of the denial of a

summary judgment motion once a final judgment on the merits has been made.

2. Divorce— equitable distribution—property contract—affirmative defense catchall provision

The trial court erred in a divorce case by disregarding a property contract on the basis that it must have been pled as an affirmative defense under the catchall provision in N.C.G.S. § 8C-1, Rule 8(c) because: (1) the contract governing property is not an affirmative defense, but instead was a piece of evidence to be considered in settling the action for equitable distribution; (2) no counterclaim was brought by defendant to which an affirmative defense would need to be made; (3) it would not have been appropriate for plaintiff to specifically plead an affirmative defense when defendant neither disputed the property contract nor brought any new claim of his own; and (4) the trial court cited to neither statutory nor case law to support its holding, and the Court of Appeals found none.

3. Divorce— equitable distribution—validity of property contract—findings of fact

A divorce case is remanded to the trial court so that the validity of the property contract and any other evidence as to equitable distribution may be considered because: (1) the trial court made no findings of fact in any of its orders as to the validity of the property contract; and (2) the record reflected no evidence on the question.

Appeal by plaintiff from orders entered 26 September 2005, 23 August 2006, and 22 August 2007 by Judge Mike Gentry in Person County District Court. Heard in the Court of Appeals 14 May 2008.

Manning, Fulton & Skinner, P.A., by Michael S. Harrell, for plaintiff-appellant.

No brief for defendant-appellee.

HUNTER, Judge.

Eula P. Street ("plaintiff") appeals from three orders pertaining to her divorce from Basil W. Street ("defendant"). After careful review, we reverse and grant a new trial.

Plaintiff and defendant married in 1985. In 1989, the parties entered into a contract ("the property contract") stating that each party

"release[d], renounce[d], and quitclaim[ed] all interest in any real property hereafter acquired by [other party]." The parties separated in 1997 and were divorced in 1999. Equitable distribution proceedings were then instigated.

In 2005, plaintiff moved for summary judgment on her claim for equitable distribution. That motion was denied on 26 September 2005; that order is one of the three from which plaintiff appeals.

On 23 August 2006, the court filed an order holding that the property contract constituted an "affirmative defense" and therefore "should have been specifically pled by Plaintiff." Because it was not, the trial court classified the parties' former home as marital property for purposes of equitable distribution. This is the second order from which plaintiff appeals.

A final equitable distribution order was filed on 22 August 2007. Therein, plaintiff was ordered to pay defendant $14,500.00—half the total equity the couple had in the marital home—"for his interest in the marital property of the parties[.]" This is the final order from which plaintiff appeals.

[1] As to plaintiff's arguments regarding the order denying plaintiff's claim for summary judgment, we note only that "[t]his Court cannot consider an appeal of denial of the summary judgment motion now that a final judgment on the merits has been made[.]" *WRI/Raleigh, L.P. v. Shaikh*, 183 N.C. App. 249, 252, 644 S.E.2d 245, 246 (2007). We therefore do not consider plaintiff's arguments as to that order.

[2] As to the other two orders, plaintiff's argument in essence is that the court erred in (1) holding that the property contract must have been pled as an affirmative defense and (2) refusing to give the property contract effect on that basis. Because we agree with the first, we do not address the second.

In its August 2006 order holding that the property contract must have been pled as an affirmative defense, the court states that the contract was "improperly and untimely filed" because it was "an affirmative defense within the meaning of Rule 8(c) of the North Carolina Rules of Civil Procedure such that it should have been specifically pled by Plaintiff." [R p. 51] Rule 8(c) lists twenty-one specific affirmative defenses that must be pled, none of which apply in this case. N.C. Gen. Stat. § 1A-1, Rule 8(c) (2007). Following this list is the following catch-all: "[A]ny other matter constituting an avoidance or affirmative defense." *Id.* There are two errors in the trial court's con-

clusion that this catch-all applies to the property contract at issue in this case. First, the contract governing property is not an affirmative defense; rather, it is a piece of evidence to be considered in settling the action for equitable distribution. Second, and more important, no counterclaim was brought by defendant to which an affirmative defense would need to be made. Plaintiff brought an action for equitable distribution, and defendant filed an answer admitting almost all of plaintiff's allegations and asking only for visitation and "such orders of equitable distribution as is [*sic*] appropriate." He neither disputed the property contract nor brought any new claim of his own. As such, it would not have been appropriate for plaintiff to specifically plead an affirmative defense.

This appears to be the only basis on which the trial court disregarded the property contract—that is, that the property contract was not timely filed because it was an affirmative defense. The trial court cited only to Rule 8(c) in support of this holding, and as discussed above, that rule does not apply. The trial court cited to neither statutory nor case law to support the holding, and this Court has found none. Thus, the property contract was improperly disregarded by the trial court.

[3] The next question, then, is whether the property contract is valid. We cannot make such a determination on the record before us; the trial court made no findings of fact in any of its orders as to the validity of the property contract, and the record reflects no evidence on the question. As such, we remand this case to the trial court so that the validity of the property contract—and any other evidence as to equitable distribution—may be considered.

Reversed; new trial.

Judges STEELMAN and STEPHENS concur.

APPENDIX

ORDER ADOPTING THE
2009 NORTH CAROLINA RULES
OF APPELLATE PROCEDURE

ORDER ADOPTING THE 2009 NORTH CAROLINA RULES OF APPELLATE PROCEDURE

These rules are promulgated by the Court under the rule-making authority conferred by Article IV, Section 13(2) of the Constitution of North Carolina. They shall be effective with respect to all appeals taken from the courts of the trial division to the courts of the appellate division; in appeals in civil and criminal cases from the Court of Appeals to the Supreme Court; in direct appeals from administrative agencies, boards, and commissions to the appellate division; and in applications to the courts of the appellate division for writs and other relief which the courts or judges thereof are empowered to give. As to such appeals, these rules supersede the North Carolina Rules of Appellate Procedure, 287 N.C. 672 (1975), as amended. These rules shall be effective on the 1st day of October, 2009, and shall apply to all cases appealed on or after that date.

Appendixes, as revised, are published with the rules for their possible helpfulness to the profession. Although authorized to be published for this purpose, they are not an authoritative source on parity with the rules.

Adopted by the Court in Conference this 2nd day of July, 2009. These rules shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals and shall 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

NORTH CAROLINA RULES OF APPELLATE PROCEDURE

Adopted 13 June 1975, with amendments received
through 2 July 2009.

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NORTH CAROLINA RULES OF APPELLATE PROCEDURE

ARTICLE I
APPLICABILITY OF RULES

RULE 1
TITLE; SCOPE OF RULES; TRIAL TRIBUNAL DEFINED

(a) *Title.* The title of these rules is “North Carolina Rules of Appellate Procedure.” They may be so cited either in general references or in reference to particular rules. In reference to particular rules the abbreviated form of citation, “N.C. R. App. P. ___,” is also appropriate.

(b) *Scope of Rules.* These rules govern procedure in all appeals from the courts of the trial division to the courts of the appellate division; in appeals in civil and criminal cases from the Court of Appeals to the Supreme Court; in direct appeals from administrative agencies, boards, and commissions to the appellate division; and in applica-

tions to the courts of the appellate division for writs and other relief which the courts or judges thereof are empowered to give.

(c) *Rules Do Not Affect Jurisdiction.* These rules shall not be construed to extend or limit the jurisdiction of the courts of the appellate division as that is established by law.

(d) *Definition of Trial Tribunal.* As used in these rules, the term "trial tribunal" includes the superior courts, the district courts, and any administrative agencies, boards, or commissions from which appeals lie directly to the appellate division.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 27 November 1984—1(a), (c)—effective 1 February 1985.
Reenacted and
Amended: 2 July 2009—added 1(a) and renumbered remaining subsections—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 2
SUSPENSION OF RULES

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.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Reenacted: 2 July 2009—effective 1 October 2009 and applies to all cases appealed on or after that date.

ARTICLE II

APPEALS FROM JUDGMENTS AND ORDERS OF SUPERIOR COURTS AND DISTRICT COURTS

RULE 3
APPEAL IN CIVIL CASES—HOW AND WHEN TAKEN

(a) *Filing the Notice of Appeal.* Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding may take appeal by filing

notice of appeal with the clerk of superior court and serving copies thereof upon all other parties within the time prescribed by subsection (c) of this rule.

(b) *Special Provisions.* Appeals in the following types of cases shall be taken in the time and manner set out in the General Statutes and appellate rules sections noted:

(1) Juvenile matters pursuant to N.C.G.S. § 7B-2602; the identity of persons under the age of eighteen at the time of the proceedings in the trial division shall be protected pursuant to Rule 3.1(b).

(2) Appeals pursuant to N.C.G.S. § 7B-1001 shall be subject to the provisions of Rule 3.1.

(c) *Time for Taking Appeal.* In civil actions and special proceedings, a party must file and serve a notice of appeal:

(1) within thirty days after entry of judgment if the party has been served with a copy of the judgment within the three day period prescribed by Rule 58 of the Rules of Civil Procedure; or

(2) within thirty days after service upon the party of a copy of the judgment if service was not made within that three day period; provided that

(3) if a timely motion is made by any party for relief under Rules 50(b), 52(b) or 59 of the Rules of Civil Procedure, the thirty day period for taking appeal is tolled as to all parties until entry of an order disposing of the motion and then runs as to each party from the date of entry of the order or its untimely service upon the party, as provided in subdivisions (1) and (2) of this subsection (c).

In computing the time for filing a notice of appeal, the provision for additional time after service by mail in Rule 27(b) of these rules and Rule 6(e) of the N.C. Rules of Civil Procedure shall not apply.

If timely notice of appeal is filed and served by a party, any other party may file and serve a notice of appeal within ten days after the first notice of appeal was served on such party.

(d) *Content of Notice of Appeal.* The notice of appeal required to be filed and served by subsection (a) of this rule shall specify the party or parties taking the appeal; shall designate the judgment or order from which appeal is taken and the court to which appeal is taken; and shall be signed by counsel of record for the party or par-

ties taking the appeal, or by any such party not represented by counsel of record.

(e) *Service of Notice of Appeal.* Service of copies of the notice of appeal may be made as provided in Rule 26.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 14 April 1976;
8 December 1988—3(a), (b), (c), (d)—effective for all judgments of the trial tribunal entered on or after 1 July 1989;
8 June 1989—3(b)—effective for all judgments of the trial tribunal entered on or after 1 July 1989;
28 July 1994—3(c)—1 October 1994;
6 March 1997—3(c)—effective upon adoption 6 March 1997;
18 October 2001—3(c)—effective 31 October 2001;
1 May 2003—3(b)(1), (2);
6 May 2004—3(b)—effective 12 May 2004;
27 April 2006—3(b)—effective 1 May 2006 and applies to all cases appealed on or after that date.
Reenacted and
Amended: 2 July 2009—amended 3(b)—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 3.1
APPEAL IN QUALIFYING JUVENILE CASES—HOW AND WHEN TAKEN; SPECIAL RULES

(a) *Filing the Notice of Appeal.* Any party entitled by law to appeal from a trial court judgment or order rendered in a case involving termination of parental rights and issues of juvenile dependency or juvenile abuse and/or neglect, appealable pursuant to N.C.G.S. § 7B-1001, may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties in the time and manner set out in Chapter 7B of the General Statutes of North Carolina. Trial counsel or an appellant not represented by counsel shall be responsible for filing and serving the notice of appeal in the time and manner required. If the appellant is represented by counsel, both the trial counsel and appellant must sign the notice of appeal, and the appellant shall cooperate with counsel throughout the appeal. All such appeals shall comply with the provisions set out in subsection (b) of this rule and, except as hereinafter provided by this rule, all other existing Rules of Appellate Procedure shall remain applicable.

(b) *Protecting the Identity of Juveniles.* For appeals filed pursuant to this rule and for extraordinary writs filed in cases to which this rule applies, the identity of involved persons under the age of eighteen at the time of the proceedings in the trial division (covered juveniles) shall be referenced only by the use of initials or pseudonyms in briefs, petitions, and all other filings, and shall be similarly redacted from all documents, exhibits, appendixes, or arguments submitted with such filings. If the parties desire to use pseudonyms, they shall stipulate in the record on appeal to the pseudonym to be used for each covered juvenile. Courts of the appellate division are not bound by the stipulation, and case captions will utilize initials. Further, the addresses and social security numbers of all covered juveniles shall be excluded from all filings and documents, exhibits, appendixes, and arguments. In cases subject to this rule, the first document filed in the appellate courts and the record on appeal shall contain the notice required by Rule 9(a).

The substitution and redaction requirements of this rule shall not apply to settled records on appeal; supplements filed pursuant to Rule 11(c); objections, amendments, or proposed alternative records on appeal submitted pursuant to Rule 3.1(c)(2); and any verbatim transcripts submitted pursuant to Rule 9(c). Pleadings and filings not subject to substitution and redaction requirements shall include the following notice on the first page of the document immediately underneath the title and in uppercase typeface: FILED PURSUANT TO RULE [3(b)(1)] [3.1(b)] [4(e)]; SUBJECT TO PUBLIC INSPECTION ONLY BY ORDER OF A COURT OF THE APPELLATE DIVISION.

Filings in cases governed by this rule that are not subject to substitution and redaction requirements will not be published on the Court's electronic filing site and will be available to the public only with the permission of a court of the appellate division. In addition, the juvenile's address and social security number shall be excluded from all filings, documents, exhibits, or arguments with the exception of sealed verbatim transcripts submitted pursuant to Rule 9(c).

(c) *Expediting Filings.* Appeals filed pursuant to these provisions shall adhere strictly to the expedited procedures set forth below:

(1) *Transcripts.* Within one business day after the notice of appeal has been filed, the clerk of superior court shall notify the court reporting coordinator of the Administrative Office of the Courts of the date the notice of appeal was filed and the names

of the parties to the appeal and their respective addresses or addresses of their counsel. Within two business days of receipt of such notification, the court reporting coordinator shall assign a transcriptionist to the case.

When there is an order establishing the indigency of the appellant, the transcriptionist shall prepare and deliver a transcript of the designated proceedings to the appellant and provide copies to the office of the clerk of the Court of Appeals and to the respective parties to the appeal at the addresses provided within thirty-five days from the date of assignment.

When there is no order establishing the indigency of the appellant, the appellant shall have ten days from the date that the transcriptionist is assigned to make written arrangements with the assigned transcriptionist for the production and delivery of the transcript of the designated proceedings. If such written arrangement is made, the transcriptionist shall prepare and deliver a transcript of the designated proceedings to the appellant and provide copies to the office of the clerk of the Court of Appeals and to the respective parties to the appeal at the addresses provided within forty-five days from the date of assignment. The non-indigent appellant shall bear the cost of the appellant's copy of the transcript.

When there is no order establishing the indigency of the appellee, the appellee shall bear the cost of receiving a copy of the requested transcript.

Motions for extensions of time to prepare and deliver transcripts are disfavored and will not be allowed by the Court of Appeals absent extraordinary circumstances.

(2) *Record on Appeal.* Within ten days after receipt of the transcript, the appellant shall prepare and serve upon all other parties a proposed record on appeal constituted in accordance with Rule 9. Trial counsel for the appealing party shall have a duty to assist appellate counsel, if separate counsel is appointed or retained for the appeal, in preparing and serving a proposed record on appeal. Within ten days after service of the proposed record on appeal upon an appellee, the appellee may serve upon all other parties:

1. a notice of approval of the proposed record;
2. specific objections or amendments to the proposed record on appeal, or
3. a proposed alternative record on appeal.

If the parties agree to a settled record on appeal within twenty days after receipt of the transcript, the appellant shall file three legible copies of the settled record on appeal in the office of the clerk of the Court of Appeals within five business days from the date the record was settled. If all appellees fail within the times allowed them either to serve notices of approval or to serve objections, amendments, or proposed alternative records on appeal, the appellant's proposed record on appeal shall constitute the settled record on appeal, and the appellant shall file three legible copies thereof in the office of the clerk of the Court of Appeals within five business days from the last date upon which any appellee could have served such objections, amendments, or proposed alternative record on appeal. If an appellee timely serves amendments, objections, or a proposed alternative record on appeal

and the parties cannot agree to the settled record within thirty days after receipt of the transcript, each party shall file three legible copies of the following documents in the office of the clerk of the Court of Appeals within five business days after the last day upon which the record can be settled by agreement:

1. the appellant shall file his or her proposed record on appeal, and
2. an appellee shall file his or her objections, amendments, or proposed alternative record on appeal.

No counsel who has appeared as trial counsel for any party in the proceeding shall be permitted to withdraw, nor shall such counsel be otherwise relieved of any responsibilities imposed pursuant to this rule, until the record on appeal has been filed in the office of the clerk of the Court of Appeals as provided herein.

(3) *Briefs.* Within thirty days after the record on appeal has been filed with the Court of Appeals, the appellant shall file his or her brief in the office of the clerk of the Court of Appeals and serve copies upon all other parties of record. Within thirty days after the appellant's brief has been served on an appellee, the appellee shall file his or her brief in the office of the clerk of the Court of Appeals and serve copies upon all other parties of record. Motions for extensions of time to file briefs will not be allowed absent extraordinary circumstances.

(d) *No-Merit Briefs.* In an appeal taken pursuant to N.C.G.S. § 7B-1001, if, after a conscientious and thorough review of the record on appeal, appellate counsel concludes that the record contains no issue of merit on which to base an argument for relief and that the appeal would be frivolous, counsel may file a no-merit brief. In the brief, counsel shall identify any issues in the record on appeal that might arguably support the appeal and shall state why those issues

lack merit or would not alter the ultimate result. Counsel shall provide the appellant with a copy of the no-merit brief, the transcript, the record on appeal, and any Rule 11(c) supplement or exhibits that have been filed with the appellate court. Counsel shall also advise the appellant in writing that the appellant has the option of filing a *pro se* brief within thirty days of the date of the filing of the no-merit brief and shall attach to the brief evidence of compliance with this subsection.

(e) *Calendaring Priority.* Appeals filed pursuant to this rule will be given priority over other cases being considered by the Court of Appeals and will be calendared in accordance with a schedule promulgated by the Chief Judge. Unless otherwise ordered by the Court of Appeals, cases subject to the expedited procedures set forth in this rule shall be disposed of on the record and briefs and without oral argument.

ADMINISTRATIVE HISTORY

Adopted: 28 April 2006—effective 1 May 2006 and applies to all cases appealed on or after that date.
Amended: 11 June 2008—3A(b)(1)—effective 1 December 2008;
Recodified former Rule 3A as Rule 3.1 and
Reenacted Rule 3.1 as amended: 2 July 2009—rewrote 3.1(b); renumbered subsections (c) & (e); amended 3.1(c)(1) & (2); added 3.1(d)—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 4
APPEAL IN CRIMINAL CASES—HOW AND WHEN TAKEN

(a) *Manner and Time.* 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 fourteen days after entry of the judgment or order or within fourteen days after a ruling on a motion for appropriate relief made during the fourteen day period following entry of the judgment or order. Appeals from district court to superior court are governed by N.C.G.S. §§ 15A-1431 and -1432.

(b) *Content of Notice of Appeal.* The notice of appeal required to be filed and served by subdivision (a)(2) of this rule shall specify the party or parties taking the appeal; shall designate the judgment or

order from which appeal is taken and the court to which appeal is taken; and shall be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record.

(c) *Service of Notice of Appeal.* Service of copies of the notice of appeal may be made as provided in Rule 26.

(d) *To Which Appellate Court Addressed.* An appeal of right from a judgment of a superior court by any person who has been convicted of murder in the first degree and sentenced to death shall be filed in the Supreme Court. In all other criminal cases, appeal shall be filed in the Court of Appeals.

(e) *Protecting the Identity of Juvenile Victims of Sexual Offenses.* For appeals filed pursuant to this rule and for extraordinary writs filed in cases to which this rule applies, the identities of all victims of sexual offenses the trial court record shows were under the age of eighteen when the trial division proceedings occurred, including documents or other materials concerning delinquency proceedings in district court, shall be protected pursuant to Rule 3.1(b).

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

Amended: 4 October 1978—4(a)(2)—effective 1 January 1979; 13 July 1982—4(d);

3 September 1987—4(d)—effective for all judgments of the superior court entered on or after 24 July 1987;

8 December 1988—4(a)—effective for all judgments of the trial tribunal entered on or after 1 July 1989;

8 June 1989—4(a)—8 December 1988 amendment rescinded prior to effective date;

18 October 2001—4(a)(2), (d) (subsection (d) amended to conform with N.C.G.S. § 7A-27)—effective 31 October 2001;

1 May 2003—4(a)(2).

Reenacted and Amended: 2 July 2009—added 4(e)—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 5
JOINDER OF PARTIES ON APPEAL

(a) *Appellants.* If two or more parties are entitled to appeal from a judgment, order, or other determination and their interests are such as to make their joinder in appeal practicable, they may file and serve a joint notice of appeal in accordance with Rules 3 and 4; or they may join in appeal after timely taking of separate appeals by filing notice of joinder in the office of the clerk of superior court and serving copies thereof upon all other parties, or in a criminal case they may give a joint oral notice of appeal.

(b) *Appellees.* Two or more appellees whose interests are such as to make their joinder on appeal practicable may, by filing notice of joinder in the office of the clerk of superior court and serving copies thereof upon all other parties, so join.

(c) *Procedure after Joinder.* After joinder, the parties proceed as a single appellant or appellee. Filing and service of papers by and upon joint appellants or appellees is as provided by Rule 26(e).

ADMINISTRATIVE HISTORY

Adopted:	13 June 1975.
Reenacted and Amended:	2 July 2009—amended 5(a)—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 6
SECURITY FOR COSTS ON APPEAL

(a) *In Regular Course.* Except in pauper appeals, an appellant in a civil action must provide adequate security for the costs of appeal in accordance with the provisions of N.C.G.S. §§ 1-285 and -286.

(b) *In Forma Pauperis Appeals.* A party in a civil action may be allowed to prosecute an appeal in forma pauperis without providing security for costs in accordance with the provisions of N.C.G.S. § 1-288.

(c) *Filed with Record on Appeal.* When security for costs is required, the appellant shall file with the record on appeal a certified copy of the appeal bond or a cash deposit made in lieu of bond.

(d) *Dismissal for Failure to File or Defect in Security.* For failure of the appellant to provide security as required by subsection (a) or to file evidence thereof as required by subsection (c), or for a sub-

stantial defect or irregularity in any security provided, the appeal may on motion of an appellee be dismissed by the appellate court where docketed, unless for good cause shown the court permits the security to be provided or the filing to be made out of time, or the defect or irregularity to be corrected. A motion to dismiss on these grounds shall be made and determined in accordance with Rule 37. When the motion to dismiss is made on the grounds of a defect or irregularity, the appellant may as a matter of right correct the defect or irregularity by filing a proper bond or making proper deposit with the clerk of the appellate court within ten days after service of the motion upon appellant or before the case is called for argument, whichever first occurs.

(e) *No Security for Costs in Criminal Appeals.* Pursuant to N.C.G.S. § 15A-1449, no security for costs is required upon appeal of criminal cases to the appellate division.

ADMINISTRATIVE HISTORY

Adopted:	13 June 1975.
Amended:	27 November 1984—6(e)—effective 1 February 1985; 26 July 1990—6(c)—effective 1 October 1990.
Reenacted and Amended:	2 July 2009—amended 6(b)—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 7
PREPARATION OF THE TRANSCRIPT; COURT REPORTER'S DUTIES

(a) *Ordering the Transcript.*

(1) *Civil Cases.* Within fourteen days after filing the notice of appeal the appellant shall contract for the transcription of the proceedings or of such parts of the proceedings not already on file, as the appellant deems necessary, in accordance with these rules, and shall provide the following information in writing: a designation of the parts of the proceedings to be transcribed; the name and address of the court reporter or other neutral person designated to prepare the transcript; and, where portions of the proceedings have been designated to be transcribed, a statement of the issues the appellant intends to raise on appeal. The appellant shall file the written documentation of this transcript contract with the clerk of the trial

tribunal, and serve a copy of it upon all other parties of record and upon the person designated to prepare the transcript. If the appellant intends to urge on appeal that a finding or conclusion of the trial court is unsupported by the evidence or is contrary to the evidence, the appellant shall cite in the record on appeal the volume number, page number, and line number of all evidence relevant to such finding or conclusion. If an appellee deems a transcript of other parts of the proceedings to be necessary, the appellee, within fourteen days after the service of the written documentation of the appellant, shall contract for the transcription of any additional parts of the proceedings or such parts of the proceedings not already on file, in accordance with these rules. The appellee shall file with the clerk of the trial tribunal, and serve on all other parties of record, written documentation of the additional parts of the proceedings to be transcribed and the name and address of the court reporter or other neutral person designated to prepare the transcript.

In civil cases and special proceedings where there is an order establishing the indigency of a party entitled to appointed appellate counsel, the ordering of the transcript shall be as in criminal cases where there is an order establishing the indigency of the defendant as set forth in Rule 7(a)(2).

(2) *Criminal Cases.* In criminal cases where there is no order establishing the indigency of the defendant for the appeal, the defendant shall contract for the transcription of the proceedings as in civil cases.

When there is an order establishing the indigency of the defendant, unless the trial judge's appeal entries specify or the parties stipulate that parts of the proceedings need not be transcribed, the clerk of the trial tribunal shall order a transcript of the proceedings by serving the following documents upon either the court reporter(s) or neutral person designated to prepare the transcript: a copy of the appeal entries signed by the judge; a copy of the trial court's order establishing indigency for the appeal; and a statement setting out the name, address, telephone number and e-mail address of appellant's counsel. The clerk shall make an entry of record reflecting the date these documents were served upon the court reporter(s) or transcriptionist.

(b) *Production and Delivery of Transcript.*

(1) *Production.* In civil cases: from the date the requesting party serves the written documentation of the transcript contract on the person designated to prepare the transcript, that person shall have sixty days to prepare and electronically deliver the transcript.

In criminal cases where there is no order establishing the indigency of the defendant for the appeal: from the date the requesting party serves the written documentation of the transcript contract upon the person designated to prepare the transcript, that person shall have sixty days to produce and electronically deliver the transcript in non-capital cases and one hundred twenty days to produce and electronically deliver the transcript in capitally tried cases.

In criminal cases where there is an order establishing the indigency of the defendant for the appeal: from the date listed on the appeal entries as the "Date order delivered to transcriptionist," that person shall have sixty-five days to produce and electronically deliver the transcript in non-capital cases and one hundred twenty-five days to produce and electronically deliver the transcript in capitally tried cases.

The transcript format shall comply with Appendix B of these rules.

Except in capitally tried criminal cases which result in the imposition of a sentence of death, the trial tribunal, in its discretion and for good cause shown by the appellant, may extend the time to produce the transcript for an additional thirty days. Any subsequent motions for additional time required to produce the transcript may only be made to the appellate court to which appeal has been taken. All motions for extension of time to produce the transcript in capitally tried cases resulting in the imposition of a sentence of death shall be made directly to the Supreme Court by the appellant.

(2) *Delivery.* The court reporter, or person designated to prepare the transcript, shall electronically deliver the completed transcript, with accompanying PDF disk to the parties including the district attorney and Attorney General of North Carolina in criminal cases, as ordered,

within the time provided by this rule, unless an extension of time has been granted under Rule 7(b)(1) or Rule 27(c). The court reporter or transcriptionist shall certify to the clerk of the trial tribunal that the transcript has been so delivered and shall send a copy of such certification to the appellate court to which the appeal is taken. The appellant shall promptly notify the court reporter when the record on appeal has been filed. Once the court reporter, or person designated to prepare the transcript, has been notified by the appellant that the record on appeal has been filed with the appellate court to which the appeal has been taken, the court reporter must electronically file the transcript with that court using the docket number assigned by that court.

(3) *Neutral Transcriptionist.* The neutral person designated to prepare the transcript shall not be a relative or employee or attorney or counsel of any of the parties, or a relative or employee of such attorney or counsel, or be financially interested in the action unless the parties agree otherwise by stipulation.

ADMINISTRATIVE HISTORY

Adopted:	13 June 1975.
REPEALED:	1 July 1978. (See note following Rule 17.)
Re-adopted:	8 December 1988—effective for all judgments of the trial tribunal entered on or after 1 July 1989.
Amended:	8 June 1989—effective for all judgments of the trial tribunal entered on or after 1 July 1989; 26 July 1990—7(a)(1), (a)(2), and (b)(1)—effective 1 October 1990; 21 November 1997—effective 1 February 1998; 8 April 1999—7(b)(1), para. 5; 18 October 2001—7(b)(1), para. 4—effective 31 October 2001; 15 August 2002—7(a)(1), para. 2; 25 January 2007—7(b)(1), paras. 3, 5; 7(b)(2)—effective 1 March 2007 and applies to all cases appealed on or after that date.
Reenacted and Amended:	2 July 2009—amended 7(a)(1) & (2), 7(b)(1) & (2)—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 8
STAY PENDING APPEAL

(a) *Stay in Civil Cases.* When appeal is taken in a civil action from a judgment, order, or other determination of a trial court, stay of execution or enforcement thereof pending disposition of the appeal must ordinarily first be sought by the deposit of security with the clerk of the superior court in those cases for which provision is made by law for the entry of stays upon deposit of adequate security, or by application to the trial court for a stay order in all other cases. After a stay order or entry has been denied or vacated by a trial court, an appellant may apply to the appropriate appellate court for a temporary stay and a writ of supersedeas in accordance with Rule 23. In any appeal which is allowed by law to be taken from an agency to the appellate division, application for the temporary stay and writ of supersedeas may be made to the appellate court in the first instance. Application for the temporary stay and writ of supersedeas may similarly be made to the appellate court in the first instance when extraordinary circumstances make it impracticable to obtain a stay by deposit of security or by application to the trial court for a stay order.

(b) *Stay in Criminal Cases.* When a defendant has given notice of appeal, those portions of criminal sentences which impose fines or costs are automatically stayed pursuant to the provisions of N.C.G.S. § 15A-1451. Stays of imprisonment or of the execution of death sentences must be pursued under N.C.G.S. § 15A-536 or Rule 23.

ADMINISTRATIVE HISTORY

Adopted:	13 June 1975.
Amended:	27 November 1984—8(b)—effective 1 February 1985;
	6 March 1997—8(a)—effective 1 July 1997.
Reenacted and Amended:	2 July 2009—amended 8(a)—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 9
THE RECORD ON APPEAL

(a) *Function; Notice in Cases Involving Juveniles; Composition of Record.* In appeals from the trial division of the General Court of Justice, review is solely upon the record on appeal, the verbatim transcript of proceedings, if one is designated, and any other items filed pursuant to this Rule 9. Parties may cite any of these items in their briefs and arguments before the appellate courts.

All filings involving juveniles covered by Rules 3(b)(1), 3.1(b), or 4(e) shall include the following notice in uppercase typeface:

FILED PURSUANT TO RULE [3(b)(1)] [3.1(b)] [4(e)]; SUBJECT TO PUBLIC INSPECTION ONLY BY ORDER OF A COURT OF THE APPELLATE DIVISION.

(1) *Composition of the Record in Civil Actions and Special Proceedings.* The record on appeal in civil actions and special proceedings shall contain:

a. an index of the contents of the record, which shall appear as the first page thereof;

b. a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing;

c. a copy of the summons with return, or of other papers showing jurisdiction of the trial court over person or property, or a statement showing same;

d. copies of the pleadings, and of any pretrial order on which the case or any part thereof was tried;

e. so much of the litigation, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all issues presented on appeal, or a statement specifying that the verbatim transcript of proceedings is being filed with the record pursuant to Rule 9(c)(2), or designating portions of the transcript to be so filed;

f. where an issue presented on appeal relates to the giving or omission of instructions to the jury, a transcript of the entire charge given; and identification of the omitted instruction by setting out the requested instruction or its substance in the record on appeal immediately following the instruction given;

g. copies of the issues submitted and the verdict, or of the trial court's findings of fact and conclusions of law;

h. a copy of the judgment, order, or other determination from which appeal is taken;

i. a copy of the notice of appeal, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding a party to the appeal to be a civil pauper, and of any agreement, notice of approval, or order settling the

record on appeal and settling the verbatim transcript of proceedings if one is filed pursuant to Rule 9(c)(2) and (c)(3);

j. copies of all other papers filed and statements of all other proceedings had in the trial court which are necessary to an understanding of all issues presented on appeal unless they appear in the verbatim transcript of proceedings which is being filed with the record pursuant to Rule 9(c)(2);

k. proposed issues on appeal set out in the manner provided in Rule 10;

l. a statement, where appropriate, that the record of proceedings was made with an electronic recording device;

m. a statement, where appropriate, that a supplement compiled pursuant to Rule 11(c) is filed with the record on appeal; and

n. any order (issued prior to the filing of the record on appeal) ruling upon a motion by an attorney who is not licensed to practice law in North Carolina to be admitted pursuant to N.C.G.S. § 84-4.1 to appear in the appeal. In the event such a motion is filed prior to the filing of the record but has not yet been ruled upon when the record is filed, the record shall include a statement that such a motion is pending and the date that motion was filed.

(2) *Composition of the Record in Appeals from Superior Court Review of Administrative Boards and Agencies*. The record on appeal in cases of appeal from judgments of the superior court rendered upon review of the proceedings of administrative boards or agencies, other than those specified in Rule 18(a), shall contain:

a. an index of the contents of the record, which shall appear as the first page thereof;

b. a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing;

c. a copy of the summons, notice of hearing, or other papers showing jurisdiction of the board or agency over the persons or property sought to be bound in the proceeding, or a statement showing same;

d. copies of all petitions and other pleadings filed in the superior court;

e. copies of all items properly before the superior court as are necessary for an understanding of all issues presented on appeal;

f. so much of the litigation in the superior court, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all issues presented, or a statement specifying that the verbatim transcript of proceedings is being filed with the record pursuant to Rule 9(c)(2), or designating portions of the transcript to be so filed;

g. a copy of any findings of fact and conclusions of law and of the judgment, order, or other determination of the superior court from which appeal is taken;

h. a copy of the notice of appeal from the superior court, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding a party to the appeal to be a civil pauper, and of any agreement, notice of approval, or order settling the record on appeal and settling the verbatim transcript of proceedings, if one is filed pursuant to Rule 9(c)(2) and (c)(3);

i. proposed issues on appeal relating to the actions of the superior court, set out in the manner provided in Rule 10; and

j. any order (issued prior to the filing of the record on appeal) ruling upon any motion by an attorney who is not licensed to practice law in North Carolina to be admitted pursuant to N.C.G.S. § 84-4.1 to appear in the appeal. In the event such a motion is filed prior to the filing of the record but has not yet been ruled upon when the record is filed, the record shall include a statement that such a motion is pending and the date that motion was filed.

(3) *Composition of the Record in Criminal Actions*. The record on appeal in criminal actions shall contain:

a. an index of the contents of the record, which shall appear as the first page thereof;

b. a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing;

c. copies of all warrants, informations, presentments, and indictments upon which the case has been tried in any court;

d. copies of docket entries or a statement showing all arraignments and pleas;

e. so much of the litigation, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all issues presented on appeal, or a statement specifying that the entire verbatim transcript of the proceedings is being filed with the record pursuant to Rule 9(c)(2), or designating portions of the transcript to be so filed;

f. where an issue presented on appeal relates to the giving or omission of instructions to the jury, a transcript of the entire charge given; and identification of the omitted instruction by setting out the requested instruction or its substance in the record on appeal immediately following the instruction given;

g. copies of the verdict and of the judgment, order, or other determination from which appeal is taken; and in capitally tried cases, a copy of the jury verdict sheet for sentencing, showing the aggravating and mitigating circumstances submitted and found or not found;

h. a copy of the notice of appeal or an appropriate entry or statement showing appeal taken orally; of all orders establishing time limits relative to the perfecting of the appeal; of any order finding defendant indigent for the purposes of the appeal and assigning counsel; and of any agreement, notice of approval, or order settling the record on appeal and settling the verbatim transcript of proceedings, if one is to be filed pursuant to Rule 9(c)(2);

i. copies of all other papers filed and statements of all other proceedings had in the trial courts which are necessary for an understanding of all issues presented on appeal, unless they appear in the verbatim transcript of proceedings which is being filed with the record pursuant to Rule 9(c)(2);

j. proposed issues on appeal set out in the manner provided in Rule 10;

k. a statement, where appropriate, that the record of proceedings was made with an electronic recording device;

l. a statement, where appropriate, that a supplement compiled pursuant to Rule 11(c) is filed with the record on appeal; and

m. any order (issued prior to the filing of the record on appeal) ruling upon any motion by an attorney who is not licensed to practice law in North Carolina to be admitted pursuant to N.C.G.S. § 84-4.1 to appear in the appeal. In the event such a motion is filed prior to the filing of the record but has not yet been ruled upon when the record is filed, the record shall include a statement that such a motion is pending and the date that motion was filed.

(4) *Exclusion of Social Security Numbers from Record on Appeal.* Social security numbers shall be deleted or redacted from any document before including the document in the record on appeal.

(b) *Form of Record; Amendments.* The record on appeal shall be in the format prescribed by Rule 26(g) and the appendixes to these rules.

(1) *Order of Arrangement.* The items constituting the record on appeal should be arranged, so far as practicable, in the order in which they occurred or were filed in the trial tribunal.

(2) *Inclusion of Unnecessary Matter; Penalty.* It shall be the duty of counsel for all parties to an appeal to avoid including in the record on appeal matter not necessary for an understanding of the issues presented on appeal, such as social security numbers referred to in Rule 9(a)(4). The cost of including such matter may be charged as costs to the party or counsel who caused or permitted its inclusion.

(3) *Filing Dates and Signatures on Papers.* Every pleading, motion, affidavit, or other paper included in the record on appeal shall show the date on which it was filed and, if verified, the date of verification and the person who verified. Every judgment, order, or other determination shall show the date on which it was entered. The typed or printed name of the person signing a paper shall be entered immediately below the signature.

(4) *Pagination; Counsel Identified.* The pages of the printed record on appeal shall be numbered consecutively, be referred to as "record pages," and be cited as "(R p ___)."

Pages of the Rule 11(c) or Rule 18(d)(3) supplement to the record on appeal shall be numbered consecutively with the pages of the record on appeal, the first page of the record supplement to bear the next consecutive number following the number of the last page of the printed record on appeal. These pages shall be referred to as "record supplement pages" and be cited as "(R S p ___)." Pages of the verbatim transcript of proceedings filed under Rule 9(c)(2) shall be referred to as "transcript pages" and be cited as "(T p ___)." At the end of the record on appeal shall appear the names, office addresses, telephone numbers, State Bar numbers, and e-mail addresses of counsel of record for all parties to the appeal.

(5) *Additions and Amendments to Record on Appeal.*

(a) *Additional Materials in the Record on Appeal.* If the record on appeal as settled is insufficient to respond to the issues presented in an appellant's brief or the issues presented in an appellee's brief pursuant to Rule 10(c), the responding party may supplement the record on appeal with any items that could otherwise have been included pursuant to this Rule 9. The responding party shall serve a copy of those items on opposing counsel and shall file three copies of the items in a volume captioned "Rule 9(b)(5) Supplement to the Printed Record on Appeal." The supplement shall be filed no later than the responsive brief or within the time allowed for filing such a brief if none is filed.

(b) *Motions Pertaining to Additions to the Record.* On motion of any party or on its own initiative, the appellate court may order additional portions of a trial court record or transcript sent up and added to the record on appeal. On motion of any party, the appellate court may order any portion of the record on appeal or transcript amended to correct error shown as to form or content. Prior to the filing of the record on appeal in the appellate court, such motions may be filed by any party in the trial court.

(c) *Presentation of Testimonial Evidence and Other Proceedings.* Testimonial evidence, voir dire, statements and events at evidentiary and non-evidentiary hearings, and other trial proceedings necessary to be presented for review by the appellate court may be

included either in the record on appeal in the form specified in Rule 9(c)(l) or by designating the verbatim transcript of proceedings of the trial tribunal as provided in Rule 9(c)(2) and (c)(3). When an issue presented on appeal relates to the giving or omission of instructions to the jury, a transcript of the entire charge given shall be included in the record on appeal. Verbatim transcripts or narration utilized in a case subject to Rules 3(b)(1), 3.1(b), or 4(e) initiated in the trial division under the provisions of Subchapter I of Chapter 7B of the General Statutes shall be prepared and delivered to the office of the clerk of the appellate court to which the appeal has been taken in the manner specified by said rules.

(1) *When Testimonial Evidence, Voir Dire, Statements and Events at Evidentiary and Non-Evidentiary Hearings, and Other Trial Proceedings Narrated—How Set Out in Record.* When an issue is presented on appeal with respect to the admission or exclusion of evidence, the question and answer form shall be utilized in setting out the pertinent questions and answers. Other testimonial evidence, voir dire, statements and events at evidentiary and non-evidentiary hearings, and other trial proceedings required by Rule 9(a) to be included in the record on appeal shall be set out in narrative form except where such form might not fairly reflect the true sense of the evidence received, in which case it may be set out in question and answer form. Parties shall use that form or combination of forms best calculated under the circumstances to present the true sense of the required testimonial evidence concisely and at a minimum of expense to the litigants. Parties may object to particular narration on the basis that it does not accurately reflect the true sense of testimony received, statements made, or events that occurred; or to particular questions and answers on the basis that the testimony might with no substantial loss in accuracy be summarized in narrative form at substantially less expense. When a judge or referee is required to settle the record on appeal under Rule 11(c) and there is dispute as to the form, the judge or referee shall settle the form in the course of settling the record on appeal.

(2) *Designation that Verbatim Transcript of Proceedings in Trial Tribunal Will Be Used.* Appellant may designate in the record on appeal that the testimonial evidence will be presented in the verbatim transcript of the evidence of the trial tribunal in lieu of narrating the evidence and other trial proceedings as permitted by Rule 9(c)(1).

When a verbatim transcript of those proceedings has been made, appellant may also designate that the verbatim transcript will be used to present voir dire, statements and events at evidentiary and non-evidentiary hearings, or other trial proceedings when those proceedings are the basis for one or more issues presented on appeal. Any such designation shall refer to the page numbers of the transcript being designated. Appellant need not designate all of the verbatim transcript that has been made, provided that when the verbatim transcript is designated to show the testimonial evidence, so much of the testimonial evidence must be designated as is necessary for an understanding of all issues presented on appeal. When appellant has narrated the evidence and other trial proceedings under Rule 9(c)(1), the appellee may designate the verbatim transcript as a proposed alternative record on appeal.

(3) *Verbatim Transcript of Proceedings—Settlement, Filing, Copies, Briefs.* Whenever a verbatim transcript is designated to be used pursuant to Rule 9(c)(2):

a. it shall be settled, together with the record on appeal, according to the procedures established by Rule 11;

b. appellant shall cause the settled record on appeal and transcript to be filed pursuant to Rule 7 with the clerk of the appellate court in which the appeal has been docketed;

c. in criminal appeals, upon settlement of the record on appeal, the district attorney shall notify the Attorney General of North Carolina that the record on appeal and transcript have been settled; and

d. the briefs of the parties must comport with the requirements of Rule 28 regarding complete statement of the facts of the case and regarding appendixes to the briefs.

(4) *Presentation of Discovery Materials.* Discovery materials offered into evidence at trial shall be brought forward, if relevant, as other evidence. In all instances in which discovery materials are considered by the trial tribunal, other than as evidence offered at trial, the following procedures for presenting those materials to the appellate court shall be used: Depositions shall be

treated as testimonial evidence and shall be presented by narration or by transcript of the deposition in the manner prescribed by this Rule 9(c). Other discovery materials, including interrogatories and answers, requests for admission, responses to requests, motions to produce, and the like, pertinent to issues presented on appeal, may be set out in the record on appeal or may be sent up as documentary exhibits in accordance with Rule 9(d)(2).

(5) *Electronic Recordings.* When a narrative or transcript has been prepared from an electronic recording, the parties shall not file a copy of the electronic recording with the appellate division except at the direction or with the approval of the appellate court.

(d) *Models, Diagrams, and Exhibits of Material.*

(1) *Exhibits.* Maps, plats, diagrams, and other documentary exhibits filed as portions of or attachments to items required to be included in the record on appeal shall be included as part of such items in the record on appeal. When such exhibits are not necessary to an understanding of the errors assigned, they may by agreement of counsel or by order of the trial court upon motion be excluded from the record on appeal. Social security numbers shall be deleted or redacted from exhibits prior to filing the exhibits in the appellate court.

(2) *Transmitting Exhibits.* Three legible copies of each documentary exhibit offered in evidence and required for understanding issues presented on appeal shall be filed in the appellate court; the original documentary exhibit need not be filed with the appellate court.

(3) *Removal of Exhibits from Appellate Court.* All models, diagrams, and exhibits of material placed in the custody of the clerk of the appellate court must be taken away by the parties within ninety days after the mandate of the Court has issued or the case has otherwise been closed by withdrawal, dismissal, or other order of the Court, unless notified otherwise by the clerk. When this is not done, the clerk shall notify counsel to remove the articles forthwith; and if they are not removed within a reasonable time after such notice, the clerk shall destroy them, or make such other disposition of them as to the clerk may seem best.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 10 June 1981—9(c)(1)—applicable to all appeals docketed on or after 1 October 1981;
12 January 1982—9(c)(1)—applicable to all appeals docketed after 15 March 1982;
27 November 1984—applicable to all appeals in which the notice of appeal is filed on or after 1 February 1985;
8 December 1988—9(a), (c)—effective for all judgments of the trial tribunal entered on or after 1 July 1989;
8 June 1989—9(a)—effective for all judgments of the trial tribunal entered on or after 1 July 1989;
26 July 1990—9(a)(3)(h), 9(d)(2)—effective 1 October 1990;
6 March 1997—9(b)(5)—effective upon adoption 6 March 1997;
21 November 1997—9(a)(1)(j)-(l), 9(a)(3)(i)-(k), 9(c)(5)—effective 1 February 1998;
18 October 2001—9(d)(2)—effective 31 October 2001;
6 May 2004—9(a), 9(a)(4), 9(b)(2), 9(b)(6), 9(c), 9(c)(2), 9(c)(3)(c), 9(d)(1), 9(d)(3)—effective 12 May 2004;
25 January 2007—added 9(a)(1)(m) & 9(a)(3)(*l*); amended 9(b)(4)—effective 1 March 2007 and applies to all cases appealed on or after that date.
Reenacted and Amended: 2 July 2009—amended and rewrote portions of 9(a), (b), (c), & (d)—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 10
PRESERVATION OF ISSUES AT TRIAL; PROPOSED ISSUES ON APPEAL

(a) *Preserving Issues During Trial Proceedings.*

(1) *General.* In order to preserve an issue 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 con-

text. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion. Any such issue that was properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal by objection noted or which by rule or law was deemed preserved or taken without any such action, including, but not limited to, whether the judgment is supported by the verdict or by the findings of fact and conclusions of law, whether the court had jurisdiction over the subject matter, and whether a criminal charge is sufficient in law, may be made the basis of an issue presented on appeal.

(2) *Jury Instructions*. A party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict, stating distinctly that to which objection is made and the grounds of the objection; provided that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury.

(3) *Sufficiency of the Evidence*. In a criminal case, a defendant may not make insufficiency of the evidence to prove the crime charged the basis of an issue presented on appeal unless a motion to dismiss the action, or for judgment as in case of nonsuit, is made at trial. If a defendant makes such a motion after the State has presented all its evidence and has rested its case and that motion is denied and the defendant then introduces evidence, defendant's motion for dismissal or judgment in case of nonsuit made at the close of State's evidence is waived. Such a waiver precludes the defendant from urging the denial of such motion as a ground for appeal.

A defendant may make a motion to dismiss the action, or for judgment as in case of nonsuit, at the conclusion of all the evidence, irrespective of whether defendant made an earlier such motion. If the motion at the close of all the evidence is denied, the defendant may urge as ground for appeal the denial of the motion made at the conclusion of all the evidence. However, if a defendant fails to move to dismiss the action, or for judgment as in case of nonsuit, at the close of all the evidence, defendant may not challenge on appeal the sufficiency of the evidence to prove the crime charged.

If a defendant's motion to dismiss the action, or for judgment as in case of nonsuit, is allowed, or shall be sustained on appeal, it shall have the force and effect of a verdict of "not guilty" as to such defendant.

(4) *Plain Error.* In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

(b) *Appellant's Proposed Issues on Appeal.* Proposed issues that the appellant intends to present on appeal shall be stated without argument at the conclusion of the record on appeal in a numbered list. Proposed issues on appeal are to facilitate the preparation of the record on appeal and shall not limit the scope of the issues presented on appeal in an appellant's brief.

(c) *Appellee's Proposed Issues on Appeal as to an Alternative Basis in Law.* Without taking an appeal, an appellee may list proposed issues on appeal in the record on appeal based on any action or omission of the trial court that was properly preserved for appellate review and that deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken. An appellee's list of proposed issues on appeal shall not preclude an appellee from presenting arguments on other issues in its brief.

Portions of the record or transcript of proceedings necessary to an understanding of such proposed issues on appeal as to an alternative basis in law may be included in the record on appeal by agreement of the parties under Rule 11(a), may be included by the appellee in a proposed alternative record on appeal under Rule 11(b), or may be designated for inclusion in the verbatim transcript of proceedings, if one is filed under Rule 9(c)(2).

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 10 June 1981—10(b)(2), applicable to every case the trial of which begins on or after 1 October 1981;
7 July 1983—10(b)(3);
27 November 1984—applicable to appeals in which the notice of appeal is filed on or after 1 February 1985;

8 December 1988—effective for all judgments of the trial tribunal entered on or after 1 July 1989.

Reenacted and Amended: 2 July 2009—changed title of rule; deleted former 10(a); renumbered and amended remaining subsections as (a)—(c)—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 11
SETTLING THE RECORD ON APPEAL

(a) *By Agreement.* This rule applies to all cases except those subject to expedited schedules in Rule 3.1.

Within thirty-five days after the reporter or transcriptionist certifies delivery of the transcript, if such was ordered (seventy days in capitally tried cases), or thirty-five days after appellant files notice of appeal, whichever is later, the parties may by agreement entered in the record on appeal settle a proposed record on appeal prepared by any party in accordance with Rule 9 as the record on appeal.

(b) *By Appellee's Approval of Appellant's Proposed Record on Appeal.* If the record on appeal is not settled by agreement under Rule 11(a), the appellant shall, within the same times provided, serve upon all other parties a proposed record on appeal constituted in accordance with the provisions of Rule 9. Within thirty days (thirty-five days in capitally tried cases) after service of the proposed record on appeal upon an appellee, that appellee may serve upon all other parties a notice of approval of the proposed record on appeal, or objections, amendments, or a proposed alternative record on appeal in accordance with Rule 11(c). If all appellees within the times allowed them either serve notices of approval or fail to serve either notices of approval or objections, amendments, or proposed alternative records on appeal, appellant's proposed record on appeal thereupon constitutes the record on appeal.

(c) *By Agreement, by Operation of Rule, or by Court Order After Appellee's Objection or Amendment.* Within thirty days (thirty-five days in capitally tried cases) after service upon appellee of appellant's proposed record on appeal, that appellee may serve upon all other parties specific amendments or objections to the proposed record on appeal, or a proposed alternative record on appeal. Amendments or objections to the proposed record on appeal shall be set out in a separate paper and shall specify any item(s) for which an objection is based on the contention that the item was not filed, served, submitted for consideration, admitted, or made the subject of

an offer of proof, or that the content of a statement or narration is factually inaccurate. An appellant who objects to an appellee's response to the proposed record on appeal shall make the same specification in its request for judicial settlement. The formatting of the proposed record on appeal and the order in which items appear in it are the responsibility of the appellant.

If any appellee timely serves amendments, objections, or a proposed alternative record on appeal, the record on appeal shall consist of each item that is either among those items required by Rule 9(a) to be in the record on appeal or that is requested by any party to the appeal and agreed upon for inclusion by all other parties to the appeal. If a party requests that an item be included in the record on appeal but not all other parties to the appeal agree to its inclusion, then that item shall not be included in the printed record on appeal, but shall be filed by the appellant with the printed record on appeal in three copies of a volume captioned "Rule 11(c) Supplement to the Printed Record on Appeal," along with any verbatim transcripts, narrations of proceedings, documentary exhibits, and other items that are filed pursuant to Rule 9(c) or 9(d); provided that any item not filed, served, submitted for consideration, or admitted, or for which no offer of proof was tendered, shall not be included. Subject to the additional requirements of Rule 28(d), items in the Rule 11(c) supplement may be cited and used by the parties as would items in the printed record on appeal.

If a party does not agree to the wording of a statement or narration required or permitted by these rules, there shall be no judicial settlement to resolve the dispute unless the objection is based on a contention that the statement or narration concerns an item that was not filed, served, submitted for consideration, admitted, or tendered in an offer of proof, or that a statement or narration is factually inaccurate. Instead, the objecting party is permitted to have inserted in the settled record on appeal a concise counter-statement. Parties are strongly encouraged to reach agreement on the wording of statements in records on appeal. Judicial settlement is not appropriate for disputes that concern only the formatting of a record on appeal or the order in which items appear in a record on appeal.

The Rule 11(c) supplement to the printed record on appeal shall contain an index of the contents of the supplement, which shall appear as the first page thereof. The Rule 11(c) supplement shall be paginated as required by Rule 9(b)(4) and the contents should be arranged, so far as practicable, in the order in which they occurred or were filed in the trial tribunal. If a party does not agree to the inclusion or specification of an exhibit or transcript in the printed record,

the printed record shall include a statement that such items are separately filed along with the supplement.

If any party to the appeal contends that materials proposed for inclusion in the record or for filing therewith pursuant to Rule 9(c) or 9(d) were not filed, served, submitted for consideration, admitted, or made the subject of an offer of proof, or that a statement or narration permitted by these rules is not factually accurate, then that party, within ten days after expiration of the time within which the appellee last served with the appellant's proposed record on appeal might have served amendments, objections, or a proposed alternative record on appeal, may in writing request that the judge from whose judgment, order, or other determination appeal was taken settle the record on appeal. A copy of the request, endorsed with a certificate showing service on the judge, shall be filed forthwith in the office of the clerk of the superior court and served upon all other parties. Each party shall promptly provide to the judge a reference copy of the record items, amendments, or objections served by that party in the case.

The functions of the judge in the settlement of the record on appeal are to determine whether a statement permitted by these rules is not factually accurate, to settle narrations of proceedings under Rule 9(c)(1), and to determine whether the record accurately reflects material filed, served, submitted for consideration, admitted, or made the subject of an offer of proof, but not to decide whether material desired in the record by either party is relevant to the issues on appeal, non-duplicative, or otherwise suited for inclusion in the record on appeal.

The judge shall send written notice to counsel for all parties setting a place and a time for a hearing to settle the record on appeal. The hearing shall be held not later than fifteen days after service of the request for hearing upon the judge. The judge shall settle the record on appeal by order entered not more than twenty days after service of the request for hearing upon the judge. If requested, the judge shall return the record items submitted for reference during the judicial settlement process with the order settling the record on appeal.

If any appellee timely serves amendments, objections, or a proposed alternative record on appeal, and no judicial settlement of the record is timely sought, the record is deemed settled as of the expiration of the ten day period within which any party could have requested judicial settlement of the record on appeal under this Rule 11(c).

Provided that, nothing herein shall prevent settlement of the record on appeal by agreement of the parties at any time within the times herein limited for settling the record by judicial order.

(d) *Multiple Appellants; Single Record on Appeal.* When there are multiple appellants (two or more), whether proceeding separately or jointly, as parties aligned in interest, or as cross-appellants, there shall nevertheless be but one record on appeal. The proposed issues on appeal of the several appellants shall be set out separately in the single record on appeal and attributed to the several appellants by any clear means of reference. In the event multiple appellants cannot agree to the procedure for constituting a proposed record on appeal, the judge from whose judgment, order, or other determination the appeals are taken shall, on motion of any appellant with notice to all other appellants, enter an order settling the procedure, including the allocation of costs.

(e) *Extensions of Time.* The times provided in this rule for taking any action may be extended in accordance with the provisions of Rule 27(c).

ADMINISTRATIVE HISTORY

Adopted:	13 June 1975.
Amended:	27 November 1984—11(a), (c), (e), (f)—applicable to appeals in which the notice of appeal is filed on or after 1 February 1985. 8 December 1988—11(a), (b), (c), (e), (f)—effective for all judgments of the trial tribunal entered on or after 1 July 1989; 26 July 1990—11(b), (c), (d)—effective 1 October 1990; 6 March 1997—11(c)—effective upon adoption 6 March 1997; 21 November 1997—11(a)—effective 1 February 1998; 6 May 2004—11(b), (c), (d)—effective 12 May 2004; 25 January 2007—11(c), paras. 1, 2, 5, 6; added paras. 3, 4, 8—effective 1 March 2007 and applies to all cases appealed on or after that date.
Reenacted and Amended:	2 July 2009—amended 11(a) & (d); added 11(e)—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 12
FILING THE RECORD; DOCKETING THE APPEAL; COPIES OF THE RECORD

(a) *Time for Filing Record on Appeal.* Within fifteen days after the record on appeal has been settled by any of the procedures provided in Rule 11 or Rule 18, the appellant shall file the record on appeal with the clerk of the court to which appeal is taken.

(b) *Docketing the Appeal.* At the time of filing the record on appeal, the appellant shall pay to the clerk the docket fee fixed pursuant to N.C.G.S. § 7A-20(b), and the clerk shall thereupon enter the appeal upon the docket of the appellate court. If an appellant is authorized to appeal in forma pauperis as provided in N.C.G.S. §§ 1-288 or 7A-450 et seq., the clerk shall docket the appeal upon timely filing of the record on appeal. An appeal is docketed under the title given to the action in the trial division, with the appellant identified as such. The clerk shall forthwith give notice to all parties of the date on which the appeal was docketed in the appellate court.

(c) *Copies of Record on Appeal.* The appellant shall file one copy of the record on appeal, three copies of each exhibit designated pursuant to Rule 9(d), three copies of any supplement to the record on appeal submitted pursuant to Rule 11(c) or Rule 18(d)(3) and shall cause the transcript to be filed electronically pursuant to Rule 7. The clerk will reproduce and distribute copies as directed by the court, billing the parties pursuant to these rules.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

Amended: 27 November 1984—applicable to appeals in which the notice of appeal is filed on or after 1 February 1985;
8 December 1988—12(a), (c)—effective for all judgments of the trial tribunal entered on or after 1 July 1989;
6 March 1997—12(c)—effective upon adoption 6 March 1997;
1 May 2003—12(c);
25 January 2007—12(a), (c)—effective 1 March 2007 and applies to all cases appealed on or after that date.

Reenacted and Amended: 2 July 2009—amended 12(c)—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 13
FILING AND SERVICE OF BRIEFS

(a) *Time for Filing and Service of Briefs.*

(1) *Cases Other Than Death Penalty Cases.* Within thirty days after the clerk of the appellate court has mailed the printed record to the parties, the appellant shall file a brief in the office of the clerk of the appellate court and serve copies thereof upon all other parties separately represented. The mailing of the printed record is not service for purposes of Rule 27(b); therefore, the provision of that rule allowing an additional three days after service by mail does not extend the period for the filing of an appellant's brief. Within thirty days after appellant's brief has been served on an appellee, the appellee shall similarly file and serve copies of a brief. If permitted by Rule 28(h), the appellant may serve and file a reply brief as provided in that rule.

(2) *Death Penalty Cases.* Within sixty days after the clerk of the Supreme Court has mailed the printed record to the parties, the appellant in a criminal appeal which includes a sentence of death shall file a brief in the office of the clerk and serve copies thereof upon all other parties separately represented. The mailing of the printed record is not service for purposes of Rule 27(b); therefore, the provision of that rule allowing an additional three days after service by mail does not extend the period for the filing of an appellant's brief. Within sixty days after appellant's brief has been served, the appellee shall similarly file and serve copies of a brief. If permitted by Rule 28(h), the appellant may serve and file a reply brief as provided in that rule, except that reply briefs filed pursuant to Rule 28(h)(2) or (h)(3) shall be filed and served within twenty-one days after service of the appellee's brief.

(b) *Copies Reproduced by Clerk.* A party need file but a single copy of a brief. At the time of filing the party may be required to pay to the clerk of the appellate court a deposit fixed by the clerk to cover the cost of reproducing copies of the brief. The clerk will reproduce and distribute copies of briefs as directed by the court.

(c) *Consequence of Failure to File and Serve Briefs.* If an appellant fails to file and serve a brief within the time allowed, the appeal may be dismissed on motion of an appellee or on the court's own initiative. If an appellee fails to file and serve its brief within the time

allowed, the appellee may not be heard in oral argument except by permission of the court.

ADMINISTRATIVE HISTORY

Adopted:	13 June 1975.
Amended:	7 October 1980—13(a)—effective 1 January 1981; 27 November 1984—13(a), (b)—effective 1 February 1985; 30 June 1988—13(a)—effective 1 September 1988; 8 June 1989—13(a)—effective 1 September 1989; 1 May 2003—13(a)(1), (b); 23 August 2005—13(a)(1), (2)—effective 1 September 2005.
Reenacted and Amended:	2 July 2009—amended 13(a)(1) & (2)—effective 1 October 2009 and applies to all cases appealed on or after that date.

ARTICLE III

REVIEW BY SUPREME COURT OF APPEALS ORIGINALLY DOCKETED IN COURT OF APPEALS: APPEALS OF RIGHT; DISCRETIONARY REVIEW

RULE 14
APPEALS OF RIGHT FROM COURT OF APPEALS TO SUPREME COURT UNDER N.C.G.S. § 7A-30

(a) *Notice of Appeal; Filing and Service.* Appeals of right from the Court of Appeals to the Supreme Court are taken by filing notices of appeal with the clerk of the Court of Appeals and with the clerk of the Supreme Court and serving notice of appeal upon all other parties within fifteen days after the mandate of the Court of Appeals has been issued to the trial tribunal. For cases which arise from the Industrial Commission, a copy of the notice of appeal shall be served on the Chair of the Industrial Commission. The running of the time for filing and serving a notice of appeal is tolled as to all parties by the filing by any party within such time of a petition for rehearing under Rule 31 of these rules, and the full time for appeal thereafter commences to run and is computed as to all parties from the date of entry by the Court of Appeals of an order denying the petition for rehearing. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within ten days after the first notice

of appeal was filed. A petition prepared in accordance with Rule 15(c) for discretionary review in the event the appeal is determined not to be of right or for issues in addition to those set out as the basis for a dissenting opinion may be filed with or contained in the notice of appeal.

(b) *Content of Notice of Appeal.*

(1) *Appeal Based Upon Dissent in Court of Appeals.* In an appeal which is based upon the existence of a dissenting opinion in the Court of Appeals, the notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment of the Court of Appeals from which the appeal is taken; shall state the basis upon which it is asserted that appeal lies of right under N.C.G.S. § 7A-30; and shall state the issue or issues which are the basis of the dissenting opinion and which are to be presented to the Supreme Court for review.

(2) *Appeal Presenting Constitutional Question.* In an appeal which is asserted by the appellant to involve a substantial constitutional question, the notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment of the Court of Appeals from which the appeal is taken; shall state the issue or issues which are the basis of the constitutional claim and which are to be presented to the Supreme Court for review; shall specify the articles and sections of the Constitution asserted to be involved; shall state with particularity how appellant's rights thereunder have been violated; and shall affirmatively state that the constitutional issue was timely raised (in the trial tribunal if it could have been, in the Court of Appeals if not) and either not determined or determined erroneously.

(c) *Record on Appeal.*

(1) *Composition.* The record on appeal filed in the Court of Appeals constitutes the record on appeal for review by the Supreme Court. However, the Supreme Court may note de novo any deficiencies in the record on appeal and may take such action in respect thereto as it deems appropriate, including dismissal of the appeal.

(2) *Transmission; Docketing; Copies.* Upon the filing of a notice of appeal, the clerk of the Court of Appeals will forthwith transmit the original record on appeal to the clerk of the Supreme Court, who shall thereupon file the

record and docket the appeal. The clerk of the Supreme Court will procure or reproduce copies of the record on appeal for distribution as directed by the Court, and may require a deposit from appellant to cover the cost of reproduction.

(d) *Briefs.*

(1) *Filing and Service; Copies.* Within thirty days after filing notice of appeal in the Supreme Court, the appellant shall file with the clerk of the Supreme Court and serve upon all other parties copies of a new brief prepared in conformity with Rule 28, presenting only those issues upon which review by the Supreme Court is sought; provided, however, that when the appeal is based upon the existence of a substantial constitutional question or when the appellant has filed a petition for discretionary review for issues in addition to those set out as the basis of a dissent in the Court of Appeals, the appellant shall file and serve a new brief within thirty days after entry of the order of the Supreme Court which determines for the purpose of retaining the appeal on the docket that a substantial constitutional question does exist or allows or denies the petition for discretionary review in an appeal based upon a dissent. Within thirty days after service of the appellant's brief upon appellee, the appellee shall similarly file and serve copies of a new brief. If permitted by Rule 28(h), the appellant may serve and file a reply brief as provided in that rule.

The parties need file but single copies of their respective briefs. The clerk will reproduce and distribute copies as directed by the Court, billing the parties pursuant to these rules.

(2) *Failure to File or Serve.* If an appellant fails to file and serve its brief within the time allowed, the appeal may be dismissed on motion of an appellee or on the Court's own initiative. If an appellee fails to file and serve its brief within the time allowed, it may not be heard in oral argument except by permission of the Court.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 31 January 1977—14(d)(1);
7 October 1980—14(d)(1)—effective 1 January 1981;

27 November 1984—14(a), (b), (d)—applicable to appeals in which the notice of appeal is filed on or after 1 February 1985;
30 June 1988—14(b)(2), (d)(1)—effective 1 September 1988;
8 June 1989—14(d)(1)—effective 1 September 1989;
6 March 1997—14(a)—effective 1 July 1997;
1 May 2003—14(c)(2), (d)(1);
23 August 2005—14(d)(1)—effective 1 September 2005.

Reenacted and Amended: 2 July 2009—amended 14(d)(1) & (2)—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 15
DISCRETIONARY REVIEW ON CERTIFICATION BY SUPREME COURT UNDER N.C.G.S. § 7A-31

(a) *Petition of Party.* Either prior to or following determination by the Court of Appeals of an appeal docketed in that court, any party to the appeal may in writing petition the Supreme Court upon any grounds specified in N.C.G.S. § 7A-31 to certify the cause for discretionary review by the Supreme Court; except that a petition for discretionary review of an appeal from the Industrial Commission, the North Carolina State Bar, the Property Tax Commission, the Board of State Contract Appeals, or the Commissioner of Insurance may only be made following determination by the Court of Appeals; and except that no petition for discretionary review may be filed in any postconviction proceeding under N.C.G.S. Ch. 15A, Art. 89, or in valuation of exempt property under N.C.G.S. Ch. 1C.

(b) *Same; Filing and Service.* A petition for review prior to determination by the Court of Appeals shall be filed with the clerk of the Supreme Court and served on all other parties within fifteen days after the appeal is docketed in the Court of Appeals. For cases that arise from the Industrial Commission, a copy of the petition shall be served on the Chair of the Industrial Commission. A petition for review following determination by the Court of Appeals shall be similarly filed and served within fifteen days after the mandate of the Court of Appeals has been issued to the trial tribunal. Such a petition may be contained in or filed with a notice of appeal of right, to be considered by the Supreme Court in the event the appeal is determined not to be of right, as provided in Rule 14(a). The running of the time for filing and serving a petition for review following

determination by the Court of Appeals is terminated as to all parties by the filing by any party within such time of a petition for rehearing under Rule 31 of these rules, and the full time for filing and serving such a petition for review thereafter commences to run and is computed as to all parties from the date of entry by the Court of Appeals of an order denying the petition for rehearing. If a timely petition for review is filed by a party, any other party may file a petition for review within ten days after the first petition for review was filed.

(c) *Same; Content.* The petition shall designate the petitioner or petitioners and shall set forth plainly and concisely the factual and legal basis upon which it is asserted that grounds exist under N.C.G.S. § 7A-31 for discretionary review. The petition shall state each issue for which review is sought and shall be accompanied by a copy of the opinion of the Court of Appeals when filed after determination by that court. No supporting brief is required, but supporting authorities may be set forth briefly in the petition.

(d) *Response.* A response to the petition may be filed by any other party within ten days after service of the petition upon that party. No supporting brief is required, but supporting authorities may be set forth briefly in the response. If, in the event that the Supreme Court certifies the case for review, the respondent would seek to present issues in addition to those presented by the petitioner, those additional issues shall be stated in the response. A motion for extension of time is not permitted.

(e) *Certification by Supreme Court; How Determined and Ordered.*

(1) *On Petition of a Party.* The determination by the Supreme Court whether to certify for review upon petition of a party is made solely upon the petition and any response thereto and without oral argument.

(2) *On Initiative of the Court.* The determination by the Supreme Court whether to certify for review upon its own initiative pursuant to N.C.G.S. § 7A-31 is made without prior notice to the parties and without oral argument.

(3) *Orders; Filing and Service.* Any determination to certify for review and any determination not to certify made in response to a petition will be recorded by the Supreme Court in a written order. The clerk of the Supreme Court will forthwith enter such order, deliver a copy thereof to the clerk of the Court of Appeals, and mail copies to all parties. The cause is docketed in the Supreme Court

upon entry of an order of certification by the clerk of the Supreme Court.

(f) *Record on Appeal.*

(1) *Composition.* The record on appeal filed in the Court of Appeals constitutes the record on appeal for review by the Supreme Court. However, the Supreme Court may note de novo any deficiencies in the record on appeal and may take such action in respect thereto as it deems appropriate, including dismissal of the appeal.

(2) *Filing; Copies.* When an order of certification is filed with the clerk of the Court of Appeals, he or she will forthwith transmit the original record on appeal to the clerk of the Supreme Court. The clerk of the Supreme Court will procure or reproduce copies thereof for distribution as directed by the Court. If it is necessary to reproduce copies, the clerk may require a deposit by the petitioner to cover the costs thereof.

(g) *Filing and Service of Briefs.*

(1) *Cases Certified Before Determination by Court of Appeals.* When a case is certified for review by the Supreme Court before being determined by the Court of Appeals, the times allowed the parties by Rule 13 to file their respective briefs are not thereby extended. If a party has filed its brief in the Court of Appeals and served copies before the case is certified, the clerk of the Court of Appeals shall forthwith transmit to the clerk of the Supreme Court the original brief and any copies already reproduced for distribution, and if filing was timely in the Court of Appeals this constitutes timely filing in the Supreme Court. If a party has not filed its brief in the Court of Appeals and served copies before the case is certified, the party shall file its brief in the Supreme Court and serve copies within the time allowed and in the manner provided by Rule 13 for filing and serving in the Court of Appeals.

(2) *Cases Certified for Review of Court of Appeals Determinations.* When a case is certified for review by the Supreme Court of a determination made by the Court of Appeals, the appellant shall file a new brief prepared in conformity with Rule 28 in the Supreme Court and serve copies upon all other parties within thirty days after the case is docketed in the Supreme Court by entry

of its order of certification. The appellee shall file a new brief in the Supreme Court and serve copies upon all other parties within thirty days after a copy of appellant's brief is served upon the appellee. If permitted by Rule 28(h), the appellant may serve and file a reply brief as provided in that rule.

(3) *Copies.* A party need file, or the clerk of the Court of Appeals transmit, but a single copy of any brief required by this Rule 15 to be filed in the Supreme Court upon certification for discretionary review. The clerk of the Supreme Court will thereupon procure from the Court of Appeals or will reproduce copies for distribution as directed by the Supreme Court. The clerk may require a deposit by any party to cover the costs of reproducing copies of its brief.

In civil appeals in forma pauperis a party need not pay the deposit for reproducing copies, but at the time of filing its original new brief shall also deliver to the clerk two legible copies thereof.

(4) *Failure to File or Serve.* If an appellant fails to file and serve its brief within the time allowed by this Rule 15, the appeal may be dismissed on motion of an appellee or upon the Court's own initiative. If an appellee fails to file and serve its brief within the time allowed by this Rule 15, it may not be heard in oral argument except by permission of the Court.

(h) *Discretionary Review of Interlocutory Orders.* An interlocutory order by the Court of Appeals, including an order for a new trial or for further proceedings in the trial tribunal, will be certified for review by the Supreme Court only upon a determination by the Court that failure to certify would cause a delay in final adjudication which would probably result in substantial harm to a party.

(i) *Appellant, Appellee Defined.* As used in this Rule 15, the terms "appellant" and "appellee" have the following meanings:

(1) With respect to Supreme Court review prior to determination by the Court of Appeals, whether on petition of a party or on the Court's own initiative, "appellant" means a party who appealed from the trial tribunal; "appellee" means a party who did not appeal from the trial tribunal.

(2) With respect to Supreme Court review of a determination of the Court of Appeals, whether on petition of a party or

on the Court's own initiative, "appellant" means the party aggrieved by the determination of the Court of Appeals; "appellee" means the opposing party; provided that, in its order of certification, the Supreme Court may designate either party an appellant or appellee for purposes of proceeding under this Rule 15.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 7 October 1980—15(g)(2)—effective 1 January 1981;
18 November 1981—15(a).
30 June 1988—15(a), (c), (d), (g)(2)—effective 1 September 1988;
8 December 1988—15(i)(2)—effective 1 January 1989;
8 June 1989—15(g)(2)—effective 1 September 1989;
6 March 1997—15(b)—effective 1 July 1997;
18 October 2001—15(d)—effective 31 October 2001;
23 August 2005—15(g)(2)—effective 1 September 2005.
Reenacted and
Amended: 2 July 2009—amended 15(c) & (d)—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 16
SCOPE OF REVIEW OF DECISIONS OF COURT OF APPEALS

(a) *How Determined.* Review by the Supreme Court after a determination by the Court of Appeals, whether by appeal of right or by discretionary review, is to determine whether there is error of law in the decision of the Court of Appeals. Except when the appeal is based solely upon the existence of a dissent in the Court of Appeals, review in the Supreme Court is limited to consideration of the issues stated in the notice of appeal filed pursuant to Rule 14(b)(2) or the petition for discretionary review and the response thereto filed pursuant to Rule 15(c) and (d), unless further limited by the Supreme Court, and properly presented in the new briefs required by Rules 14(d)(1) and 15(g)(2) to be filed in the Supreme Court.

(b) *Scope of Review in Appeal Based Solely Upon Dissent.* When the sole ground of the appeal of right is the existence of a dis-

sent in the Court of Appeals, review by the Supreme Court is limited to a consideration of those issues that are (1) specifically set out in the dissenting opinion as the basis for that dissent, (2) stated in the notice of appeal, and (3) properly presented in the new briefs required by Rule 14(d)(1) to be filed in the Supreme Court. Other issues in the case may properly be presented to the Supreme Court through a petition for discretionary review pursuant to Rule 15, or by petition for writ of certiorari pursuant to Rule 21.

(c) *Appellant, Appellee Defined.* As used in this Rule 16, the terms "appellant" and "appellee" have the following meanings when applied to discretionary review:

(1) With respect to Supreme Court review of a determination of the Court of Appeals upon petition of a party, "appellant" means the petitioner and "appellee" means the respondent.

(2) With respect to Supreme Court review upon the Court's own initiative, "appellant" means the party aggrieved by the decision of the Court of Appeals and "appellee" means the opposing party; provided that, in its order of certification, the Supreme Court may designate either party an "appellant" or "appellee" for purposes of proceeding under this Rule 16.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

Amended: 3 November 1983—16(a), (b)—applicable to all notices of appeal filed in the Supreme Court on and after 1 January 1984.
30 June 1988—16(a), (b)—effective 1 September 1988;
26 July 1990—16(a)—effective 1 October 1990.

Reenacted and Amended: 2 July 2009—amended 16(a) & (b)—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 17
APPEAL BOND IN APPEALS UNDER N.C.G.S. §§ 7A-30, 7A-31

(a) *Appeal of Right.* In all appeals of right from the Court of Appeals to the Supreme Court in civil cases, the party who takes appeal shall, upon filing the notice of appeal in the Supreme Court, file with the clerk of that Court a written undertaking, with good and

sufficient surety in the sum of $250, or deposit cash in lieu thereof, to the effect that all costs awarded against the appealing party on the appeal will be paid.

(b) *Discretionary Review of Court of Appeals Determination.* When the Supreme Court on petition of a party certifies a civil case for review of a determination of the Court of Appeals, the petitioner shall file an undertaking for costs in the form provided in subsection (a). When the Supreme Court on its own initiative certifies a case for review of a determination of the Court of Appeals, no undertaking for costs shall be required of any party.

(c) *Discretionary Review by Supreme Court Before Court of Appeals Determination.* When a civil case is certified for review by the Supreme Court before being determined by the Court of Appeals, the undertaking on appeal initially filed in the Court of Appeals shall stand for the payment of all costs incurred in either the Court of Appeals or the Supreme Court and awarded against the party appealing.

(d) *Appeals in Forma Pauperis.* No undertakings for costs are required of a party appealing in forma pauperis.

ADMINISTRATIVE HISTORY

Adopted:	13 June 1975.
Amended:	19 June 1978—effective 1 July 1978;
	26 July 1990—17(a)—effective 1 October 1990.
Reenacted:	2 July 2009—effective 1 October 2009 and applies to all cases appealed on or after that date.

ARTICLE IV

DIRECT APPEALS FROM ADMINISTRATIVE AGENCIES TO APPELLATE DIVISION

RULE 18
TAKING APPEAL; RECORD ON APPEAL—COMPOSITION AND SETTLEMENT

(a) *General.* Appeals of right from administrative agencies, boards, or commissions (hereinafter “agency”) directly to the appellate division under N.C.G.S. § 7A-29 shall be in accordance with the procedures provided in these rules for appeals of right from the courts of the trial divisions, except as provided in this Article.

(b) *Time and Method for Taking Appeals.*

(1) The times and methods for taking appeals from an agency shall be as provided in this Rule 18 unless the statutes governing the agency provide otherwise, in which case those statutes shall control.

(2) Any party to the proceeding may appeal from a final agency determination to the appropriate court of the appellate division for alleged errors of law by filing and serving a notice of appeal within thirty days after receipt of a copy of the final order of the agency. The final order of the agency is to be sent to the parties by Registered or Certified Mail. The notice of appeal shall specify the party or parties taking the appeal; shall designate the final agency determination from which appeal is taken and the court to which appeal is taken; and shall be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record.

(3) If a transcript of fact-finding proceedings is not made by the agency as part of the process leading up to the final agency determination, the appealing party may contract with the reporter for production of such parts of the proceedings not already on file as it deems necessary, pursuant to the procedures prescribed in Rule 7.

(c) *Composition of Record on Appeal.* The record on appeal in appeals from any agency shall contain:

(1) an index of the contents of the record on appeal, which shall appear as the first page thereof;

(2) a statement identifying the commission or agency from whose judgment, order, or opinion appeal is taken; the session at which the judgment, order, or opinion was rendered, or if rendered out of session, the time and place of rendition; and the party appealing;

(3) a copy of the summons with return, notice of hearing, or other papers showing jurisdiction of the agency over persons or property sought to be bound in the proceeding, or a statement showing same;

(4) copies of all other notices, pleadings, petitions, or other papers required by law or rule of the agency to be filed

with the agency to present and define the matter for determination, including a Form 44 for all workers' compensation cases which originate from the Industrial Commission;

(5) a copy of any findings of fact and conclusions of law and a copy of the order, award, decision, or other determination of the agency from which appeal was taken;

(6) so much of the litigation before the agency or before any division, commissioner, deputy commissioner, or hearing officer of the agency, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all issues presented on appeal, or a statement specifying that the verbatim transcript of proceedings is being filed with the record pursuant to Rule 9(c)(2) and (c)(3);

(7) when the agency has reviewed a record of proceedings before a division or an individual commissioner, deputy commissioner, or hearing officer of the agency, copies of all items included in the record filed with the agency which are necessary for an understanding of all issues presented on appeal;

(8) copies of all other papers filed and statements of all other proceedings had before the agency or any of its individual commissioners, deputies, or divisions which are necessary to an understanding of all issues presented on appeal, unless they appear in the verbatim transcript of proceedings being filed pursuant to Rule 9(c)(2) and (c)(3);

(9) a copy of the notice of appeal from the agency, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding a party to the appeal to be a civil pauper, and of any agreement, notice of approval, or order settling the record on appeal and settling the verbatim transcript of proceedings if one is filed pursuant to Rule 9(c)(2) and (c)(3);

(10) proposed issues on appeal relating to the actions of the agency, set out as provided in Rule 10;

(11) a statement, when appropriate, that the record of proceedings was made with an electronic recording device;

(12) a statement, when appropriate, that a supplement compiled pursuant to Rule 18(d)(3) is filed with the record on appeal; and

(13) any order (issued prior to the filing of the record on appeal) ruling upon any motion by an attorney who is not licensed to practice law in North Carolina to be admitted pursuant to N.C.G.S. § 84-4.1 to appear in the appeal. In the event such a motion is filed prior to the filing of the record but has not yet been ruled upon when the record is filed, the record shall include a statement that such a motion is pending and the date that motion was filed.

(d) *Settling the Record on Appeal.* The record on appeal may be settled by any of the following methods:

(1) *By Agreement.* Within thirty-five days after filing of the notice of appeal, or after production of the transcript if one is ordered pursuant to Rule 18(b)(3), the parties may by agreement entered in the record on appeal settle a proposed record on appeal prepared by any party in accordance with this Rule 18 as the record on appeal.

(2) *By Appellee's Approval of Appellant's Proposed Record on Appeal.* If the record on appeal is not settled by agreement under Rule 18(d)(1), the appellant shall, within thirty-five days after filing of the notice of appeal, or after production of the transcript if one is ordered pursuant to Rule 18(b)(3), serve upon all other parties a proposed record on appeal constituted in accordance with the provisions of Rule 18(c). Within thirty days after service of the proposed record on appeal upon an appellee, that appellee may serve upon all other parties a notice of approval of the proposed record on appeal or objections, amendments, or a proposed alternative record on appeal. Amendments or objections to the proposed record on appeal shall be set out in a separate paper and shall specify any item(s) for which an objection is based on the contention that the item was not filed, served, submitted for consideration, admitted, or made the subject of an offer of proof, or that the content of a statement or narration is factually inaccurate. An appellant who objects to an appellee's response to the proposed record on appeal shall make the same specification in its request for judicial settlement. The formatting of the proposed

record on appeal and the order in which items appear in it is the responsibility of the appellant. Judicial settlement is not appropriate for disputes concerning only the formatting or the order in which items appear in the settled record on appeal. If all appellees within the times allowed them either file notices of approval or fail to file either notices of approval or objections, amendments, or proposed alternative records on appeal, appellant's proposed record on appeal thereupon constitutes the record on appeal.

(3) *By Agreement, by Operation of Rule, or by Court Order After Appellee's Objection or Amendment.* If any appellee timely files amendments, objections, or a proposed alternative record on appeal, the record on appeal shall consist of each item that is either among those items required by Rule 9(a) to be in the record on appeal or that is requested by any party to the appeal and agreed upon for inclusion by all other parties to the appeal, in the absence of contentions that the item was not filed, served, or offered into evidence. If a party requests that an item be included in the record on appeal but not all parties to the appeal agree to its inclusion, then that item shall not be included in the printed record on appeal, but shall be filed by the appellant with the record on appeal in a volume captioned "Rule 18(d)(3) Supplement to the Printed Record on Appeal," along with any verbatim transcripts, narrations of proceedings, documentary exhibits, and other items that are filed pursuant to Rule 18(b) or 18(c); provided that any item not filed, served, submitted for consideration, admitted, or for which no offer of proof was tendered shall not be included. Subject to the additional requirements of Rule 28(d), items in the Rule 18(d)(3) supplement may be cited and used by the parties as would items in the printed record on appeal.

If a party does not agree to the wording of a statement or narration required or permitted by these rules, there shall be no judicial settlement to resolve the dispute unless the objection is based on a contention that the statement or narration concerns an item that was not filed, served, submitted for consideration, admitted, or tendered in an offer of proof, or that a statement or narration is factually inaccurate. Instead, the objecting party is permitted to have inserted in the settled record on appeal a concise counter-statement. Parties are strongly

encouraged to reach agreement on the wording of statements in records on appeal.

The Rule 18(d)(3) supplement to the printed record on appeal shall contain an index of the contents of the supplement, which shall appear as the first page thereof. The Rule 18(d)(3) supplement shall be paginated consecutively with the pages of the record on appeal, the first page of the supplement to bear the next consecutive number following the number of the last page of the record on appeal. These pages shall be referred to as "record supplement pages," and shall be cited as "(R S p ___)." The contents of the supplement should be arranged, so far as practicable, in the order in which they occurred or were filed in the trial tribunal. If a party does not agree to the inclusion or specification of an exhibit or transcript in the printed record, the printed record shall include a statement that such items are separately filed along with the supplement.

If any party to the appeal contends that materials proposed for inclusion in the record or for filing therewith pursuant to Rule 18(b) or 18(c) were not filed, served, submitted for consideration, admitted, or offered into evidence, or that a statement or narration permitted by these rules is not factually accurate, then that party, within ten days after expiration of the time within which the appellee last served with the appellant's proposed record on appeal might have filed amendments, objections, or a proposed alternative record on appeal, may in writing request that the agency head convene a conference to settle the record on appeal. A copy of that request, endorsed with a certificate showing service on the agency head, shall be served upon all other parties. Each party shall promptly provide to the agency head a reference copy of the record items, amendments, or objections served by that party in the case.

The functions of the agency head in the settlement of the record on appeal are to determine whether a statement permitted by these rules is not factually accurate, to settle narrations of proceedings under Rule 18(c)(6), and to determine whether the record accurately reflects material filed, served, submitted for consideration, admitted, or made the subject of an offer of proof, but not to decide whether material desired in the record by

either party is relevant to the issues on appeal, non-duplicative, or otherwise suited for inclusion in the record on appeal.

Upon receipt of a request for settlement of the record on appeal, the agency head shall send written notice to counsel for all parties setting a place and time for a conference to settle the record on appeal. The conference shall be held not later than fifteen days after service of the request upon the agency head. The agency head or a delegate appointed in writing by the agency head shall settle the record on appeal by order entered not more than twenty days after service of the request for settlement upon the agency. If requested, the settling official shall return the record items submitted for reference during the settlement process with the order settling the record on appeal.

When the agency head is a party to the appeal, the agency head shall forthwith request the Chief Judge of the Court of Appeals or the Chief Justice of the Supreme Court, as appropriate, to appoint a referee to settle the record on appeal. The referee so appointed shall proceed after conference with all parties to settle the record on appeal in accordance with the terms of these rules and the appointing order.

If any appellee timely serves amendments, objections, or a proposed alternative record on appeal, and no judicial settlement of the record is sought, the record is deemed settled as of the expiration of the ten day period within which any party could have requested judicial settlement of the record on appeal under this Rule 18(d)(3).

Nothing herein shall prevent settlement of the record on appeal by agreement of the parties at any time within the times herein limited for settling the record by agency order.

(e) *Further Procedures and Additional Materials in the Record on Appeal.* Further procedures for perfecting and prosecuting the appeal shall be as provided by these rules for appeals from the courts of the trial divisions.

(f) *Extensions of Time.* The times provided in this rule for taking any action may be extended in accordance with the provisions of Rule 27(c).

ADMINISTRATIVE HISTORY

Adopted:	13 June 1975.
Amended:	21 June 1977; 7 October 1980—18(d)(3)—effective 1 January 1981; 27 February 1985—applicable to all appeals in which the notice of appeal is filed on or after 15 March 1985; 26 July 1990—18(b)(3), (d)(1), (d)(2)—effective 1 October 1990; 6 March 1997—18(c)(2), (c)(4)—effective 1 July 1997; 21 November 1997—18(c)(11)—effective 1 February 1998; 6 May 2004—18(c)(1), (d)(2)-(3)—effective 12 May 2004; 25 January 2007—18(d)(2); 18(d)(3), paras. 1, 4, 5; added 18(d)(3), paras. 2, 3, 8—effective 1 March 2007 and applies to all cases appealed on or after that date.
Reenacted and Amended:	2 July 2009—amended 18(c)(6), (7), (8) & (10); added 18(c)(13); amended title of 18(e)—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 19
[RESERVED]

ADMINISTRATIVE HISTORY

Adopted:	13 June 1975.
Amended:	21 June 1977—19(d).
REPEALED:	27 February 1985—effective 15 March 1985.

RULE 20
MISCELLANEOUS PROVISIONS OF LAW GOVERNING AGENCY APPEALS

Specific provisions of law pertaining to stays pending appeals from any agency to the appellate division, to pauper appeals therein, and to the scope of review and permissible mandates of the Court of Appeals therein shall govern the procedure in such appeals notwithstanding any provisions of these rules that may prescribe a different procedure.

ADMINISTRATIVE HISTORY

Adopted:	13 June 1975.
Amended:	27 February 1985—effective 15 March 1985.
Reenacted:	2 July 2009—effective 1 October 2009 and applies to all cases appealed on or after that date.

ARTICLE V

EXTRAORDINARY WRITS

RULE 21
CERTIORARI

(a) *Scope of the Writ.*

(1) *Review of the Judgments and Orders of Trial Tribunals.* The 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, or when no right of appeal from an interlocutory order exists, or for review pursuant to N.C.G.S. § 15A-1422(c)(3) of an order of the trial court denying a motion for appropriate relief.

(2) *Review of the Judgments and Orders of the Court of Appeals.* The writ of certiorari may be issued by the Supreme Court in appropriate circumstances to permit review of the decisions and orders of the Court of Appeals when the right to prosecute an appeal of right or to petition for discretionary review has been lost by failure to take timely action, or for review of orders of the Court of Appeals when no right of appeal exists.

(b) *Petition for Writ; to Which Appellate Court Addressed.* Application for the writ of certiorari shall be made by filing a petition therefor with the clerk of the court of the appellate division to which appeal of right might lie from a final judgment in the cause by the tribunal to which issuance of the writ is sought.

(c) *Same; Filing and Service; Content.* The petition shall be filed without unreasonable delay and shall be accompanied by proof of service upon all other parties. For cases which arise from the Industrial Commission, a copy of the petition shall be served on the Chair of the Industrial Commission. The petition shall contain a statement of the facts necessary to an understanding of the issues pre-

sented by the application; a statement of the reasons why the writ should issue; and certified copies of the judgment, order, or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition. The petition shall be verified by counsel or the petitioner. Upon receipt of the prescribed docket fee, the clerk will docket the petition.

(d) *Response; Determination by Court.* Within ten days after service of the petition any party may file a response thereto with supporting affidavits or certified portions of the record not filed with the petition. Filing shall be accompanied by proof of service upon all other parties. The court for good cause shown may shorten the time for filing a response. Determination will be made on the basis of the petition, the response, and any supporting papers. No briefs or oral argument will be received or allowed unless ordered by the court upon its own initiative.

(e) *Petition for Writ in Postconviction Matters; to Which Appellate Court Addressed.* Petitions for writ of certiorari to review orders of the trial court denying motions for appropriate relief upon grounds listed in N.C.G.S. § 15A-1415(b) by persons who have been convicted of murder in the first degree and sentenced to death shall be filed in the Supreme Court. In all other cases such petitions shall be filed in and determined by the Court of Appeals, and the Supreme Court will not entertain petitions for certiorari or petitions for further discretionary review in these cases. In the event the petitioner unreasonably delays in filing the petition or otherwise fails to comply with a rule of procedure, the petition shall be dismissed by the court. If the petition is without merit, it shall be denied by the court.

(f) *Petition for Writ in Postconviction Matters—Death Penalty Cases.* A petition for writ of certiorari to review orders of the trial court on motions for appropriate relief in death penalty cases shall be filed in the Supreme Court within sixty days after delivery of the transcript of the hearing on the motion for appropriate relief to the petitioning party. The responding party shall file its response within thirty days of service of the petition.

ADMINISTRATIVE HISTORY

Adopted:	13 June 1975.
Amended:	18 November 1981—21(a), (e);
	27 November 1984—21(a)—effective 1 February 1985;
	3 September 1987—21(e)—effective for all judgments of the superior court entered on and after 24 July 1987;

	8 December 1988—21(f)—applicable to all cases in which the superior court order is entered on or after 1 July 1989; 6 March 1997—21(c), (f)—effective 1 July 1997; 15 August 2002—21(e).
Reenacted:	2 July 2009—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 22
MANDAMUS AND PROHIBITION

(a) *Petition for Writ; to Which Appellate Court Addressed.* Applications for the writs of mandamus or prohibition directed to a judge, judges, commissioner, or commissioners shall be made by filing a petition therefor with the clerk of the court to which appeal of right might lie from a final judgment entered in the cause by the judge, judges, commissioner, or commissioners to whom issuance of the writ is sought.

(b) *Same; Filing and Service; Content.* The petition shall be filed without unreasonable delay after the judicial action sought to be prohibited or compelled has been undertaken, or has occurred, or has been refused, and shall be accompanied by proof of service on the respondent judge, judges, commissioner, or commissioners and on all other parties to the action. The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the issues presented and of the relief sought; a statement of the reasons why the writ should issue; and certified copies of any order or opinion or parts of the record that may be essential to an understanding of the matters set forth in the petition. The petition shall be verified by counsel or the petitioner. Upon receipt of the prescribed docket fee, the clerk shall docket the petition.

(c) *Response; Determination by Court.* Within ten days after service of the petition the respondent or any party may file a response thereto with supporting affidavits or certified portions of the record not filed with the petition. Filing shall be accompanied by proof of service upon all other parties. The court for good cause shown may shorten the time for filing a response. Determination will be made on the basis of the petition, the response, and any supporting papers. No briefs or oral argument will be received or allowed unless ordered by the court upon its own initiative.

ADMINISTRATIVE HISTORY

Adopted:	13 June 1975.
Reenacted:	2 July 2009—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 23
SUPERSEDEAS

(a) *Pending Review of Trial Tribunal Judgments and Orders.*

(1) *Application—When Appropriate.* Application may be made to the appropriate appellate court for a writ of supersedeas to stay the execution or enforcement of any judgment, order, or other determination of a trial tribunal which is not automatically stayed by the taking of appeal when an appeal has been taken, or a petition for mandamus, prohibition, or certiorari has been filed to obtain review of the judgment, order, or other determination; and (i) a stay order or entry has been sought by the applicant by deposit of security or by motion in the trial tribunal and such order or entry has been denied or vacated by the trial tribunal, or (ii) extraordinary circumstances make it impracticable to obtain a stay by deposit of security or by application to the trial tribunal for a stay order.

(2) *Same—How and to Which Appellate Court Made.* Application for the writ is by petition which shall in all cases, except those initially docketed in the Supreme Court, be first made to the Court of Appeals. Except when an appeal from a superior court is initially docketed in the Supreme Court, no petition will be entertained by the Supreme Court unless application has been made first to the Court of Appeals and denied by that Court.

(b) *Pending Review by Supreme Court of Court of Appeals Decisions.* Application may be made in the first instance to the Supreme Court for a writ of supersedeas to stay the execution or enforcement of a judgment, order, or other determination mandated by the Court of Appeals when a notice of appeal of right or a petition for discretionary review has been or will be timely filed, or a petition for review by certiorari, mandamus, or prohibition has been filed to obtain review of the decision of the Court of Appeals. No prior motion for a stay order need be made to the Court of Appeals.

(c) *Petition; Filing and Service; Content.* The petition shall be filed with the clerk of the court to which application is being made and shall be accompanied by proof of service upon all other parties. The petition shall be verified by counsel or the petitioner. Upon receipt of the required docket fee, the clerk will docket the petition.

For stays of the judgments of trial tribunals, the petition shall contain a statement that stay has been sought in the court to which

issuance of the writ is sought and denied or vacated by that court, or shall contain facts showing that it was impracticable there to seek a stay. For stays of any judgment, the petition shall contain: (1) a statement of any facts necessary to an understanding of the basis upon which the writ is sought; and (2) a statement of reasons why the writ should issue in justice to the applicant. The petition may be accompanied by affidavits and by any certified portions of the record pertinent to its consideration. It may be included in a petition for discretionary review by the Supreme Court under N.C.G.S. § 7A-31, or in a petition to either appellate court for certiorari, mandamus, or prohibition.

(d) *Response; Determination by Court.* Within ten days after service of the petition any party may file a response thereto with supporting affidavits or certified portions of the record not filed with the petition. Filing shall be accompanied by proof of service upon all other parties. The court for good cause shown may shorten the time for filing a response. Determination will be made on the basis of the petition, the response, and any supporting papers. No briefs or oral argument will be received or allowed unless ordered by the court upon its own initiative.

(e) *Temporary Stay.* Upon the filing of a petition for supersedeas, the applicant may apply, either within the petition or by separate paper, for an order temporarily staying enforcement or execution of the judgment, order, or other determination pending decision by the court upon the petition for supersedeas. If application is made by separate paper, it shall be filed and served in the manner provided for the petition for supersedeas in Rule 23(c). The court for good cause shown in such a petition for temporary stay may issue such an order *ex parte*. In capital cases, such stay, if granted, shall remain in effect until the period for filing a petition for certiorari in the United States Supreme Court has passed without a petition being filed, or until certiorari on a timely filed petition has been denied by that Court. At that time, the stay shall automatically dissolve.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 2 December 1980—23(b)—effective 1 January 1981;
6 March 1997—23(e)—effective 1 July 1997.
Reenacted: 2 July 2009—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 24
FORM OF PAPERS; COPIES

A party need file with the appellate court but a single copy of any paper required to be filed in connection with applications for extraordinary writs. The court may direct that additional copies be filed. The clerk will not reproduce copies.

ADMINISTRATIVE HISTORY

Adopted:	13 June 1975.
Reenacted:	2 July 2009—effective 1 October 2009 and applies to all cases appealed on or after that date.

ARTICLE VI

GENERAL PROVISIONS

RULE 25
PENALTIES FOR FAILURE TO COMPLY WITH RULES

(a) *Failure of Appellant to Take Timely Action.* If after giving notice of appeal from any court, commission, or commissioner the appellant shall fail within the times allowed by these rules or by order of court to take any action required to present the appeal for decision, the appeal may on motion of any other party be dismissed. Prior to the filing of an appeal in an appellate court, motions to dismiss are made to the court, commission, or commissioner from which appeal has been taken; after an appeal has been filed in an appellate court, motions to dismiss are made to that court. Motions to dismiss shall be supported by affidavits or certified copies of docket entries which show the failure to take timely action or otherwise perfect the appeal and shall be allowed unless compliance or a waiver thereof is shown on the record, or unless the appellee shall consent to action out of time, or unless the court for good cause shall permit the action to be taken out of time.

Motions heard under this rule to courts of the trial divisions may be heard and determined by any judge of the particular court specified in Rule 36 of these rules; motions made under this rule to a commission may be heard and determined by the chair of the commission; or if to a commissioner, then by that commissioner. The procedure in all motions made under this rule to trial tribunals shall be that provided for motion practice by the N.C. Rules of Civil Procedure; in all motions made under this rule to courts of the appellate division, the procedure shall be that provided by Rule 37 of these rules.

(b) *Sanctions for Failure to Comply with Rules.* A court of the appellate division may, on its own initiative or motion of a party, impose a sanction against a party or attorney or both when the court determines that such party or attorney or both substantially failed to comply with these appellate rules. The court may impose sanctions of the type and in the manner prescribed by Rule 34 for frivolous appeals.

ADMINISTRATIVE HISTORY

Adopted:	13 June 1975.
Amended:	8 December 1988—effective 1 July 1989;
	6 March 1997—25(a)—effective upon adoption 6 March 1997.
Reenacted:	2 July 2009—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 26
FILING AND SERVICE

(a) *Filing.* Papers required or permitted by these rules to be filed in the trial or appellate divisions shall be filed with the clerk of the appropriate court. Filing may be accomplished by mail or by electronic means as set forth in this rule.

(1) *Filing by Mail.* Filing may be accomplished by mail addressed to the clerk but is not timely unless the papers are received by the clerk within the time fixed for filing, except that motions, responses to petitions, the record on appeal, and briefs shall be deemed filed on the date of mailing, as evidenced by the proof of service.

(2) *Filing by Electronic Means.* Filing in the appellate courts may be accomplished by electronic means by use of the electronic filing site at www.ncappellatecourts.org. All documents may be filed electronically through the use of this site. A document filed by use of the official electronic web site is deemed filed as of the time that the document is received electronically.

Responses and motions may be filed by facsimile machines, if an oral request for permission to do so has first been tendered to and approved by the clerk of the appropriate appellate court.

In all cases in which a document has been filed by facsimile machine pursuant to this rule, counsel must

forward the following items by first class mail, contemporaneously with the transmission: the original signed document, the electronic transmission fee, and the applicable filing fee for the document, if any. The party filing a document by electronic means shall be responsible for all costs of the transmission, and neither they nor the electronic transmission fee may be recovered as costs of the appeal. When a document is filed to the electronic filing site at www.ncappellatecourts.org, counsel may either have his or her account drafted electronically by following the procedures described at the electronic filing site, or counsel must forward the applicable filing fee for the document by first class mail, contemporaneously with the transmission.

(b) *Service of All Papers Required.* Copies of all papers filed by any party and not required by these rules to be served by the clerk shall, at or before the time of filing, be served on all other parties to the appeal.

(c) *Manner of Service.* Service may be made in the manner provided for service and return of process in Rule 4 of the N.C. Rules of Civil Procedure and may be so made upon a party or upon its attorney of record. Service may also be made upon a party or its attorney of record by delivering a copy to either or by mailing a copy to the recipient's last known address, or if no address is known, by filing it in the office of the clerk with whom the original paper is filed. Delivery of a copy within this rule means handing it to the attorney or to the party, or leaving it at the attorney's office with a partner or employee. Service by mail is complete upon deposit of the paper enclosed in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service, or, for those having access to such services, upon deposit with the State Courier Service or Inter-Office Mail. When a document is filed electronically to the official web site, service also may be accomplished electronically by use of the other counsel's correct and current electronic mail address(es), or service may be accomplished in the manner described previously in this subsection.

(d) *Proof of Service.* Papers presented for filing shall contain an acknowledgment of service by the person served or proof of service in the form of a statement of the date and manner of service and of the names of the persons served, certified by the person who made service. Proof of service shall appear on or be affixed to the papers filed.

(e) *Joint Appellants and Appellees.* Any paper required by these rules to be served on a party is properly served upon all parties joined in the appeal by service upon any one of them.

(f) *Numerous Parties to Appeal Proceeding Separately.* When there are unusually large numbers of appellees or appellants proceeding separately, the trial tribunal, upon motion of any party or on its own initiative, may order that any papers required by these rules to be served by a party on all other parties need be served only upon parties designated in the order, and that the filing of such a paper and service thereof upon the parties designated constitutes due notice of it to all other parties. A copy of every such order shall be served upon all parties to the action in such manner and form as the court directs.

(g) *Documents Filed with Appellate Courts.*

(1) *Form of Papers.* Papers presented to either appellate court for filing shall be letter size (8½ x 11") with the exception of wills and exhibits. All printed matter must appear in at least 12-point type on unglazed white paper of 16-20 pound substance so as to produce a clear, black image, leaving a margin of approximately one inch on each side. The body of text shall be presented with double spacing between each line of text. No more than twenty-seven lines of double-spaced text may appear on a page, even if proportional type is used. Lines of text shall be no wider than 6½ inches. The format of all papers presented for filing shall follow the additional instructions found in the appendixes to these rules. The format of briefs shall follow the additional instructions found in Rule 28(j).

(2) *Index required.* All documents presented to either appellate court other than records on appeal, which in this respect are governed by Rule 9, shall, unless they are less than ten pages in length, be preceded by a subject index of the matter contained therein, with page references, and a table of authorities, i.e., cases (alphabetically arranged), constitutional provisions, statutes, and textbooks cited, with references to the pages where they are cited.

(3) *Closing.* The body of the document shall at its close bear the printed name, post office address, telephone number, State Bar number and e-mail address of counsel of record, and in addition, at the appropriate place, the manuscript signature of counsel of record. If the document

has been filed electronically by use of the official web site at www.ncappellatecourts.org, the manuscript signature of counsel of record is not required.

(4) *Protecting the Identity of Certain Juveniles.* Parties shall protect the identity of juveniles covered by Rules 3(b)(1), 3.1(b), or 4(e) pursuant to said rules.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

Amended: 5 May 1981—26(g)—effective for all appeals arising from cases filed in the court of original jurisdiction after 1 July 1982;
11 February 1982—26(c);
7 December 1982—26(g)—effective for documents filed on and after 1 March 1983;
27 November 1984—26(a)—effective for documents filed on and after 1 February 1985;
30 June 1988—26(a), (g)—effective 1 September 1988;
26 July 1990—26(a)—effective 1 October 1990;
6 March 1997—26(b), (g)—effective 1 July 1997;
4 November 1999—effective 15 November 1999;
18 October 2001—26(g), para. 1—effective 31 October 2001;
15 August 2002—26(a)(1);
3 October 2002—26(g)—effective 7 October 2002;
1 May 2003—26(a)(1);
6 May 2004—26(g)(4)—effective 12 May 2004.

Reenacted and Amended: 2 July 2009—amended 26(g)(3) & (4)—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 27
COMPUTATION AND EXTENSION OF TIME

(a) *Computation of Time.* In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or a legal holiday.

(b) *Additional Time After Service by Mail.* Except as to filing of notice of appeal pursuant to Rule 3(c), whenever a party has the right to do some act or take some proceedings within a prescribed period after the service of a notice or other paper and the notice or paper is served by mail, three days shall be added to the prescribed period.

(c) *Extensions of Time; By Which Court Granted.* Except as herein provided, courts for good cause shown may upon motion extend any of the times prescribed by these rules or by order of court for doing any act required or allowed under these rules, or may permit an act to be done after the expiration of such time. Courts may not extend the time for taking an appeal or for filing a petition for discretionary review or a petition for rehearing or the responses thereto prescribed by these rules or by law.

(1) *Motions for Extension of Time in the Trial Division.* The trial tribunal for good cause shown by the appellant may extend once for no more than thirty days the time permitted by Rule 11 or Rule 18 for service of the proposed record on appeal.

Motions for extensions of time made to a trial tribunal may be made orally or in writing and without notice to other parties and may be determined at any time or place within the state.

Motions made under this Rule 27 to a court of the trial division may be heard and determined by any of those judges of the particular court specified in Rule 36 of these rules. Such motions made to a commission may be heard and determined by the chair of the commission; or if to a commissioner, then by that commissioner.

(2) *Motions for Extension of Time in the Appellate Division.* All motions for extensions of time other than those specifically enumerated in Rule 27(c)(1) may be made only to the appellate court to which appeal has been taken.

(d) *Motions for Extension of Time; How Determined.* Motions for extension of time made in any court may be determined *ex parte*, but the moving party shall promptly serve on all other parties to the appeal a copy of any order extending time; provided that motions made after the expiration of the time allowed in these rules for the action sought to be extended must be in writing and with notice to all other parties and may be allowed only after all other parties have had an opportunity to be heard.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 7 March 1978—27(c);
4 October 1978—27(c)—effective 1 January 1979;
27 November 1984—27(a), (c)—effective 1 February 1985;
8 December 1988—27(c)—effective for all judgments of the trial tribunal entered on or after 1 July 1989;
26 July 1990—27(c), (d)—effective 1 October 1990;
18 October 2001—27(c)—effective 31 October 2001.
Reenacted and
Amended: 2 July 2009—amended 27(b)—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 28
BRIEFS: FUNCTION AND CONTENT

(a) *Function.* The function of all briefs required or permitted by these rules is to define clearly the issues presented to the reviewing court and to present the arguments and authorities upon which the parties rely in support of their respective positions thereon. The scope of review on appeal is limited to issues so presented in the several briefs. Issues not presented and discussed in a party's brief are deemed abandoned. Similarly, issues properly presented for review in the Court of Appeals, but not then stated in the notice of appeal or the petition accepted by the Supreme Court for review and discussed in the new briefs required by Rules 14(d)(1) and 15(g)(2) to be filed in the Supreme Court for review by that Court, are deemed abandoned.

Parties shall protect the identity of juveniles covered by Rules 3(b)(1), 3.1(b), or 4(e) pursuant to said rules.

(b) *Content of Appellant's Brief.* An appellant's brief shall contain, under appropriate headings and in the form prescribed by Rule 26(g) and the appendixes to these rules, in the following order:

(1) A cover page, followed by a subject index and table of authorities as required by Rule 26(g).

(2) A statement of the issues presented for review. The proposed issues on appeal listed in the record on appeal

shall not limit the scope of the issues that an appellant may argue in its brief.

(3) A concise statement of the procedural history of the case. This shall indicate the nature of the case and summarize the course of proceedings up to the taking of the appeal before the court.

(4) A statement of the grounds for appellate review. Such statement shall include citation of the statute or statutes permitting appellate review. When an appeal is based on Rule 54(b) of the Rules of Civil Procedure, the statement shall show that there has been a final judgment as to one or more but fewer than all of the claims or parties and that there has been a certification by the trial court that there is no just reason for delay. When an appeal is interlocutory, the statement must contain sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.

(5) A full and complete statement of the facts. This should be a non-argumentative summary of all material facts underlying the matter in controversy which are necessary to understand all issues presented for review, supported by references to pages in the transcript of proceedings, the record on appeal, or exhibits, as the case may be.

(6) An argument, to contain the contentions of the appellant with respect to each issue presented. Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.

The argument shall contain a concise statement of the applicable standard(s) of review for each issue, which shall appear either at the beginning of the discussion of each issue or under a separate heading placed before the beginning of the discussion of all the issues.

The body of the argument and the statement of applicable standard(s) of review shall contain citations of the authorities upon which the appellant relies. Evidence or other proceedings material to the issue may be narrated or quoted in the body of the argument, with appropriate reference to the record on appeal, the transcript of proceedings, or exhibits.

(7) A short conclusion stating the precise relief sought.

(8) Identification of counsel by signature, typed name, post office address, telephone number, State Bar number, and e-mail address.

(9) The proof of service required by Rule 26(d).

(10) Any appendix required or allowed by this Rule 28.

(c) *Content of Appellee's Brief; Presentation of Additional Issues*. An appellee's brief shall contain a subject index and table of authorities as required by Rule 26(g), an argument, a conclusion, identification of counsel, and proof of service in the form provided in Rule 28(b) for an appellant's brief, and any appendix required or allowed by this Rule 28. It need contain no statement of the issues presented, of the procedural history of the case, of the grounds for appellate review, of the facts, or of the standard(s) of review, unless the appellee disagrees with the appellant's statements and desires to make a restatement or unless the appellee desires to present issues in addition to those stated by the appellant.

Without taking an appeal, an appellee may present issues on appeal based on any action or omission of the trial court that deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken. Without having taken appeal or listing proposed issues as permitted by Rule 10(c), an appellee may also argue on appeal whether a new trial should be granted to the appellee rather than a judgment notwithstanding the verdict awarded to the appellant when the latter relief is sought on appeal by the appellant. If the appellee presents issues in addition to those stated by the appellant, the appellee's brief must contain a full, non-argumentative summary of all material facts necessary to understand the new issues supported by references to pages in the record on appeal, the transcript of proceedings, or the appendixes, as appropriate, as well as a statement of the applicable standard(s) of review for those additional issues.

An appellee may supplement the record with any materials pertinent to the issues presented on appeal, as provided in Rule 9(b)(5).

(d) *Appendixes to Briefs*. Whenever the transcript of proceedings is filed pursuant to Rule 9(c)(2), the parties must file verbatim portions of the transcript as appendixes to their briefs, if required by this Rule 28(d). Parties must modify verbatim portions of the transcript filed pursuant to this rule in a manner consistent with Rules 3(b)(1), 3.1(b), or 4(e).

(1) *When Appendixes to Appellant's Brief Are Required.* Except as provided in Rule 28(d)(2), the appellant must reproduce as appendixes to its brief:

a. those portions of the transcript of proceedings which must be reproduced verbatim in order to understand any issue presented in the brief;

b. those portions of the transcript showing the pertinent questions and answers when an issue presented in the brief involves the admission or exclusion of evidence;

c. relevant portions of statutes, rules, or regulations, the study of which is required to determine issues presented in the brief;

d. relevant items from the Rule 11(c) or Rule 18(d)(3) supplement to the printed record on appeal, the study of which are required to determine issues presented in the brief.

(2) *When Appendixes to Appellant's Brief Are Not Required.* Notwithstanding the requirements of Rule 28(d)(l), the appellant is not required to reproduce an appendix to its brief with respect to an issue presented:

a. whenever the portion of the transcript necessary to understand an issue presented in the brief is reproduced verbatim in the body of the brief;

b. to show the absence or insufficiency of evidence unless there are discrete portions of the transcript where the subject matter of the alleged insufficiency of the evidence is located; or

c. to show the general nature of the evidence necessary to understand an issue presented in the brief if such evidence has been fully summarized as required by Rule 28(b)(4) and (5).

(3) *When Appendixes to Appellee's Brief Are Required.* An appellee must reproduce appendixes to its brief in the following circumstances:

a. Whenever the appellee believes that appellant's appendixes do not include portions of the transcript or items from the Rule 11(c) or Rule 18(d)(3) supplement to the printed record on appeal that are required by Rule 28(d)(1), the appellee shall reproduce those portions of the transcript or supplement it believes to be necessary to understand the issue.

b. Whenever the appellee presents a new or additional issue in its brief as permitted by Rule 28(c), the

appellee shall reproduce portions of the transcript or relevant items from the Rule 11(c) or Rule 18(d)(3) supplement to the printed record on appeal as if it were the appellant with respect to each such new or additional issue.

(4) *Format of Appendixes.* The appendixes to the briefs of any party shall be in the format prescribed by Rule 26(g) and shall consist of clear photocopies of transcript pages that have been deemed necessary for inclusion in the appendix under this Rule 28(d). The pages of the appendix shall be consecutively numbered, and an index to the appendix shall be placed at its beginning.

(e) *References in Briefs to the Record.* References in the briefs to parts of the printed record on appeal and to parts of the verbatim transcript or parts of documentary exhibits shall be to the pages where those portions appear.

(f) *Joinder of Multiple Parties in Briefs.* Any number of appellants or appellees in a single cause or in causes consolidated for appeal may join in a single brief even though they are not formally joined on the appeal. Any party to any appeal may adopt by reference portions of the briefs of others.

(g) *Additional Authorities.* Additional authorities discovered by a party after filing its brief may be brought to the attention of the court by filing a memorandum thereof with the clerk of the court and serving copies upon all other parties. The memorandum may not be used as a reply brief or for additional argument, but shall simply state the issue to which the additional authority applies and provide a full citation of the authority. Authorities not cited in the briefs or in such a memorandum may not be cited and discussed in oral argument.

Before the Court of Appeals, the party shall file an original and three copies of the memorandum; in the Supreme Court, the party shall file an original and fourteen copies of the memorandum.

(h) *Reply Briefs.* No reply brief will be received or considered by the court, except in the following circumstances:

(1) The court, upon its own initiative, may order a reply brief to be filed and served.

(2) If the appellee has presented in its brief new or additional issues as permitted by Rule 28(c), an appellant may, within fourteen days after service of such brief, file and serve a reply brief limited to those new or additional issues.

(3) If the parties are notified under Rule 30(f) that the case will be submitted without oral argument on the record and briefs, an appellant may, within fourteen days after service of such notification, file and serve a reply brief limited to a concise rebuttal to arguments set out in the brief of the appellee which were not addressed in the appellant's principal brief or in a reply brief filed pursuant to Rule 28(h)(1).

(4) If the parties are notified that the case has been scheduled for oral argument, an appellant may, within fourteen days after service of such notification, file and serve a motion for leave to file a reply brief. The motion shall state concisely the reasons why a reply brief is believed to be desirable or necessary and the issues to be addressed in the reply brief. The proposed reply brief may be submitted with the motion for leave and shall be limited to a concise rebuttal to arguments set out in the brief of the appellee which were not addressed in the appellant's principal brief. Unless otherwise ordered by the court, the motion for leave will be determined solely upon the motion and without responses thereto or oral argument. The clerk of the appellate court will notify the parties of the court's action upon the motion, and, if the motion is granted, the appellant shall file and serve the reply brief within ten days of such notice.

(5) Motions for extensions of time in relation to reply briefs are disfavored.

(i) *Amicus Curiae Briefs.* A brief of an amicus curiae may be filed only by leave of the appellate court wherein the appeal is docketed or in response to a request made by that court on its own initiative.

A person desiring to file an amicus curiae brief shall present to the court a motion for leave to file, served upon all parties. The motion shall state concisely the nature of the applicant's interest, the reasons why an amicus curiae brief is believed desirable, the issues of law to be addressed in the amicus curiae brief, and the applicant's position on those issues. The proposed amicus curiae brief may be conditionally filed with the motion for leave. Unless otherwise ordered by the court, the application for leave will be determined solely upon the motion and without responses thereto or oral argument.

The clerk of the appellate court will forthwith notify the applicant and all parties of the court's action upon the application. Unless

other time limits are set out in the order of the court permitting the brief, the amicus curiae shall file the brief within the time allowed for the filing of the brief of the party supported or, if in support of neither party, within the time allowed for filing appellant's brief. Motions for leave to file an amicus curiae brief submitted to the court after the time within which the amicus curiae brief normally would be due are disfavored in the absence of good cause. Reply briefs of the parties to an amicus curiae brief will be limited to points or authorities presented in the amicus curiae brief which are not presented in the main briefs of the parties. No reply brief of an amicus curiae will be received.

A motion of an amicus curiae to participate in oral argument will be allowed only for extraordinary reasons.

(j) *Length Limitations Applicable to Briefs Filed in the Court of Appeals.* Each brief filed in the Court of Appeals, whether filed by an appellant, appellee, or amicus curiae, formatted according to Rule 26 and the appendixes to these rules, shall have either a page limit or a word-count limit, depending on the type style used in the brief:

(1) *Type.*

(A) *Type style.* Documents must be set in a plain roman style, although italics or boldface may be used for emphasis. Case names must be italicized or underlined. Documents may be set in either proportionally spaced or nonproportionally spaced (monospaced) type.

(B) *Type size.*

1. Nonproportionally spaced type (e.g., Courier or Courier New) may not contain more than ten characters per inch (12-point).

2. Proportionally spaced type (e.g., Times New Roman) must be 14-point or larger.

3. Documents set in Courier New 12-point type or Times New Roman 14-point type will be deemed in compliance with these type size requirements.

(2) *Document.*

(A) *Page limits for briefs using nonproportional type.* The page limit for a principal brief that uses nonproportional type is thirty-five pages. The page limit for a reply brief permitted by Rule 28(h)(1), (2), or (3) is fifteen pages, and the page limit for a reply brief per-

mitted by Rule 28(h)(4) is twelve pages. Unless otherwise ordered by the court, the page limit for an amicus curiae brief is fifteen pages. A page shall contain no more than twenty-seven lines of double-spaced text of no more than sixty-five characters per line. Covers, indexes, tables of authorities, certificates of service, and appendixes do not count toward these page limits. The court may strike or require resubmission of briefs with excessive single-spaced passages or footnotes that are used to circumvent these page limits.

(B) *Word-count limits for briefs using proportional type.* A principal brief that uses proportional type may contain no more than 8,750 words. A reply brief permitted by Rule 28(h)(1), (2), or (3) may contain no more than 3,750 words, and a reply brief permitted by Rule 28(h)(4) may contain no more than 3,000 words. Unless otherwise ordered by the court, an amicus curiae brief may contain no more than 3,750 words. Covers, indexes, tables of authorities, certificates of service, certificates of compliance with this rule, and appendixes do not count against these word-count limits. Footnotes and citations in the text, however, do count against these word-count limits. Parties who file briefs in proportional type shall submit with the brief, immediately before the certificate of service, a certification, signed by counsel of record, or in the case of parties filing briefs *pro se*, by the party, that the brief contains no more than the number of words allowed by this rule. For purposes of this certification, counsel and parties may rely on word counts reported by word-processing software, as long as footnotes and citations are included in those word counts.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

Amended: 27 January 1981—repeal 28(d)—effective 1 July 1981;
10 June 1981—28(b), (c)—effective 1 October 1981;
12 January 1982—28(b)(4)—effective 15 March 1982;
7 December 1982—28(i)—effective 1 January 1983;

27 November 1984—28(b), (c), (d), (e), (g), (h)—effective 1 February 1985;
30 June 1988—28(a), (b), (c), (d), (e), (h), (i)—effective 1 September 1988;
8 June 1989—28(h), (j)—effective 1 September 1989;
26 July 1990—28(h)(2)—effective 1 October 1990;
18 October 2001—28(b)(4)-(10), (c), (j)—effective 31 October 2001;
3 October 2002—28(j)—effective 7 October 2002;
6 May 2004—28(d), (h), (j)(2), (k)—effective 12 May 2004;
23 August 2005—28(b)(6), (c), (h)(4)—effective 1 September 2005;
25 January 2007—28(b)(6), para. 1; 28(c), para. 1; 28(d)(3)(a), (b); 28(i), paras. 2, 3; 28(j)(2)(A)(1) & (2); added 28(d)(1)(d)—effective 1 March 2007 and applies to all cases appealed on or after that date.

Reenacted and Amended: 2 July 2009—amended 28(a), (b), (c), (d), (e), (h), (i), (j); deleted former 28(k) and replaced with new language in 28(a)—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 29
SESSIONS OF COURTS; CALENDAR OF HEARINGS

(a) *Sessions of Court.*

(1) *Supreme Court.* The Supreme Court shall be in continuous session for the transaction of business. Unless otherwise scheduled by the Court, hearings in appeals will be held during the months of February through May and September through December. Additional settings may be authorized by the Chief Justice.

(2) *Court of Appeals.* Appeals will be heard in accordance with a schedule promulgated by the Chief Judge. Panels of the Court will sit as scheduled by the Chief Judge. For the transaction of other business, the Court of Appeals shall be in continuous session.

(b) *Calendaring of Cases for Hearing.* Each appellate court will calendar the hearing of all appeals docketed in the court. In general, appeals will be calendared for hearing in the order in which they are

docketed, but the court may vary the order for any cause deemed appropriate. On motion of any party, with notice to all other parties, the court may determine without hearing to give an appeal peremptory setting or otherwise to vary the normal calendar order. Except as advanced for peremptory setting on motion of a party or the court's own initiative, no appeal will be calendared for hearing at a time less than thirty days after the filing of the appellant's brief. The clerk of the appellate court will give reasonable notice to all counsel of record of the setting of an appeal for hearing by mailing a copy of the calendar.

ADMINISTRATIVE HISTORY

Adopted:	13 June 1975.
Amended:	3 March 1982—29(a)(1);
	3 September 1987—29(a)(1);
	26 July 1990—29(b)—effective 1 October 1990.
Reenacted and Amended:	2 July 2009—amended 29(a)(1)—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 30
ORAL ARGUMENT AND UNPUBLISHED OPINIONS

(a) *Order and Content of Argument.*

(1) The appellant is entitled to open and conclude the argument. The opening argument shall include a fair statement of the case. Oral arguments should complement the written briefs, and counsel will therefore not be permitted to read at length from briefs, records, and authorities.

(2) In cases involving juveniles covered by Rules 3(b)(1), 3.1(b), or 4(e), counsel shall refrain from using a juvenile's name in oral argument and shall refer to the juvenile pursuant to said rules.

(b) *Time Allowed for Argument.*

(1) *In General.* Ordinarily a total of thirty minutes will be allowed all appellants and a total of thirty minutes will be allowed all appellees for oral argument. Upon written or oral application of any party, the court for good cause shown may extend the times limited for argument. Among other causes, the existence of adverse interests between multiple appellants or between multiple appellees may be suggested as good cause for such an

extension. The court of its own initiative may direct argument on specific points outside the times limited.

Counsel is not obliged to use all the time allowed, and should avoid unnecessary repetition; the court may terminate argument whenever it considers further argument unnecessary.

(2) *Numerous Counsel.* Any number of counsel representing individual appellants or appellees proceeding separately or jointly may be heard in argument within the times herein limited or allowed by order of court. When more than one counsel is heard, duplication or supplementation of argument on the same points shall be avoided unless specifically directed by the court.

(c) *Non-Appearance of Parties.* If counsel for any party fails to appear to present oral argument, the court will hear argument from opposing counsel. If counsel for no party appears, the court will decide the case on the written briefs unless it orders otherwise.

(d) *Submission on Written Briefs.* By agreement of the parties, a case may be submitted for decision on the written briefs, but the court may nevertheless order oral argument before deciding the case.

(e) *Unpublished Opinions.*

(1) In order to minimize the cost of publication and of providing storage space for the published reports, the Court of Appeals is not required to publish an opinion in every decided case. If the panel that hears the case determines that the appeal involves no new legal principles and that an opinion, if published, would have no value as a precedent, it may direct that no opinion be published.

(2) The text of a decision without published opinion shall be posted on the Administrative Office of the Courts' North Carolina Court System Internet web site and reported only by listing the case and the decision in the advance sheets and the bound volumes of the North Carolina Court of Appeals Reports.

(3) An unpublished decision of the North Carolina Court of Appeals does not constitute controlling legal authority. Accordingly, citation of unpublished opinions in briefs, memoranda, and oral arguments in the trial and appellate divisions is disfavored, except for the purpose of establishing claim preclusion, issue preclusion, or the law of the case. If a party believes, nevertheless, that an unpub-

lished opinion has precedential value to a material issue in the case and that there is no published opinion that would serve as well, the party may cite the unpublished opinion if that party serves a copy thereof on all other parties in the case and on the court to which the citation is offered. This service may be accomplished by including the copy of the unpublished opinion in an addendum to a brief or memorandum. A party who cites an unpublished opinion for the first time at a hearing or oral argument must attach a copy of the unpublished opinion relied upon pursuant to the requirements of Rule 28(g). When citing an unpublished opinion, a party must indicate the opinion's unpublished status.

(4) Counsel of record and *pro se* parties of record may move for publication of an unpublished opinion, citing reasons based on Rule 30(e)(1) and serving a copy of the motion upon all other counsel and *pro se* parties of record. The motion shall be filed and served within ten days of the filing of the opinion. Any objection to the requested publication by counsel or *pro se* parties of record must be filed within five days after service of the motion requesting publication. The panel that heard the case shall determine whether to allow or deny such motion.

(f) *Pre-Argument Review; Decision of Appeal Without Oral Argument.*

(1) any time that the Supreme Court concludes that oral argument in any case pending before it will not be of assistance to the Court, it may dispose of the case on the record and briefs. In those cases, counsel will be notified not to appear for oral argument.

(2) The Chief Judge of the Court of Appeals may from time to time designate a panel to review any pending case, after all briefs are filed but before argument, for decision under this rule. If all of the judges of the panel to which a pending appeal has been referred conclude that oral argument will not be of assistance to the Court, the case may be disposed of on the record and briefs. Counsel will be notified not to appear for oral argument.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 18 December 1975—30(e);
3 May 1976—30(f);

5 February 1979—30(e);
10 June 1981—30(f)—effective 1 July 1981;
18 October 2001—-30(e)(2), (4)—effective 1 January 2002;
3 October 2002—30(e)(3)—effective 7 October 2002;
6 May 2004—30(a)(2)—effective 12 May 2004;
23 August 2005—30, 30(e) (titles)—effective 1 September 2005.

Reenacted and Amended: 2 July 2009—amended 30(a)(2), 30(b)(1)—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 31
PETITION FOR REHEARING

(a) *Time for Filing; Content.* A petition for rehearing may be filed in a civil action within fifteen days after the mandate of the court has been issued. The petition shall state with particularity the points of fact or law that, in the opinion of the petitioner, the court has overlooked or misapprehended and shall contain such argument in support of the petition as petitioner desires to present. It shall be accompanied by a certificate of at least two attorneys who for periods of at least five years, respectively, shall have been members of the bar of this State and who have no interest in the subject of the action and have not been counsel for any party to the action, that they have carefully examined the appeal and the authorities cited in the decision, and that they consider the decision in error on points specifically and concisely identified. Oral argument in support of the petition will not be permitted.

(b) *How Addressed; Filed.* A petition for rehearing shall be addressed to the court that issued the opinion sought to be reconsidered.

(c) *How Determined.* Within thirty days after the petition is filed, the court will either grant or deny the petition. A determination to grant or deny will be made solely upon the written petition; no written response will be received from the opposing party and no oral argument by any party will be heard. Determination by the court is final. The rehearing may be granted as to all or fewer than all points suggested in the petition. When the petition is denied, the clerk shall forthwith notify all parties.

(d) *Procedure When Granted.* Upon grant of the petition the clerk shall forthwith notify the parties that the petition has been

granted. The case will be reconsidered solely upon the record on appeal, the petition to rehear, new briefs of both parties, and the oral argument if one has been ordered by the court. The briefs shall be addressed solely to the points specified in the order granting the petition to rehear. The petitioner's brief shall be filed within thirty days after the case is certified for rehearing, and the opposing party's brief, within thirty days after petitioner's brief is served. Filing and service of the new briefs shall be in accordance with the requirements of Rule 13. No reply brief shall be received on rehearing. If the court has ordered oral argument, the clerk shall give notice of the time set therefor, which time shall be not less than thirty days after the filing of the petitioner's brief on rehearing.

(e) *Stay of Execution.* When a petition for rehearing is filed, the petitioner may obtain a stay of execution in the trial court to which the mandate of the appellate court has been issued. The procedure is as provided by Rule 8 of these rules for stays pending appeal.

(f) *Waiver by Appeal from Court of Appeals.* The timely filing of a notice of appeal from, or of a petition for discretionary review of, a determination of the Court of Appeals constitutes a waiver of any right thereafter to petition the Court of Appeals for rehearing as to such determination or, if a petition for rehearing has earlier been filed, an abandonment of such petition.

(g) *No Petition in Criminal Cases.* The courts will not entertain petitions for rehearing in criminal actions.

ADMINISTRATIVE HISTORY

Adopted:	13 June 1975.
Amended:	27 November 1984—31(a)—effective 1 February 1985;
	3 September 1987—31(d);
	8 December 1988—31(b), (d)—effective 1 January 1989;
	18 October 2001—31(b)—effective 31 October 2001.
Reenacted:	2 July 2009—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 32
MANDATES OF THE COURTS

(a) *In General.* Unless a court of the appellate division directs that a formal mandate shall issue, the mandate of the court consists of certified copies of its judgment and of its opinion and any direction of its clerk as to costs. The mandate is issued by its transmittal from

the clerk of the issuing court to the clerk or comparable officer of the tribunal from which appeal was taken to the issuing court.

(b) *Time of Issuance.* Unless a court orders otherwise, its clerk shall enter judgment and issue the mandate of the court twenty days after the written opinion of the court has been filed with the clerk.

ADMINISTRATIVE HISTORY

Adopted:	13 June 1975.
Amended:	27 November 1984—32(b)—effective 1 February 1985.
Reenacted:	2 July 2009—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 33
ATTORNEYS

(a) *Appearances.* An attorney will not be recognized as appearing in any case unless he or she is entered as counsel of record therein. The signature of an attorney on a record on appeal, motion, brief, or other document permitted by these rules to be filed in a court of the appellate division constitutes entry of the attorney as counsel of record for the parties designated and a certification that the attorney represents such parties. The signature of a member or associate in a firm's name constitutes entry of the firm as counsel of record for the parties designated. Counsel of record may not withdraw from a case except by leave of court. Only those counsel of record who have personally signed the brief prior to oral argument may be heard in argument.

(b) *Signatures on Electronically Filed Documents.* If more than one attorney is listed as being an attorney for the party(ies) on an electronically filed document, it is the responsibility of the attorney actually filing the document by computer to (1) list his or her name first on the document, and (2) place on the document under the signature line the following statement: "I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it."

(c) *Agreements.* Only those agreements of counsel which appear in the record on appeal or which are filed in the court where an appeal is docketed will be recognized by that court.

(d) *Limited Practice of Out-of-State Attorneys.* Attorneys who are not licensed to practice law in North Carolina, but desire to appear before the appellate courts of North Carolina in a matter shall submit a motion to the appellate court fully complying with the re-

quirements set forth in N.C.G.S. § 84-4.1. This motion shall be filed prior to or contemporaneously with the out-of-state attorney signing and filing any motion, petition, brief, or other document in any appellate court. Failure to comply with this provision may subject the attorney to sanctions and shall result in the document being stricken, unless signed by another attorney licensed to practice in North Carolina. If an attorney is admitted to practice before the Court of Appeals in a matter, the attorney shall be required to file another motion should the case proceed to the Supreme Court. However, if the required fee has been paid to the Court of Appeals, another fee shall not be due at the Supreme Court.

ADMINISTRATIVE HISTORY

Adopted:	13 June 1975.
Amended:	18 October 2001—33(a)-(c)—effective 31 October 2001.
Reenacted and Amended:	2 July 2009—added 33(d)—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 33.1
SECURE LEAVE PERIODS FOR ATTORNEYS

(a) *Purpose, Authorization.* In order to secure for the parties to actions and proceedings pending in the appellate division, and to the public at large, the heightened level of professionalism that an attorney is able to provide when the attorney enjoys periods of time that are free from the urgent demands of professional responsibility and to enhance the overall quality of the attorney's personal and family life, any attorney may from time to time designate and enjoy one or more secure leave periods each year as provided in this rule.

(b) *Length, Number.* A secure leave period shall consist of one or more complete calendar weeks. During any calendar year, an attorney's secure leave periods pursuant to this rule and to Rule 26 of the General Rules of Practice for the Superior and District Courts shall not exceed, in the aggregate, three calendar weeks.

(c) *Designation, Effect.* To designate a secure leave period, an attorney shall file a written designation containing the information required by subsection (d), with the official specified in subsection (e), and within the time provided in subsection (f). Upon such filing, the secure leave period so designated shall be deemed allowed without further action of the court, and the attorney shall not be required to appear at any argument or other in-court proceeding in the appellate division during that secure leave period.

(d) *Content of Designation.* The designation shall contain the following information: (1) the attorney's name, address, telephone number, State Bar number, and e-mail address; (2) the date of the Monday on which the secure leave period is to begin and of the Friday on which it is to end; (3) the dates of all other secure leave periods during the current calendar year that have previously been designated by the attorney pursuant to this rule and to Rule 26 of the General Rules of Practice for the Superior and District Courts; (4) a statement that the secure leave period is not being designated for the purpose of delaying, hindering, or interfering with the timely disposition of any matter in any pending action or proceeding; (5) a statement that no argument or other in-court proceeding has been scheduled during the designated secure leave period in any matter pending in the appellate division in which the attorney has entered an appearance; and (6) a listing of all cases, by caption and docket number, pending before the appellate court in which the designation is being filed. The designation shall apply only to those cases pending in that appellate court on the date of its filing. A separate designation shall be filed as to any cases on appeal subsequently filed and docketed.

(e) *Where to File Designation.* The designation shall be filed as follows: (1) if the attorney has entered an appearance in the Supreme Court, in the office of the clerk of the Supreme Court, even if the designation was filed initially in the Court of Appeals; (2) if the attorney has entered an appearance in the Court of Appeals, in the office of the clerk of the Court of Appeals.

(f) *When to File Designation.* The designation shall be filed: (1) no later than ninety days before the beginning of the secure leave period, and (2) before any argument or other in-court proceeding has been scheduled for a time during the designated secure leave period.

ADMINISTRATIVE HISTORY

Adopted: 6 May 1999—effective 1 January 2000 for all actions and proceedings pending in the appellate division on and after that date.

Recodified former Rule 33A as Rule 33.1 and
Reenacted Rule 33.1 as amended: 2 July 2009—amended 33.1(d) & (e)—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 34
FRIVOLOUS APPEALS; SANCTIONS

(a) A court of the appellate division may, on its own initiative or motion of a party, impose a sanction against a party or attorney or

both when the court determines that an appeal or any proceeding in an appeal was frivolous because of one or more of the following:

(1) the appeal was not well grounded in fact and was not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(2) the appeal was taken or continued for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(3) a petition, motion, brief, record, or other paper filed in the appeal was grossly lacking in the requirements of propriety, grossly violated appellate court rules, or grossly disregarded the requirements of a fair presentation of the issues to the appellate court.

(b) A court of the appellate division may impose one or more of the following sanctions:

(1) dismissal of the appeal;

(2) monetary damages including, but not limited to,

a. single or double costs,

b. damages occasioned by delay,

c. reasonable expenses, including reasonable attorney fees, incurred because of the frivolous appeal or proceeding;

(3) any other sanction deemed just and proper.

(c) A court of the appellate division may remand the case to the trial division for a hearing to determine one or more of the sanctions under subdivisions (b)(2) or (b)(3) of this rule.

(d) If a court of the appellate division remands the case to the trial division for a hearing to determine a sanction under subsection (c) of this rule, the person subject to sanction shall be entitled to be heard on that determination in the trial division.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Amended: 8 December 1988—effective 1 July 1989;
8 April 1999—34(d).
Reenacted: 2 July 2009—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 35
COSTS

(a) *To Whom Allowed.* Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court; if a judgment is affirmed, costs shall be taxed against the appellant unless otherwise ordered by the court; if a judgment is reversed, costs shall be taxed against the appellee unless otherwise ordered; if a judgment is affirmed in part, reversed in part, or modified in any way, costs shall be allowed as directed by the court.

(b) *Direction as to Costs in Mandate.* The clerk shall include in the mandate of the court an itemized statement of costs taxed in the appellate court and a designation of the party against whom such costs are taxed.

(c) *Costs of Appeal Taxable in Trial Tribunals.* Any costs of an appeal that are assessable in the trial tribunal shall, upon receipt of the mandate, be taxed as directed therein and may be collected by execution of the trial tribunal.

(d) *Execution to Collect Costs in Appellate Courts.* Costs taxed in the courts of the appellate division may be made the subject of execution issuing from the court where taxed. Such execution may be directed by the clerk of the court to the proper officers of any county of the state; may be issued at any time after the mandate of the court has been issued; and may be made returnable on any day named. Any officer to whom such execution is directed is subject to the penalties prescribed by law for failure to make due and proper return.

ADMINISTRATIVE HISTORY

Adopted:	13 June 1975.
Reenacted:	2 July 2009—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 36
TRIAL JUDGES AUTHORIZED TO ENTER ORDERS UNDER THESE RULES

(a) *When Particular Judge Not Specified by Rule.* When by these rules a trial court or a judge thereof is permitted or required to enter an order or to take some other judicial action with respect to a pending appeal and the rule does not specify the particular judge with authority to do so, the following judges of the respective courts have such authority with respect to causes docketed in their respective divisions:

(1) *Superior Court.* The judge who entered the judgment, order, or other determination from which appeal was taken, and any regular or special superior judge resident in the district or assigned to hold court in the district wherein the cause is docketed;

(2) *District Court.* The judge who entered the judgment, order, or other determination from which appeal was taken; the chief district court judge of the district wherein the cause is docketed; and any judge designated by such chief district court judge to enter interlocutory orders under N.C.G.S. § 7A-192.

(b) *Upon Death, Incapacity, or Absence of Particular Judge Authorized.* When by these rules the authority to enter an order or to take other judicial action is limited to a particular judge and that judge is unavailable by reason of death, mental or physical incapacity, or absence from the state, the Chief Justice will, upon motion of any party, designate another judge to act in the matter. Such designation will be by order entered *ex parte*, copies of which will be mailed forthwith by the clerk of the Supreme Court to the judge designated and to all parties.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Reenacted: 2 July 2009—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 37
MOTIONS IN APPELLATE COURTS

(a) *Time; Content of Motions; Response.* An application to a court of the appellate division for an order or for other relief available under these rules may be made by filing a motion for such order or other relief with the clerk of the court, with service on all other parties. Unless another time is expressly provided by these rules, the motion may be filed and served at any time before the case is called for oral argument. The motion shall contain or be accompanied by any matter required by a specific provision of these rules governing such a motion and shall state with particularity the grounds on which it is based and the order or relief sought. If a motion is supported by affidavits, briefs, or other papers, these shall be served and filed with the motion. Within ten days after a motion is served or until the appeal is called for oral argument, whichever period is shorter, a party may file and serve copies of a response in opposition to the motion, which may be supported by affidavits, briefs, or other papers

in the same manner as motions. The court may shorten or extend the time for responding to any motion.

(b) *Determination.* Notwithstanding the provisions of Rule 37(a), a motion may be acted upon at any time, despite the absence of notice to all parties and without awaiting a response thereto. A party who has not received actual notice of such a motion, or who has not filed a response at the time such action is taken, and who is adversely affected by the action may request reconsideration, vacation, or modification thereof. Motions will be determined without argument, unless the court orders otherwise.

(c) *Protecting the Identity of Certain Juveniles.* Parties shall protect the identity of juveniles covered by Rules 3(b)(1), 3.1(b), or 4(e) pursuant to said rules.

(d) *Withdrawal of Appeal in Criminal Cases.* Withdrawal of appeal in criminal cases shall be in accordance with N.C.G.S. § 15A-1450. In addition to the requirements of N.C.G.S. § 15A-1450, after the record on appeal in a criminal case has been filed in an appellate court but before the filing of an opinion, the defendant shall also file a written notice of the withdrawal with the clerk of the appropriate appellate court.

(e) *Withdrawal of Appeal in Civil Cases.*

(1) Prior to the filing of a record on appeal in the appellate court, an appellant or cross-appellant may, without the consent of the other party, file a notice of withdrawal of its appeal with the tribunal from which appeal has been taken. Alternatively, prior to the filing of a record on appeal, the parties may file a signed stipulation agreeing to dismiss the appeal with the tribunal from which the appeal has been taken.

(2) After the record on appeal has been filed, an appellant or cross-appellant or allparties jointly may move the appellate court in which the appeal is pending, prior to the filing of an opinion, for dismissal of the appeal. The motion must specify the reasons therefor, the positions of all parties on the motion to dismiss, and the positions of all parties on the allocation of taxed costs. The appeal may be dismissed by order upon such terms as agreed to by the parties or as fixed by the appellate court.

(f) *Effect of Withdrawal of Appeal.* The withdrawal of an appeal shall not affect the right of any other party to file or continue such party's appeal or cross-appeal.

ADMINISTRATIVE HISTORY

Adopted:	13 June 1975.
Amended:	6 May 2004—37(c)—effective 12 May 2004; 25 January 2007—added 37(d)-(f)—effective 1 March 2007 and applies to all cases appealed on or after that date.
Reenacted and Amended:	2 July 2009—rewrote 37(c)—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 38
SUBSTITUTION OF PARTIES

(a) *Death of a Party.* No action abates by reason of the death of a party while an appeal may be taken or is pending, if the cause of action survives. If a party acting in an individual capacity dies after appeal is taken from any tribunal, the personal representative of the deceased party in a personal action, or the successor in interest of the deceased party in a real action may be substituted as a party on motion filed by the representative or the successor in interest or by any other party with the clerk of the court in which the action is then docketed. A motion to substitute made by a party shall be served upon the personal representative or successor in interest in addition to all other parties. If such a deceased party in a personal action has no personal representative, any party may in writing notify the court of the death, and the court in which the action is then docketed shall direct the proceedings to be had in order to substitute a personal representative.

If a party against whom an appeal may be taken dies after entry of a judgment or order but before appeal is taken, any party entitled to appeal therefrom may proceed as appellant as if death had not occurred; and after appeal is taken, substitution may then be effected in accordance with this subdivision. If a party entitled to appeal dies before filing a notice of appeal, appeal may be taken by the personal representative, or, if there is no personal representative, by the attorney of record within the time and in the manner prescribed in these rules; and after appeal is taken, substitution may then be effected in accordance with this rule.

(b) *Substitution for Other Causes.* If substitution of a party to an appeal is necessary for any reason other than death, substitution shall be effected in accordance with the procedure prescribed in subsection (a).

(c) *Public Officers; Death or Separation from Office.* When a person is a party to an appeal in an official or representative capacity

and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and the person's successor is automatically substituted as a party. Prior to the qualification of a successor, the attorney of record for the former party may take any action required by these rules. An order of substitution may be made, but neither failure to enter such an order nor any misnomer in the name of a substituted party shall affect the substitution unless it be shown that the same affected the substantial rights of a party.

ADMINISTRATIVE HISTORY

Adopted:	13 June 1975.
Reenacted:	2 July 2009—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 39
DUTIES OF CLERKS; WHEN OFFICES OPEN

(a) *General Provisions.* The clerks of the courts of the appellate division shall take the oaths and give the bonds required by law. The courts shall be deemed always open for the purpose of filing any proper paper and of making motions and issuing orders. The offices of the clerks with the clerks or deputies in attendance shall be open during business hours on all days except Saturdays, Sundays, and legal holidays, but the respective courts may provide by order that the offices of their clerks shall be open for specified hours on Saturdays or on particular legal holidays or shall be closed on particular business days.

(b) *Records to Be Kept.* The clerk of each of the courts of the appellate division shall keep and maintain the records of that court on paper, microfilm, or electronic media, or any combination thereof. The records kept by the clerk shall include indexed listings of all cases docketed in that court, whether by appeal, petition, or motion, and a notation of the dispositions attendant thereto; a listing of final judgments on appeals before the court, indexed by title, docket number, and parties, containing a brief memorandum of the judgment of the court and the party against whom costs were adjudicated; and records of the proceedings and ceremonies of the court.

ADMINISTRATIVE HISTORY

Adopted:	13 June 1975.
Amended:	8 December 1988—39(b)—effective 1 January 1989.
Reenacted:	2 July 2009—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 40
CONSOLIDATION OF ACTIONS ON APPEAL

Two or more actions that involve common issues of law may be consolidated for hearing upon motion of a party to any of the actions made to the appellate court wherein all are docketed, or upon the initiative of that court. Actions so consolidated will be calendared and heard as a single case. Upon consolidation, the parties may set the course of argument, within the times permitted by Rule 30(b), by written agreement filed with the court prior to oral argument. This agreement shall control unless modified by the court.

ADMINISTRATIVE HISTORY

Adopted:	13 June 1975.
Amended: 1	8 October 2001—effective 31 October 2001.
Reenacted and Amended:	2 July 2009—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 41
APPEAL INFORMATION STATEMENT

(a) The Court of Appeals has adopted an Appeal Information Statement (Statement) which will be revised from time to time. The purpose of the Statement is to provide the Court the substance of an appeal and the information needed by the Court for effective case management.

(b) Each appellant shall complete, file, and serve the Statement as set out in this rule.

(1) The clerk of the Court of Appeals shall furnish a Statement form to all parties to the appeal when the record on appeal is docketed in the Court of Appeals.

(2) Each appellant shall complete and file the Statement with the clerk of the Court of Appeals at or before the time his or her appellant's brief is due and shall serve a copy of the statement upon all other parties to the appeal pursuant to Rule 26. The Statement may be filed by mail addressed to the clerk and, if first class mail is utilized, is deemed filed on the date of mailing as evidenced by the proof of service. Parties shall protect the identity of juveniles covered by Rules 3(b)(1), 3.1(b), or 4(e) pursuant to said rules.

(3) If any party to the appeal concludes that the Statement is in any way inaccurate or incomplete, that party may file

with the Court of Appeals a written statement setting out additions or corrections within seven days of the service of the Statement and shall serve a copy of the written statement upon all other parties to the appeal pursuant to Rule 26. The written statement may be filed by mail addressed to the clerk and, if first class mail is utilized, is deemed filed on the date of mailing as evidenced by the proof of service.

ADMINISTRATIVE HISTORY

Adopted: 3 March 1994—effective 15 March 1994.
Amended: 6 May 2004—41(b)(2)—effective 12 May 2004.
Reenacted and
Amended: 2 July 2009—amended 41(b)(2)—effective 1 October 2009 and applies to all cases appealed on or after that date.

RULE 42
[RESERVED]

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.
Renumbered: Effective 15 March 1994.
Amended: 18 October 2001—effective 31 October 2001.
Recodified
as Rule 1(a): 2 July 2009—effective 1 October 2009.

APPENDIXES TO THE NORTH CAROLINA RULES OF APPELLATE PROCEDURE

Adopted 1 July 1989
Including Amendments through 2 July 2009.

Appendix A: Timetables for Appeals

Appendix B: Format and Style

Appendix C: Arrangement of Record on Appeal

Appendix D: Forms

Appendix E: Content of Briefs

Appendix F: Fees and Costs

APPENDIX A
TIMETABLES FOR APPEALS

TIMETABLE OF APPEALS FROM TRIAL DIVISION AND ADMINISTRATIVE AGENCIES UNDER ARTICLES II AND IV OF THE RULES OF APPELLATE PROCEDURE

Action	*Time (Days)*	*From date of*	*Rule Ref.*
Taking appeal (civil)	30	entry of judgment (unless tolled)	3(c)
Cross appeal	10	service and filing of a timely notice of appeal	3(c)
Taking appeal (agency)	30	receipt of final agency order (unless statutes provide otherwise)	18(b)(2)
Taking appeal (criminal)	14	entry of judgment (unless tolled)	4(a)
Ordering transcript (civil, agency)	14	filing notice of appeal	7(a)(1) 18(b)(3)
Ordering transcript (criminal indigent)	14	order filed by clerk of superior court	7(a)(2)
Preparing & delivering transcript (civil, non-capital criminal) (capital criminal)	 60 120	service of order for transcript	7(b)(1)
Serving proposed record on appeal (civil, non-capital criminal) (agency)	 35 35	notice of appeal (no transcript) or reporter's certificate of delivery of transcript	11(b) 18(d)
Serving proposed record on appeal (capital)	70	reporter's certificate of delivery	11(b)
Serving objections or proposed alternative record on appeal (civil, non-capital criminal) (capital criminal) (agency)	 30 35 30	service of proposed record service of proposed record	11(c) 18(d)(2)
Requesting judicial settlement of record	10	expiration of the last day within which an appellee served could serve objections, etc.	11(c) 18(d)(3)
Judicial settlement of record	20	service on judge of request for settlement	11(c) 18(d)(3)

Filing record on appeal in appellate court	15	settlement of record on appeal	12(a)
Filing appellant's brief (or mailing brief under Rule 26(a))	30	Clerk's mailing of printed record (60 days in Death Cases)	13(a)
Filing appellee's brief (or mailing brief under Rule 26(a))	30	service of appellant's brief (60 days in Death Cases)	13(a)
Oral Argument	30	filing appellant's brief (usual minimum time)	29
Certification or Mandate	20	issuance of opinion	32
Petition for Rehearing (civil action only)	15	mandate	31(a)

TIMETABLE OF APPEALS FROM TRIAL DIVISION UNDER ARTICLE II, RULE 3.1, OF THE RULES OF APPELLATE PROCEDURE

Action	*Time (Days)*	*From date of*	*Rule Ref.*
Taking appeal	10	entry of judgment	3.1(a); N.C.G.S. § 7B-1001
Notifying court reporting coordinator (clerk of superior court)	1 (business)	filing notice of appeal	3.1(c)(1)
Assigning transcriptionist (court reporting coordinator)	2 (business)	receipt of notification court reporting coordinator	3.1(c)(1)
Preparing and delivering a transcript of designated proceedings (indigent appellant)	35	assignment by court reporting coordinator	3.1(c)(1)
Preparing and delivering a transcript of designated proceedings (non-indigent appellant)	45	assignment of transcriptionist	3.1(c)(1)
Serving proposed record on appeal	10	receipt of transcript	3.1(c)(2)
Serving notice of approval, or objections, or proposed alternative record on appeal	10	service of proposed record	3.1(c)(2)
Filing record on appeal when parties agree to a settled record within 20 days of receipt of transcript	5 (business)	settlement of record	3.1(c)(2)

Filing record on appeal if *all* appellees fail either to serve notices of approval, or objections, or proposed alternative records on appeal	5 (business)	last date on which *any* appellee could so serve	3.1(c)(2)
Appellant files proposed record on appeal and appellee(s) files objections and amendments or an alternative proposed record on appeal when parties cannot agree to a settled record on appeal within 30 days after receipt of the transcript	5 (business)	last date on which the record could be settled by agreement	3.1(c)(2)
Filing appellant's brief	30	filing of record on appeal	3.1(c)(3)
Filing appellee's brief	30	service of appellant's brief	3.1(c)(3)

TIMETABLE OF APPEALS TO THE SUPREME COURT FROM THE COURT OF APPEALS UNDER ARTICLE III OF THE RULES OF APPELLATE PROCEDURE

Action	*Time (Days)*	*From date of*	*Rule Ref.*
Petition for Discretionary Review prior to determination	15	docketing appeal in Court of Appeals	15(b)
Notice of Appeal and/or Petition for Discretionary Review	15	mandate of Court of Appeals (or from order of Court of Appeals denying petition for rehearing)	14(a) 15(b)
Cross-Notice of Appeal	10	filing of first notice of appeal1	4(a)
Response to Petition for Discretionary Review	10	service of petition	15(d)
Filing appellant's brief (or mailing brief under Rule 26(a))	30	filing notice of appeal certification of review	14(d) 15(g)(2)
Filing appellee's brief (or mailing brief under Rule 26(a))	30	service of appellant's brief	14(d) 15(g)
Oral Argument	30	filing appellee's brief (usual minimum time)	29
Certification or Mandate	20	issuance of opinion	32

Petition for Rehearing (civil action only)	15	mandate	31(a)

NOTES

All of the critical time intervals outlined here except those for taking an appeal, petitioning for discretionary review, responding to a petition for discretionary review, or petitioning for rehearing may be extended by order of the court in which the appeal is docketed at the time. Note that Rule 7(b)(1) authorizes the trial tribunal to grant only one extension of time for production of the transcript and that the trial tribunal lacks such authority in criminal cases in which a sentence of death has been imposed. Note also that Rule 27 authorizes the trial tribunal to grant only one extension of time for service of the proposed record. All other motions for extension of the times provided in these rules must be filed with the appellate court to which the appeal of right lies.

No time limits are prescribed for petitions for writs of certiorari other than that they be "filed without unreasonable delay." (Rule 21(c)).

Appendix A amended effective 1 October 1990; 6 March 1997; 31 October 2001; 1 May 2003; 1 September 2005; 1 October 2009.

APPENDIX B
FORMAT AND STYLE

All documents for filing in either appellate court are prepared on 8½ x 11", plain, white unglazed paper of 16 to 20 pound weight. Typing is done on one side only, although the document will be reproduced in two-sided format. No vertical rules, law firm marginal return addresses, or punched holes will be accepted. The papers need not be stapled; a binder clip or rubber bands are adequate to secure them in order.

Papers shall be prepared using at least 12-point type so as to produce a clear, black image. Documents shall be set either in nonproportional type or in proportional type, defined as follows: Nonproportional type is defined as 10-character-per-inch Courier (or an equivalent style of Pica) type that devotes equal horizontal space to each character. Proportional type is defined as any non-italic, nonscript font, other than nonproportional type, that is 14-point or larger. Under Appellate Rule 28(j), briefs in nonproportional type are governed by a page limit, and briefs in proportional type are governed by a word-count limit. To allow for binding of documents, a margin of approximately one inch shall be left on all sides of the page. The formatted page should be approximately 6½ inches wide and 9 inches

long. Tabs are located at the following distances from the left margin: ½", 1", 1½", 2", 4¼" (center), and 5".

CAPTIONS OF DOCUMENTS

All documents to be filed in either appellate court shall be headed by a caption. The caption contains: the number to be assigned the case by the clerk; the Judicial District from which the case arises; the appellate court to whose attention the document is addressed; the style of the case showing the names of all parties to the action, except as provided by Rules 3(b)(1), 3.1(b), and 4(e); the county from which the case comes; the indictment or docket numbers of the case below (in records on appeal and in motions and petitions in the cause filed prior to the filing of the record); and the title of the document. The caption shall be placed beginning at the top margin of a cover page and again on the first textual page of the document.

No. ______ (Number) DISTRICT

(SUPREME COURT OF NORTH CAROLINA)
(or)
(NORTH CAROLINA COURT OF APPEALS)

****

STATE OF NORTH CAROLINA	)	
or	)	
(Name of Plaintiff)	)	From (Name) County
	)	No. ________
v	)	
	)	
(Name of Defendant)	)	

****

(TITLE OF DOCUMENT)

****

The caption should reflect the title of the action (all parties named except as provided by Rules 3(b)(1), 3.1(b), and 4(e)) as it appeared in the trial division. The appellant or petitioner is not automatically given topside billing; the relative positions of the plaintiff and defendant should be retained.

The caption of a record on appeal and of a notice of appeal from the trial division should include directly below the name of the county, the indictment or docket numbers of the case in the trial division. Those numbers, however, should not be included in other documents, except a petition for writ of certiorari or other petitions and

motions in which no record on appeal has yet been created in the case. In notices of appeal or petitions to the Supreme Court from decisions of the Court of Appeals, the caption should show the Court of Appeals docket number in similar fashion.

Immediately below the caption of each document, centered and underlined, in all capital letters, should be the title of the document, e.g., PETITION FOR DISCRETIONARY REVIEW UNDER N.C.G.S. § 7A-31, or DEFENDANT-APPELLANT'S BRIEF. A brief filed in the Supreme Court in a case previously heard and decided by the Court of Appeals is entitled NEW BRIEF.

INDEXES

A brief or petition that is ten pages or more in length and all appendixes to briefs (Rule 28) must contain an index to the contents.

The index should be indented approximately 3/4" from each margin, providing a 5" line. The form of the index for a record on appeal should be as follows (indexes for briefs are addressed in Appendix E):

(Record)

INDEX

Organization of the Court 1
Complaint of Tri-Cities Mfg. 1

* * *

*PLAINTIFF'S EVIDENCE:
John Smith 17
Tom Jones 23
Defendant's Motion for Nonsuit 84

*DEFENDANT'S EVIDENCE:
John Q. Public 86
Mary J. Public 92
Request for Jury Instructions 101
Charge to the Jury 101
Jury Verdict 102
Order or Judgment 108
Appeal Entries 109
Order Extending Time 111
Proposed Issues on Appeal 113
Certificate of Service 114
Stipulation of Counsel 115
Names and Addresses of Counsel 116

USE OF THE TRANSCRIPT OF EVIDENCE WITH RECORD ON APPEAL

Those portions asterisked (*) in the sample index above would be omitted if the transcript option were selected under Appellate Rule 9(c). In their place in the record, counsel should place a statement in substantially the following form:

> "Per Appellate Rule 9(c) the transcript of proceedings in this case, taken by (name), court reporter, from (date) to (date) and consisting of (# of pages) pages, numbered (1) through (last page#), and bound in (# of volumes) volumes is filed contemporaneously with this record."

The transcript should be prepared with a clear, black image on 8½ x 11" paper of 16-20 pound substance. Enough copies should be reproduced to assure the parties of a reference copy and one file copy in the appellate court. In criminal appeals, the district attorney is responsible for conveying a copy to the Attorney General (Rule 9(c)).

The transcript should not be inserted into the record on appeal, but rather should be separately bound and submitted for filing in the proper appellate court with the record. Transcript pages inserted into the record on appeal will be treated as a narration and will be printed at the standard page charge. Counsel should note that the separate transcript will not be reproduced with the record on appeal, but will be treated and used as an exhibit.

TABLE OF CASES AND AUTHORITIES

Immediately following the index and before the inside caption, all briefs, petitions, and motions that are ten pages or greater in length shall contain a table of cases and authorities. Cases should be arranged alphabetically, followed by constitutional provisions, statutes, regulations, and other textbooks and authorities. The format should be similar to that of the index. Citations should be made according to the most recent edition of A Uniform System of Citation. Citations to regional reporters shall include parallel citations to official state reporters.

FORMAT OF BODY OF DOCUMENT

The body of the record on appeal should be single-spaced with double spaces between paragraphs. The body of petitions, notices of appeal, responses, motions, and briefs should be double-spaced, with captions, headings, issues, and long quotes single-spaced.

Adherence to the margins is important since the document will be reproduced front and back and will be bound on the side. No part of the text should be obscured by that binding.

Quotations of more than three lines in length should be indented ¾" from each margin and should be single-spaced. The citation should immediately follow the quote.

References to the record on appeal should be made through a parenthetic entry in the text. (R pp 38-40) References to the transcript, if used, should be made in similar manner. (T p 558, line 21)

TOPICAL HEADINGS

The various sections of the brief or petition should be separated (and indexed) by topical headings, centered and underlined, in all capital letters.

Within the argument section, the issues presented should be set out as a heading in all capital letters and in paragraph format from margin to margin. Sub-issues should be presented in similar format, but block indented ½" from the left margin.

NUMBERING PAGES

The cover page containing the caption of the document (and the index in records on appeal) is unnumbered. The index and table of cases and authorities are on pages numbered with lowercase roman numerals, e.g., i, ii, iv.

While the page containing the inside caption and the beginning of the substance of the petition or brief bears no number, it is page 1. Subsequent pages are sequentially numbered by arabic numbers, flanked by dashes, at the center of the top margin of the page, e.g. -4-.

An appendix to the brief should be separately numbered in the manner of a brief.

SIGNATURE AND ADDRESS

Unless filed *pro se*, all original papers filed in a case will bear the original signature of at least one counsel participating in the case, as in the example below. The name, address, telephone number, State Bar number, and e-mail address of the person signing, together with the capacity in which that person signs the paper, will be included. When counsel or the firm is retained, the firm name should be included above the signature; however, if counsel is appointed in an indigent criminal appeal, only the name of the appointed counsel should appear, without identification of any firm affiliation. Counsel participating in argument must have signed the brief in the case prior to that argument.

(Retained) [LAW FIRM NAME]

By: ______________________
[Name]

By: ______________________
[Name]
Attorneys for Plaintiff-Appellants
P. O. Box 0000
Raleigh, NC 27600
(919) 999-9999
State Bar No. _______
[e-mail address]

(Appointed) ______________________
[Name]
Attorney for Defendant-Appellant
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Raleigh, NC 27600
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State Bar No. _______
[e-mail address]

Appendix B amended effective 31 October 2001; 15 August 2002; 7 October 2002; 12 May 2004; 1 September 2005; 1 October 2009.

APPENDIX C
ARRANGEMENT OF RECORD ON APPEAL

Only those items listed in the following tables and that are required by Rule 9(a) in the particular case should be included in the record. See Rule 9(b)(2) for sanctions for including unnecessary items in the record. The items marked by an asterisk (*) could be omitted from the printed record if the transcript option of Rule 9(c) is used and a transcript of the items exists.

Table 1

SUGGESTED ORDER IN APPEAL FROM CIVIL JURY CASE

1. Title of action (all parties named) and case number in caption, per Appendix B
2. Index, per Rule 9(a)(1)a
3. Statement of organization of trial tribunal, per Rule 9(a)(1)b
4. Statement of record items showing jurisdiction, per Rule 9(a)(1)c
5. Complaint

6. Pre-answer motions of defendant, with rulings thereon
7. Answer
8. Motion for summary judgment, with rulings thereon (* if oral)
9. Pretrial order
*10. Plaintiff's evidence, with any evidentiary rulings that a party to the appeal contends are erroneous
*11. Motion for directed verdict, with ruling thereon
*12. Defendant's evidence, with any evidentiary rulings that a party to the appeal contends are erroneous
*13. Plaintiff's rebuttal evidence, with any evidentiary rulings that a party to the appeal contends are erroneous
14. Issues tendered by parties
15. Issues submitted by court
16. Court's instructions to jury, per Rule 9(a)(1)f
17. Verdict
18. Motions after verdict, with rulings thereon (* if oral)
19. Judgment
20. Items, including Notice of Appeal, required by Rule 9(a)(1)i
21. Statement of transcript option as required by Rule 9(a)(1)i and 9(a)(1)*l*
22. Statement required by Rule 9(a)(1)m when a record supplement will be filed
23. Entries showing settlement of record on appeal, extensions of time, etc.
24. Proposed Issues on Appeal per Rule 9(a)(1)k
25. Names, office addresses, telephone numbers, State Bar numbers, and e-mail addresses of counsel for all parties to the appeal

Table 2

SUGGESTED ORDER IN APPEAL FROM SUPERIOR COURT REVIEW OF ADMINISTRATIVE AGENCY DECISION

1. Title of action (all parties named) and case number in caption, per Appendix B
2. Index, per Rule 9(a)(2)a
3. Statement of organization of superior court, per Rule 9(a)(2)b
4. Statement of record items showing jurisdiction of the board or agency, per Rule 9(a)(2)c
5. Copy of petition or other initiating pleading
6. Copy of answer or other responsive pleading
7. Copies of all pertinent items from administrative proceeding filed for review in superior court, including evidence
*8. Evidence taken in superior court, in order received
9. Copies of findings of fact, conclusions of law, and judgment of superior court

10. Items required by Rule 9(a)(2)h
11. Entries showing settlement of record on appeal, extensions of time, etc.
12. Proposed issues on appeal, per Rule 9(a)(2)i
13. Names, office addresses, telephone numbers, State Bar numbers, and e-mail addresses of counsel for all parties to the appeal

Table 3

SUGGESTED ORDER IN APPEAL OF CRIMINAL CASE

1. Title of action (all parties named) and case number in caption, per Appendix B
2. Index, per Rule 9(a)(3)a
3. Statement of organization of trial tribunal, per Rule 9(a)(3)b
4. Warrant
5. Judgment in district court (where applicable)
6. Entries showing appeal to superior court (where applicable)
7. Bill of indictment (if not tried on original warrant)
8. Arraignment and plea in superior court
9. *Voir dire* of jurors

*10. State's evidence, with any evidentiary rulings that a party to the appeal contends are erroneous
11. Motions at close of State's evidence, with rulings thereon (* if oral)

*12. Defendant's evidence, with any evidentiary rulings that a party to the appeal contends are erroneous
13. Motions at close of defendant's evidence, with rulings thereon (* if oral)

*14. State's rebuttal evidence, with any evidentiary rulings that a party to the appeal contends are erroneous
15. Motions at close of all evidence, with rulings thereon (* if oral)
16. Court's instructions to jury, per Rules 9(a)(3)f and 10(a)(2)
17. Verdict
18. Motions after verdict, with rulings thereon (* if oral)
19. Judgment and order of commitment
20. Appeal entries
21. Entries showing settlement of record on appeal, extensions of time, etc.
22. Proposed issues on appeal, per Rule 9(a)(3)j
23. Names, office addresses, telephone numbers, State Bar numbers, and e-mail addresses of counsel for all parties to the appeal

Table 4

PROPOSED ISSUES ON APPEAL

A. Examples related to pretrial rulings in civil actions

1. Did the trial court err in denying defendant's motion to dismiss for lack of personal jurisdiction under N.C. R. Civ. P. 12(b)(2)?

2. Did the trial court err in denying defendant's motion to dismiss for failure to state a claim upon which relief may be granted under N.C. R. Civ. P. 12(b)(6)?

3. Did the trial court err in denying defendant's motion to require plaintiff to submit to an independent physical examination under N.C. R. Civ. P. 35?

4. Did the trial court err in denying defendant's motion for summary judgment under N.C. R. Civ. P. 56?

B. Examples related to civil jury trial rulings

1. Did the trial court err in admitting the hearsay testimony of E.F.?

2. Did the trial court err in denying defendant's motion for a directed verdict?

3. Did the trial court err in instructing the jury on the doctrine of last clear chance?

4. Did the trial court err in instructing the jury on the doctrine of sudden emergency?

5. Did the trial court err in denying defendant's motion for a new trial?

C. Examples related to civil non-jury trials

1. Did the trial court err in denying defendant's motion to dismiss at the close of plaintiff's evidence?

2. Did the trial court err in its finding of fact No. 10?

3. Did the trial court err in its conclusion of law No. 3?

Appendix C amended effective 1 October 1990; 31 October 2001; 1 October 2009.

APPENDIX D

FORMS

Captions for all documents filed in the appellate division should be in the format prescribed by Appendix B, addressed to the Court whose review is sought.

1. NOTICES OF APPEAL

a. To Court of Appeals from trial division

Appropriate in all appeals of right from district or superior court except appeals from criminal judgments imposing sentences of death.

(Caption)

****

TO THE HONORABLE COURT OF APPEALS OF NORTH CAROLINA:

(Plaintiff)(Defendant), (Name of Party), hereby gives notice of appeal to the Court of Appeals of North Carolina (from the final judgment)(from the order) entered on (date) in the (District)(Superior) Court of (name) County, (describing it).

Respectfully submitted this the __ day of _________, 2___.

s/_______________________
Attorney for (Plaintiff)(Defendant)-Appellant
(Address, Telephone Number, State Bar Number, and E-mail Address)

b. To Supreme Court from a Judgment of the Superior Court Including a Sentence of Death

(Caption)

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

(Name of Defendant), Defendant, hereby gives notice of appeal to the Supreme Court of North Carolina from the final judgment entered by (name of Judge) in the Superior Court of (name) County on (date), which judgment included a conviction of murder in the first degree and a sentence of death.

Respectfully submitted this the __ day of _________, 2___.

s/______________________
Attorney for Defendant-Appellant
(Address, Telephone Number, State
Bar Number, and E-mail Address)

c. To Supreme Court from a Judgment of the Court of Appeals

Appropriate in all appeals taken as of right from opinions and judgments of the Court of Appeals to the Supreme Court under N.C.G.S. § 7A-30. The appealing party shall enclose a clear copy of the opinion of the Court of Appeals with the notice. To take account of the possibility that the Supreme Court may determine that the appeal does not lie of right, an alternative petition for discretionary review may be filed with the notice of appeal.

(Caption)

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

(Plaintiff)(Defendant), (Name of Party), hereby appeals to the Supreme Court of North Carolina from the judgment of the Court of Appeals (describe it), which judgment . . .

(Constitutional question—N.C.G.S. § 7A-30(1)) . . . directly involves a substantial question arising under the Constitution(s) (of the United States)(and)(or)(of the State of North Carolina) as follows:

(Here describe the specific issues, citing constitutional provisions under which they arise and showing how such issues were timely raised below and are set out in the record of appeal, e.g.:)

Issue 1: Said judgment directly involves a substantial question arising under the Fourth and Fourteenth Amendments to the Constitution of the United States and under Article 1, Section 20 of the Constitution of the State of North Carolina, in that it deprives rights secured thereunder to the defendant by overruling defendant's challenge to the denial of (his) (her) Motion to Suppress Evidence Obtained by a Search Warrant, thereby depriving defendant of the constitutional right to be secure in his or her person, house, papers, and effects against unreasonable searches and seizures and violating constitutional prohibitions against warrants issued without probable cause and warrants not supported by evidence. This constitutional issue was timely raised in the trial

tribunal by defendant's Motion to Suppress Evidence Obtained by a Search Warrant made prior to trial of defendant (R pp 7-10). This constitutional issue was determined erroneously by the Court of Appeals.

In the event the Court finds this constitutional question to be substantial, petitioner intends to present the following issues in its brief for review:

(Here list all issues to be presented in appellant's brief to the Supreme Court, not limited to those which are the basis of the constitutional question claim. An issue may not be briefed if it is not listed in the notice of appeal.)

(Dissent—N.C.G.S. § 7A-30(2)) . . . was entered with a dissent by Judge (name), based on the following issue(s):

(Here state the issue or issues that are the basis of the dissenting opinion in the Court of Appeals. Do not state additional issues. Any additional issues desired to be raised in the Supreme Court when the appeal of right is based solely on a dissenting opinion must be presented by a petition for discretionary review as to the additional issues.)

Respectfully submitted this the __ day of _________, 2___.

s/_____________________

Attorney for (Plaintiff)(Defendant)-Appellant
(Address, Telephone Number, State Bar Number, and E-mail Address)

2. [Reserved.]

3. PETITION FOR DISCRETIONARY REVIEW UNDER N.C.G.S. § 7A-31

To seek review of the opinion and judgment of the Court of Appeals when petitioner contends the case involves issues of public interest or jurisprudential significance. May also be filed as a separate paper in conjunction with a notice of appeal to the Supreme Court when the appellant contends that such appeal lies of right due to substantial constitutional questions under N.C.G.S. § 7A-30, but desires to have the Court consider discretionary review should it determine that appeal does not lie of right in the particular case.

(Caption)

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

(Plaintiff)(Defendant),(Name of Party), respectfully petitions the Supreme Court of North Carolina to certify for discretionary review the judgment of the Court of Appeals (describing it) on the basis that (here set out the grounds from N.C.G.S. § 7A-31 that provide the basis for the petition). In support of this petition, (Plaintiff)(Defendant) shows the following:

Facts

(Here state first the procedural history of the case through the trial division and the Court of Appeals. Then set out factual background necessary for understanding the basis of the petition.)

Reasons Why Certification Should Issue

(Here set out factual and legal arguments to justify certification of the case for full review. While some substantive argument will certainly be helpful, the focus of the argument in the petition should show how the opinion of the Court of Appeals conflicts with prior decisions of the Supreme Court or how the case is significant to the jurisprudence of the State or of significant public interest. If the Court is persuaded to take the case, the appellant may deal thoroughly with the substantive issues in the new brief.)

Issues to be Briefed

In the event the Court allows this petition for discretionary review, petitioner intends to present the following issues in its brief for review:

(Here list all issues to be presented in appellant's brief to the Supreme Court, not limited to those that are the basis of the petition. An issue may not be briefed if it is not listed in the petition.)

Respectfully submitted this the __ day of _________, 2___.

s/______________________
Attorney for (Plaintiff)(Defendant)-Appellant
(Address, Telephone Number, State Bar Number, and E-mail Address)

Attached to the petition shall be a certificate of service upon the opposing parties and a clear copy of the opinion of the Court of Appeals in the case.

4. PETITION FOR WRIT OF CERTIORARI

To seek review: (1) by the appropriate appellate court of judgments or orders of trial tribunals when the right to prosecute an

appeal has been lost or when no right to appeal exists; and (2) by the Supreme Court of decisions and orders of the Court of Appeals when no right to appeal or to petition for discretionary review exists or when such right has been lost by failure to take timely action.

(Caption)

****

TO THE HONORABLE (SUPREME COURT)(COURT OF APPEALS) OF NORTH CAROLINA:

(Plaintiff)(Defendant), (Name of Party), respectfully petitions this Court to issue its writ of certiorari pursuant to Rule 21 of the N.C. Rules of Appellate Procedure to review the (judgment)(order) (decree) of the [Honorable (name), Judge Presiding, (Superior) (District) Court, (name) County][North Carolina Court of Appeals], dated (date), (here describe the judgment, order, or decree appealed from), and in support of this petition shows the following:

Facts

(Here set out factual background necessary for understanding the basis of the petition: e.g., failure to perfect appeal by reason of circumstances constituting excusable neglect; nonappealability of right of an interlocutory order, etc.) (If circumstances are that transcript could not be procured from court reporter, statement should include estimate of date of availability and supporting affidavit from the reporter.)

Reasons Why Writ Should Issue

(Here set out factual and legal arguments to justify issuance of writ: e.g., reasons why interlocutory order makes it impracticable for petitioner to proceed further in trial court; meritorious basis of petitioner's proposed issues, etc.)

Attachments

Attached to this petition for consideration by the Court are certified copies of the (judgment)(order)(decree) sought to be reviewed, and (here list any other certified items from the trial court record and any affidavits attached as pertinent to consideration of the petition).

Wherefore, petitioner respectfully prays that this Court issue its writ of certiorari to the [(Superior)(District) Court (name) County] [North Carolina Court of Appeals] to permit review of the (judgment)(order)(decree) above specified, upon issues stated as follows: (here list the issues, in the manner provided for in the petition for discretionary review); and that the petitioner have such other relief as to the Court may seem proper.

Respectfully submitted this the __ day of _________, 2___.

s/______________________
Attorney for Petitioner
(Address, Telephone Number, State
Bar Number, and E-mail Address)

(Verification by petitioner or counsel)

(Certificate of service upon opposing parties)

(Attach a clear copy of the opinion, order, etc. which is the subject of the petition and other attachments as described in the petition.)

5. PETITION FOR WRIT OF SUPERSEDEAS UNDER RULE 23 AND MOTION FOR TEMPORARY STAY

A writ of supersedeas operates to stay the execution or enforcement of any judgment, order, or other determination of a trial court or of the Court of Appeals in civil cases under Appellate Rule 8 or to stay imprisonment or execution of a sentence of death in criminal cases (other portions of criminal sentences, e.g. fines, are stayed automatically pending an appeal of right).

A motion for temporary stay under Rule 23(e) is appropriate to seek an immediate stay of execution on an *ex parte* basis pending the Court's decision on the petition for supersedeas or the substantive petition in the case.

(Caption)

****

TO THE HONORABLE (COURT OF APPEALS)(SUPREME COURT)
OF NORTH CAROLINA:

(Plaintiff)(Defendant), (Name of Party), respectfully petitions this Court to issue its writ of supersedeas to stay (execution) (enforcement) of the (judgment)(order)(decree) of the [Honorable __________, Judge Presiding, (Superior)(District) Court, __________ County][North Carolina Court of Appeals] dated __________, pending review by this Court of said (judgment)(order)(decree) which (here describe the judgment, order, or decree and its operation if not stayed); and in support of this petition shows the following:

Facts

(Here set out factual background necessary for understanding the basis of the petition and justifying its filing under Rule 23: e.g., trial judge has vacated the entry upon finding security deposited

under N.C.G.S. § _____ inadequate; trial judge has refused to stay execution upon motion therefor by petitioner; circumstances make it impracticable to apply first to trial judge for stay, etc.; and showing that review of the trial court judgment is being sought by appeal or extraordinary writ.)

<u>Reasons Why Writ Should Issue</u>

(Here set out factual and legal arguments for justice of issuing the writ; e.g., that security deemed inadequate by trial judge is adequate under the circumstances; that irreparable harm will result to petitioner if it is required to obey decree pending its review; that petitioner has meritorious basis for seeking review, etc.)

<u>Attachments</u>

Attached to this petition for consideration by the court are certified copies of the (judgment)(order)(decree) sought to be stayed and (here list any other certified items from the trial court record and any affidavits deemed necessary to consideration of the petition).

Wherefore, petitioner respectfully prays that this Court issue its writ of supersedeas to the [(Superior)(District) Court, _________ County)][North Carolina Court of Appeals] staying (execution) (enforcement) of its (judgment) (order)(decree) above specified, pending issuance of the mandate to this Court following its review and determination of the(appeal)(discretionary review)(review by extraordinary writ)(now pending)(the petition for which will be timely filed); and that the petitioner have such other relief as to the Court may seem proper.

Respectfully submitted this the __ day of _________, 2___.

s/______________________
Attorney for Petitioner
(Address, Telephone Number, State Bar Number, and E-mail Address)

(Verification by petitioner or counsel.)

(Certificate of Service upon opposing party.)

Rule 23(e) provides that in conjunction with a petition for supersedeas, either as part of it or separately, the petitioner may move for a temporary stay of execution or enforcement pending the Court's ruling on the petition for supersedeas. The following form is illustrative of such a motion for temporary stay, either included as part of the main petition or filed separately.

Motion for Temporary Stay

(Plaintiff)(Defendant) respectfully applies to the Court for an order temporarily staying (execution)(enforcement) of the (judgment)(order)(decree) that is the subject of (this)(the accompanying) petition for writ of supersedeas, such order to be in effect until determination by this Court whether it shall issue its writ. In support of this Application, movant shows that (here set out the legal and factual arguments for the issuance of such a temporary stay order; e.g., irreparable harm practically threatened if petitioner must obey decree of trial court during interval before decision by Court whether to issue writ of supersedeas).

Motion for Stay of Execution

In death cases, the Supreme Court uses an order for stay of execution of death sentence in lieu of the writ of supersedeas. Counsel should promptly apply for such a stay after the judgment of the Superior Court imposing the death sentence. The stay of execution order will provide that it remains in effect until dissolved. The following form illustrates the contents needed in such a motion.

(Caption)

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Now comes the defendant, (name), who respectfully shows the Court:

1. That on (date of judgment), The Honorable __________, Judge Presiding, Superior Court, __________ County, sentenced the defendant to death, execution being set for (date of execution).

2. That pursuant to N.C.G.S. § 15A-2000(d)(1), there is an automatic appeal of this matter to the Supreme Court of North Carolina, and defendant's notice of appeal was given (describe the circumstances and date of notice).

3. That the record on appeal in this case cannot be served and settled, the matter docketed, the briefs prepared, the arguments heard, and a decision rendered before the date scheduled for execution.

WHEREFORE, the defendant prays the Court to enter an Order staying the execution pending judgment and further orders of this Court.

Respectfully submitted this the __ day of _________, 2___.

s/________________________
Attorney for Defendant-Appellant
(Address, Telephone Number, State
Bar Number, and E-mail Address)

(Certificate of Service on Attorney General, District Attorney, and Warden of Central Prison)

6. PROTECTING THE IDENTITY OF CERTAIN JUVENILES; NOTICE

In cases governed by Rules 3(b), 3.1(b), and 4(e), the notice requirement of Rules 3.1(b) and 9(a) is as follows:

(Caption)

****

TO THE HONORABLE (COURT OF APPEALS)(SUPREME COURT) OF NORTH CAROLINA:

FILED PURSUANT TO RULE [3(b)(1)][3.1(b)][4(e)]; SUBJECT TO PUBLIC INSPECTION ONLY BY ORDER OF A COURT OF THE APPELLATE DIVISION.

Appendix D amended effective 6 March 1997; 31 October 2001; 1 March 2007; 1 October 2009.

APPENDIX E

CONTENT OF BRIEFS

CAPTION

Briefs should use the caption as shown in Appendix B. The Title of the Document should reflect the position of the filing party both at the trial level and on the appeal, e.g., DEFENDANT-APPELLANT'S BRIEF, PLAINTIFF-APPELLEE'S BRIEF, or BRIEF FOR THE STATE. A brief filed in the Supreme Court in a case decided by the Court of Appeals is captioned a "New Brief" and the position of the filing party before the Supreme Court should be reflected, e.g., DEFENDANT-APPELLEE'S NEW BRIEF (when the State has appealed from the Court of Appeals in a criminal matter).

The cover page should contain only the caption of the case. Succeeding pages should present the following items, in order.

INDEX OF THE BRIEF

Each brief should contain a topical index beginning at the top margin of the first page following the cover, in substantially the following form:

I N D E X

TABLE OF CASES AND AUTHORITIES ii
ISSUES PRESENTED 1
STATEMENT OF THE CASE 2
STATEMENT OF THE FACTS 2
ARGUMENT:

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS HIS INCULPATORY STATEMENT BECAUSE THAT STATEMENT WAS THE PRODUCT OF AN ILLEGAL DETENTION 6

* * *

IV. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS THE FRUITS OF A WARRANTLESS SEARCH OF HIS APARTMENT BECAUSE THE CONSENT GIVEN WAS THE PRODUCT OF POLICE COERCION 18

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APPENDIX:
VOIR DIRE DIRECT EXAMINATION OF [NAME] . . . . . . App. 1-7
VOIR DIRE CROSS-EXAMINATION OF [NAME] . . . . . . App. 8-11
VOIR DIRE DIRECT EXAMINATION OF OFFICER [NAME] . . . . App. 12-17
VOIR DIRE CROSS-EXAMINATION OF OFFICER [NAME] . . . . App. 18-20

* * * * *

TABLE OF CASES AND AUTHORITIES

This table should begin at the top margin of the page following the index. Page references should be made to each citation of authority, as shown in the example below.

TABLE OF CASES AND AUTHORITIES

Dunaway v. New York, 442 U.S. 200,
99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979) 11
State v. Perry, 298 N.C. 502, 259 S.E.2d 496 (1979) 14
State v. Reynolds, 298 N.C. 380, 259 S.E.2d 843 (1979) 12
United States v. Mendenhall, 446 U.S. 544,
100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980) 14

4th Amendment, U. S. Constitution 28
14th Amendment, U. S. Constitution 28

N.C.G.S. § 15A-221 29
N.C.G.S. § 15A-222 28
N.C.G.S. § 15A-223 29

* * * * *

ISSUES PRESENTED

The inside caption is on page 1 of the brief, followed by the Issues Presented. The phrasing of the issues presented need not be identical to that set forth in the proposed issues on appeal in the record. The appellee's brief need not restate the issues unless the appellee desires to present additional issues to the Court.

ISSUES PRESENTED

I. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS HIS INCULPATORY STATEMENT BECAUSE THAT STATEMENT WAS THE PRODUCT OF AN ILLEGAL DETENTION?

* * *

STATEMENT OF THE CASE

If the Issues Presented carry beyond page 1, the Statement of the Case should follow them, separated by the heading. If the Issues Presented do not carry over, the Statement of the Case should begin at the top of page 2 of the brief.

Set forth a concise chronology of the course of the proceedings in the trial court and the route of appeal, including pertinent dates. For example:

STATEMENT OF THE CASE

The defendant, [name], was convicted of first-degree rape at the [date], Criminal Session of the Superior Court, [name] County, the Honorable [name] presiding, and received ___________ sentence for

the __________ felony. The defendant gave written notice of appeal in open court to the Supreme Court of North Carolina at the time of the entry of judgment on [date]. The transcript was ordered on [date] and was delivered to the parties on [date].

A motion to extend the time for serving and filing the record on appeal was allowed by the Supreme Court on [date]. The record was filed and docketed in the Supreme Court on [date].

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

Set forth the statutory basis for permitting appellate review. For example, in an appeal from a final judgment to the Court of Appeals, the appellant might state that the ground for appellate review is a final judgment of the superior court under N.C.G.S. § 7A-27(b). If the appeal is based on N.C. R. Civ. P. 54(b), the appellant must also state that there has been a final judgment as to one or more but fewer than all of the claims or parties and that there has been a certification by the trial court that there is no just reason for delay. If the appeal is from an interlocutory order or determination based on a substantial right, the appellant must present, in addition to the statutory authorization, facts and argument showing the substantial right that will be lost, prejudiced, or less than adequately protected absent immediate appellate review.

STATEMENT OF THE FACTS

The facts constitute the basis of the dispute or criminal charges and the procedural mechanics of the case if they are significant to the issues presented. The facts should be stated objectively and concisely and should be limited to those that are relevant to the issue or issues presented.

Do not include verbatim portions of the record or other matters of an evidentiary nature in the statement of the facts. Summaries and record or transcript citations should be used instead. No appendix should be compiled simply to support the statement of the facts.

The appellee's brief need contain no statement of the case or facts if there is no dispute. The appellee may state additional facts where deemed necessary, or, if there is a dispute over the facts, may restate the facts as they appear from the appellee's viewpoint.

ARGUMENT

Each issue will be set forth in uppercase typeface as the party's contention, e.g.,

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS HIS INCULPATORY STATEMENT BECAUSE THAT STATEMENT WAS THE PRODUCT OF AN ILLEGAL DETENTION.

The standard of review for each issue presented shall be set out in accordance with Rule 28(b)(6).

Parties should feel free to summarize, quote from, or cite to the record or transcript during the presentation of argument. If the transcript option is selected under Rule 9(c), the appendix to the brief may be needed, as described in Rule 28 and below.

When statutory or regulatory materials are cited, the relevant portions should be quoted in the body of the argument or placed in the appendix to the brief, as required by Rule 28(d)(1)c.

CONCLUSION

State briefly and clearly the specific objective or relief sought in the appeal. It is not necessary to restate the party's contentions, since they are presented both in the index and as headings to the individual arguments.

SIGNATURE AND CERTIFICATE OF SERVICE

Following the conclusion, the brief must be dated and signed, with the attorney's typed or printed name, mailing address, telephone number, State Bar number, and e-mail address, all indented to the center of the page.

The Certificate of Service is then shown with a centered, uppercase heading. The certificate itself, describing the manner of service upon the opposing party with the complete mailing address of the party or attorney served, is followed by the date and the signature of the person certifying the service.

APPENDIX TO THE BRIEF UNDER THE TRANSCRIPT OPTION

Rules 9(c) and 28 require additional steps to be taken in the brief to point the Court to appropriate excerpts from the transcript considered essential to the understanding of the arguments presented.

Counsel are encouraged to cite, narrate, and quote freely within the body of the brief. However, if because of length a verbatim quotation is not included in the body of the brief, that portion of the transcript and others like it shall be compiled into an appendix to the brief to be placed at the end of the brief, following all signatures and certificates. Counsel should not attach the entire transcript as an appendix to support issues involving a directed verdict, sufficiency of the evidence, or the like.

The appendix should be prepared to be clear and readable, distinctly showing the transcript page or pages from which each passage is drawn. Counsel may reproduce transcript pages themselves, clearly indicating those portions to which attention is directed.

The appendix should include a table of contents, showing the items contained in the appendix and the pages in the appendix where those items appear. The appendix shall be paginated separately from the text of the brief. For example:

CONTENTS OF APPENDIX

VOIR DIRE DIRECT EXAMINATION OF [NAME] 1

VOIR DIRE CROSS-EXAMINATION OF [NAME] 9

VOIR DIRE DIRECT EXAMINATION OF OFFICER [NAME] . . 13

VOIR DIRE CROSS-EXAMINATION OF OFFICER [NAME] . . . 19

* * * * *

The appendix will be printed as submitted with the brief to which it is appended. Therefore, clarity of image is extremely important.

Appendix E amended effective 31 October 2001; 15 August 2002; 1 September 2005; 1 October 2009.

APPENDIX F

FEES AND COSTS

Fees and costs are provided by order of the Supreme Court and apply to proceedings in either appellate court. There is no fee for filing a motion in a cause; other fees are as follows and should be submitted with the document to which they pertain, made payable to the clerk of the appropriate appellate court:

Notice of Appeal, Petition for Discretionary Review, Petition for Writ of Certiorari or other extraordinary writ, Petition for Writ of Supersedeas—docketing fee of $10.00 for each document, i.e., docketing fees for a notice of appeal and petition for discretionary review filed jointly would be $20.00.

Petitions to rehear require a docketing fee of $20.00. (Petitions to rehear are only entertained in civil cases.)

An appeal bond or cash deposit of $250.00 is required in civil cases per Rules 6 and 17. The bond should be filed contemporaneously with the record in the Court of Appeals and with the notice of appeal in the Supreme Court. The bond will not be required in cases

brought by petition for discretionary review or certiorari unless and until the court allows the petition.

Costs for printing documents are $1.75 per printed page. The appendix to a brief under the transcript option of Rules 9(c) and 28(b) and (c) will be reproduced as is, but billed at the rate of the printing of the brief. Both appellate courts will bill the parties for the costs of printing their documents.

Court costs on appeal total $9.00, plus the cost of copies of the opinion to each party filing a brief, and are imposed when a notice of appeal is withdrawn or dismissed, or when the mandate is issued following the opinion in a case.

Photocopying charges are $.20 per page. The facsimile transmission fee for documents sent from the clerk's office, which is in addition to standard photocopying charges, is $5.00 for the first twenty-five pages and $.20 for each page thereafter.

The fee for a certified copy of an appellate court decision, in addition to photocopying charges, is $10.00.

Appendix F amended effective 31 October 2001; 1 October 2009.

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WORD AND PHRASE INDEX

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

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APPEAL AND ERROR

Appealability—denial of summary judgment—final judgment on merits—Plaintiff's arguments in a divorce case regarding the order denying her claim for summary judgment were not considered because the Court cannot consider an appeal of the denial of a summary judgment motion once a final judgment on the merits has been made. **Street v. Street, 815.**

Appealability—final judgment—substantial right—The trial court did not err by concluding an order to comply and order denying intervenor's motion to dismiss petitioner Secretary of Revenue's motion to compel E&Y to produce documents E&Y withheld as privileged were not appeals from interlocutory orders because: (1) the order granting petitioner's application was a final judgment; and (2) even if it was not a final judgment, the denial of discovery orders asserting a statutory or common law privilege affects a substantial right. **In re Ernst & Young, LLP, 668.**

Appealability—interlocutory order—certification—personal jurisdiction—Although an appeal from the order granting defendant's motion to dismiss is from an interlocutory order since plaintiff's claims against another defendant remain pending, plaintiff was entitled to immediate appellate review based on the trial court's N.C.G.S. § 1A-1, Rule 54(b) certification and also by virtue of N.C.G.S. § 1-277(b) since plaintiff's claim was dismissed as a result of the trial court's decision that it lacked personal jurisdiction over defendant. **Dailey v. Popma, 64.**

Appealability—lack of subject matter jurisdiction—untimely appeal—The Court of Appeals did not have subject matter jurisdiction in a contested will case to consider caveator's purported appeal from a judgment and order filed 21 May 2007, and the appeal related to the 21 May 2007 judgment is dismissed, because: (1) there was nothing in the record indicating that caveator was not properly served with a copy of the judgment within the prescribed period under N.C.G.S. § 1A-1, Rule 3; and (2) caveator did not file notice of appeal until 10 August 2007, which was over two months after the judgment. **In re Will of Harts, 807.**

Appealability—partial denial of summary judgment—governmental immunity—An appeal from the denial of summary judgment involving governmental immunity was interlocutory but properly before the Court of Appeals. **Murray v. County of Person, 575.**

Appealability—partial summary judgment—claims remaining against another defendant—Plaintiff's appeal from an 8 March 2007 partial summary judgment order is dismissed as an appeal from an interlocutory order because: (1) the judgment disposed of plaintiff's claims against the town, but left unresolved her claims against the State of North Carolina; (2) there was no Rule 54(b) certification in the record; and (3) plaintiff neither stated nor argued that her appeal affected a substantial right. **Hyatt v. Town of Lake Lure, 386.**

Appealability—request for injunction dismissed—no further pending action—Plaintiff's appeal was not interlocutory where plaintiff's request for a mandatory injunction was dismissed for failure to join necessary parties and there was no longer any action pending. **Durham Cty. v. Graham, 600.**

Appealability—timely appeal—Caveator's notice of appeal on 10 August 2007 of the order taxing caveator with costs and attorney fees in a contested will case

APPEAL AND ERROR—Continued

did not violate the thirty day mandate because it was entered on 24 July 2007. **In re Will of Harts, 807.**

Appellate rules violations—dismissal not required—The Court of Appeals denied plaintiffs' motion to dismiss defendants' appeal based on alleged violations of N.C. R. App. P. 28(b) because: (1) our Supreme Court has held that a party's failure to comply with a nonjurisdictional rule of appellate procedure, such as Rule 28(b), normally should not lead to dismissal of the appeal; and (2) to the extent defendants failed to comply with Rule 28(b), their noncompliance does not approach the level of a substantial failure or gross violation, and thus the court was not authorized to consider any sanction. **Shepard v. Bonita Vista Properties, L.P., 614.**

Appellate rules violations—failure to include subject index—Although plaintiff's brief violated the Rules of Appellate Procedure since it did not contain a subject index as required by N.C. R. App. P. 28(b)(1), the Court of Appeals did not believe this minor violation warranted sanctions under Rules 25 and 34. **Gillis v. Montgomery Cty. Sheriff's Dep't, 377.**

Assignment of error—necessity—The Court of Appeals did not review defendant's contentions regarding Miranda warnings in a prosecution for indecent liberties and sexual acts with a 13-year-old where defendant did not assign error to the trial court's findings or conclusions. **State v. Tadeja, 439.**

Guilty plea—double jeopardy motion to dismiss denied—Defendant's appeal to the Court of Appeals was dismissed where defendant pled guilty in district court, that plea was stricken and indictments were issued in superior court, defendant moved to dismiss based on double jeopardy, and the superior court denied that motion and defendant entered a plea of guilty in superior court. **State v. Corbett, 1.**

Notice of appeal—date of service—The trial court did not err by denying defendants' motion to dismiss plaintiff's appeal based on the date of service of notice of appeal. The trial court was free to weigh the credibility of evidence concerning the date of service and find a particular date; presumed findings supported by competent evidence are deemed conclusive on appeal. **Sellers v. Morton, 75.**

Notice of appeal—from only one of two orders—Plaintiffs' appeal from a summary judgment for defendant Farm Bureau was dismissed where there was also a summary judgment for defendant Seawell, Farm Bureau's employee, on a different date; there was only one notice of appeal, from the summary judgment for Seawell; plaintiff's argument that the notice of appeal was meant to apply to both orders was rejected; and the Court of Appeals declined to treated the matter as a petition for certiorari. The appeal would have been found to be without merit even if had been heard. **Luther v. Seawell, 139.**

Preservation of issues—appellate rules violations—assignments of error abandoned—Defendant's assignments of error that violated N.C. R. App. P. 28(b)(6) were not considered and were deemed abandoned. **Nationwide Mut. Fire Ins. Co. v. Mnatsakanov, 802.**

Preservation of issues—arguments not presented at trial—A defendant convicted of indecent liberties and sexual acts with a 13-year-old waived appel-

APPEAL AND ERROR—Continued

late review of contentions that some of the charges should have been dismissed where the arguments in his brief were not those he presented at trial. **State v. Tadeja, 439.**

Preservation of issues—assignments of error—supporting argument or case law required—Assignments of error which were not supported by argument or case law were deemed abandoned. **Matthews v. Davis, 545.**

Preservation of issues—basis of objection at trial—oral motion for joinder at proceeding—A juvenile did not preserve for appeal the question of whether the State's oral motion for joinder should have been written because he objected at trial on a different ground. However, even if it had been preserved, it has been held that an oral motion may made in the judge's discretion, and respondent neither argued nor demonstrated that the trial court abused its discretion in this regard. **In re R.D.L., 526.**

Preservation of issues—failure to argue—failure to cite authority—Although defendant contends the trial court abused its discretion in a first-degree sex offense, first-degree kidnapping, and first-degree burglary case by failing to declare a mistrial based on testimony of two SBI agents who blurted out that defendant was incarcerated in the presence of the jury, this assignment of error is dismissed because defendant failed to demonstrate by specific argument or authority that the testimony was highly prejudicial and deprived him of a trial by an impartial jury. **State v. Simmons, 224.**

Preservation of issues—failure to argue—failure to cite authority—Although caveator contends that the trial court abused its discretion in a contested will case by taxing all costs and $25,000 in attorney fees to caveator, this assignment of error is dismissed because caveator failed to make any substantive argument, or cite any law, supporting his argument as required by N.C. R. App. P. 28(b)(6). **In re Will of Harts, 807.**

Preservation of issues—failure to assign error—failure to argue—Although the trial court's order contains several items that may be subject to challenge in an equitable distribution case including setting the value of the marital residence as the future sales price of the residence instead of the net fair market value on the date of separation, failing to specify the reasons for the delay in plaintiff's receipt of defendant's monthly retirement checks and commencement of alimony payments after the sale of the marital residence, and the trial court's entering of conflicting findings and conclusions regarding the classification of plaintiff's lump sum award of $18,000 as her share of defendant's retirement benefits, these issues will not be considered on appeal because they are neither assigned as error nor argued in the brief as required by N.C. R. App. P. 10(a). **Helms v. Helms, 19.**

Preservation of issues—failure to cite authority—Defendant abandoned his argument concerning the prosecutor's argument about prior acts where he failed to cite authority in support of his contention. **State v. Martin, 462.**

Preservation of issues—failure to cite authority—failure to argue—Although plaintiff contends the trial court erred in a case alleging misconduct by an arbitrator by imposing N.C.G.S. § 1A-1, Rule 11 sanctions allegedly without giving plaintiff a right to be heard considering the amount of attorney fees, this

APPEAL AND ERROR—Continued

assignment of error is dismissed because: (1) plaintiff cited no authority to support the contention as required by N.C. R. App. P. 28; (2) even assuming arguendo that the argument had been preserved, plaintiff failed to argue or show how the amount of attorney fees was in any manner unreasonable; and (3) the fact that the trial court rejected plaintiff's arguments does not mean that they were not considered. **Dalenko v. Collier, 713.**

Preservation of issues—failure to make offer of proof—Although defendant contends the trial court erred in a multiple attempting to evade or defeat tax case under N.C.G.S. § 105-236(a)(7) by excluding evidence of defendant's inquiry to the Department of Revenue investigator of what he could do to "make things right," this issue was not properly preserved for review because: (1) defendant made no request to make a proffer of the agent's answer; and (2) the Court of Appeals will not speculate as to what the answer would have been or its significance. **State v. Howell, 349.**

Preservation of issues—failure to raise constitutional issues at trial—waiver—Although defendant contends the trial court deprived him of his state and federal constitutional due process right by precluding his use of the defenses of voluntary intoxication and diminished capacity in an attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury case, this assignment of error is dismissed because defendant failed to raise these constitutional issues at trial, and thus, they are waived. **State v. McDonald, 782.**

Preservation of issues—failure to rule on motion in limine—failure to introduce evidence—Although defendant contends the trial court erred in a multiple attempting to evade or defeat tax case under N.C.G.S. § 105-236(a)(7) by failing to admit into evidence defendant's filing of amended tax returns following his indictment on these charges, this issue is dismissed because defendant has not properly preserved this issue for review when: (1) the trial court did not rule on the motion in limine; (2) defendant failed to attempt to introduce evidence at trial; and (3) even assuming arguendo that the trial court granted the State's motion in limine and that there was a proffer of the evidence in the record, the trial court would have properly excluded this evidence since the subsequent satisfaction of defendant's tax liability has no bearing on whether defendant willfully evaded his tax obligations at the times when those taxes were due. **State v. Howell, 349.**

Preservation of issues—issue not addressed when new trial already granted—Defendant's argument that the trial court committed constitutional error by precluding him from introducing evidence regarding certain character traits does not need to be addressed in light of the fact that the Court of Appeals already held that defendant was entitled to a new trial. **State v. Banks, 743.**

Preservation of issues—necessity of assignment of error and supporting authority—Arguments on appeal were not properly before the appellate court where the issues were not assigned as error or supported by authority. **State v. Davis, 535.**

Preservation of issues—objection at trial—argument in brief—The Court of Appeals did not consider defendant's contentions concerning the cross-examination of his grandmother in a prosecution for attempted burglary where

APPEAL AND ERROR—Continued

defendant did not cite authority for his proposition and abandoned it, or did not object at trial and did not specifically argue plain error. **State v. Martin, 462.**

Record—exhibit not included—argument abandoned—Defendant's failure to include a video as an exhibit to the record on appeal and to record it in the trial transcript meant that he abandoned his argument concerning admission of the videotaped interview with a child. **State v. Davis, 535.**

Right to unanimous jury verdict—not raised at trial—An assignment of error which alleges that a defendant's constitutional right to a unanimous jury verdict has been violated may be raised on appeal even though it was not raised at trial. **State v. Haddock, 474.**

Rules violations—substantial—costs as sanction—The Court of Appeals imposed costs on plaintiff's attorney as a sanction where the number and nature of the Appellate Rules violations were considered gross or substantial. **Azar v. Presbyterian Hosp., 367.**

Substantial rules violations—sanction but not dismissal—Plaintiffs' attorneys were ordered to pay double printing costs for numerous rules violations where the noncompliance with the appellate rules was substantial but not so gross as to warrant dismissal. **Luther v. Seawell, 139.**

ARSON

First-degree—motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendant Boston's motion to dismiss the charge of first-degree arson, even though defendant contends the State presented inconsistent theories of her guilt, because: (1) while the victim's testimony and an accomplice's testimony do contain some inconsistencies, they are consistent as they relate to the elements of first-degree arson; (2) the accomplice's testimony regarding the circumstances surrounding the fire was sufficient to demonstrate that defendant Boston acted willfully and maliciously in setting the fire; (3) both witnesses identified the building burned as a dwelling house of another person, namely, the victim; and (4) the victim testified that she was home at the time of the fire. **State v. Boston, 637.**

ASSAULT

Deadly weapon with intent to kill inflicting serious injury—accomplice—motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the charge of assault with a deadly weapon with intent to kill inflicting serious injury under an accomplice theory where the evidence tended to show that defendant aided by driving the SUV that chased the victim into the gas station parking lot where another person shot the victim while defendant was present and acting in concert with the other person. **State v. Little, 655.**

With a deadly weapon inflicting serious injury—seriousness of injury—The trial court correctly denied defendant's motion to dismiss a charge of assault with a deadly weapon inflicting serious injury where defendant argued that there was insufficient evidence of a serious injury, but the victim was shot in the knee; drove himself to the hospital; received treatment and pain medication, which he

ASSAULT—Continued

took for two weeks (although he was not hospitalized); walked with a limp for one to two weeks; and took about a month for his knee to fully heal. **State v. Tice, 506.**

ATTORNEYS

Child custody—contingency fees—Contingency attorney fees in child custody actions are void as against public policy, and the portion of a Canadian judgment granting such fees was not enforceable. **Maxwell Schuman & Co. v. Edwards, 356.**

Custody—expenses of action—separate from contingency fee for legal expenses—Expenses of a Canadian appeal in a child custody action were recognized in North Carolina even though the attorney fees were voided as being based on a contingency. In general, other fees contained in a contingent fee arrangement are also void, but in this case there was no written agreement about the total costs and defendant was responsible for the expenses, win or lose. **Maxwell Schuman & Co. v. Edwards, 356.**

BURGLARY AND UNLAWFUL BREAKING OR ENTERING

Attempted—fingers underneath a screen—The trial court did not err by denying a motion to dismiss a charge of attempted first-degree burglary where the State presented evidence that defendant removed a portion of a window screen and inserted his fingers underneath the screen in the nighttime. **State v. Martin, 462.**

Attempted first-degree—no charge on lesser-included offense—The trial court did not err in a prosecution for attempted first-degree burglary by not instructing the jury on the lesser-included offense of attempted misdemeanor breaking and entering. The State presented sufficient evidence to submit the attempted burglary charge to the jury, and no evidence was presented to suggest that defendant's intent was anything other than to commit a felony within the home. **State v. Martin, 462.**

Instruction—prior crimes or acts—intent and motive—no plain error—There was no plain error in an attempted burglary prosecution where the trial court instructed the jury to consider prior acts only to determine intent and motive and did not include language that the jury could not consider the evidence to prove the character of defendant or that he acted in conformity therewith. The court's instruction was substantially similar to the pattern jury instruction; while the additional instructions would not have been inappropriate, it is incumbent on defendant to make those requests to the trial court. **State v. Martin, 462.**

Juvenile—money taken from purse in office—There was sufficient evidence to support a charge of felonious breaking or entering and larceny and to find a juvenile delinquent where defendant was sitting in a library across the hall from the office of an Extension Service director, she left her office for about five minutes and was greeted by defendant standing in her office, defendant did not have permission to be in the office, the director discovered that her pocket book had been tampered with, and there was money missing. The director's office is in a public building, but her job functions do not require public access to her office, so that there was no implied consent to the juvenile's entry into her office; even

BURGLARY AND UNLAWFUL BREAKING OR ENTERING—Continued

if there had been, stealing cash from the director's purse voids that consent ab initio. **In re S.D.R., 552.**

CHILD ABUSE AND NEGLECT

Felonious child abuse—plain error analysis—instruction—additional theory of intentional assault proximately resulting in serious bodily injury—The trial court did not commit plain error in a felonious child abuse case by allegedly instructing the jury on a theory of guilt not alleged in the indictment, even though defendant contends the instructions included the theory of intentional injury but impermissibly included an additional theory of intentional assault which proximately resulted in serious bodily injury, because: (1) the intent to commit the act is the gravamen of the offense, and whether defendant intended the assault and not the serious bodily injury was immaterial; (2) the trial court instructed the jury it could find defendant guilty of felonious child abuse if it found that he intentionally inflicted a serious bodily injury to the child or intentionally assaulted the child which proximately resulted in serious bodily injury; and (3) the instruction did not provide the jury with a materially distinct ground to find defendant guilty. **State v. Oakman, 796.**

Felonious child abuse—plain error analysis—instruction—intent—culpable or criminal negligence—The trial court did not commit plain error in a felonious child abuse case by instructing the jury that it could find the requisite intent supporting the charge through actual intent to inflict injury or culpable or criminal negligence from which such intent may be implied. **State v. Oakman, 796.**

Nonsecure custody order—appeal—jurisdiction—An appeal was dismissed where it involved a DSS motion for review of a nonsecure custody order for a child and the foster care board rate, and appellant argued that even though nonsecure custody orders are expressly excluded from the statutory list of appealable juvenile orders, it had the right to appeal under an exception for an order finding an absence of jurisdiction. The trial court had jurisdiction over the proceedings and the order at issue in this case, and the issue raised by appellant is not jurisdictional in nature. The court's order addressing the merits of DSS's motion for review is not transformed into an order finding the absence of jurisdiction merely because the trial court questioned whether it had the authority to order foster care board rates in a nonsecure custody order that was entered months earlier. **In re A.T., 372.**

CHILD SUPPORT, CUSTODY, AND VISITATION

Change of circumstances—previously modified order—The starting point from which a change of circumstances could be shown in a motion to modify child support was a 2005 modification order that addressed all aspects of the child support obligation on the merits where the original order was from 1993 and there had been other modifications in the interim. **Devaney v. Miller, 208.**

Child support—motion to modify—summary procedure—Dismissal of a motion to modify child support is a summary procedure similar to judgment on the pleadings when only the allegations in the motion and the court file are considered by the trial court. The factual allegations of a motion to modify need not

CHILD SUPPORT, CUSTODY, AND VISITATION—Continued

be detailed, but they must be legally sufficient to satisfy the elements of at least some legally recognized claim. On appeal, the dismissal is subject to de novo review. **Devaney v. Miller, 208.**

Custody—expenses of action—separate from contingency fee for legal expenses—Expenses of a Canadian appeal in a child custody action were recognized in North Carolina even though the attorney fees were voided as being based on a contingency. In general, other fees contained in a contingent fee arrangement are also void, but in this case there was no written agreement about the total costs and defendant was responsible for the expenses, win or lose. **Maxwell Schuman & Co. v. Edwards, 356.**

Motion to modify—allegations of reduced income—information and belief—The allegations in a motion to modify child support were not sufficient to survive a motion to dismiss where the only allegation was that, on information and belief, the parties' incomes had changed. Even assuming that the allegation is true, that alone is not sufficient; only a substantial and involuntary decrease in the noncustodial parent's income can justify a decrease in the child support obligation absent a showing of a change in the needs of the child. **Devaney v. Miller, 208.**

Same sex partners—findings regarding intent to create a family unit required—clear, cogent and convincing standard—A child custody action involving same sex partners was remanded for further findings where the trial court acted under a misapprehension of the law. The court made no findings specifically addressing the intent of defendant to create a family unit that included plaintiff and the two children or to cede to plaintiff parental responsibility and decision-making authority. The required evidence must be clear, cogent, and convincing. **Heatzig v. MacLean, 451.**

CIVIL PROCEDURE

Judgment entered out of session—untimely objection—The trial court did not err by entering judgment out of session in a case alleging misconduct by an arbitrator because plaintiff failed to lodge a timely objection, and her consent was presumed under N.C.G.S. § 1A-1, Rule 58 where the session was concluded at 12:00 noon on a Friday and plaintiff filed a written object at 4:49 p.m. on that day. **Dalenko v. Collier, 713.**

New trial erroneously granted—repetitive evidence disallowed—The trial court erred in a premises liability case by granting plaintiff a new trial under N.C.G.S. § 1A-1, Rule 59 based on the trial court's failure to allow the jury to view the videotaped deposition of a former employee of the pertinent restaurant where the former employee read aloud the verbatim transcript of her deposition because plaintiff already had the full benefit of the prior inconsistent statements plaintiff sought to introduce through the videotaped deposition. **Harrell v. Sagebrush of N.C., LLC, 381.**

Summary judgment hearing—notice—The trial court did not err in a divorce case by concluding defendant wife received adequate and proper notice of the summary judgment hearing, even though defendant contends the notice of hearing only stated the date and not the time of the hearing. **Wilson v. Wilson, 789.**

CLASS ACTIONS

Settlement in another state—full faith and credit—The trial court erred by refusing to accord full faith and credit to an Illinois settlement of a class-action suit where the jurisdictional and due process concerns of the North Carolina court were fully and fairly litigated and finally decided by the Illinois court. **Moody v. Sears Roebuck & Co., 256.**

Standing—after settlement of another suit—Plaintiff Moody was not a party aggrieved by the trial court's actions and lacked standing to appeal in a class action arising from defendant's vehicle alignment services. Plaintiff had presumably received his settlement from defendant in an Illinois action and is now in compliance with the Illinois judge's order directing him to dismiss his North Carolina lawsuit. However, defendant's appeal presents essentially the same issues. **Moody v. Sears Roebuck & Co., 256.**

Voluntary dismissal—court's authority—pre-certification—settlement in another state—Although a trial court does not derive any pre-certification supervisory authority under N.C.G.S. § 1A-1, Rule 23(c), this does not imply that a trial court wholly lacks authority to review a motion for pre-certification dismissal of a class-action complaint. When a plaintiff seeks voluntary dismissal of a pre-certification class-action complaint, the trial court should engage in a limited inquiry to determine whether the parties have abused the class-action mechanism for personal gain, and whether dismissal will prejudice absent putative class members. If neither concern is present, plaintiff is entitled to a voluntary dismissal, but if either or both are present, the trial court retains jurisdiction. **Moody v. Sears Roebuck & Co., 256.**

Voluntary dismissal—judicial approval—pre-certification—The trial court erred by concluding that plaintiff Moody was required to obtain judicial approval under N.C.G.S. § 1A-1, Rule 23(c) before obtaining a voluntary dismissal of his class-action complaint where the class had not yet been certified. **Moody v. Sears Roebuck & Co., 256.**

CONSPIRACY

Civil—breach of agreements—not supported by evidence—The trial court did not err by granting summary judgment for defendants on a claim for civil conspiracy arising from the sale of plaintiff's business to defendants Morton and Kincaid and its subsequent resale to defendant Stroupe Mirror. The threshold issue was whether plaintiff forecast evidence of an agreement between defendants to cause the first purchaser (SGI) to breach its lease and non-compete agreements with plaintiff, but the evidence shows that the second sale was entered into in an effort to remove a lien and does not support the allegation that defendants intentionally excluded payment to plaintiff. **Sellers v. Morton, 75.**

CONSTITUTIONAL LAW

Attempted murder—assault with deadly weapon with intent to kill—double jeopardy inapplicable—arrest of judgment on less serious offense—not abuse of discretion—Although the offenses of attempted murder and assault with a deadly weapon with intent to kill arose out of the same factual basis, they were distinct offenses because each had an element not present in the other, and the trial court could sentence defendant for both of those offenses

CONSTITUTIONAL LAW—Continued

without subjecting defendant to double jeopardy and was not required to arrest judgment entered on either offense. Therefore, the trial court did not abuse its discretion by arresting judgment on the less serious offense of assault with a deadly weapon with intent to kill and entering a sentence based on the more serious attempted murder conviction. **State v. Garris, 276.**

Double jeopardy—use of prior conviction—The trial court did not err by denying defendant's motion to dismiss a habitual felon indictment where it resulted from a prior conviction used to support both a current conviction for possession of a firearm by a felon and defendant's sentencing as a habitual felon. **State v. Williams, 96.**

Effective assistance of counsel—failure to give notice of defenses of diminished capacity and voluntary intoxication—Defendant was not deprived of his state and federal constitutional right to effective assistance of counsel based on his attorney's failure to give notice to the State that he intended to assert the defense of diminished capacity and voluntary intoxication in an attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury case because: (1) defendant failed to present substantial evidence of either voluntary intoxication or diminished capacity; and (2) there was no reasonable probability that the alleged error affected the outcome of the trial. **State v. McDonald, 782.**

Effective assistance of counsel—failure to make motion to dismiss charges—A defendant did not receive ineffective assistance of counsel in a multiple attempting to evade or defeat tax case under N.C.G.S. § 105-236(a)(7) based on his trial counsel's failure to make a motion to dismiss the charges at the close of the State's case because substantial evidence was presented showing that defendant acted willfully, including defendant's statements coupled with his actions; and defendant failed to demonstrate that but for the failure of counsel, there would have been a reasonable probability of a different outcome. **State v. Howell, 349.**

Effective assistance of counsel—failure to object—Defendant did not receive ineffective assistance of counsel in a first-degree sex offense, first-degree kidnapping, and first-degree burglary case based on his trial counsel's failure to object to the admission of a witness's testimony as to the general reactions and characteristics of sexual assault victims. **State v. Simmons, 224.**

Effective assistance of counsel—stipulation to prior offense—Defendant was not denied effective assistance of counsel on a charge of possession of a firearm by a felon where his counsel agreed to stipulate that he had been convicted of possession of cocaine and did not insist that the nature of the felony not be disclosed to the jury. Defendant did not demonstrate that the charges equate such that the jury was likely to believe that the past charge makes the current one more likely. **State v. Tice, 506.**

Right to jury—Rule 11 sanctions—The trial court did not violate plaintiff's right to a trial in a case alleging misconduct by an arbitrator by imposing N.C.G.S. § 1A-1, Rule 11 sanctions without a jury because there is no right to a jury trial when considering the facts underlying a Rule 11 sanction. **Dalenko v. Collier, 713.**

CONSTITUTIONAL LAW—Continued

Right to remain silent—comment on defendant's exercise of right—harmless error beyond reasonable doubt—The admission of testimony by an accomplice and a detective in an arson case that defendant refused to speak with the police prior to her arrest violated defendant's Fifth Amendment privilege against self-incrimination where defendant did not testify at trial and the testimony was admitted as substantive evidence. However, this improper use of defendant's pre-arrest silence was harmless error because, when considered with the State's other substantial evidence of defendant's guilt, defendant's pre-arrest silence was simply not a significant or essential part of the State's case-in-chief. **State v. Boston, 637.**

Sixth Amendment—jury selection—impasse with attorney—trial tactics not the issue—The trial court did not violate defendant's Sixth Amendment rights by prohibiting him from making final decisions about peremptory challenges when there was an alleged absolute impasse between defendant and defense counsel regarding peremptory challenges. The impasse concerned the necessity of defendant standing trial, not an impasse concerning trial tactics. Even assuming an impasse concerning trial tactics, defendant's strategy for exercising peremptory challenges was unlawfully discriminatory and defense counsel could not have complied with defendant's requests. **State v. Williams, 96.**

CONSTRUCTION CLAIMS

Breach of contract—unworkmanlike construction of sea wall—motion to dismiss denied—The trial court did not err by denying defendant's motion to dismiss a breach of contract claim which arose from the construction of a rip rap sea wall and subsequent erosion. The court's findings support its conclusion that the sea wall was constructed in an unworkmanlike manner so that soil and sand could pass through the fabric under the rip rap and erosion could occur. **Matthews v. Davis, 545.**

CONTEMPT

Criminal contempt—failure to hold show cause order before different judge—The trial court erred by holding respondent attorney in criminal contempt when it did not have the show cause order returned before a different judge even though defendant failed to make such a motion, and the judgment is vacated, where the record revealed the criminal contempt with which defendant was charged, regarding his failure to appear for calendar call and failure to return legal authority the judge had requested, was based upon acts so involving the judge that his objectivity may reasonably have been questioned. **In re Marshall, 53.**

CONTRACTS

Breach of contract—compensatory damages—extra hours worked—assent—The trial court did not err in a breach of contract case by concluding that plaintiff Rosseter was entitled to compensatory damages for the extra hours she worked as office manager for defendant's RV campground. **Shepard v. Bonita Vista Properties, L.P., 614.**

Forum selection clause—improvement to N.C. real property—void—The trial court erred by granting defendant's motion to dismiss for improper venue an

CONTRACTS—Continued

action arising from cancellation of a contract for work on a retail outlet in Asheville, N.C. The contract contained a clause indicating that any action was to be brought in Florida, but, under N.C.G.S. § 22B-2, forum selection clauses contained within contracts involving improvements to real property located in North Carolina are void as a matter of public policy. **Price & Price Mech. of N.C., Inc. v. Miken Corp., 177.**

Tortious interference—resale of business—evidence of malice—The trial court did not err by granting summary judgment for defendants on a claim for tortious interference with contract arising from the sale of plaintiff's business to defendants Morton and Kincaid and its subsequent resale to defendant Stroupe Mirror. Plaintiff contended that malice was present in the circumstances surrounding the Stroupe purchase agreement, but the evidence did not support plaintiff's contentions, and a legitimate business reason was presented for the sale. **Sellers v. Morton, 75.**

COSTS

Attorney fees—reasonableness—Although the trial court did not abuse its discretion in an unfair and deceptive trade practices case by awarding attorney fees under N.C.G.S. § 75-16.1, the case is remanded for a determination of the reasonableness of the award because the Court of Appeals was unable to determine from the trial court's findings whether the amount of the award was reasonable when the findings did not fully address the skill required to perform the legal services that were rendered or the experience and ability of plaintiffs' trial counsel. **Shepard v. Bonita Vista Properties, L.P., 614.**

Attorney fees—substantial justification—special circumstances—The trial court did not abuse its discretion by awarding attorney fees under N.C.G.S. § 6-19.1 to petitioners who successfully challenged the Environmental Management Commission's (EMC) denial of a petition for rulemaking to reclassify a river dam's tailwater to trout waters. **Table Rock Chapter of Trout Unlimited v. Environmental Mgmt. Comm'n, 362.**

Child support—action on behalf of mother—defendant not child's father—attorney fees assessed against mother—order inequitable—The trial court's order requiring the mother to pay $750.00 of defendant putative father's attorney fees after he was excluded as the child's father in a paternity proceeding instituted by the county child support enforcement agency on behalf of the mother was inequitable and an abuse of discretion. **Guilford Cty. ex rel. Holt v. Puckett, 693.**

Filing fees—service fees—mediation fees—discretionary costs—Although the trial court did not err in a negligence case arising out of an automobile accident by denying statutory costs for filing fees since they are not an enumerated cost under N.C.G.S. § 7A-305(d), it did err by denying plaintiffs' motion for costs totaling $822.50 as to the service fees under N.C.G.S. § 7A-305(d)(6) and mediation fees under N.C.G.S. § 7A-305(d)(7) because these costs must be awarded to the prevailing party. In addition, there was no evidence that the trial court abused its discretion by denying plaintiffs' motion for discretionary costs allowed under N.C.G.S. § 6-20. **Priest v. Safety-Kleen Sys., Inc., 341.**

Witness fees—offer of judgment—The trial court did not err in a negligence case arising out of an automobile accident by allegedly failing to make sufficient

COSTS—Continued

findings of fact regarding the offer of judgment and witness fees because: (1) the error complained of in regard to the offer of judgment is not apparent to the Court of Appeals, and thus lacks merit; (2) the trial court did not abuse its discretion by failing to award uniform witness fees and travel expenses under N.C.G.S. § 7A-314(a) when plaintiffs did not ask for the fees in their motion, they did not argue that they were entitled to those fees in their brief, and there was no evidence that plaintiffs certified the uniform fees to the clerk of superior court as required by N.C.G.S. § 7A-314(a); and (3) additional fees for expert witnesses as allowed by N.C.G.S. § 7A-314(d) were purely within the trial court's discretion, and there was no evidence the trial court abused that discretion. **Priest v. Safety-Kleen Sys., Inc., 341.**

CRIMINAL LAW

Clerical errors in judgment—remand for correction—A conviction for assault was remanded for correction of clerical errors in the date of judgment and the date of the offense. **State v. Streeter, 496.**

Failure to instruct on perfect or imperfect self-defense—plain error analysis—The trial court did not commit plain error in a prosecution for attempted first-degree murder of a police officer and assault with a deadly weapon with intent to kill by failing to instruct the jury on perfect or imperfect self-defense because the evidence showed that defendant threatened he would shoot, the officer had reason to believe that defendant had weapons on his person or within the bag he carried with him, and the trial court could reasonably find the officer acted within his discretion when he fired at defendant given the danger of the circumstances and the risk of great bodily harm if defendant carried out his threat to shoot; and defendant failed to present substantial evidence showing the officer acted with unusual force given the circumstances. **State v. Garris, 276.**

Inquiry into division of jury—*Allen* charge—two hours into deliberations—The trial court did not abuse its discretion when it inquired into the numerical division of the jury and gave an *Allen* instruction two hours into deliberations. The inquiry was reasonable so that the court could plan for the afternoon recess and the following day, the court was not impatient toward the jury, and it did not take any action to coerce or intimidate the jury into reaching a verdict. **State v. Streeter, 496.**

Instructions—acting in concert—The trial court did not err in a first-degree murder and robbery with a dangerous weapon case by instructing the jury on acting in concert because: (1) the evidence revealed that the wounds on the victim's front and back suggested that he might have been attacked by two different weapons simultaneously; and (2) without presenting the jury with these instructions, the jury might have decided it could not determine whether defendant or another individual struck the blow that killed the victim, and as such acquitted defendant. **State v. Rankin, 332.**

Instructions—defense of accident not included—There was no plain error in an assault prosecution from the trial court not instructing the jury on the defense of accident. The only evidence of accident was defendant's statement, and the possibility of a different verdict is too remote to meet the test of plain error. **State v. Streeter, 496.**

CRIMINAL LAW—Continued

Instructions—flight—There was no plain error in instructing the jury on defendant's flight in considering a cocaine possession charge where defendant fled after an officer indicated that he wanted to search defendant. **State v. Sinclair, 485.**

Instructions—self-defense—defendant as the aggressor—The trial court did not commit plain error in a second-degree murder case by instructing the jury that defendant could not claim self-defense if he was the aggressor in the fight because the record indicated the evidence was sufficient to support an instruction regarding defendant acting as an aggressor. **State v. Banks, 743.**

Instructions—self-defense—duty to retreat—The trial court did not commit plain error in a felony discharging a weapon into occupied property case by failing to instruct the jury when giving the instruction on self-defense that defendant did not have a duty to retreat because: (1) even if the jury believed defendant was under a duty to retreat, defendant's testimony that he was unable to retreat would satisfy such a duty, thus making the instruction superfluous; (2) it was likely that defendant did have a duty to retreat, making an instruction to the contrary incorrect, when there was evidence that defendant entered the fight voluntarily as evidenced by his telling another person not to be brave, and saying that this was a situation where somebody could get shot; and (3) engaging in a verbal disagreement with threatening language did not indicate abandonment of the fight. **State v. Canady, 680.**

Prosecutor's closing argument—witness's prior statements—properly admitted—There was no plain error in an assault prosecution where the prosecutor used a witness's prior statements in her closing argument. The prosecutor may refer to any evidence presented at trial in her closing argument, and these statements had been admitted as corroborating evidence. **State v. Streeter, 496.**

Transfer of juvenile for trial as adult—review—abuse of discretion standard—A superior court reviewing a district court's transfer of a juvenile for trial as an adult is limited to review for abuse of discretion and may not, as here, reweigh the evidence, decide which factors are more important, and reverse the district court on that basis. **In re E.S., 568.**

Victim's outburst—denial of mistrial—curative instruction—The trial court did not abuse its discretion in a sex offense, kidnapping, and burglary case by failing to declare a mistrial based on the victim's outburst during her testimony at trial given the rapidity with which the trial court removed the jury and gave it a curative instruction. **State v. Simmons, 224.**

DAMAGES AND REMEDIES

Punitive—summary judgment on underlying claim—The trial court did not err by granting summary judgment for defendants on a claim for punitive damages arising from the sale of plaintiff's business to defendants Morton and Kincaid and its subsequent resale to defendant Stroupe Mirror. Summary judgment was correctly granted on the underlying tortious interference claim. **Sellers v. Morton, 75.**

Repair of sea wall—conflicting evidence—nonjury trial—The trial court did not err in a nonjury trial in its award of damages for repair of a sea wall built in

DAMAGES AND REMEDIES—Continued

an unworkmanlike manner where there was evidence to support the damages awarded, even though the award was less than the cost of repair estimated by plaintiffs' expert. The credibility and weight of the evidence was for the court. **Matthews v. Davis, 545.**

Restitution—amount—sufficiency of evidence—The trial court erred in a robbery with a dangerous weapon case by ordering defendant to pay restitution in the amount of $1,500.00, and the case is remanded to the trial court for a new sentencing hearing, because there was no testimony from the victim or any other evidence presented at trial or sentencing to support the restitution amount. **State v. Tuck, 768.**

DISCOVERY

Cross-examination—referencing police report not produced during discovery—remand for findings—The trial court abused its discretion in a robbery with a dangerous weapon case by allowing the State during cross-examination of a defense witness to reference a police report that had not been produced to defendant during discovery. The case is remanded for an evidentiary hearing to determine when the investigating agency or prosecutor discovered or should have discovered the statement, and when they were aware or should have been aware of its relation to the charges brought against defendant. **State v. Tuck, 768.**

Motion to compel documents withheld as privileged—motion to dismiss—sufficiency of evidence—The trial court did not err in a tax audit case arising from the creation of tax shelters designed to reduce intervenor's state corporate income tax by denying intervenor's motion to dismiss petitioner Secretary of Revenue's application to compel E&Y to produce documents pursuant to an administrative summons that E&Y withheld as privileged even though intervenor contends the pertinent application did not identify any return whose correctness petitioner was determining, any return he was constructing, any tax liability for any year he was determining or any tax he was trying to collect. **In re Ernst & Young, LLP, 668.**

Sanction for violations—precluded defenses—voluntary intoxication—diminished capacity—The trial court did not abuse its discretion by precluding defendant's use of the defenses of voluntary intoxication and diminished capacity as a discovery violation sanction under N.C.G.S. § 15A-910 in an attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury case. **State v. McDonald, 782.**

Summary judgment before end of discovery period—no discovery sought by opposing party—The trial court did not err by ruling on motions for summary judgment before the end of a discovery period where there was no evidence that plaintiff (the opposing party) sought discovery prior to the motions for summary judgment, no record of any objections to hearing the motions for summary judgment, and no action by plaintiff to continue the hearing for pretrial discovery. **Sellers v. Morton, 75.**

Withheld documents—anticipation of litigation—work product privilege—It was unclear whether the trial court abused its discretion by granting petitioner Secretary of Revenue's application and issuing an order to comply with

DISCOVERY—Continued

an administrative summons, and the case is remanded for an in camera review of the pertinent withheld documents to determine whether some of them are in fact privileged. **In re Ernst & Young, LLP, 668.**

DIVORCE

Absolute—subject matter jurisdiction—personal jurisdiction—proper notice and service—The district court did not lack subject matter jurisdiction and personal jurisdiction even though defendant wife contends she was not properly served with the summons and complaint prior to the trial court's entry of absolute divorce because: (1) in regard to subject matter jurisdiction, the court found that plaintiff had been a citizen and resident of North Carolina for more than six months next preceding the institution of this action, and plaintiff and defendant have lived separate and apart for more than one year without resuming the marital relationship; (2) in regard to personal jurisdiction, plaintiff filed an affidavit of service by certified mail on 7 June 2007; (3) plaintiff's verified complaint contained allegations consistent with the trial court's order and was properly treated as an affidavit; and (4) competent evidence supported the court's unchallenged findings of fact. **Wilson v. Wilson, 789.**

Alimony—dependent spouse—supporting spouse—accustomed standard of living prior to separation—The trial court did not err in an alimony and equitable distribution case by concluding as a matter of law under N.C.G.S. § 50-16.1A that plaintiff wife was a dependent spouse and defendant husband was a supporting spouse because the findings of fact demonstrated that during the marriage and at the time of the hearing, plaintiff had an income-expenses deficit of $627 per month, thus supporting the conclusion that she was a dependent spouse; and a surplus of income over expenses is sufficient in and of itself to warrant a supporting spouse classification, and the findings of fact showed defendant's income-expenses surplus supported this classification. **Helms v. Helms, 19.**

Equitable distribution—marital property—401(k) retirement account—The trial court did not abuse its discretion in an equitable distribution case by awarding each of the parties one-half of defendant husband's 401(k) retirement account where defendant failed to present any evidence tending to show the number of years his 401(k) account existed prior to the marriage. **Helms v. Helms, 19.**

Equitable distribution—property contract—affirmative defense catchall provision—The trial court erred in a divorce case by disregarding a property contract on the basis that it must have been pled as an affirmative defense under the catchall provision in N.C.G.S. § 8C-1, Rule 8(c) because the contract governing property is not an affirmative defense, but instead was a piece of evidence to be considered in settling the action for equitable distribution; and no counterclaim was brought by defendant to which an affirmative defense would need to be made. **Street v. Street, 815.**

Equitable distribution—validity of property contract—findings of fact—A divorce case is remanded to the trial court so that the validity of the property contract and any other evidence as to equitable distribution may be considered because the trial court made no findings of fact in any of its orders as to the valid-

DIVORCE—Continued

ity of the property contract, and the record reflected no evidence on the question. **Street v. Street, 815.**

DRUGS

Constructive possession—crack cocaine found along route of fleeing defendant—The trial court properly denied a motion to dismiss a charge of possessing cocaine with intent to sell or deliver where defendant ran from officers and the crack cocaine was found along the route followed by defendant shortly after he was apprehended. The circumstances create a reasonable inference that the drugs came from defendant. **State v. Sinclair, 485.**

Instructions—constructive possession—The trial court did not err by instructing the jury on constructive possession of cocaine where the drugs were found along the path defendant had followed as he fled from officers. **State v. Sinclair, 485.**

Possession of cocaine—motion to dismiss—sufficiency of evidence—constructive possession—The trial court erred by denying defendant's motion to dismiss the charge of possession of cocaine because constructive possession depends on the totality of circumstances in each case, and mere presence in a room where drugs are located does not itself support an inference of constructive possession. **State v. Miller, 124.**

ENVIRONMENTAL LAW

Attorney fees—substantial justification—special circumstances—The trial court did not abuse its discretion by awarding attorney fees under N.C.G.S. § 6-19.1 to petitioners who successfully challenged the Environmental Management Commission's (EMC) denial of a petition for rulemaking to reclassify a river dam's tailwater to trout waters. **Table Rock Chapter of Trout Unlimited v. Environmental Mgmt. Comm'n, 362.**

EVIDENCE

Calling witness who would invoke Fifth Amendment privilege—notice—The trial court did not commit plain error in a first-degree murder and robbery with a dangerous weapon case by allowing the State to call defendant's son as a witness even though the State knew the witness would invoke his Fifth Amendment privilege against self-incrimination. **State v. Rankin, 332.**

Character—peaceful and law-abiding citizen—The trial court erred in a second-degree murder case by denying defendant the opportunity to provide character evidence that he was a peaceful and law-abiding citizen. **State v. Banks, 743.**

Child pornography—video clips shown to jury—no abuse of discretion—The trial court did not abuse its discretion in a prosecution for third-degree sexual exploitation of a minor by allowing the State to show the jury twelve video clips of children engaged in sexual activity. Defendant had stipulated that the computer contained images of sexual activity, but a stipulation does not preclude the State from proving all of the essential elements of its case, and a non-duplicative, brief presentation of the evidence was appropriate as it served as the basis for the charges. **State v. Riffe, 86.**

EVIDENCE—Continued

Corroborative—interview with child—questions asked and background information—A report from a clinical social worker concerning the victim of statutory rape and indecent liberties was not rendered noncorroborative of the child's testimony because it contained questions posed to the child, as well as some background information. The jury needed to hear the questions to comprehend the child's prior statements, and the background information was relevant to understand the nature and purpose of the interview. **State v. Davis, 535.**

Defendant and witness Muslim—religion used as mechanism to get witness to testify—alibi—The trial court did not err in a first-degree murder and robbery with a dangerous weapon case by allowing the State to present evidence identifying defendant and a witness as Muslim where the witness testified that, per her religious beliefs, when defendant asked her to provide an alibi for him, she felt obligated to do so, which is why she initially testified that he had been with her at the time of the murder; and the fact that defendant was using his religion as a mechanism to try to get the witness to testify on his behalf and actually commit perjury was relevant for that purpose, and it was not being offered as a means of showing credibility. **State v. Rankin, 332.**

Generally emotional subject—prejudice not shown—A defendant in a prosecution for statutory rape and indecent liberties did not show prejudice from certain evidence with a generalized argument that the evidence was highly emotional and likely to inflame the jury. **State v. Davis, 535.**

Hearsay exceptions—present sense impression—excited utterance—regularly conducted activity—public records and reports—The trial court did not abuse its discretion in an assault with a deadly weapon with intent to kill inflicting serious injury, possession of a firearm by a convicted felon, and discharging a firearm into occupied property case by denying the admission of testimony from the SBI Special Agent about an unavailable witness's statements made several hours after the pertinent shooting while sitting in the agent's state issued vehicle outside the police department because such testimony was not admissible as hearsay exceptions for present sense impressions, excited utterances, regularly conducted activity or public records or reports. **State v. Little, 655.**

Juvenile victim—sealed records—in camera review—The trial court did not err by denying disclosure of some of the sealed records of a 13-year-old victim of indecent liberties and sexual acts. After a thorough review of the records not supplied to defendant, the Court of Appeals agreed with the trial court that they did not contain favorable or material evidence for defendant. **State v. Tadeja, 439.**

Officers' service weapons—SBI's chain of custody procedures—In a prosecution for attempted murder of a police officer, communicating threats to officers and other crimes, the trial court did not abuse its discretion by allowing testimony establishing the chain of custody of the arresting officers' service weapons, which had been fired in pursuit of defendant and collected as evidence, because the nature of the testimony did not suggest that the officers had been cleared of any wrongdoing, including unlawfully using excessive force against defendant, even though their service weapons had been returned to them. **State v. Garris, 276.**

Opinion of child's credibility—admission not plain error—Statements in the report of a clinical social worker vouching for the credibility of a victim of

EVIDENCE—Continued

statutory rape and indecent liberties should not have been admitted, but there was no plain error because the jury could assess for itself from other evidence the credibility of the child and there was not a reasonable probability of a different result without the conclusory statement. **State v. Davis, 535.**

Prior crimes or bad acts—admissible for motive and intent—not too remote in time—The trial court did not err by admitting testimony of an attempted burglary defendant's prior acts of breaking and entering and larceny. The prior acts were admissible to show motive and intent, and the time span of two years was not too remote, although remoteness in time is less significant when the prior conduct is used to show intent or motive. **State v. Martin, 462.**

Prior crimes or bad acts—burglary prosecution—marijuana possession—motive—The trial court did not err in an attempted burglary prosecution by admitting a prior act of marijuana possession. The evidence was relevant to show motive in that defendant needed money, and the prior act occurred just days before the alleged attempted burglary. **State v. Martin, 462.**

Prior crimes or bad acts—involuntary manslaughter—State's refusal to accept defendant's stipulation—The trial court did not abuse its discretion in an assault with a deadly weapon with intent to kill inflicting serious injury, possession of a firearm by a convicted felon, and discharging a firearm into occupied property case by allowing the State to present evidence of defendant's prior felony conviction for involuntary manslaughter and then failing to give a limiting instruction with respect to evidence of defendant's prior conviction when defendant made an offer to stipulate to his status as a felon. **State v. Little, 655.**

Prior crimes or bad acts—multiple sexual assaults—The trial court did not commit plain error in a first-degree sex offense, first-degree kidnapping, and first-degree burglary case by admitting under N.C.G.S. § 8C-1, Rule 404(b) testimony of three prosecution witnesses stating that they were also sexually assaulted by defendant because the incidents were sufficiently similar and not so remote in time as to be more probative than prejudicial under the balancing test of N.C.G.S. § 8C-1, Rule 403. **State v. Simmons, 224.**

Prior crimes bad acts—relevance to victim's delay in reporting—The trial court did not err in a prosecution for indecent liberties and sexual acts with a 13-year-old by admitting evidence of defendant's extra-marital affair where defendant told the victim that his wife had almost left him after discovering the affair. The evidence was relevant to the victim's delay in reporting defendant's actions. **State v. Tadeja, 439.**

Prior crimes or bad acts—sufficiently similar and timely—The trial court did not err in an attempted burglary prosecution by admitting defendant's prior act of breaking and entering and larceny where the two incidents were sufficiently similar in that defendant attempted or did enter through a window, both residences were in the same neighborhood, a gun registered to defendant's grandfather was recovered from the earlier scene, and the incidents were only six months apart. **State v. Martin, 462.**

Rape—opinions of perpetrator's identity—not prejudicial—There was no prejudice in a prosecution for first-degree rape and other offenses in the admission of testimony from various witnesses about whether there was ever any question as to who committed the crime. The testimony was offered as an explanation

EVIDENCE—Continued

of why the SBI protocol for the victim's sexual assault kit was not followed rather than for the truth of the matter. Moreover, defendant did not show a reasonable possibility of a different result without this evidence. **State v. Lawrence, 422.**

Relevance—child victim of sexual assault—treatment plan—The trial court did not abuse its discretion in a prosecution for statutory rape and indecent liberties by admitting testimony about the victim's therapy and treatment plan. The evidence was relevant to show that the victim had suffered trauma, and defendant cross-examined the victim about her therapy. **State v. Davis, 535.**

Shiny object—rape victim's impression of weapon—The trial court did not err in a prosecution for first-degree rape and other offenses by admitting the victim's testimony that she saw a shiny object in defendant's hand and that she thought it was a knife. The testimony is probative of whether the victim reasonably believed that defendant displayed a dangerous or deadly weapon, one of the statutory elements of the crime. **State v. Lawrence, 422.**

Social workers—reasons children delay reporting abuse—collateral to this case—Evidence from social workers about the reasons children do not report sexual abuse was collateral in a case in which the victim reported the abuse in question the day after it occurred. Moreover, defendant did not demonstrate prejudice. **State v. Davis, 535.**

State of mind—child victim of sexual assault—The trial court did not err by admitting evidence of the state of mind of a child victim of indecent liberties and statutory rape. Evidence of her state of mind, including fear, was relevant to whether she had been sexually abused. Defendant cited no authority for the contention that the probative value was outweighed by the danger of prejudice. **State v. Davis, 535.**

State of mind—mother of child victim—Admission of evidence that the mother of a child victim of statutory rape and indecent liberties did not believe her accusations was not plain error. **State v. Davis, 535.**

Victim's prior statements—corroboration—additional details—curative instruction—The trial court did not err in an assault prosecution by admitting the testimony of an officer about a victim's prior statements for corroborative purposes. The statements that defendant contends were not corroborative merely provide additional details, immaterial to defendant's guilt, and the trial court gave a curative instruction prohibiting consideration of any noncorroborative statements. Moreover, there was other evidence of guilt and the jury would not have reached a different result even without the testimony. **State v. Streeter, 496.**

FIREARMS AND OTHER WEAPONS

Discharging firearm into occupied property—instruction—justification or excuse—The trial court did not commit plain error in a felony discharging a weapon into occupied property case by its instruction that in order to find defendant guilty, the jury had to find that defendant discharged the firearm "without justification or excuse, that is, in self-defense," even though defendant contends it led the jury to believe that self-defense was the only justification or excuse, because: (1) defendant presented no evidence of any justification or

FIREARMS AND OTHER WEAPONS—Continued

excuse other than self-defense at trial, and the absence of any evidence of another justification or excuse freed the trial court from having to leave the instruction open to other excuses; and (2) the issue of whether defendant accidentally fired was not a justification or excuse for shooting, but rather went to the element of intent. **State v. Canady, 680.**

Discharging firearm into occupied property—instruction—meaning of "into"—The trial court's instruction in a prosecution for discharging a firearm into occupied property that "into" meant "into any part of the property structure" adequately conveyed to the jury that the outside wall is a part of the enclosure of the apartment and was not error. **State v. Canady, 680.**

Discharging firearm into occupied property—sufficiency of evidence—bullet hit exterior wall—The trial court did not err by denying defendant's motions to dismiss the charge of discharging a firearm into occupied property because: (1) contrary to defendant's assertion, the intent element in N.C.G.S. § 14-34.1 applies merely to the discharging and not to the eventual destination of the bullet; (2) there was evidence that supported the conclusion that defendant intended to discharge the gun; and (3) although defendant contends there was insufficient evidence that he shot "into" the pertinent apartment when the bullet hit the exterior wall, the claim that the exterior walls of the apartment do not constitute part of the enclosure is without legal merit since discharging a firearm into an enclosure does not have to mean through the wall of the enclosure. **State v. Canady, 680.**

Discharging firearm into occupied property—sufficiency of indictment—knew or should have known property was occupied—An indictment in a felony discharging a weapon into occupied property case gave the trial court subject matter jurisdiction, even though defendant contends it failed to allege the element that defendant knew or should have known that the property was occupied at the time he discharged the firearm, because the indictment was couched in the language of N.C.G.S. § 14-34.1 and alleged all of the essential elements. **State v. Canady, 680.**

Permit denial—involuntary commitment—statutory requirements not met—Plaintiff should not have been denied a hand-gun permit based on a commitment to a mental institution where the statutory requirements for involuntary commitment were not met. **Waldron v. Batten, 237.**

Possession of firearm by felon—simultaneous possession of multiple firearms—single conviction and sentence—A defendant may be convicted and sentenced only once for possession of a firearm by a felon based upon his simultaneous possession of multiple firearms. **State v. Garris, 276.**

GOVERNOR

Executive order—state employees' retirement system—employer contributions escrowed—unconstitutionality—An executive order signed by the governor directing that state employers send the employer portion of retirement contributions for the state employees' retirement system to the State Controller for placement into an escrow account for the purpose of ensuring a balanced state budget "diverted" the funds in violation of N.C. Const. art. V, § 6(2) even though the employer contributions had not yet been received by the retirement system. **Stone v. State, 402.**

GUARANTY

Part of debt transaction—consideration—Guaranty agreements were supported by consideration where they were executed as a part of the transaction which created the guaranteed debt. **Branch Banking & Tr. Co. v. Morrison, 173.**

HOMICIDE

Second-degree murder—sufficiency of evidence—malice—The trial court did not err by submitting the charge of second-degree murder to the jury, even though defendant contends there was insufficient evidence of malice, because: (1) the intentional use of a deadly weapon which causes death gives rise to an inference that the killing was done with malice and is sufficient to establish murder in the second-degree; (2) the State presented evidence that defendant retrieved a gun from his vehicle, intentionally fired the gun at the victim, and killed him; and (3) although the State's evidence showed defendant may have acted in imperfect self-defense, the State also put forward additional evidence that defendant acted with malice when he killed the victim. **State v. Banks, 743.**

IMMUNITY

Public duty doctrine—suit in individual capacity—The public duty doctrine does not extend to government workers sued only in their individual capacities, and summary judgment was properly denied to defendants on that ground in an action against employees of a county health department arising from the failure of a septic system. **Murray v. County of Person, 575.**

Public officers—not available—Public officers immunity was not available to health department employees in the positions of Environmental Health Specialist and Environmental Health Supervisor, and the trial court correctly denied summary judgment for defendants on that issue in an action arising from the failure of a septic system. **Murray v. County of Person, 575.**

Public official—airport authority contract—Summary judgment for defendants was correctly denied on the issue of public official immunity in an action arising from an airport authority decision to not renew a Fixed Base Operator contract. Plaintiffs did not allege injury to themselves as distinct from the general public in their open meetings claim and did not seek compensation for an alleged violation of N.C.G.S. § 14-234(a)(1) so that public official immunity did not apply to such claims. Also, plaintiffs' claim for duress and wrongful interference with contract required malicious intent so that public official immunity was inapplicable to those claims. **Free Spirit Aviation, Inc. v. Rutherford Airport Auth., 581.**

INJUNCTIONS

Findings—failure to join necessary party—The trial court did not err by allegedly requiring evidence of defendants' ability to comply with an injunction; it did not in fact make that finding. The finding of which plaintiff complains was not an independent ground for dismissing the action, but was in support of the conclusion that plaintiff had not joined the necessary parties. **Durham Cty. v. Graham, 600.**

INSURANCE

Claim investigated—not a deceptive trade practice—Defendants did not engage in deceptive trade practices in an insurance claim by failing to investigate certain information where they diligently pursued questions as to liability for the fire and had their own independent investigator conduct inquiries. **Luther v. Seawell, 139.**

Homeowners—effective date of restriction—dog bite—The trial court erred by entering summary judgment for plaintiff insurance company because a genuine issue of material fact existed as to whether a restriction of coverage for a homeowners policy for any occurrence caused by insured's dog became effective on the date the restriction was signed by the insured or on the date of the policy's renewal and thus whether the policy covered a claim under the homeowners policy for a dog bite that occurred after the restriction was signed but before the renewal date. **Nationwide Mut. Fire Ins. Co. v. Mnatsakanov, 802.**

Homeowners—misrepresentations—application completed by insurance company employee—signed by plaintiffs—The trial court correctly granted summary judgment for defendant Seawell, an employee of an insurance company, in an action arising from misrepresentations on an insurance application. Although plaintiffs contended that they had given truthful answers to Seawell when he filled out the application, plaintiffs signed the application, and the policy would not have been issued had the correct information been provided. **Luther v. Seawell, 139.**

Misrepresentations on application—adopted by signature—Plaintiff adopted representations on an insurance application form filled in by an insurance company employee by signing the application. **Luther v. Seawell, 139.**

Policy covering sheriff's department—set-off provision—ambiguous—The structure and language of a county sheriff's department's insurance policy supported a deputy's interpretation of set-off provisions applicable to underinsured motorist coverage as requiring a deduction for third party payments from total damages rather than policy limits. Plaintiff's (the insurer's) view is also reasonable, which means that the policy is ambiguous and the construction that favors the insured will be accepted. **N.C. Counties Liability & Prop. Joint Risk Mgmt. Agency v. Curry, 217.**

Professional liability—claims made and reported policy—summary judgment—The trial court correctly affirmed summary judgment for defendant insurance company on plaintiff's claim under a professional liability policy where plaintiff did not make its claim within the required 60 days of the policy period. The parties had a plain, unambiguous contract which required that the claim arise during a covered policy period and be made within the policy period or 60 days afterwards. **Eagle Eng'g, Inc. v. Continental Cas. Co., 593.**

Uninsured motorist—striking log in roadway—physical contact between vehicles required—Plaintiff was not entitled to uninsured motorist benefits where plaintiff struck a pine tree log that had allegedly fallen off a truck and was lying in the middle of the interstate because our courts have required physical contact between the vehicle operated by the insured motorist and the vehicle operated by a hit-and-run driver for the uninsured motorist provisions of N.C.G.S. § 20-279.21(b)(3)(b) to apply. **Moore v. Nationwide Mut. Ins. Co., 106.**

JUDGES

Expression of opinion—repeated inquiries and *Allen* charges—The trial court did not impermissibly express an opinion as to the weight of the evidence in an arson case by its repeated *Allen* charges and inquiries into the jury's numerical division. **State v. Boston, 637.**

Failure to recuse ex mero motu—no duty—A judge was under no duty to recuse himself on his own motion from a summary judgment hearing on a negligence claim by a special needs student who fell at school because the judge made comments indicating that he did not think that plaintiff should have been in a regular school. The issue was not preserved for appellate review where plaintiff made no motion for recusal in the lower court. **Foster v. Nash-Rocky Mount Cty. Bd. of Educ., 323.**

Order of the court—drafted by party—appearance of impartiality—It was noted that a remanded order should have been entirely typewritten and should have had consistent paragraph numbers where the order as filed included the footer "Defendant's Proposed Order" and a handwritten addition, so that the paragraph numbers were not consistent. The signing of such an order does not convey an appearance of impartiality on the part of the court. **Heatzig v. MacLean, 451.**

JUDGMENTS

Canadian—enforcement—Plaintiff complied with the statutory provisions of the Uniform Enforcement of Foreign Judgments Act in seeking enforcement of a Canadian judgment for attorney fees for a Canadian child custody action and was not required to bring forth evidence that none of the defenses available to defendants were valid. The North Carolina Foreign Money Judgments Recognition Act (NCFMJRA) pertains to recognition of a judgment rather than enforcement. **Maxwell Schuman & Co. v. Edwards, 356.**

JUDICIAL SALES

Defendant not within county—notice not required—Defendant was not entitled to receive personal notice of the impending execution sale of a condominium on the North Carolina coast because he was not located in Onslow county, there was no evidence that he had an agent in North Carolina, and the Sheriff complied with the statutory requirement that notice be sent by registered mail. **St. Regis of Onslow Cty. v. Johnson, 516.**

Judgment docketed—ownership transferred before sale—no personal notice—no due process violation—A New Jersey family trust which received ownership of a condominium on the North Carolina coast after a judgment but before the execution sale was not entitled to personal notice, nor were its due process rights affected. The judgment had been docketed and the trust had record notice of the judgment lien. **St. Regis of Onslow Cty. v. Johnson, 516.**

Notice via registered letter—additional steps impractical—The notice of an impending execution sale complied with due process requirements where the Sheriff provided notice via registered letter and did not become aware that the normal procedures for providing notice were ineffective until after the sale had been finalized. It was not practicable for the Sheriff, without knowledge of the

JUDICIAL SALES—Continued

non-receipt, to take additional reasonable steps to notify defendant of the impending sale of the property. **St. Regis of Onslow Cty. v. Johnson, 516.**

JURISDICTION

Personal jurisdiction—internet postings—minimum contacts—The trial court did not err in a libel and civil conspiracy case arising out of defamatory comments posted on the internet by dismissing plaintiff North Carolina resident's complaint against defendant Georgia resident based on lack of personal jurisdiction because whether internet postings confer jurisdiction in a particular forum hinges on the manifested intent and focus of defendant, and plaintiff presented no evidence suggesting that defendant, through his internet postings, manifested an intent to target and focus on North Carolina readers as required by the test in *Young*, 315 F.3d 256 (2003), for asserting personal jurisdiction over defendant. **Dailey v. Popma, 64.**

Personal jurisdiction—minimum contacts—consistent and continuous interaction—The trial court did not err in a breach of contract or quasi-contract and conversion case by denying defendant Greensky's motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(2) based on lack of personal jurisdiction because defendant had sufficient minimum contacts to purposefully avail itself of the privilege of conducting activities within North Carolina, thus subjecting itself to personal jurisdiction, including: (1) defendant's consistent and continuous two-year interaction with plaintiff in reference to the sale of furniture from plaintiff to Eclectic; (2) numerous communications; (3) frequent payments for the furniture purchased by Eclectic; and (4) the alleged attempted sale of plaintiff's furniture without payment. **Rossetto USA, Inc. v. Greensky Fin., LLC, 196.**

Personal jurisdiction—minimum contacts—passive receipt of shipment—The trial court erred in a breach of contract or quasi-contract and conversion case by denying defendant Furniture Retailers's motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(2) based on lack of personal jurisdiction because defendant's passive receipt of a shipment of furniture from plaintiff intended for Eclectic, its one phone call to plaintiff in North Carolina, and its attempt to sell furniture on eBay was insufficient to establish minimum contacts with North Carolina. **Rossetto USA, Inc. v. Greensky Fin., LLC, 196.**

JURY

Deliberations—instruction—*Allen* charge—plain error analysis—The trial court did not commit plain error in a first-degree arson case by instructing the jury on the *Allen* charge under N.C.G.S. § 15A-1235(c) regarding jury deliberations because N.C.G.S. § 15A-1235(c) does not require an affirmative indication from the jury that it is having difficulty reaching a verdict, nor does it require that the jury deliberate for a lengthy period of time before the trial court may give the *Allen* instruction. **State v. Boston, 637.**

Deliberations—instruction—multiple *Allen* charges—inquiry into numerical division—totality of circumstances review—A review of the totality of circumstances revealed that the trial court did not coerce a verdict in a first-degree arson case by its multiple *Allen* charges and inquiries into the jury's numerical division. **State v. Boston, 637.**

JURY—Continued

Out-of-state jurors—not challenged—issue not preserved for review—Defendant did not preserve for review the issue of seating a juror who had moved out-of-state where he did not move to have the juror excused for cause, object to the juror, or use one of his peremptory challenges to excuse him. **State v. Davis, 535.**

JUVENILES

Cars damaged—insufficiency of evidence of some counts—entire adjudication remanded—A juvenile adjudication was reversed and remanded where the proceeding arose from a series of incidents in which cars were damaged by rocks, respondent's statements did not amount to a general admission, and the State did not present substantial evidence of respondent's participation in seven of the nine offenses. It could not be determined whether the disposition order would have been altered had the trial court properly adjudicated respondent delinquent based solely on the two petitions on which the State presented sufficient evidence. **In re R.D.L., 526.**

Delinquency—admission of guilt—factual basis required—The trial court erred in a juvenile delinquency case arising out of felony larceny and attempted felony larceny of a vehicle by accepting a juvenile's admission of guilt because the State failed to follow the mandate of N.C.G.S. § 7B-2407(c) to establish a factual basis for admitting a juvenile's plea when the prosecutor's statement of facts does not contain any statement or evidence that the pertinent pickup truck was worth more than $1,000, and the record did not include a written statement of the juvenile, sworn testimony, or a statement by the juvenile's attorney that the truck was valued at more than $1,000. **In re D.C., 246.**

Delinquency—subject matter jurisdiction—failure to file petitions within mandatory period—The trial court lacked subject matter jurisdiction in a juvenile delinquency case arising out of injury to personal property, and the judgment is vacated, because: (1) the juvenile court counselor failed to file the petitions within the period mandated by N.C.G.S. § 7B-1703(b); and (2) although the statute allows an extension of fifteen additional days at the discretion of the chief court counselor, the record failed to demonstrate that the chief court counselor granted such an extension. **In re K.W., 812.**

Modification of prior dispositional order—changed circumstances—The trial court did not err in a first-degree sex offense on a child case by modifying a juvenile's prior dispositional order from a Level II placement in a residential sex offender program to a Level III indefinite commitment to a youth development center not to exceed his nineteenth birthday where there was competent evidence to support the trial court's finding that due to a lack of funding under State and Federal law, the prior placement was no longer available to the undocumented alien juvenile. **In re D.G., 752.**

KIDNAPPING

During robbery—insufficient evidence of separate offense—The evidence was not sufficient to support convictions for second-degree kidnapping where defendant and others entered a McDonald's, made the patrons and workers lie down, and took the manager to the back to open the safe. The evidence estab-

KIDNAPPING—Continued

lishes only the elements of robbery with the one added component of the victims being required to lie down, which was a mere technical asportation. **State v. Taylor, 561.**

First-degree—sufficiency of evidence—separate confinement, restraint, or removal beyond rape—The trial court erred by denying defendant's motion to dismiss the charge of first-degree kidnapping, and the conviction is vacated based on insufficient evidence showing a separate asportation of a victim during the commission of the separate felony offense of rape, because: (1) defendant raped the victim in the guest bedroom; and (2) there was no evidence of confinement, restraint, or removal other that than that which was inherent to the offense of rape itself. **State v. Simmons, 224.**

LANDLORD AND TENANT

Ejectment—conditional obligation to pay rent—summary judgment for tenant—There was no genuine issue of fact in a summary ejectment action, and summary judgment was properly granted for defendant, where the landlord argued that the meaning of a phrase relieving the tenant of the obligation to pay rent under certain circumstances was ambiguous. The meaning of the contract was clear and only one reasonable interpretation exists; moreover, the lease did not imply that rent was to be accrued and paid later, when the circumstances changed. **Majestic Cinema Holdings, LLC v. High Point Cinema, LLC, 163.**

Ejectment—lease agreement—conditional obligation to pay rent—not liquidated damages—There was no genuine issue of fact in an ejectment action as to whether a lease agreement provided for liquidated damages or an unenforceable penalty. While the lease gave the tenant the right to abstain from making rent payments under certain conditions, there is nothing to indicate that the provision was intended as a recovery for breach of contract and does not describe a liquidated damage. **Majestic Cinema Holdings, LLC v. High Point Cinema, LLC, 163.**

LARCENY

Money taken from purse—evidence sufficient—The evidence was sufficient to deny a juvenile's motion to dismiss a charge of felonious larceny purusant to a breaking or entering where defendant was seen across the hall from an office, an occupant of the office left for about five minutes and returned to find defendant in her office, defendant did not have permission to be in the office, and her purse had been tampered with and money was missing. **In re S.D.R., 552.**

MEDICAL MALPRACTICE

Bedsores—proximate cause of death—evidence speculative—Plaintiff failed to forecast evidence demonstrating causation in a medical malpractice action involving the treatment of bedsores, and defendants were entitled to summary judgment where the decedent suffered from many ailments and testimony as to whether decedent's bedsores were the proximate cause of her death was speculative. **Azar v. Presbyterian Hosp., 367.**

Failure to diagnose or treat sooner—proximate cause—sufficiency of evidence—summary judgment—The trial court did not err in a medical malprac-

MEDICAL MALPRACTICE—Continued

tice case by granting summary judgment in favor of defendants because: (1) where plaintiff alleges that he was injured due to a physician's negligent failure to diagnose or treat plaintiff's medical condition sooner, plaintiff must present at least some evidence of a causal connection between defendant's failure to intervene and plaintiff's inability to achieve a better ultimate medical outcome; and (2) plaintiff's evidence was insufficient to establish the requisite causal connection between defendants' alleged negligence and plaintiff's blindness when neither of plaintiff's expert witnesses were able to testify that plaintiff's vision would be better today had defendants initiated steroid treatment sooner, nor were they able to testify that plaintiff's vision probably would be better. **Lord v. Beerman, 290.**

MOTOR VEHICLES

Driving while impaired—driver's license checkpoint—lawful purpose—reasonableness—The trial court erred in a driving while impaired case by concluding the pertinent driver's license checkpoint had a lawful purpose and was reasonable, and the case is remanded for new findings and conclusions regarding the primary programmatic purpose of the checkpoint. **State v. Veazey, 181.**

Driving while impaired—driver's license checkpoint—secondary checking station—The trial court did not err in a driving while impaired case by concluding that a trooper did not unreasonably detain defendant by directing him to a secondary checking station after an initial driver's license checkpoint stop and by admitting evidence gained as a result of this secondary stop because: (1) the trooper testified that when defendant presented his driver's license during the initial checkpoint detention, the trooper detected a strong odor of alcohol in the vehicle and also observed that defendant's eyes were red and glassy; and (2) these facts provided a sufficient basis for reasonable suspicion permitting the trooper to pursue further investigation and detention of defendant. **State v. Veazey, 181.**

Uninsured motorist—striking log in roadway—physical contact between vehicles required—Plaintiff was not entitled to uninsured motorist benefits where plaintiff struck a pine tree log that had allegedly fallen off a truck and was lying in the middle of the interstate because our courts have required physical contact between the vehicle operated by the insured motorist and the vehicle operated by a hit-and-run driver for the uninsured motorist provisions of N.C.G.S. § 20-279.21(b)(3)(b) to apply. **Moore v. Nationwide Mut. Ins. Co., 106.**

NEGLIGENCE

Fire damage—causation—mere conjecture, surmise, and speculation—summary judgment—The trial court did not err in a negligence case arising from fire damage by granting defendants' motion for summary judgment on the issue of the cause of the fire because plaintiffs' assertion that the evidence pointed to an electrical fire originating from the right rear of defendants' building was a mere conjecture, surmise, and speculation as to the cause of the fire; and the record was devoid of any evidence tending to support plaintiffs' assertion when an inspector and two other experts were unable to determine the origin of the fire. **Elm St. Gallery, Inc. v. Williams, 760.**

NEGLIGENCE—Continued

Fire damage—proximate cause—delay taking corrective action to remedy condition—summary judgment—The trial court did not err in a negligence case arising from fire damage by granting defendants' motion for summary judgment on the issue of whether defendants negligently delayed taking corrective action to remedy the condition of their building after the fire occurred because, assuming arguendo that plaintiffs could establish a duty and breach thereof, plaintiffs failed to produce any evidence tending to show or raise any inference that defendants' alleged negligence was the proximate cause of plaintiffs' injury. **Elm St. Gallery, Inc. v. Williams, 760.**

OBSTRUCTION OF JUSTICE

Juvenile—sufficiency of evidence—There was sufficient evidence for the trial court to find a juvenile delinquent for resisting, delaying, and obstructing an officer during an investigation of missing cash at an Extension Service office. **In re S.D.R., 552.**

Resisting an officer—fleeing—The trial court properly dismissed a charge of resisting a public officer where defendant was approached by an officer who knew him in a known drug area, defendant asked if the officer wanted to search him again, and then fled after the officer said yes. Flight from a consensual encounter cannot be used as evidence that defendant was resisting, delaying, or obstructing the officer. **State v. Sinclair, 485.**

PARENT AND CHILD

Parent by estoppel—theory not adopted—The theory of parent by estoppel is not adopted: the North Carolina Supreme Court has enunciated a clear and comprehensive framework for determining custody claims of persons who are not the parent of the children. **Heatzig v. MacLean, 451.**

Parental status—no authority to confer—The trial court erred by conferring parental status on a same sex partner where the court rejected the assertion that the birth mother had acted inconsistently with her constitutionally protected status as a natural parent. A district court in North Carolina is without authority to confer parental status upon a person who is not the biological parent of a child. **Heatzig v. MacLean, 451.**

PARTIES

Necessary—current owner of landfill—The current owner of land was a necessary party to a county's action to obtain a mandatory injunction requiring the former landowners who had engaged in land-disturbing activity to restore the land, but the city was not a necessary party, and neither were the lien holders. Even though a zoning permit would be required to comply with the injunction, the city claims no interest in the property and is not at present necessary to determine the outcome between the parties. Augmentation of the land does not affect any rights that the lien holders may have in the subject property. **Durham Cty. v. Graham, 600.**

PENSIONS AND RETIREMENT

Executive order—state employees' retirement system—employer contributions escrowed—unconstitutionality—An executive order signed by the governor directing that state employers send the employer portion of retirement contributions for the state employees' retirement system to the State Controller for placement into an escrow account for the purpose of ensuring a balanced state budget "diverted" the funds in violation of N.C. Const. art. V, § 6(2) even though the employer contributions had not yet been received by the retirement system. **Stone v. State, 402.**

State employees' retirement system—actuarially sound funding—contractual right—Vested state employees have a contractual right to have their retirement systems funded in an actuarially sound manner. **Stone v. State, 402.**

State employees' retirement system—employer contribution escrowed—no penalty—The trial court did not err by granting summary judgment for the State Treasurer and the board of trustees of the state employees' retirement system on a claim for a writ of mandamus to compel compliance with N.C.G.S. § 135-8(f)(3), which imposes a penalty when contributions to the state employees' retirement system are not received. The statute speaks in terms of default by an employer, but in the present case the employer contributions were escrowed as the result of an executive order. Moreover, the Treasurer and board of trustees had routinely waived the imposition of the fine when it was determined that there was no intent to not remit the contributions in a timely manner. **Stone v. State, 402.**

State employees' retirement system—escrow of employer contributions—impairment of contract—The diversion of employer contributions from the state employees' retirement system into an escrow account pursuant to an executive order signed by the governor impaired the contractual rights of vested members to a retirement system funded in an actuarially sound manner because, at the time the employer contributions were escrowed, it was unclear when, or even whether, the diverted funds would be repaid, and the integrity and security of the retirement system were threatened. **Stone v. State, 402.**

State employees' retirement system—escrow of employer contributions—not reasonable and necessary—The escrow of the employer contributions to the state employees' retirement system was not reasonable and necessary to serve the important public purpose of avoiding a constitutionally prohibited budget deficit and violated the contract clause of the U.S. Constitution. A balanced budget could have been achieved in another way. **Stone v. State, 402.**

PLEADINGS

Rule 11 sanctions—complaint seeking injunction—damages or harm not alleged—The trial court did not err by granting Rule 11 sanctions for a pro se complaint seeking an injunction that did not allege damage or irreparable harm. Had plaintiff read the applicable law, he would have concluded that his complaint was not warranted by existing law and was insufficient to state a claim upon which relief could be granted. **Ward v. Jett Properties, LLC, 605.**

Rule 11 sanctions—consideration of lesser sanctions—reasonableness of amount—The trial court did not err in a case alleging misconduct by an arbitra-

PLEADINGS—Continued

tor by imposing N.C.G.S. § 1A-1, Rule 11 sanctions allegedly without considering lesser sanctions or making an inquiry into the reasonableness of the award of attorney fees because: (1) the trial court stated it considered all available sanctions; and (2) the order found as fact that the amount of attorney fees awarded to defendant was appropriate based upon the amount of work required by the case and the experience of defense attorneys. **Dalenko v. Collier, 713.**

Rule 11 sanctions—findings of fact—conclusions of law—collateral estoppel—judicial immunity—The trial court did not err in a case alleging misconduct by an arbitrator by imposing N.C.G.S. § 1A-1, Rule 11 sanctions even though plaintiff contends they were not supported by the findings of fact and conclusions of law because plaintiff's action was barred by collateral estoppel as a result of the entry of an order confirming the arbitrator's award in the pertinent prior case where plaintiff was afforded a full and fair opportunity to litigate these same issues; and plaintiff's action was barred by judicial immunity applicable to arbitrators since the complaint alleged conduct within the course and scope of the arbitration proceeding. **Dalenko v. Collier, 713.**

Rule 11 sanctions—gatekeeper order—good faith reliance upon attorney certification—The trial court did not err in a case alleging misconduct by an arbitrator by imposing N.C.G.S. § 1A-1, Rule 11 sanctions against plaintiff even though she contends she relied in good faith upon the certification of an attorney because: (1) a certification by an attorney required by a prior gatekeeper order does not insulate plaintiff from Rule 11 sanctions; (2) plaintiff signed the amended complaint as a pro se plaintiff and not in conjunction with an attorney; (3) nothing in the record indicated that plaintiff objectively relied upon the attorney's certification to form a reasonable belief that she had a valid claim against defendant, but instead the amended complaint showed that plaintiff prepared it and submitted it to the attorney for review as required by the gatekeeper order; (4) the attorney did not suggest to plaintiff that she file the complaint; and (5) the position taken by plaintiff on appeal is directly contrary to that taken by her before the trial court. **Dalenko v. Collier, 713.**

Rule 11 sanctions—multiple claims against other tenants—improper purpose—The trial court did not err when granting Rule 11 sanctions by concluding that plaintiff's claims were filed for an improper purpose. Plaintiff suffered no actual harm, yet filed complaints against his landlord and other tenants living in his complex. Also indicative of improper purpose are the forty-two actions filed in the last six years, including one alleging identical conduct which was dismissed. **Ward v. Jett Properties, LLC, 605.**

PREMISES LIABILITY

Slip and fall—new trial—no evidence that safety policies followed—burden of proof shifted—The trial court improperly shifted the burden of proof to defendant in a negligence action arising from a fall on diced peaches in a store by granting a new trial on the ground that defendant failed to produce evidence that it had complied with its safety sweep policies and failed to identify any employee responsible for performing the safety sweeps. **Hines v. Wal-Mart Stores E., L.P., 390.**

PROBATION AND PAROLE

Revocation—possession of explosive device—firearm ammunition—The trial court erred by revoking defendant's probation for being in possession of an explosive device because firearm ammunition alone, absent a means to discharge it, is not an explosive device under N.C.G.S. § 15A-1343(b)(5). **State v. Sherrod, 776.**

PUBLIC OFFICERS AND EMPLOYEES

Disability—Social Security offset—vesting of benefits—In an action arising from the State's attempt to collect an overpayment of disability benefits that resulted from a failure to offset Social Security payments, the trial court properly dismissed petitioner's class action for failure to state a claim, and properly ruled against petitioner on the whole record test. Although there was no setoff provision when petitioner began work, his benefits did not vest until after the legislature altered the statute governing those benefits. **Whisnant v. Teachers' & State Employees' Ret. Sys. of N.C., 233.**

911 dispatcher—wrongful termination—insufficient allegation of notice of violation of public policy—A former 911 dispatcher in defendant county sheriff's department failed to state a claim against defendant for wrongful termination in violation of public policy where she alleged that she was wrongfully terminated "for reasons that are against the public policy of North Carolina," but she failed to allege a violation of any explicit statutory or constitutional provision or that defendant encouraged plaintiff to violate any law that might result in potential harm to the public. **Gillis v. Montgomery Cty. Sheriff's Dep't, 377.**

RAPE

First-degree—evidence of weapon—sufficiency—The trial court did not err by denying defendant's motion to dismiss a charge of first-degree rape where there was an adequate evidentiary basis for the jury to conclude that the victim reasonably believed that defendant employed a deadly weapon to threaten the victim with death, whereby he effectively discouraged any further resistance. Defendant's threats were sufficiently connected in time to the acts for there to be a continuous transaction. **State v. Lawrence, 422.**

Second-degree—indictment—disjunctive—not facially invalid—An indictment was not facially invalid where it alleged that defendant had raped a victim who was mentally incapacitated "and/or" physically helpless. A person of common understanding would know the intent of the indictment, and the language was sufficient to notify defendant of the charges against him. **State v. Haddock, 474.**

Second-degree—instruction—disjunctive—mental incapacity and physical helplessness—An instruction on second-degree rape in which the clauses on mental incapacity and physical helplessness were joined by the disjunctive "or" was not fatally ambiguous in that it did not offer a choice between two discrete acts. Mental incapacity and physical helplessness are two alternative means by which the force necessary to complete a rape may be shown and are not discrete criminal acts. **State v. Haddock, 474.**

Second-degree—instruction—mental incapacity—act committed upon victim—voluntary intoxication short of unconsciousness—The trial court

RAPE—Continued

erred when it did not include the words "due to any act committed upon the victim" in an instruction on second-degree rape based upon the theory of mental incapacitation. Strictly construed because it is a criminal statute, the protection of N.C.G.S. § 14-27.1(2) does not serve to negate the consent of a person who voluntarily and as a result of her own actions becomes intoxicated to a level short of unconsciousness or physical helplessness. In this case, there was a reasonable possibility that a different result would have been reached at trial. **State v. Haddock, 474.**

ROBBERY

Felony murder—felony of robbery—intent to steal—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the charge of robbery with a dangerous weapon and felony murder based upon the robbery because it was immaterial whether the intent was formed before or after force was used upon the victim, provided that the theft and force are aspects of a single transaction; and taking the facts in the light most favorable to the State, the jury could have concluded that defendant entered the house intending to steal firearms and, once having obtained them and after killing defendant, left without conducting a more rigorous search of the house for hidden cash that would have delayed his escape. **State v. Rankin, 332.**

SCHOOLS AND EDUCATION

Bus accident—sovereign immunity not waived—Even if the Industrial Commission did not have exclusive jurisdiction, the trial court did not err by dismissing claims arising from a school bus accident where defendant did not waive governmental immunity. Exclusions relating to automobiles in the board's risk management program and excess liability coverage applied here. **Stacy v. Merrill, 131.**

Special education student—fall—summary judgment for school board—Summary judgment was correctly granted for defendant school board on a claim of negligent supervision in an action arising from a fall by a special education student. Summary judgment was affirmed for the special education teacher supervising the child and therefore plaintiff could not show a negligent act. **Foster v. Nash-Rocky Mount Cty. Bd. of Educ., 323.**

Special education student—fall—summary judgment for teacher—The trial court did not show that summary judgment was improperly granted for a special education teacher (defendant Brown) in an action arising from a fall by a special needs student. Plaintiff did not show a genuine issue of material fact as to how defendant Brown's actions constituted a failure to exercise ordinary prudence to prevent foreseeable harm and thus a breach of her duty to supervise plaintiff. **Foster v. Nash-Rocky Mount Cty. Bd. of Educ., 323.**

SEARCH AND SEIZURE

Consent to search body—inside of mouth—A juvenile's consent to a search of his body extended to his mouth, where the officer was investigating missing money, defendant consented to a search, defendant became unresponsive to the officer's questions and would not make eye contact, and the officer saw something in defendant's mouth. **In re S.D.R., 552.**

SEARCH AND SEIZURE—Continued

Motion to suppress—unlawful entry into hotel room by police officers—The trial court erred in a felonious possession of a Schedule II controlled substance (cocaine) and felonious possession of a Schedule VI controlled substance (marijuana) case by denying defendant's motion to suppress evidence discovered in defendant's hotel room because, although defendant had a general expectation of privacy in the room subject to exceptions for the entry of hotel staff and their agents to perform their duties even to the extent of entering the room without his express consent if necessary to perform those duties, the police officers' entry into defendant's room violated his expectation of privacy; and defendant did not consent to the search or waive his rights when he did not open the door to his hotel room voluntarily, but rather was coerced by hotel management. **State v. McBennett, 734.**

Multiple dwellings on one property—warrant not sufficiently specific—The trial court correctly granted a motion to suppress cocaine and drug paraphernalia seized pursuant to a search warrant which described two dwellings on the property to be searched and the purchase of a controlled substance at that location by a confidential informant. When there are two dwellings described under a single address and in the absence of allegations about the target of the investigation, the supporting affidavit must allege facts sufficient to establish probable cause to search either or both buildings. **State v. Taylor, 587.**

Traffic stop—motion to suppress evidence—papers—The trial court did not err in an accessory after the fact to murder and financial identity fraud case by denying defendant's motion to suppress evidence including papers seized during a search by an officer during a traffic stop because: (1) when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile; (2) defendant did not argue that his arrest for having an expired tag was not lawful, and there was no evidence to suggest such a conclusion; and (3) contrary to defendant's assertion, there is no requirement that the search be only for evidence of the crime for which defendant was arrested or that the illegal nature of that evidence be immediately apparent. **State v. Carter, 152.**

SENTENCING

Aggravating factors—knowingly created great risk of death to more than one person by means of weapon or device normally hazardous to lives of more than one person—*Blakely* error—harmless beyond reasonable doubt—The trial court committed harmless *Blakely* error in a multiple assault with a firearm on a law enforcement officer, assault with a deadly weapon inflicting serious injury, and discharging a firearm into occupied property case by considering evidence of aggravating factors not found by a jury or admitted by defendant. **State v. Sellars, 703.**

Consolidated offenses—conviction vacated—A first-degree sex offense, first-degree kidnapping, and first-degree burglary case is remanded for resentencing because: (1) the trial court consolidated defendant's sexual offense and kidnapping charges for sentencing, and defendant's kidnapping conviction was vacated; and (2) it was probable that defendant's conviction for two or more offenses adversely influenced the trial court's judgment on the length of the sentence to be imposed when the offenses were consolidated for judgment. **State v. Simmons, 224.**

SENTENCING—Continued

Habitual felon—indictment not defective—An habitual felon indictment was not fatally defective where it did not allege that defendant was at least eighteen years old at the time of at least two prior convictions (the indictment need not allege defendant's age or date of birth); the statement that the felonies were committed in violation of the General Statutes and that defendant was convicted in Superior Court in North Carolina sufficiently named the state against whom the felonies were committed; there was sufficient notice that defendant was being tried as a recidivist; and, the indictment is not fatally defective for its failure to indicate that a detective testified before the Grand Jury. **State v. Sinclair, 485.**

Habitual felon—underlying felony dismissed—Defendant's conviction for attaining the status of an habitual felon is vacated based on the dismissal of a charge for possession of cocaine. **State v. Miller, 124.**

Judge's remarks—defendant's rejection of plea offers—The trial court's remarks about defendant's rejection of a previous plea offer and the sentence to which he would be exposed if he rejected another were an effort to ensure that defendant was fully informed of the risk he was taking and did not indicate consideration of improper facts in sentencing defendant. **State v. Tice, 506.**

Judge's remarks—rejection of plea bargain—use of fabricated evidence—A trial judge's remarks at sentencing did not indicate punishment for rejecting a plea bargain where the judge justified the sentence with his belief that defendant's evidence was fabricated. **State v. Tice, 506.**

Prior record level—prior conviction remanded for lesser felony—Defendant's motion for appropriate relief was granted and the case was remanded for the sole purpose of resentencing because: (1) at the sentencing hearing, defendant stipulated to having ten prior record points thus making him level IV; (2) one of the prior convictions contributing to those ten points was a Class C felony for common law robbery which was remanded for resentencing based on a Class H felony for the charge of larceny from the person; and (3) deleting two points would make defendant a prior record level III instead of IV. **State v. Carter, 152.**

SEXUAL OFFENSES

Amendment—sexual exploitation of minor—date of offense—The trial court did not err by allowing the State to amend indictments for third-degree sexual exploitation of a minor to change the date of each count where time was not an essential element of the crime and defendant did not present an alibi defense. **State v. Riffe, 86.**

Exploitation of minor—computer images—knowledge of character or content of files—The evidence that defendant had knowledge of the character or content of material on his computer was sufficient to deny his motion to dismiss a charge of third-degree sexual exploitation of a minor, even if the statute required knowledge of both the character and content of the material. **State v. Riffe, 86.**

Exploitation of minor—computer images—possession—The evidence that defendant was in possession of child pornography on a computer was sufficient in a prosecution for third-degree sexual exploitation of a minor. **State v. Riffe, 86.**

SEXUAL OFFENSES—Continued

Instructions—factual basis for guilt—There was no plain error in a conviction for sexual acts with a 13-year-old where the court's summary of the facts as to one charge was not the appropriate set of facts for guilt of that charge. There was evidence upon which the jury could properly find that defendant had committed a sexual act, the law was correctly stated to the jury, the instructions as a whole were correct, and the jury was admonished to personally determine the facts of the case. **State v. Tadeja, 439.**

STALKING

Comments posted on website—evidence not sufficient—The trial court's finding that defendant "stalked" plaintiffs in violation of N.C.G.S. § 50C-1 by posting messages on a website was not supported by any competent evidence and was vacated. **Ramsey v. Harman, 146.**

STATUTES OF LIMITATION AND REPOSE

Tolling by voluntary dismissal—improper service in original action—A plaintiff must obtain proper service of process prior to a voluntary dismissal to toll the statute of limitations. In this case, the trial court correctly granted a motion to dismiss a negligence action where personal service was not obtained in the original action; an alias and pluries summons was issued but service was obtained 62 days after issuance rather than within the required 60; another alias and pluries summons was never served; a voluntary dismissal was taken; and the action was refiled with proper service but beyond the statute of limitations. **Camara v. Gbarbera, 394.**

TAXATION

Ad valorem—evidence before Commission—not prejudicial—review de novo—There was no prejudice in a proceeding before the Property Tax Commission in the admission of testimony about the legal sufficiency of a county's schedule of values. The taxpayer's appeal was based strictly on the facial validity of the schedule and de novo review was conducted accordingly. **In re Appeal of Parker, 313.**

Ad valorem—present use schedule—soil type key—The Property Tax Commission did not err when it concluded that there was no deficiency in a present-use schedule because of the absence of a soil type key. The information in the schedule of values provided sufficient detail to enable those making appraisals to adhere to the schedule; the burden is on the taxpayer to show the class of land in which his property fits and to obtain the soil values for his particular land from the department of agriculture. **In re Appeal of Parker, 313.**

Ad valorem—schedule of value—legal restrictions—sufficiently detailed—A county schedule of values for property tax valuation was not required to include an adjustment for certain governmental restrictions, including The Clean Water Act, The Food Security Act, and The N.C. Sedimentation Pollution Control Act. When a county's schedule of values, standards and rules includes a general reference to legal restrictions on land use, it need not list every type of restriction in order to be sufficiently detailed. **In re Appeal of Parker, 313.**

TAXATION—Continued

Ad valorem—valuation—shared ownership—no adjustment—Property tax valuations in North Carolina are governed by the Machinery Act, not by the Internal Revenue Code, and there is no provision in the Machinery Act or the cases under it for the valuation of property to be adjusted for shared ownership, including tenancy in common. **In re Appeal of Parker, 313.**

Ad valorem—valuation schedules—lot size—A county schedule of values for property tax valuation was not insufficient because it did not contain a table of incremental and decremental rates for use in calculating valuations for properties of greater or less than the base size listed in the tables in the schedule. Tract or lot size was not mentioned in N.C.G.S. § 105-317(a)(1) as a factor in determining the value of land, and it was not error for the county's schedule of values to not include incremental and decremental rates; however, lot size may be relevant in valuing property. **In re Appeal of Parker, 313.**

Ad valorem—valuation schedules—neighborhood information—sufficient for those making appraisal—The detail in a county's schedule of values for property taxes contained sufficient information about neighborhoods for those making the appraisals to adhere to them in making appraisals. **In re Appeal of Parker, 313.**

Ad valorem—valuation schedules—sufficiently detailed—The Property Tax Commission did not err by concluding that a true value schedule contained enough detail to comply with N.C.G.S. § 105-317(b). Although the taxpayer contended that a schedule of values, standards and rules must contain all of the statutory factors listed in N.C.G.S. § 105-317(b)(1), the cases on which the taxpayer relied did not overrule prior cases and did not hold that each of the statutory factors must be considered. While the schedule of values here did not reveal specific mention of water power, water rights, or mineral deposits, taxpayer made no showing that those factors actually influenced the value of land in that county. **In re Appeal of Parker, 313.**

Failure to issue civil summons, file complaint or serve process—jurisdiction—N.C.G.S. § 105-258—The trial court did not err in a tax audit case arising from the creation of tax shelters designed to reduce intervenor's state corporate income tax by denying intervenor's motion to dismiss petitioner Secretary of Revenue's application to compel E&Y to produce documents pursuant to an administrative summons that E&Y withheld as privileged, even though intervenor contends petitioner violated the North Carolina Rules of Civil Procedure by failing to issue a civil summons, file a complaint, or serve process on either E&Y or intervenor. **In re Ernst & Young, LLP, 668.**

TERMINATION OF PARENTAL RIGHTS

Jurisdiction—temporary jurisdiction moot—home state—The trial court did not lack jurisdiction under the UCCJEA to terminate respondent parents' parental rights even though respondents contend the court was limited to entering temporary orders based on the temporary nature of emergency jurisdiction under N.C.G.S. § 50A-204 because by the time of the filing of the petition and motion for termination of parental rights, respondent mother and the two children had been physically present in North Carolina for two years; any issue of temporary jurisdiction is now moot given the children's residency and the lack of

TERMINATION OF PARENTAL RIGHTS—Continued

any other custody proceedings or orders in other states; and while N.C.G.S. § 7B-1101 would preclude basing the termination of parental rights court's jurisdiction on N.C.G.S. § 50A-204, the holding of *In re M.B.*, 179 N.C. App. 572 (2006), established the court's jurisdiction in North Carolina under N.C.G.S. § 50A-201(a)(1) based on being the home state. **In re E.X.J. & A.J.J., 34.**

Personal jurisdiction—prior adjudication order—service of summons and petition to only one parent—The trial court did not lack personal jurisdiction in a termination of parental rights case even though respondent father contends he was never personally served with the summons and petition in the underlying adjudication action. **In re E.X.J. & A.J.J., 34.**

Standing—home state—temporary emergency jurisdiction—The trial court did not err by concluding that the Rutherford County Department of Social Services (DSS) had standing to file a petition or motion for termination of parental rights even though North Carolina was not the children's home state as defined under the UCCJEA at the time of the filing of the juvenile petition in this action. **In re E.X.J. & A.J.J., 34.**

Willfully leaving children in foster care without reasonable progress—clear, cogent, and convincing evidence—The trial court did not err by concluding that grounds existed to terminate respondent mother's parental rights because: (1) there was clear, cogent, and convincing evidence to support the trial court's determination under N.C.G.S. § 7B-1111(a)(2) that respondent willfully left the children in foster care for more than twelve months without showing to the satisfaction of the court that reasonable progress under the circumstances had been made; (2) respondent failed to complete the NOVA program to address domestic violence issues; (3) respondent failed to attend therapy sessions on a regular basis as recommended; and (4) respondent did not comply with her case plan and failed to address the issues which led to the removal of her children. **In re J.Z.M., R.O.M., R.D.M., & D.T.F., 158.**

TORT CLAIMS ACT

School bus accident—exclusive jurisdiction in Industrial Commission—The Industrial Commission had exclusive jurisdiction over claims arising from a school bus accident in which a child riding a bicycle fell into the path of the bus, and the trial court did not err by dismissing claims filed in superior court. The legislative intent was for N.C.G.S. § 143-300.1 to allow the Industrial Commission to hear tort claims alleging negligence arising from and inseparably connected to events occurring at the time a school bus driver was operating the bus in the course of her employment. **Stacy v. Merrill, 131.**

UNFAIR TRADE PRACTICES

Attorney fees—reasonableness—Although the trial court did not abuse its discretion in an unfair and deceptive trade practices case by awarding attorney fees under N.C.G.S. § 75-16.1, the case is remanded for a determination of the reasonableness of the award because the Court of Appeals was unable to determine from the trial court's findings whether the amount of the award was reasonable when the findings did not fully address the skill required to perform the legal services that were rendered or the experience and ability of plaintiffs' trial counsel. **Shepard v. Bonita Vista Properties, L.P., 614.**

UNFAIR TRADE PRACTICES—Continued

Treble damages—rental of campground spaces—disconnecting electricity—damage to RVs—The trial court did not err by awarding treble damages on plaintiffs' unfair and deceptive trade practices (UDTP) claims for damages to their RVs when defendant RV campground owner disconnected electrical service to the RVs, regardless of whether plaintiffs were residential tenants entitled to the protections of Chapter 42. **Shepard v. Bonita Vista Properties, L.P., 614.**

UNJUST ENRICHMENT

Sale and resale of business—benefit not conferred on defendants—The trial court did not err by granting summary judgment for defendants on a claim for unjust enrichment arising from the sale of plaintiff's business to defendants Morton and Kincaid and its subsequent resale to defendant Stroupe Mirror. Plaintiff did not prove that he conferred a benefit on defendants, which is necessary in order to recover on an unjust enrichment claim. **Sellers v. Morton, 75.**

UTILITIES

Campground furnishing electricity—public utility—overcharges—An RV campground owner was operating a public utility, and the trial court properly awarded damages to former tenants of the campground under the Public Utilities Act, where (1) the owner charged the tenants more than the actual cost of electricity supplied to the campground by a power company; and (2) the owner's argument that the overcharges for electricity were not "willful" because the owner was ignorant of the proper way to calculate electricity charges was without merit. **Shepard v. Bonita Vista Properties, L.P., 614.**

WEAPONS AND OTHER FIREARMS

Concealed weapon—evidence not sufficient—firearm in backpack in van—no evidence of location in van—The trial court should have granted defendant's motion to dismiss a charge of carrying a concealed weapon where the weapon was found in a backpack in a van from which the rear seats had been removed. There must be evidence that the weapon was within the reach and control of the defendant, but the State did not present evidence about where the backpack was found in the van. **State v. Soles, 241.**

WORKERS' COMPENSATION

Assignment of claims—assignment of proceeds and advance assignment also barred—N.C.G.S. § 97-21 barred defendants' assertion of a lien on the proceeds of plaintiff's workers' compensation claim where defendant was the assignee of a company which invests capital in personal injury cases. The prohibition bars assignment of the proceeds, not just assignment of the Industrial Commission Form 18 claim, and the purposes of the Workers' Compensation Act are supported by the prohibition of advance assignment of workers' compensation benefits. **Cross v. Capital Transaction Grp., Inc., 115.**

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Industrial Commission findings that plaintiff's back condition did not substantially change as a result of the second accident and that the second accident did not materially aggravate or accelerate the low back injury. **Starr v. Gaston Cty. Bd. of Educ., 301.**

Back injury—subsequent neck injury—sustained improvement—In a workers' compensation case involving an initial back injury and subsequent neck injury, defendant's contention about plaintiff's sustained improvement after surgery was contradicted by unchallenged findings, by medical testimony, and by testimony from the human resources representative of the employer. **Starr v. Gaston Cty. Bd. of Educ., 301.**

Evenly divided panel—hold-over commissioner—An Industrial Commission decision was remanded where one of the commissioners had properly served in a hold-over capacity since the expiration of his term, but the Governor issued a letter informing him that his successor had been appointed on the same day he signed this opinion and award. He was not a qualified officer de jure or de facto, his concurrence in the opinion was a nullity, and there was no majority on the evenly divided panel. **Baxter v. Danny Nicholson, Inc., 168.**

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