NORTH CAROLINA COURT OF APPEALS REPORTS

VOLUME 192

19 AUGUST 2008

16 SEPTEMBER 2008

RALEIGH
2010

CITE THIS VOLUME
192 N.C. APP.

TABLE OF CONTENTS

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

THE COURT OF APPEALS
OF
NORTH CAROLINA

Chief Judge

JOHN C. MARTIN

Judges

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

Emergency Recalled Judges

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

Former Chief Judges

GERALD ARNOLD
SIDNEY S. EAGLES, JR.

Former Judges

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

Administrative Counsel

DANIEL M. HORNE, JR.

Clerk

JOHN H. CONNELL

OFFICE OF STAFF COUNSEL

Director

Leslie Hollowell Davis

Assistant Director

Daniel M. Horne, Jr.

Staff Attorneys

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

ADMINISTRATIVE OFFICE OF THE COURTS

Director

John W. Smith

Assistant Director

David F. Hoke

APPELLATE DIVISION REPORTER

Ralph A. White, Jr.

ASSISTANT APPELLATE DIVISION REPORTERS

H. James Hutcheson
Kimberly Woodell Sieredzki

TRIAL JUDGES OF THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

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

DISTRICT	JUDGES	ADDRESS
	Fourth Division	
11A	Franklin F. Lanier	Buies Creek
11B	Thomas H. Lock	Smithfield
12	E. Lynn Johnson	Fayetteville
	Gregory A. Weeks	Fayetteville
	Jack A. Thompson[2]	Fayetteville
	James F. Ammons, Jr.	Fayetteville
13A	Douglas B. Sasser	Whiteville
13B	Ola M. Lewis	Southport
16A	Richard T. Brown	Laurinburg
16B	Robert F. Floyd, Jr.	Lumberton
	James Gregory Bell	Lumberton
	Fifth Division	
17A	Edwin Graves Wilson, Jr.	Eden
	Richard W. Stone	Eden
17B	A. Moses Massey	Mt. Airy
	Andy Cromer	King
18	Catherine C. Eagles	Greensboro
	Lindsay R. Davis, Jr.	Greensboro
	John O. Craig III	High Point
	R. Stuart Albright	Greensboro
	Patrice A. Hinnant	Greensboro
19B	Vance Bradford Long	Asheboro
19D	James M. Webb	Whispering Pines
21	Judson D. DeRamus, Jr.	Winston-Salem
	William Z. Wood, Jr.	Clemmons
	L. Todd Burke	Winston-Salem
	Ronald E. Spivey	Winston-Salem
23	Edgar B. Gregory	Wilkesboro
	Sixth Division	
19A	W. Erwin Spainhour	Concord
19C	John L. Holshouser, Jr.	Salisbury
20A	Tanya T. Wallace	Rockingham
	Kevin M. Bridges	Oakboro
20B	W. David Lee	Monroe
22A	Christopher Collier	Statesville
	Joseph Crosswhite	Statesville
22B	Mark E. Klass	Lexington
	Theodore S. Royster, Jr.	Lexington
	Seventh Division	
25A	Beverly T. Beal	Lenoir
	Robert C. Ervin	Morganton
25B	Timothy S. Kincaid	Newton
	Nathaniel J. Poovey	Newton
26	W. Robert Bell	Charlotte
	Richard D. Boner	Charlotte
	J. Gentry Caudill[3]	Charlotte

DISTRICT	JUDGES	ADDRESS
	YVONNE MIMS EVANS	Charlotte
	LINWOOD O. FOUST	Charlotte
	ERIC L. LEVINSON	Charlotte
	F. LANE WILLIAMSON[4]	Charlotte
27A	JESSE B. CALDWELL III	Gastonia
	TIMOTHY L. PATTI	Gastonia
27B	FORREST DONALD BRIDGES	Shelby
	JAMES W. MORGAN	Shelby
	Eighth Division	
24	JAMES L. BAKER, JR.	Marshall
	CHARLES PHILLIP GINN	Boone
28	DENNIS JAY WINNER[5]	Asheville
	ALAN Z. THORNBURG	Asheville
29A	LAURA J. BRIDGES	Rutherfordton
29B	MARK E. POWELL	Hendersonville
30A	JAMES U. DOWNS	Franklin
30B	BRADLEY B. LETTS	Sylva

SPECIAL JUDGES

MARVIN K. BLOUNT	Greenville
ALBERT DIAZ	Charlotte
RICHARD L. DOUGHTON	Sparta
A. ROBINSON HASSELL	Greensboro
D. JACK HOOKS, JR.	Whiteville
LUCY NOBLE INMAN[6]	Raleigh
JACK W. JENKINS	Morehead City
JOHN R. JOLLY, JR.	Raleigh
SHANNON R. JOSEPH	Raleigh
CALVIN MURPHY	Charlotte
WILLIAM R. PITTMAN	Raleigh
RIPLEY EAGLES RAND	Raleigh
BEN F. TENNILLE	Greensboro
CRESSIE H. THIGPEN, JR.	Raleigh
GARY E. TRAWICK, JR.	Burgaw

EMERGENCY JUDGES

W. DOUGLAS ALBRIGHT	Greensboro
STEVE A. BALOG	Burlington
MICHAEL E. BEALE	Rockingham
HENRY V. BARNETTE, JR.	Raleigh
ANTHONY M. BRANNON	Durham
STAFFORD G. BULLOCK	Raleigh
C. PRESTON CORNELIUS	Mooresville
B. CRAIG ELLIS	Laurinburg
ERNEST B. FULLWOOD	Wilmington
ZORO J. GUICE, JR.	Hendersonville

DISTRICT	JUDGES	ADDRESS
	THOMAS D. HAIGWOOD	Greenville
	CLARENCE E. HORTON, JR.	Kannapolis
	CHARLES C. LAMM, JR.	Terrell
	GARY LYNN LOCKLEAR	Pembroke
	JERRY CASH MARTIN	Mt. Airy
	J. RICHARD PARKER	Manteo
	JAMES E. RAGAN III	Oriental
	DONALD L. SMITH	Raleigh
	JAMES C. SPENCER, JR.	Durham
	A. LEON STANBACK	Durham
	JOHN M. TYSON	Fayetteville
	GEORGE L. WAINWRIGHT	Morehead City
	DENNIS WINNER[7]	Asheville

RETIRED/RECALLED JUDGES

J. B. ALLEN	Burlington
FRANK R. BROWN	Tarboro
JAMES C. DAVIS	Concord
LARRY G. FORD	Salisbury
MARVIN K. GRAY	Charlotte
KNOX V. JENKINS	Four Oaks
JOHN B. LEWIS, JR.	Farmville
ROBERT D. LEWIS	Asheville
JULIUS A. ROUSSEAU, JR.	Wilkesboro
THOMAS W. SEAY	Spencer
RALPH A. WALKER, JR.	Raleigh

1. Retired 30 July 2010.
2. Retired 30 June 2010
3. Retired 30 July 2010.
4. Appointed and sworn in 27April 2010.
5. Retired 30 June 2010.
6. Appointed and sworn in 30 April 2010.
7. Appointed and sworn in 27 July 2010.

DISTRICT COURT DIVISION

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

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

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

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

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

DISTRICT	JUDGES	ADDRESS
29B	Athena F. Brooks (Chief)	Cedar Mountain
	David Kennedy Fox	Hendersonville
	Thomas M. Brittain, Jr.	Hendersonville
	Peter Knight	Hendersonville
30	Richlyn D. Holt (Chief)[1]	Waynesville
	Steven J. Bryant	Bryson City
	Monica Hayes Leslie	Waynesville
	Richard K. Walker	Waynesville
	Danya L. Vanhook	Waynesville

EMERGENCY DISTRICT COURT JUDGES

Thomas V. Aldridge, Jr.	Whiteville
Kyle D. Austin	Pineola
Sarah P. Bailey	Rocky Mount
Grafton G. Beaman	Elizabeth City
Ronald E. Bogle	Raleigh
James Thomas Bowen III	Lincolnton
Ronald W. Burris[2]	Albemarle
Hugh B. Campbell	Charlotte
Samuel Cathey	Charlotte
Danny E. Davis[3]	Waynesville
Shelly H. Desvouges	Raleigh
M. Patricia DeVine	Hillsborough
J. Keaton Fonvielle	Shelby
Thomas G. Foster, Jr.	Greensboro
Earl J. Fowler, Jr.	Asheville
Rodney R. Goodman	Kinston
Joyce A. Hamilton	Raleigh
Lawrence Hammond, Jr.	Asheboro
James W. Hardison	Williamston
Jane V. Harper	Charlotte
James A. Harrill, Jr.	Winston-Salem
Resa Harris	Charlotte
Robert E. Hodges	Morganton
Shelly S. Holt	Wilmington
James M. Honeycutt	Lexington
Philip F. Howerton, Jr.	Charlotte
William G. Jones	Charlotte
Lillian B. Jordan	Asheboro
David Q. LaBarre	Durham
William C. Lawton	Raleigh
James E. Martin	Greenville
Harold Paul McCoy, Jr.	Halifax
Lawrence McSwain	Greensboro
Fritz Y. Mercer, Jr.	Charlotte
William M. Neely	Asheboro
Otis M. Oliver	Dobson
Warren L. Pate	Raeford
Nancy C. Phillips	Elizabethtown
Dennis J. Redwing	Gastonia

DISTRICT	JUDGES	ADDRESS
	J. Larry Senter	Raleigh
	Joseph E. Setzer, Jr.	Goldsboro
	Russell Sherrill III	Raleigh
	Catherine C. Stevens	Chapel Hill
	J. Kent Washburn	Graham
	Charles W. Wilkinson, Jr.	Oxford

RETIRED/RECALLED JUDGES

Claude W. Allen, Jr.	Oxford
Donald L. Boone	High Point
Joyce A. Brown	Otto
Daphene L. Cantrell	Charlotte
T. Yates Dobson, Jr.	Smithfield
Spencer B. Ennis[4]	Graham
Harley B. Gaston, Jr.	Gastonia
Jane V. Harper	Charlotte
Roland H. Hayes	Gastonia
Walter P. Henderson	Trenton
Charles A. Horn, Sr.	Shelby
Edward H. McCormick	Lillington
J. Bruce Morton	Greensboro
Stanley Peele	Hillsborough
Margaret L. Sharpe	Winston-Salem
Samuel M. Tate	Morganton
John L. Whitley	Wilson

1. Appointed 1 August 2010 to replace Judge Danny E. Davis who retired 30 July 2010.
2. Appointed and sworn in 2 January 2009. Resigned 3 April 2009.
3. Appointed and sworn in 1 August 2010.
4. Deceased 22 May 2010.

ATTORNEY GENERAL OF NORTH CAROLINA

Attorney General
ROY COOPER

Chief of Staff
KRISTI HYMAN

Deputy Chief of Staff
NELS ROSELAND

General Counsel
J. B. KELLY

Senior Policy Advisor
JULIA WHITE

Chief Deputy Attorney General
GRAYSON G. KELLEY

Solicitor General
CHRIS BROWNING, JR.

Senior Deputy Attorneys General

JAMES J. COMAN
ANN REED DUNN
JAMES C. GULICK
WILLIAM P. HART
REGINALD L. WATKINS
THOMAS J. ZIKO

Assistant Solicitor General
JOHN F. MADDREY

Special Deputy Attorneys General

DANIEL D. ADDISON
STEVEN M. ARBOGAST
JOHN J. ALDRIDGE III
HAL F. ASKINS
JONATHAN P. BABB
GRADY L. BALENTINE, JR.
VALERIE L. BATEMAN
MARC D. BERNSTEIN
ROBERT J. BLUM
WILLIAM H. BORDEN
HAROLD D. BOWMAN
DAVID P. BRENSKILLE
ANNE J. BROWN
MABEL Y. BULLOCK
JILL LEDFORD CHEEK
LEONIDAS CHESTNUT
KATHRYN J. COOPER
FRANCIS W. CRAWLEY
ROBERT M. CURRAN
NEIL C. DALTON
MARK A. DAVIS
GAIL E. DAWSON
LEONARD DODD
VIRGINIA L. FULLER
ROBERT R. GELBLUM
GARY R. GOVERT
NORMA S. HARRELL
ROBERT T. HARGETT
RICHARD L. HARRISON
JENNIE W. HAUSER
JANE T. HAUTIN
E. BURKE HAYWOOD
JOSEPH E. HERRIN
ISHAM FAISON HICKS
KAY MILLER-HOBART
J. ALLEN JERNIGAN
DANIEL S. JOHNSON
DOUGLAS A. JOHNSTON
FREDERICK C. LAMAR
CELIA G. LATA
ROBERT M. LODGE
MARY L. LUCASSE
AMAR MAJMUNDAR
GAYL M. MANTHEI
RONALD M. MARQUETTE
ALANA MARQUIS-ELDER
ELIZABETH L. MCKAY
BARRY S. MCNEILL
THOMAS R. MILLER
W. RICHARD MOORE
ROBERT C. MONTGOMERY
G. PATRICK MURPHY
DENNIS P. MYERS
LARS F. NANCE
SUSAN K. NICHOLS
SHARON PATRICK-WILSON
ALEXANDER M. PETERS
THOMAS J. PITMAN
DOROTHY A. POWERS
DIANE A. REEVES
LEANN RHODES
GERALD K. ROBBINS
BUREN R. SHIELDS III
RICHARD E. SLIPSKY
TIARE B. SMILEY
VALERIE B. SPALDING
ELIZABETH N. STRICKLAND
DONALD R. TEETER
PHILIP A. TELFER
MELISSA L. TRIPPE
VICTORIA L. VOIGHT
JOHN H. WATTERS
KATHLEEN M. WAYLETT
EDWIN W. WELCH
JAMES A. WELLONS
THEODORE R. WILLIAMS
MARY D. WINSTEAD
THOMAS M. WOODWARD

Assistant Attorneys General

STANLEY G. ABRAMS
DAVID J. ADINOLFI II
JAMES P. ALLEN
RUFUS C. ALLEN
ALLISON A. ANGELL
KEVIN ANDERSON
STEVEN A. ARMSTRONG
JOHN P. BARKLEY
JOHN G. BARNWELL, JR.
KATHLEEN M. BARRY
SCOTT K. BEAVER
BRIAN R. BERMAN
ERICA C. BING
AMY L. BIRCHER
KATHLEEN N. BOLTON
BARRY H. BLOCH
KAREN A. BLUM
DAVID W. BOONE
RICHARD H. BRADFORD
CHRISTOPHER BROOKS
JILL A. BRYAN
STEVEN F. BRYANT
BETHANY A. BURGON
HILDA BURNETTE-BAKER
SONYA M. CALLOWAY-DURHAM
JASON T. CAMPBELL
STACY T. CARTER
LAUREN M. CLEMMONS
JOHN CONGLETON
SCOTT A. CONKLIN
LISA G. CORBETT

Assistant Attorneys General—continued

Douglas W. Corkhill
Susannah B. Cox
Lotta A. Crabtree
Robert D. Croom
Laura E. Crumpler
Joan M. Cunningham
Tracy C. Curtner
Kimberly A. D'Arruda
Lisa B. Dawson
Clarence J. DelForge III
Melissa Drugan
Kimberly W. Duffley
Brenda Eaddy
Letitia C. Echols
David B. Efird
Joseph E. Elder
David L. Elliott
Jennifer Epperson
Caroline Farmer
June S. Ferrell
Joseph Finarelli
William W. Finlator, Jr.
Margaret A. Force
Tawanda N. Foster-Williams
Heather H. Freeman
Terrence D. Friedman
Amy L. Funderburk
Jane A. Gilchrist
Lisa Glover
Christine Goebel
Michael David Gordon
Richard A. Graham
Angel E. Gray
John R. Green, Jr.
Leonard G. Green
Alexandra S. Gruber
Mary E. Guzman
Melody R. Hairston
Patricia Bly Hall
Nancy Dunn Hardison
Lisa H. Harper
Richard L. Harrison
William P. Hart, Jr.
Kathryne Hathcock
Tracy J. Hayes
Ernest Michael Heavner
Thomas D. Henry
Clinton C. Hicks
Alexander M. Hightower
Jennifer L. Hillman
Tina L. Hlabse
Charles H. Hobgood
Mary C. Hollis
James C. Holloway
Susannah P. Holloway
Amy Kunstling Irene
Tenisha S. Jacobs
Creecy C. Johnson
Joel L. Johnson
Durwin P. Jones
Catherine F. Jordan
Catherine A. Kayser
Linda J. Kimbell
Anne E. Kirby
Freeman E. Kirby, Jr.
David N. Kirkman
Brent D. Kiziah
Tina A. Krasner
Laura L. Lansford
Donald W. Laton
Philip A. Lehman
Rebecca E. Lem
Anita Leveaux-Quigless
Floyd M. Lewis
Eryn E. Linkous
Amanda P. Little
Martin T. McCracken
J. Bruce McKinney
Gregory S. McLeod
Kevin G. Mahoney
John W. Mann
Ann W. Matthews
Sarah Y. Meacham
Thomas G. Meacham, Jr.
Jess D. Mekeel
Brenda E. Menard
Mary S. Mercer
Derick Mertz
Anne M. Middleton
Vaughn S. Monroe
Thomas H. Moore
Katherine Murphy
Ellen A. Newby
John F. Oates
Daniel O'Brien
Jane L. Oliver
Jay L. Osborne
Donald O'Toole
Roberta A. Ouellette
Sondra C. Panico
Elizabeth F. Parsons
Brian Paxton
John A. Payne
Teresa H. Pell
Jacqueline M. Perez
Cheryl A. Perry
Donald K. Phillips
LaShawn L. Piquant
Ebony J. Pittman
Diane M. Pomper
Kimberly D. Potter
Latoya B. Powell
Rajeev K. Premakumar
Newton G. Pritchett, Jr.
Robert K. Randleman
Ashby T. Ray
Charles E. Reece
Peter A. Regulaski
Phillip T. Reynolds
Leann Rhodes
Yvonne B. Ricci
Charlene B. Richardson
Seth P. Rosebrock
John P. Scherer II
Nancy E. Scott
Jonathan D. Shaw
Chris Z. Sinha
Scott T. Slusser
Belinda A. Smith
Donna D. Smith
Robert K. Smith
Marc X. Sneed
M. Janette Soles
Richard G. Sowerby, Jr.
James M. Stanley
Iain M. Stauffer
Angenette R. Stephenson
Mary Ann Stone
Jennifer J. Strickland
Scott Stroud
Kip D. Sturgis
Sueanna P. Sumpter
Dahr J. Tanoury
Gary M. Teague
Kathryn J. Thomas
Jane R. Thompson
Douglas P. Thoren
Judith L. Tillman
Vanessa N. Totten
Teresa L. Townsend
Shawn C. Troxler
Brandon L. Truman
Juanita B. Twyford
Lee A. Vlahos
Richard James Votta
Sandra Wallace-Smith
Gaines M. Weaver
Margaret L. Weaver
James A. Webster
Elizabeth J. Weese
Oliver G. Wheeler
Kimberly L. Wierzel
Larissa S. Williamson
Christopher H. Wilson
Donna B. Wojcik
Phillip K. Woods
Patrick Wooten
Harriet F. Worley
Claude N. Young, Jr.
Ward A. Zimmerman

DISTRICT ATTORNEYS

DISTRICT	DISTRICT ATTORNEY	ADDRESS
1	Frank R. Parrish	Elizabeth City
2	Seth H. Edwards	Washington
3A	W. Clark Everett	Greenville
3B	Scott Thomas	New Bern
4	Dewey G. Hudson, Jr.	Clinton
5	Benjamin Russell David	Wilmington
6A	Melissa Pelfrey	Halifax
6B	Valerie Asbell	Ahoskie
7	Robert Evans	Tarboro
8	C. Branson Vickory III	Goldsboro
9	Samuel B. Currin	Oxford
9A	Jim Long[1]	Roxboro
10	C. Colon Willoughby, Jr.	Raleigh
11	Susan Doyle	Smithfield
12	Edward W. Grannis, Jr.	Fayetteville
13	Rex Gore	Bolivia
14	Tracey Cline	Durham
15A	Pat Nadolski	Graham
15B	James R. Woodall, Jr.	Hillsborough
16A	Kristy McMillan Newton	Raeford
16B	L. Johnson Britt III	Lumberton
17A	Phil Berger, Jr.	Wentworth
17B	C. Ricky Bowman	Dobson
18	J. Douglas Henderson	Greensboro
19A	Roxann L. Vaneekhoven	Concord
19B	Garland N. Yates	Asheboro
19C	William D. Kenerly	Salisbury
19D	Maureen Krueger	Carthage
20A	Michael D. Parker	Wadesboro
20B	John C. Snyder III	Monroe
21	Jim O'Neill	Winston-Salem
22	Sarah Kirkman	Lexington
22B	Gary Frank	Lexington
23	Thomas E. Horner	Wilkesboro
24	Gerald W. Wilson	Boone
25	James Gaither, Jr.	Newton
26	Peter S. Gilchrist III	Charlotte
27A	R. Locke Bell	Gastonia
27B	Richard L. Shaffer	Shelby
28	Ronald L. Moore	Asheville
29A	Bradley K. Greenway	Marion
29B	Jeff Hunt	Hendersonville
30	Michael Bonfoey	Waynesville

1. Acting District Attorney.

PUBLIC DEFENDERS

DISTRICT	PUBLIC DEFENDER	ADDRESS
1	Andy Womble	Elizabeth City
3A	Robert C. Kemp III	Greenville
	Stephen M. Hagen (Acting)	
3B	James Q. Wallace III	Beaufort
5	Jennifer Harjo	Wilmington
10	George Bryan Collins, Jr.	Raleigh
12	Ron D. McSwain	Fayetteville
14	Lawrence M. Campbell	Durham
15B	James E. Williams, Jr.	Carrboro
16A	Jonathan L. McInnis	Laurinburg
16B	Angus B. Thompson	Lumberton
18	Wallace C. Harrelson	Greensboro
21	George R. Clary III	Winston-Salem
26	Kevin P. Tully	Charlotte
27A	Kellum Morris	Gastonia
28	M. LeAnn Melton	Asheville

CASES REPORTED WITHOUT PUBLISHED OPINIONS

CASES REPORTED WITHOUT PUBLISHED OPINIONS

GENERAL STATUTES CITED

GENERAL STATUTES CITED

NORTH CAROLINA CONSTITUTION CITED

RULES OF EVIDENCE CITED

RULES OF CIVIL PROCEDURE CITED

RULES OF CIVIL PROCEDURE CITED

RULES OF APPELLATE PROCEDURE CITED

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

CITY OF ASHEVILLE, A MUNICIPAL CORPORATION, PLAINTIFF v. STATE OF NORTH CAROLINA, AND COUNTY OF BUNCOMBE, ET AL., DEFENDANTS

No. COA07-516

(Filed 19 August 2008)

1. Appeal and Error— Supreme Court decision—dispositive

Although plaintiff City of Asheville argues that *Candler v. City of Asheville*, 247 N.C. 398, incorrectly decided the issues at the time and is not dispositive of any issue in the present case, the Court of Appeals has no authority to overrule decisions of the Supreme Court.

2. Appeal and Error— prior opinion—not overruled

In an action involving rates for customers of the Asheville water distribution system who live outside the Asheville city limits, the Court of Appeals held that *Candler v. City of Asheville*, 247 N.C. 398 was not overruled by language in *Piedmont Aviation, Inc. v. Raleigh-Durham Airport Authority*, 288 N.C. 98.

3. Collateral Estoppel and Res Judicata— res judicata—constitutionality claim—not raised in prior case

In an action involving a series of session laws concerning City of Asheville water rates (Sullivan I, II, and III), the City was precluded by res judicata from challenging Sullivan I under any provision of the North Carolina Constitution because it litigated

the constitutionality of Sullivan I in *Candler v. City of Asheville*, 247 N.C. 398 (1958). Even though it now contends that *Candler* decided different constitutional questions, the current claims could have been raised in *Candler*.

4. Collateral Estoppel and Res Judicata— collateral estoppel—series of session laws on same subject—constitutional challenge to one—subsequent challenge to others on different provisions

In an action involving a series of session laws concerning City of Asheville water rates (Sullivan I, II, and III), the City was not precluded by collateral estoppel from challenging the constitutionality of Sullivan II and III under a particular provision of the North Carolina Constitution by its failure in an earlier case to argue that Sullivan 1 violated that provision.

5. Cities and Towns; Constitutional Law— North Carolina Constitution—water system—local acts not involving health and sanitation

Session laws concerning the City of Asheville water system and its relationship with surrounding areas (Sullivan I, II, and III) were local acts but were not prohibited by Article II, Section 24, Clause 1 of the North Carolina Constitution as involving health and sanitation. The plain language of Sullivan II indicates that it relates only to economic matters; the mere implication of water or a water system in a legislative enactment does not necessitate a conclusion that it relates to health and sanitation in violation of the Constitution. Sullivan III's legislative purpose is not inconsistent with Sullivan II to a certainty, and any reasonable doubt must be resolved in favor of presumed constitutionality.

6. Cities and Towns; Constitutional Law— North Carolina Constitution—water system—local acts not involving trade

Session laws concerning the City of Asheville water system and its relationship with surrounding areas (Sullivan II, and III) were local acts but were not prohibited by Article II, Section 24, Clause 1 of the North Carolina Constitution as involving trade. Asheville, acting in its proprietary capacity to operate the water distribution system, is not a citizen of the State engaging in trade for the purpose of Article II, Section 24 of the North Carolina Constitution.

7. Cities and Towns— water system—surrounding area—session laws limiting proprietary decisions

Session laws involving the operation of the City of Asheville water system (Sullivan II and III) did not impermissibly intrude on the decision-making authority of Asheville under the North Carolina Constitution with respect to its purely proprietary and private activities. While these session laws preclude certain decisions regarding Asheville citizens and customers outside the city limits, judges are not legislators.

8. Appeal and Error— brief—argument abandoned

Asheville abandoned on appeal its contention that session laws concerning its water system violated the law of the land clause in the North Carolina Constitution by not presenting and discussing that argument in its brief. As the challenging party, Asheville had the burden of establishing the unconstitutionality of the statute.

9. Cities and Towns; Constitutional Law— North Carolina Constitution—session law—local water system—not an exclusive emolument

Modifications to N.C.G.S. § 160A-312(a) under a session law (Sullivan III) do not violate the prohibition on exclusive emoluments in the North Carolina Constitution. Those modifications do not confer an exclusive benefit on water consumers located outside Asheville's corporate limits which is not already shared by water consumers located within Asheville's corporate limits.

Appeal by plaintiff from order entered 2 February 2007 by Judge Howard E. Manning, Jr. in Wake County Superior Court. Heard in the Court of Appeals 4 February 2008.

Robert W. Oast, Jr., City Attorney for the City of Asheville, and Moore & Van Allen, PLLC, by Daniel G. Clodfelter, Mark A. Nebrig, T. Randolph Perkins, and Jeffrey M. Young, for plaintiff-appellant.

Roy Cooper, Attorney General, by Mark A. Davis, Special Deputy Attorney General, and W. Dale Talbert, Special Deputy Attorney General, for defendant-appellee State of North Carolina.

Long, Parker, Warren & Jones, P.A., by W. Scott Jones, and Robert B. Long, Jr., for defendants-appellees Buncombe defendants.

Andrew L. Romanet, Jr., General Counsel, and Gregory F. Schwitzgebel, III, Senior Assistant General Counsel, for North Carolina League of Municipalities, amicus curiae.

MARTIN, Chief Judge.

Plaintiff City of Asheville ("Asheville") appeals from the trial court's 2 February 2007 order denying its motion for summary judgment, granting cross-motions for summary judgment by the State of North Carolina and the County of Buncombe with several affiliated officials and individuals (with the State of North Carolina, collectively "defendants"), and dismissing the action.

According to the parties' Amended Complaint and Answers, Asheville operates and at least partially owns a water treatment and distribution system for the treatment and supply of water for drinking, cooking, and cleaning purposes, and for the operation of sanitary disposal systems for individuals and entities within its corporate limits and for some individuals and entities outside of its corporate limits. According to the September 2005 certified Water System Management Plan from Asheville's Water Resources Department, Asheville operates this water distribution system as a public enterprise. The system "serves all of the City of Asheville, approximately 60% of Buncombe County and less than 1% of Henderson County. The major water supply is the City's watershed, which is comprised of 20,000 acres of mountainous forestland in eastern Buncombe County." "The water distribution system . . . is comprised of over 1,200 miles of transmission and service lines, 24 pump stations, 21 storage reservoirs, and associated equipment. [Asheville's] watershed, treatment plants, transmission and service lines, pumping stations and reservoir storage systems combine to make th[e] system one of the largest in North Carolina."

This case arises out of Asheville's desire to "determine the rates it would charge to supply water to customers located outside the Asheville city limits" unencumbered by any "restrictions . . . [or] requirements imposed on Asheville resulting from the passage and enforcement" of three session laws (collectively "the Sullivan Acts") enacted by the North Carolina General Assembly: (1) House Bill 931, Chapter 399 of the 1933 Public-Local Laws (hereinafter

"Sullivan I"); (2) House Bill 1065, Session Law 2005-140 (hereinafter "Sullivan II"); and (3) House Bill 1064, Session Law 2005-139 (hereinafter "Sullivan III").

Sullivan I, captioned "An Act to Regulate Charges Made by the City of Asheville for Water Consumed in Buncombe County Water Districts," provides:

> SECTION 1. That from and after the passage of this act it shall be unlawful for the City of Asheville or any of the governing authorities, agents, or employees, thereof, to charge, exact, or collect from any resident of Buncombe County, whose property is now connected or may hereafter be connected with the main of any water district which has paid or issued bonds for the payment of the expense of laying such main, a rate for water consumed higher than that charged by the City of Asheville to persons residing within the corporate limits of said city.
>
> SEC. 2. That the City of Asheville is hereby specifically authorized and empowered, through its officers, agents and employees, to cause any user of water who shall fail to pay promptly his water rent for any month to be cut off, and his right to further use of water from the city system to be discontinued until payment of any water rent arrearages.
>
> SEC. 3. That it is the purpose and intent of this act to declare that persons residing outside of the corporate limits of the City of Asheville shall be entitled to the use of Asheville surplus water only, and the governing body of the City of Asheville is authorized and empowered to discontinue the supply of water to any districts, or persons, out of the corporate limits of the City of Asheville at any time that there may be a drought or other emergency, or at any time the governing body of the City of Asheville may deem that the city has use for all of its water supply.
>
> SEC. 4. That it shall be the duty of the County Commissioners of Buncombe County and/or the trustees of the different water districts operating outside of the corporate limits of the City of Asheville, in Buncombe County, to maintain the water lines in proper repair in order that there may not be a waste of water by leakage.

Sullivan Act, ch. 399, 1933 N.C. Public-Local Laws 376.

Sullivan II, captioned "An Act Regarding Water Rates in Buncombe County," provides:

> SECTION 1. From and after the effective date of this act, it shall be unlawful for the City of Asheville, or any of the governing authorities, agents, or employees thereof, to charge, exact, or collect from any water consumer in Buncombe County currently or hereafter connected to the waterlines currently maintained by the Asheville/Buncombe Water Authority, and replacements, extensions, and additions thereto a rate for water consumed higher than the rate charged for the same classification of water consumer residing or located within the corporate limits of the City of Asheville. Classification of water consumer as referred to herein means the type of facility to which the water is provided (e.g., single-family residence, multiple-family residence, retail, commercial, industrial) without regard to geographic location within Buncombe County.
>
> SECTION 2. The City of Asheville may, through its officers, agents, and employees, cause any user of water who shall fail to pay promptly his water rent for any month to be cut off and his right to further use of water from the city system to be discontinued until payment of any water rent arrearages, all consistent with G.S. 160A-314(b).
>
> SECTION 3. It shall be the duty of the Board of Commissioners of Buncombe County and/or the trustees of the different water districts operating outside of the corporate limits of the City of Asheville in Buncombe County to maintain the waterlines owned by the County of Buncombe and such water districts in proper repair in order that there may not be a waste of water by leakage.
>
> SECTION 4. To the extent that the Sullivan Act (Chapter 399 of the Public-Local Laws of 1933) does not conflict with this act, it continues to apply.

Sullivan II, ch. 140, 2005 N.C. Sess. Laws 246-47.

Finally, Sullivan III, captioned "An Act Regarding the Operation of Public Enterprises by the City of Asheville" and enacted on the same day as Sullivan II, modified N.C.G.S. §§ 160A-312, 160A-31(a), and 160A-58.1(c). The only section of Sullivan III at issue in the present case modifies N.C.G.S. § 160A-312 to provide, in relevant part:

> (a) A city shall have authority to acquire, construct, establish, enlarge, improve, maintain, own, operate, and contract for the operation of any or all of the public enterprises as defined in this Article to furnish services to the city and its citizens

and other areas and their citizens located outside the corporate limits of the city. Subject to Part 2 of this Article, a city may acquire, construct, establish, enlarge, improve, maintain, own, and operate any public enterprise outside its corporate limits, within reasonable limitations.

(b) A city shall have full authority to protect and regulate any public enterprise system belonging to or operated by it by adequate and reasonable rules. The rules shall be adopted by ordinance, and shall comply with all of the following:

(1) The rules shall apply equally to the public enterprise system both within and outside the corporate limits of the city.

(2) The rules may not apply differing treatment within and outside the corporate limits of the city.

(3) The rules shall make access to public enterprise services available to the city and its citizens and other areas and their citizens located outside the corporate limits of the city equally.

(4) The rules may prioritize the continuation of the provision of services based on availability of excess capacity to provide the service.

(5) The rules may be enforced with the remedies available under any provision of law.

. . . .

(d) A city shall account for a public enterprise in a separate fund and may not transfer any money from that fund to another except for a capital project fund established for the construction or replacement of assets for that public enterprise. Obligations of the public enterprise may be paid out of the separate fund. Obligations shall not include any other fund or line item in the city's budget.

Sullivan III, ch. 139, 2005 N.C. Sess. Laws 243-44.

Our discussion of the issues involved in this case would not be complete without some historical background. The history of this case began over eighty years ago. Asheville's City Manager Gary W. Jackson, Asheville's Director of the Water Resources Department David Hanks, Buncombe County's representative in the State Senate

Martin L. Nesbitt, Jr., Buncombe County's Finance Director Donna Clark, certified public accountant G. Edward Towson, II, and Buncombe County's Assistant County Manager and Director of Planning Jon Creighton provided testimony by sworn affidavits regarding the history of the development, ownership, construction, maintenance, and operating costs of the water distribution system and the Asheville/Buncombe Water Authority.

As set out more fully in *Candler v. City of Asheville*, 247 N.C. 398, 400-04, 101 S.E.2d 470, 471-75 (1958), which chronicled the first thirty-five years of the history of this case, with the increase in development in Asheville and Buncombe County, between 1923 and 1927, pursuant to acts of the General Assembly, six water and sewer districts were formed in Buncombe County. *See id.* at 400, 101 S.E.2d at 471. As the trial court stated, "[t]hese districts had certain geographical boundaries outside the City of Asheville and were authorized to acquire rights of way for water and sewer lines, to construct the lines, and hold elections authorizing the issuance of bonds paying therefor." Citing *Candler*, the court further stated that "[t]he districts did issue the bonds and build water lines for the distribution of the water, which lines were connected to the water system initially established by the City of Asheville." The record also establishes that each of the six districts was a body politic, governed and administered by its own trustees who determined policy.

Following Asheville's "land boom" and the Depression at the end of the 1920's, all local governments in Buncombe County and all of the water and sewer districts were bankrupted. The Buncombe County Commissioners, who also served as trustees of the various water districts, levied taxes to pay the principal and interest on the bonds issued by the water districts within the districts, and to pay for the maintenance of the water and sewer lines as provided by Sullivan I. *See id.* at 401, 101 S.E.2d at 472. According to the record, "[i]n 1936, the local governments in [Buncombe] County took actions required to refinance all defaulted bonds, both of the local governments and the districts." "County Commissioners, in their role as trustees, determine[d] the tax rate to be levied within each district to provide funds for the maintenance of the water and sewer lines and to amortize the debt."

According to the affidavits of Asheville's City Manager Jackson and Buncombe County's Assistant County Manager and Director of Planning Creighton, in 1960, Asheville annexed portions of the territory of the original water districts and thereby assumed $396,000.00

in bonded indebtedness as a pro-rata share of the existing principal balance from the water districts for areas annexed into Asheville that year. According to Jackson, "[w]hen Asheville and Buncombe County defaulted on their bonded indebtedness during the Great Depression, the water district indebtedness was part of the consolidated indebtedness that was refinanced through refunding bonds . . . . Th[is] debt was finally paid off in 1976." (Citations omitted.)

Jackson stated in his affidavit that, "[i]n 1980, following the final payment and satisfaction of all the water district debt and the refunding debt from the Great Depression, the Asheville City Council passed a resolution authorizing the filing of a declaratory judgment action challenging the validity of Sullivan I." According to Jackson, as well as Buncombe County's State Senator Nesbitt, in November 1980, an interlocal agreement was reached between Asheville and Buncombe County with an effective date of 29 October 1981 "relating to water service in Buncombe County," establishing the Asheville/Buncombe Water Authority, and relating to additional "matters of local governmental concern . . . including parks and recreation and law enforcement." According to Jackson's affidavit, this interlocal agreement and its subsequent amendments (hereinafter "the Water Agreement") "contained a specific provision whereby Asheville specifically agreed not to challenge Sullivan I's constitutionality while the [Water Agreement was] in force." Jackson stated that, as a result of the provisions of the Water Agreement, the City ultimately did not file the declaratory judgment action.

The affidavits of Jackson and Nesbitt also show that, in compliance with the provisions of Sullivan I, the 1981 Water Agreement also "required Asheville to charge the same water rates for the same classes of customers within and outside of the City limits," even though Asheville began charging the same water rates following the Court's decision in *Candler* in 1958, and continued to do so until it terminated the Water Agreement in accordance with its express terms effective 30 June 2005.

According to Creighton, from 1957 through 1981, Buncombe County "carried out its obligations under [Sullivan I] to maintain [the] waterlines owned by the County primarily by making payments to the City of Asheville for maintenance of the lines" and, from 1981 through 2005, to the Asheville/Buncombe Water Authority pursuant to the Water Agreement. As reflected in the affidavit of Buncombe County's Finance Director Clark and supporting exhibits, from July 1973 through June 1998, Buncombe County "contributed $26,435,201.00

towards the construction, upkeep and other costs of the Asheville Buncombe Water System. Of that amount, $1,932,834.00 were grant funds." Per Clark and Creighton, for the fiscal years from 1982 through 2005, when Buncombe County held title to various public recreational facilities pursuant to the Water Agreement until its termination by Asheville in 2005, Buncombe County's capital expenditures on those facilities was $9,025,715.00. As Nesbitt stated, during the period from October 1981 through June 2005, "the water system had in fact been allowed to fall farther into disrepair while [Asheville] and, to a lesser extent, Buncombe County were taking money from the water system."

As indicated in Jackson's affidavit, "[i]n accord with the provisions of [the Water Agreement] and effective upon its termination, . . . certain water lines and facilities conveyed to Asheville reverted to [Buncombe] County." According to Nesbitt's affidavit and the 30 September 2005 Agreement Between the City of Asheville and Buncombe County for Water System Maintenance and Repair entered into after the enactment of Sullivan II and III, the parties do not dispute that the South Buncombe pump station and storage tank are owned by Buncombe County and, pursuant to the 1981 Water Agreement, the ownership of all water system facilities conveyed to Asheville "were to be re-conveyed to the County of Buncombe and its water districts following termination of the Water Agreement." However, the parties are not otherwise in agreement about the current ownership of the water system facilities that make up the water distribution system.

On 11 October 2005, Asheville filed its Amended Complaint for Declaratory Judgment against the State of North Carolina challenging the constitutionality of the Sullivan Acts. On 13 March 2006, the State of North Carolina filed its Answer to Amended Complaint seeking dismissal of Asheville's complaint and a declaration that the Sullivan Acts are constitutional. On 18 July 2006, the County of Buncombe with several affiliated officials and individuals (collectively "Buncombe defendants") filed a Motion to Intervene and an Answer to Asheville's complaint seeking a dismissal of the action and, in the alternative, a declaration of the constitutionality of the Sullivan Acts. In September 2006, the trial court granted Buncombe defendants' Motion to Intervene.

On 12 July 2006, Asheville filed its Motion for Summary Judgment. On 2 January and 5 January 2007, respectively, the State of North Carolina and Buncombe defendants filed their own Motions for

Summary Judgment. After a hearing on 16 January 2007, the trial court entered its Memorandum of Decision and Order on 2 February 2007, concluding as a matter of law that the Sullivan Acts are constitutional "in that (A) they are a valid exercise of legislative authority, (B) they are not local acts in violation of Article II, Section 24 of the North Carolina Constitution and (C) Sullivan I, II and III do not violate Article I, Section 19 of the North Carolina Constitution." The court also "reject[ed] the arguments by the City of Asheville that: (1) the Sullivan Acts are unconstitutional under the rule announced in *Asbury v. Town of Albemarle*, 162 N.C. 247[, 78 S.E. 146] (1913); and (2) that Sullivan III unconstitutionally creates special privileges for an ineligible class of persons in violation of the exclusive emoluments prohibition contained in Article I, Section 32 of the North Carolina Constitution." Accordingly, the court denied Asheville's motion for summary judgment and granted defendants' cross-motions for summary judgment. Asheville filed its notice of appeal to this Court on 27 February 2007.

The record on appeal contains ten assignments of error, eight of which have been brought forward in appellant's brief. The remaining two assignments of error not brought forward in appellant's brief are not discussed below and are deemed abandoned. *See* N.C.R. App. P. 28(b)(6) (2008) ("Immediately following each question [in appellant's brief] shall be a reference to the assignments of error pertinent to the question, identified by their numbers and by the pages at which they appear in the printed record on appeal. Assignments of error not set out in the appellant's brief . . . will be taken as abandoned.").

"On appeal, an order allowing summary judgment is reviewed *de novo*." *Tiber Holding Corp. v. DiLoreto*, 170 N.C. App. 662, 665, 613 S.E.2d 346, 349 (citing *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003)), *disc. review denied*, 360 N.C. 78, 623 S.E.2d 263 (2005). "Further, 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). " 'The purpose of summary judgment . . . [is] to bring litigation to an early decision on the merits without the delay and expense of a trial where it can be readily demonstrated that no material facts are in issue.' " *Barnhill Sanitation Serv., Inc. v. Gaston County*, 87 N.C. App. 532, 536, 362 S.E.2d 161, 164 (1987) (quoting *Kessing v. Mortgage Corp.*, 278 N.C. 523, 533, 180 S.E.2d 823, 829 (1971)), *disc. review denied*, 321 N.C. 742, 366 S.E.2d 856 (1988).

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." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2007). Although determining what constitutes a genuine issue of material fact is "often difficult," our Supreme Court has stated that "an issue is genuine if it is supported by substantial evidence, and an issue is material if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action." *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681, 565 S.E.2d 140, 146 (2002) (citations omitted) (internal quotation marks omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, and means more than a scintilla or a permissible inference." *Id.* (citations omitted) (internal quotation marks omitted).

I.

[1] Asheville contends the trial court erred by concluding that the Sullivan Acts were enacted pursuant to a valid exercise of legislative authority, arguing instead that the Legislature exceeded the constitutional limitations on its authority under Article II, Section 24, Clause 1, Subclauses (a) and (j), Article I, Section 19, and Article I, Section 32 of the North Carolina Constitution. Before addressing Asheville's arguments, in response to defendants' briefs, we must first determine whether Asheville's contention that the Sullivan Acts are unconstitutional and were not enacted pursuant to a valid exercise of legislative authority is precluded by the doctrines of res judicata or collateral estoppel.

In *Candler*, the Court heard an action in which similarly-situated Buncombe defendants sued then-defendant Asheville "to restrain [Asheville] from putting into effect an ordinance which provide[d] a higher rate for consumers of water living outside the City than that charged to consumers residing in the City [in alleged contravention to Sullivan I]." *Candler*, 247 N.C. at 399, 101 S.E.2d at 471. In *Candler*, the Court unanimously held:

> *In our opinion*, in light of all the facts and circumstances revealed on this record, *the Legislature had the power to enact [Sullivan I], and that such Act is constitutional and valid and is binding on the City of Asheville* insofar as it pertains to the right to sell water to persons, firms, and corporations who obtain

> water through mains constructed and maintained at the expense of the taxpayers in these water or water and sewer districts. *We further hold that such Act does not violate Section 17, Article I, of the Constitution of North Carolina*, or the Fourteenth Amendment to the Constitution of the United States.

Id. at 411, 101 S.E.2d at 479 (emphasis added). We find no ambiguity in the plain language of the Court's holding that Sullivan I was "constitutional and valid and [wa]s binding on the City of Asheville" and "further hold[ing] that such Act d[id] not violate Section 17, Article I, of the Constitution of North Carolina." *Id.* However, Asheville argues that *Candler* "incorrectly decided the issues" that were before the North Carolina Supreme Court at the time, was "not good law when it was decided," and "cannot be dispositive of any issue" in the present case. Nonetheless, this Court "has no authority to overrule decisions of [the] Supreme Court and [has] the responsibility to follow those decisions until otherwise ordered by the Supreme Court." *Dunn v. Pate*, 334 N.C. 115, 118, 431 S.E.2d 178, 180 (1983) (alterations in original) (internal quotation marks omitted).

[2] Asheville next argues that *Candler* has since been overruled by *Piedmont Aviation, Inc. v. Raleigh-Durham Airport Authority*, 288 N.C. 98, 215 S.E.2d 552 (1975), asserting that *Piedmont Aviation* rejected *Candler's* "minor premise" which "rests on a conceptual confusion about rate-setting" that the power to establish rates to be charged by a municipal utility to its consumers is a governmental function, not a proprietary one. We disagree and conclude that *Candler* is still binding authority on the constitutionality of Sullivan I.

In *Piedmont Aviation*, several airlines ("petitioners") challenged a municipal airport authority (the "Authority") alleging that the Authority's action to increase landing fees and space rental charges at the airport was unreasonable and discriminatory. *See Piedmont Aviation*, 288 N.C. at 99, 105, 215 S.E.2d at 552-53, 556. The issue before the Court was whether petitioners were entitled to judicial review of the Authority's determination about the establishment of the landing fees. *See id.* at 100, 215 S.E.2d at 553. The Court held that "the fixing by the Authority of the fees it will charge for the use of its property is not an 'administrative decision' . . . and the procedure provided . . . for the obtaining of judicial review of 'administrative decisions' is not applicable thereto." *Id.* at 105, 215 S.E.2d at 556.

Almost twenty years earlier in *Candler*, the Court stated: "It is clear that the power to establish rates is a governmental function and not a proprietary one." *Candler*, 247 N.C. at 407, 101 S.E.2d at 477. In *Piedmont Aviation*, however, after stating that "[a] municipality operating an airport acts in a proprietary capacity," *Piedmont Aviation*, 288 N.C. at 102, 215 S.E.2d at 555, the Court made the following singular reference to *Candler*:

> Thus, in determining the fee it will charge for the privilege of landing an aircraft upon its runway and the rent it will charge for the use of its properties, the Authority is acting as the proprietor of the property, not as a regulatory agency. *The statement* in *Candler v. Asheville*, 247 N.C. 398, 101 S.E.2d 470, to the effect that a municipality in establishing rates it will charge for water is exercising a governmental function *was not necessary to the decision in that case, is not supported by the authorities cited therefor and may no longer be deemed authoritative.* That statement [in *Candler*] overlooks *the distinction to be drawn between municipal action fixing rates to be charged by a public utility to its customers* and municipal action fixing rates which the municipality, itself, will charge for its service. *The former function is a governmental function.* The latter is a proprietary function.

Id. at 102-03, 215 S.E.2d at 555 (emphasis added) (citations omitted). From the Court's plain language that the statement it corrected in *Candler* "was not necessary to the decision in that case," *Piedmont Aviation* did not overrule *Candler*. Therefore, we conclude that *Candler* is still binding authority regarding the constitutionality of Sullivan I. *See Dunn*, 334 N.C. at 118, 431 S.E.2d at 180.

[3] Asheville finally argues that *Candler* does not dispose of this case because it "decided an altogether different constitutional question"; namely, that the challenge to Sullivan I in *Candler* was presented under Article I, Section 17 of the 1868 Constitution and under the Fourteenth Amendment of the U.S. Constitution. Again, we must disagree.

The doctrine of res judicata embodies the general rule that "any right, fact, or question in issue and directly adjudicated on or necessarily involved in the determination of an action before a competent court . . . on the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies." *Gaither Corp. v. Skinner*, 241 N.C. 532, 535, 85 S.E.2d 909, 911 (1955).

The general rule is that "[a] final judgment rendered by a court of competent jurisdiction, on the merits, is conclusive as to the rights of the parties and their privies, and as to them constitutes an absolute bar to a subsequent action involving the same claim, demand, and cause of action." *Id.* (internal quotation marks omitted). However, "[i]t is to be noted that the phase of the doctrine of *res judicata* which precludes relitigation of the same cause of action is broader in its application than a mere determination of the questions involved in the prior action." *Id.* "The bar of the judgment in such cases extends not only to matters actually determined, but also to other matters which in the exercise of due diligence could have been presented for determination in the prior action." *Id.* at 535-36, 85 S.E.2d at 911; *see also* Black's Law Dictionary 1337 (8th ed. 2004) ("[T]he effect of foreclosing any litigation of matters that never have been litigated[] because of the determination that they should have been advanced in an earlier suit . . . has gone under the name, 'true res judicata,' or the names, 'merger' and 'bar.' ") (quoting Charles Alan Wright, *The Law of Federal Courts* § 100A, at 722-23 (5th ed. 1994)).

The Court's rationale for this doctrine is as follows:

> The judgment or decree of a Court possessing competent jurisdiction is final as to the subject-matter thereby determined. The principle extends further. *It is not only final as to the matter actually determined but as to every other matter which the parties might litigate in the cause, and which they might have had decided.* . . . This extent of the rule can impose no hardship. It requires no more than a reasonable degree of vigilance and attention; a different course might be dangerous and often oppressive. It might tend to unsettle all the determinations of law and open a door for infinite vexation. The rule is founded on sound principle. . . . The plea of *res judicata* applies, except in special cases, not only to the points upon which the Court was required by the parties to form an opinion and pronounce judgment but to every point which properly belonged to the subject in litigation and which the parties, exercising reasonable diligence, might have brought forward at the time and determined respecting it.

Piedmont Wagon Co. v. Byrd, 119 N.C. 460, 462-63, 26 S.E. 144, 145 (1896) (emphasis added) (first omission in original) (internal quotation marks omitted). This approach continues to prevail in our appellate courts one hundred years later:

> The court requires parties to bring forward the whole case, and will not, *except under special circumstances*, permit the same parties to open the same subject of litigation in respect to matters which might have been brought forward as part of the subject in controversy. . . . The plea of *res adjudicata* applies, . . . not only to the points upon which the court was required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject in litigation and which the parties, exercising reasonable diligence, might have brought forward at the time and determined respecting it.

Edwards v. Edwards, 118 N.C. App. 464, 471-72, 456 S.E.2d 126, 131 (1995) (first omission in original) (quoting *In re Trucking Co.*, 285 N.C. 552, 560, 206 S.E.2d 172, 178 (1974)).

The parties in the present case do not dispute either that a final judgment on the merits was reached in *Candler* or that there is an identity of the parties and their privies between the present case and *Candler*. However, we are not persuaded by Asheville's argument that *Candler* is not binding authority on the present case "because it decided an altogether different constitutional question." In its brief in *Candler*, then-defendant Asheville answered then-plaintiffs' (now Buncombe defendants') complaint by alleging that Sullivan I violated Article I, Section 17 (present Article I, Section 19), and Article I, Section 7 (present Article I, Section 32) of the North Carolina Constitution. In its brief for the present case, Asheville again argues that Sullivan I violates these same constitutional provisions. Additionally, in its *Candler* brief, Asheville did not allege or argue that Sullivan I violated Article II, Section 29 (present Article II, Section 24), although it asserts this claim today. Since (1) Asheville has already litigated Sullivan I's constitutionality under Article I, Section 19 and Article I, Section 32 of the North Carolina Constitution in *Candler*, (2) Asheville *could have asserted* Sullivan I's unconstitutionality under former Article II, Section 29 at the time of the action in *Candler but chose not to do so*, and (3) the Court held that Sullivan I was "constitutional and valid and [wa]s binding on the City of Asheville" in spite of Asheville's arguments to the contrary, *see Candler*, 247 N.C. at 411, 101 S.E.2d at 474, we conclude that Asheville is precluded under the doctrine of res judicata from challenging the constitutionality of Sullivan I under any provision of the North Carolina Constitution in the present case. Our decision renders it unnecessary to address Asheville's remaining assignments of error regarding the constitutionality of Sullivan I, or to address defendants'

contention that Asheville is collaterally estopped from challenging the constitutionality of Sullivan I.

[4] While defendants did not argue that Asheville is collaterally estopped from litigating the constitutionality of Sullivan II and Sullivan III under Article I, Section 19 or Article I, Section 32 of the North Carolina Constitution, defendants present arguments that Asheville is collaterally estopped from litigating the constitutionality of challenging Sullivan II and III under Article II, Section 24. We disagree.

"The companion doctrines of *res judicata* (claim preclusion) and collateral estoppel (issue preclusion) have been developed by the courts for the dual purposes of protecting litigants from the burden of relitigating previously decided matters and promoting judicial economy by preventing needless litigation." *Bockweg v. Anderson*, 333 N.C. 486, 491, 428 S.E.2d 157, 161 (1993). Again, "[w]here the second action between two parties is *upon the same claim*, [the doctrine of res judicata allows] the prior judgment [to] serve[] as a bar to the relitigation of all matters that *were or should have been* adjudicated in the prior action." *Id.* at 492, 428 S.E.2d at 161 (emphasis added). " 'But where the second action between the same parties is *upon a different claim* or demand, the judgment in the prior action operates as an *estoppel only as to those matters in issue* or points controverted, upon the determination of which the finding or verdict was rendered.' " *King v. Grindstaff*, 284 N.C. 348, 356, 200 S.E.2d 799, 805 (1973) (emphasis added) (quoting *Cromwell v. County of Sac*, 94 U.S. 351, 353, 24 L. Ed. 195, 198 (1877)). In other words, "the prior judgment serves as a bar *only as to issues actually litigated* and determined in the original action." *Bockweg*, 333 N.C. at 492, 428 S.E.2d at 161 (emphasis added). "[A]n issue is 'actually litigated,' for purposes of collateral estoppel or issue preclusion, if it is properly raised in the pleadings or otherwise submitted for determination and [is] in fact determined." 47 Am. Jur. 2d *Judgments* § 494 (2006). "A very close examination of matters actually litigated must be made in order to determine if the underlying issues are in fact identical. If they are not identical, then the doctrine of collateral estoppel does not apply." *Beckwith v. Llewellyn*, 326 N.C. 569, 574, 391 S.E.2d 189, 191, *reh'g denied*, 327 N.C. 146, 394 S.E.2d 168 (1990).

In the present case, in its brief and reply brief, Asheville repeatedly asserts that it neither "raised, briefed, [n]or argued" that Sullivan I violated former Article II, Section 29 (present Article II, Section 24) of the North Carolina Constitution. Asheville argues that the Court in

Candler was not presented with, nor did it decide, the issue of whether Sullivan I was an invalid local act under present Article II, Section 24. Defendants agree that Asheville did not argue that Sullivan I was unconstitutional under former Article II, Section 29 in *Candler*. Thus, as we concluded above, the fact that Asheville *could have* alleged a violation of this constitutional provision in *Candler* is the reason Asheville is precluded by res judicata, *not* collateral estoppel, from making that same constitutional claim today. Consequently, as Asheville contended in oral argument before this Court, *its failure to argue* that Sullivan I violated this constitutional provision to the *Candler* Court *must also mean* that the issue of whether Sullivan II and Sullivan III violate Article II, Section 24 was not actually litigated in *Candler*, was not necessary to the Court's determination that Sullivan I was constitutional, and is not precluded under collateral estoppel in the present case. We agree.

However, defendants argue that *Candler*, nonetheless, is still binding authority on the question of whether Sullivan I was constitutional under former Article II, Section 29. In *Candler*, the Court stated a fundamental rule that no party in the present case disputes: "Section 4, Article VIII, [present Article VII, Section 1] of our Constitution does not forbid the Legislature from passing special acts, amending charter of cities, towns, and incorporated villages, or conferring upon municipal corporations additional powers, or restricting the powers theretofore vested in them." *Candler*, 247 N.C. at 409, 101 S.E.2d at 478. In support of its statement, the Court cited four cases: *Kornegay v. City of Goldsboro*, 180 N.C. 441, 105 S.E. 187 (1920); *Holton v. Town of Mocksville*, 189 N.C. 144, 126 S.E. 326 (1925); *Webb v. Port Commission*, 205 N.C. 663, 172 S.E. 377 (1934); and *Deese v. Town of Lumberton*, 211 N.C. 31, 188 S.E. 857 (1936). The *Candler* Court next excerpted language from *Kornegay* and *Holton* to provide additional support for this statement.

In *Holton*, the plaintiff, a property owner in the town of Mocksville, appealed from the trial court's denial of her motion for nonsuit concerning "whether upon all the evidence the plaintiff's lots had been lawfully assessed and whether or not the amounts levied against them were valid liens" "because there was no petition signed by the owners of lots abutting on the street directed to be improved by the resolution," as was required by a statute of general applicability. *Holton*, 189 N.C. at 148, 126 S.E. at 328. At trial, defendant offered into evidence chapter 86, Private Laws 1923, entitled "An act relating to the financing of street and sidewalk improvements in the town of

Mocksville" which provided that "[the] board of commissioners [of the town of Mocksville] shall have power to levy special assessments as herein provided [i.e., without petition]" as required by the statute. *See id.* at 149, 126 S.E. at 328 (alterations in original). On appeal, plaintiff "attack[ed] the constitutionality of the act, contending [(1)] that by section 4 of Article VIII of the Constitution of North Carolina, the General Assembly was without power to enact it, and [(2)] that the act [wa]s void because [it was] retroactive and retrospective." *Id.* The *Holton* Court disposed of the issue regarding the constitutionality of the Mocksville act in one paragraph, the text of which was excerpted in full by the *Candler* Court. Again, in *Candler*, the Court included the following paragraph from *Holton* in support of its statement in *Candler* that former Article VIII, Section 4 does not forbid the Legislature from passing special acts or conferring powers upon, or restricting powers of, a municipality:

> Section 4 of Article VIII of the Constitution imposes upon the General Assembly the duty to provide by general laws for the improvement of cities, towns and incorporated villages. It does not, however, forbid altering or amending charters of cities, towns and incorporated villages or conferring upon municipal corporations additional powers or restricting the powers theretofore vested in them. We find nothing in section 4, Article VIII of the Constitution rendering this act unconstitutional, *nor does the act relate to any of the matters upon which the General Assembly is forbidden by section 29 of Article II to legislate. Kornegay v. Goldsboro*, 180 N.C. 441, 105 S.E. 187 (1920).

Candler, 247 N.C. at 410, 101 S.E.2d at 478-79 (emphasis added) (quoting *Holton*, 189 N.C. at 149, 126 S.E. at 328-29). Defendants point to the *Candler* Court's excerpted language from *Holton*—"nor does the act relate to any of the matters upon which the General Assembly is forbidden by section 29 of Article II to legislate"—to support the argument that *Candler* determined that Sullivan I was constitutional under former Article II, Section 29. We do not agree. Based on the facts that (1) the constitutionality of Sullivan I under Article II, Section 29 was not an issue before the *Candler* Court, (2) the location and context of the *Holton* quotation in *Candler* was plainly citing relevant, foundational law regarding the Legislature's powers under the Constitution, and (3) nowhere else in *Candler* does the Court ever mention, let alone examine, former Article II, Section 29, we are not convinced by defendants' arguments that the Court held that Sullivan I was constitutional under present Article II, Section 24 in *Candler*.

We hold the trial court erred when, in reliance on this language in *Candler* excerpted from *Holton*, it concluded "as a matter of law that the provisions and limitations imposed on the City of Asheville in [the Sullivan Acts we]re within the power of the Legislature to enact" because "*Candler* ma[de] clear that none of the Sullivan Acts at issue in this litigation are prohibited by Article II, Section 24 of the Constitution." Therefore, we hold that Asheville is not precluded under the doctrine of collateral estoppel from challenging the constitutionality of Sullivan II and Sullivan III under Article II, Section 24 of the North Carolina Constitution in the present case.

II.

[5] The trial court concluded that, while the Sullivan Acts are local acts, none are prohibited by Article II, Section 24 of the Constitution because, as a matter of law, the Sullivan Acts "do not relate to health and sanitation and do not regulate trade." While Asheville agrees that the Sullivan Acts are local acts, it contends the trial court erred by concluding that none of the Sullivan Acts at issue in this litigation are prohibited by Article II, Section 24.

Article VII, Section 1 of the North Carolina Constitution provides, in part:

> The General Assembly shall provide for the organization and government and the fixing of boundaries of counties, cities and towns, and other governmental subdivisions, and, except as otherwise prohibited by this Constitution, may give such powers and duties to counties, cities and towns, and other governmental subdivisions as it may deem advisable.

N.C. Const. art. VII, § 1. In other words, "[m]unicipalities have no inherent powers; they have only such powers as are delegated to them by legislative enactment." *In re Ordinance of Annexation No. 1977-4*, 296 N.C. 1, 16-17, 249 S.E.2d 698, 707 (1978). Additionally, as cited in Asheville's brief, "municipalities 'are creatures of the legislature, public in their nature, subject to its control, and have only such powers as it may confer[;] . . . powers [which] may be changed, modified, diminished, or enlarged, and, subject to the constitutional limitations, conferred at the legislative will.' " *Candler*, 247 N.C. at 407, 101 S.E.2d at 477 (quoting *Holmes v. City of Fayetteville*, 197 N.C. 740, 150 S.E. 624 (1929), *appeal dismissed per curiam*, 281 U.S. 700, 74 L. Ed. 1126 (1930)). " 'There is no contract between the State and the public that a municipal charter shall not at all times be subject to

the direction and control of the body by which it is granted.' " *Id.*; *see also Williamson v. City of High Point*, 213 N.C. 96, 106, 195 S.E. 90, 96 (1938) ("[Municipalities] are but instrumentalities of the State for the administration of local government, and their authority as such may be enlarged, abridged, or withdrawn entirely at the will or pleasure of the Legislature.") (internal quotation marks omitted). Our Supreme Court has further stated that

> a municipal corporation has no extra-territorial powers; but the rule is not without exceptions. The Legislature has undoubted authority to confer upon cities and towns jurisdiction for sanitary and police purposes in territory contiguous to the corporation. . . . If a municipality owns and operates a water or lighting plant and has an excess of water or electricity beyond the requirements of the public, which is available for disposal, it may make a sale of such excess to outside consumers as an incident to the proper exercise of its legitimate powers. . . . It is equally clear that without legislative authority [a municipality] would not be permitted to extend its lines beyond the corporate limits for the purpose of selling [water] to nonresidents of the city.

Williamson, 213 N.C. at 106, 195 S.E. at 96 (omissions in original) (internal quotation marks omitted). Thus, "in common with all the courts of this country, . . . municipal corporations, *in the absence of constitutional restrictions*, are the creatures of the legislative will, and are subject to its control; the sole object being the common good, and that rests in legislative discretion." *Town of Highlands v. City of Hickory*, 202 N.C. 167, 168, 162 S.E. 471, 471 (1932) (emphasis added) (internal quotation marks omitted).

"All power which is not expressly limited by the people in our State Constitution remains with the people, and an act of the people through their representatives in the legislature is valid unless prohibited by that Constitution." *State ex rel. Martin v. Preston*, 325 N.C. 438, 448-49, 385 S.E.2d 473, 478 (1989). "The members of the General Assembly are representatives of the people. The wisdom and expediency of a statute are for the legislative department, when acting entirely within constitutional limits." *McIntyre v. Clarkson*, 254 N.C. 510, 515, 119 S.E.2d 888, 891 (1961). Nonetheless, "we are aware that . . . '[i]t is well settled in this State that the courts have the power, and it is their duty in proper cases, to declare an act of the General Assembly unconstitutional—but it must be plainly and clearly the case.' " *Williams v. Blue Cross Blue Shield of N.C.*, 357 N.C. 170, 183,

581 S.E.2d 415, 425 (2003) (quoting *Glenn v. Bd. of Educ.*, 210 N.C. 525, 529-30, 187 S.E. 781, 784 (1936)). " 'If there is any reasonable doubt, it will be resolved in favor of the lawful exercise of their powers by the representatives of the people.' " *Id.*

Article II, Section 24 of the North Carolina Constitution identifies fourteen "[p]rohibited subjects" about which the General Assembly "shall not enact any local, private, or special act or resolution." N.C. Const. art. II, § 24, cl. 1. "Any local, private, or special act or resolution enacted in violation of the . . . [limitations specified in Section 24] shall be void." N.C. Const. art. II, § 24, cl. 3. The purpose for this provision in our Constitution was most recently chronicled by our Supreme Court in *Williams v. Blue Cross Blue Shield of North Carolina*, 357 N.C. 170, 581 S.E.2d 415 (2003):

> The organic law of the State was originally drafted and promulgated by a convention which met at Halifax in December[] 1776. During the ensuing 140 years, the Legislature of North Carolina possessed virtually unlimited constitutional power to enact local, private, and special statutes. This legislative power was exercised with much liberality, and produced a plethora of local, private, and special enactments. As an inevitable consequence, the law of the State was frequently one thing in one locality, and quite different things in other localities. To minimize the resultant confusion, the people of North Carolina amended their Constitution at the general election of 1916 so as to deprive their Legislature of the power to enact local, private, or special acts or resolutions relating to many of the most common subjects of legislation.
>
> . . . .
>
> In thus amending their organic law, the people were motivated by the desire that the General Assembly should legislate for North Carolina in respect to the subjects specified as a single united commonwealth rather than as a conglomeration of innumerable discordant communities. To prevent this laudable desire from degenerating into a mere pious hope, they decreed in emphatic and express terms that "any local, private, or special act or resolution passed in violation of the provisions of this section shall be void."

Id. at 185-86, 581 S.E.2d at 426-27 (omission in original) (quoting *Idol v. Street*, 233 N.C. 730, 732-33, 65 S.E.2d 313, 314-15 (1951)). Thus, the Court determined,

> [i]t was the purpose of [Article II, Section 24] to free the General Assembly from the enormous amount of petty detail which had been occupying its attention, to enable it to devote more time and attention to general legislation of statewide interest and concern, to strengthen local self-government by providing for the delegation of local matters by *general laws* to local authorities, and to require uniform and coordinated action under general laws on matters related to the welfare of the whole State.

Id. at 188, 581 S.E.2d at 428 (alteration in original) (quoting *High Point Surplus Co. v. Pleasants*, 264 N.C. 650, 656, 142 S.E.2d 697, 702 (1965)). The issue in the present case turns on whether the Constitution otherwise prohibited the enactment of Sullivan II or III by virtue of Article II, Section 24. *See City of New Bern v. New Bern-Craven County Bd. of Educ.*, 338 N.C. 430, 438, 450 S.E.2d 735, 740 (1994). "If so, the legislature's ability to ascribe [or deny] powers and duties to [Asheville] does not extend to [the Sullivan Acts] and they are void." *See id.*

Our review of this issue is two-fold. *See Williams*, 357 N.C. at 183, 581 S.E.2d at 425. First, we must determine whether the Sullivan Acts are local acts as contended by Asheville or whether they are general laws as contended by defendants. *See id.* Second, if they are found to be local acts, we must determine whether the Sullivan Acts (1) relate to health and sanitation or (2) regulate trade. *See id.*

A.

To consider whether Sullivan II and III are violative of Subclauses (a) or (j) of Article II, Section 24, Clause 1 of our Constitution, we must first determine whether Sullivan II and III are local acts or general laws. A determination that Sullivan II and III are general laws would render further consideration of this issue unnecessary because (1) our Supreme Court has long held that " '[a] statute is either 'general' or 'local'; there is no middle ground,' " *id.* (quoting *High Point Surplus Co.*, 264 N.C. at 656, 142 S.E.2d at 702), and (2) Clause 1 of Section 24 is implicated only after a law is determined to be "local," "private," or "special." *See* N.C. Const. art. II, § 24, cl. 1.

The General Assembly may be "directed or authorized by th[e] Constitution to enact general laws," and those "[g]eneral laws may be enacted for classes defined by population *or other criteria*." N.C. Const. art. XIV, § 3 (emphasis added). A law is general where it

> *is broad enough* to reach . . . all places affected by the conditions to be remedied, *so that the statute operates uniformly throughout the state under like circumstances*, and its classification is reasonable and based upon a rational difference of situation or condition, . . . *even though it does not actually apply to all parts of the state, or indeed, even though there are only a few places, or one place, on which the statute operates.*

McIntyre, 254 N.C. at 518, 119 S.E.2d at 894 (emphasis added). Thus, "[c]onceivably, a statute may be local if it excludes only one county. On the other hand, it may be general if it includes only one or a few counties. It is a matter of classification." *High Point Surplus Co.*, 264 N.C. at 656, 142 S.E.2d at 702.

Conversely, as discussed above, Article II, Section 24 of the North Carolina Constitution expressly provides that the General Assembly "shall not enact any local, private, or special act or resolution" relating to or regulating any of fourteen enumerated subjects. *See* N.C. Const. art. II, § 24, cl. 1. Our Supreme Court has stated that, within the meaning of constitutional prohibitions against local laws, a law is local where,

> by force of an inherent limitation, it arbitrarily separates some places from others upon which, but for such limitation, it would operate, *where it embraces less than the entire class of places to which such legislation would be necessary or appropriate having regard to the purpose for which the legislation was designed*, and where the classification does not rest on circumstances distinguishing the places included from those excluded.

Williams, 357 N.C. at 184, 581 S.E.2d at 425-26 (emphasis added) (quoting *McIntyre*, 254 N.C. at 518, 119 S.E.2d at 894). Accordingly, "when the persons or things subject to the law are not reasonably different from those excluded, the statute is local or special." *McIntyre*, 254 N.C. at 518, 119 S.E.2d at 894. In other words, a local law "discriminates between different localities without any real, proper, or reasonable basis or necessity—a necessity springing from manifest peculiarities clearly distinguishing those of one class from each of the other classes, and imperatively demanding legislation for each class separately that would be useless or detrimental to the others." *Id.* "[U]ltimately the problem is resolved into the question of what facts in each case are sufficiently important to justify the exclusions and inclusions." *Id.* at 519, 119 S.E.2d at 894 (alteration in original) (internal quotation marks omitted).

Because " 'no exact rule or formula capable of constant application can be devised for determining in every case whether a law is local, private or special or whether general,' " *Williams*, 357 N.C. at 183, 581 S.E.2d at 425 (quoting *McIntyre*, 254 N.C. at 517, 119 S.E.2d at 893), the Court has "set out alternative methods for determining whether a law is general or local." *Id.* (citing *City of New Bern*, 338 N.C. at 435-36, 450 S.E.2d at 738-39).

The "reasonable classification" method of analysis, first applied in *McIntyre v. Clarkson*, 254 N.C. 510, 119 S.E.2d 888 (1961), "considers how the law in question classifies the persons or places to which it applies." *Williams*, 357 N.C. at 183, 581 S.E.2d at 425. Under this analysis, "[a] law is general if it applies to and operates uniformly on all the members of any class of persons, places or things requiring legislation peculiar to itself in matters covered by the law." *McIntyre*, 254 N.C. at 519, 119 S.E.2d at 894 (internal quotation marks omitted). "Classification must be reasonable and germane to the law. It must be based on a reasonable and tangible distinction and operate the same on all parts of the state under the same conditions and circumstances. Classification must not be discriminatory, arbitrary or capricious." *Id.* at 519, 119 S.E.2d at 894-95. "The Legislature has *wide discretion* in making classifications." *Id.* at 519, 119 S.E.2d at 894 (emphasis added). Accordingly, "[t]he test is whether the classification is reasonable and whether it embraces all of the class to which it relates. Classifications . . . must be natural and intrinsic and based on substantial differences." *Id.* at 519, 119 S.E.2d at 894-95; *see also City of New Bern*, 338 N.C. at 435-36, 450 S.E.2d at 738-39 ("[Under this test, a law is general if] any rational basis reasonably related to the objective of the legislation can be identified which justifies the separation of units of local government into included and excluded categories.") (internal quotation marks omitted) (quoting *Adams v. N.C. Dep't. of Nat. & Econ. Res.*, 295 N.C. 683, 691, 249 S.E.2d 402, 407 (1978)).

In *Town of Emerald Isle v. State of North Carolina*, 320 N.C. 640, 360 S.E.2d 756 (1987), the Supreme Court departed from the "reasonable classification" test and instead "applied a general public interest method of analysis, which focuses on 'the extent to which the act in question affects the general public interests and concerns.' " *City of New Bern*, 338 N.C. at 436, 450 S.E.2d at 739 (quoting *Emerald Isle*, 320 N.C. at 651, 360 S.E.2d at 763). In *Emerald Isle*, the Court "addressed whether an act that established a public pedestrian beach access facility in Bogue Point was a local act." *Id.* There, "the act in

question applied only to a site-specific portion of land on a particular . . . public pedestrian beach access facility [which, by definition,] . . . rest[ed] in but one location." *Williams*, 357 N.C. at 184, 581 S.E.2d at 426 (internal quotation marks omitted). The Court held that the purpose of the act in *Emerald Isle* was "to establish pedestrian beach access facilities for general public use in the vicinity of Boglet Inlet," and so held that the act was *not* a local act, reasoning that, "[b]y directing the establishment of public pedestrian beach access facilities including parking areas, pedestrian walkways, and restroom facilities, the legislature . . . sought to promote the general public welfare by preserving the beach area for general public pedestrian use." *Emerald Isle*, 320 N.C. at 651-52, 360 S.E.2d at 763.

In the present case, we do not believe that the method of classification identified in *Emerald Isle* is an appropriate test to analyze whether Sullivan II and III are general laws or local acts. First, Sullivan II and III are "not site-specific as in *Emerald Isle* because '[s]uch . . . legislated change[s] could be effected as easily in [Buncombe County] as in any other [county] in the state.' " *See Williams*, 357 N.C. at 184-85, 581 S.E.2d at 426 (first and fourth alterations in original) (quoting *City of New Bern*, 338 N.C. at 436, 450 S.E.2d at 739). Additionally, while any member of the general public who travels to Bogue Point could benefit from the pedestrian beach access facilities at issue in *Emerald Isle*, Sullivan II and III expressly benefit only a small subset of North Carolinians. Specifically, Sullivan II applies only to those "water consumer[s] in Buncombe County currently or hereafter connected to the waterlines currently maintained by the Asheville/Buncombe Water Authority" against whom the City of Asheville would seek "to charge, exact, or collect . . . a rate for water consumed higher than the rate charged for the same classification of water consumer[s] residing or located within the corporate limits of the City of Asheville." Sullivan II, ch. 140, 2005 N.C. Sess. Laws 246. Sullivan III applies only to citizens of Asheville and citizens of other areas located outside the corporate limits of the city to whom Asheville furnishes its public enterprise services. *See* Sullivan III, ch. 139, 2005 N.C. Sess. Laws 243. Consequently, the general public interest method of analysis identified in *Emerald Isle* is inapplicable to this case. *See Williams*, 357 N.C. at 185, 581 S.E.2d at 426.

To determine whether the General Assembly was authorized by the Constitution to enact Sullivan II and to prohibit Asheville from charging higher rates to water consumers for services provided outside its corporate limits, we must examine whether Sullivan II was

"rationally based upon some situation unique to" Buncombe County to warrant the Legislature's decision to revoke from Asheville the authority it otherwise conferred to all cities in the State to charge differential rates to public enterprise service consumers under N.C.G.S. §§ 160A-311, -312, and -314. *See Williams*, 357 N.C. at 185, 581 S.E.2d at 426. With regard to Sullivan III, we must determine whether the Legislature's decision was warranted to modify N.C.G.S. § 160A-312 as follows: (1) to allow Asheville, unlike any other city in the State subject to N.C.G.S. § 160A-312, to be held liable for damages to those citizens outside the corporate limits for failure to furnish any public enterprise service; and (2) to restrict Asheville's discretionary management of revenue from its water distribution system, unlike any other city in the State, by requiring the city to "account for a public enterprise in a separate fund and . . . not transfer any money from that fund to another except for a capital project fund established for the construction or replacement of assets for that public enterprise." Sullivan III, ch. 139, 2005 N.C. Sess. Laws 243-44.

In 1971, the General Assembly conferred upon all cities in North Carolina the power to "establish, . . . maintain, own, [and] operate" those endeavors defined as "public enterprises," which included "[w]ater supply and distribution systems." N.C. Gen. Stat. §§ 160A-311(2), 160A-312(a) (2007). At the same time, the General Assembly empowered cities to "establish and revise from time to time schedules of rents, rates, fees, charges, and penalties for the use of or the services furnished by any public enterprise." N.C. Gen. Stat. § 160A-314(a) (2007). The Legislature also conferred upon all North Carolina cities the power to "vary [those schedules of rents, rates, fees, charges, and penalties] according to classes of service, and [to adopt] *different schedules* [of rents, rates, fees, charges, and penalties] . . . *for services provided outside the corporate limits of the city*." *Id.* (emphasis added). In other words, according to this Court's interpretation of N.C.G.S. § 160A-314(a) in *Town of Spring Hope v. Bissette*, 53 N.C. App. 210, 280 S.E.2d 490 (1981), *aff'd*, 305 N.C. 248, 287 S.E.2d 851 (1982), "[u]nder this broad, unfettered grant of authority, the setting of . . . rates and charges [for water and sewer services] is a matter for the judgment and discretion of municipal authorities, not to be invalidated by the courts *absent some showing of arbitrary or discriminatory action*." *Smith Chapel Baptist Church v. City of Durham*, 350 N.C. 805, 816, 517 S.E.2d 874, 881 (1999) (first alteration in original) (emphasis added) (internal quotation marks omitted). Finally, also in 1971, the version of N.C.G.S. § 160A-312 enacted by

the General Assembly and made generally applicable to all municipalities prior to the modifications of Sullivan III specified that, while a city may "acquire, construct, establish, enlarge, improve, maintain, own, and operate any public enterprise outside its corporate limits, within reasonable limitations, . . . in no case shall a city be held liable for damages to those outside the corporate limits for failure to furnish any public enterprise service." N.C. Gen. Stat. § 160A-312(a).

Thus, while the Constitution does not forbid the General Assembly from "conferring upon municipal corporations additional powers *or restricting the powers theretofore vested in them*" by the Legislature, *see Holton*, 189 N.C. at 149, 126 S.E. at 328 (emphasis added), the issue before us is whether the General Assembly's decision to enact Sullivan II and III was based on circumstances that made the water distribution system in Asheville reasonably different from all other North Carolina municipalities which were excluded from Sullivan II and III.

According to three of the eighteen legislative findings included in its preamble, the General Assembly enacted Sullivan II expressly because

> practically all, if not all, of the cost of the waterlines serving Buncombe County (outside of the corporate limits of the City of Asheville) has been paid by the County of Buncombe, the various water and sewer districts of the County of Buncombe, by the Asheville/Buncombe Water Authority pursuant to its duties to Buncombe County, and by private developers and landowners, desiring water service in such areas and not paid by the City of Asheville; and
>
> . . . during the term of the Water Agreement, the County of Buncombe has paid directly to the City of Asheville in excess of $37,000,000 pursuant to that Agreement; and
>
> . . . .
>
> . . . the complicated pattern of dealings between the City of Asheville and the County of Buncombe regarding the provision of water to water consumers in Buncombe County connected to the waterlines currently maintained by the Asheville/Buncombe Water Authority, and replacements, extensions, and additions thereto has now given rise to the issue of the rate that the City of Asheville may charge the water consumers in Buncombe County connected to the waterlines currently maintained by the

> Asheville/Buncombe Water Authority, and replacements, extensions, and additions thereto to whom it provides water even though [Sullivan I] remains in full force and effect . . . .

Sullivan II, ch. 140, 2005 N.C. Sess. Laws 245-46. Defendants argue that (1) these findings are "the reasons why the past, current, and anticipated future equities necessitated the enactment of [Sullivan II and III]," (2) the "long and tumultuous history" involving Asheville's water distribution system "amply justifies" the legislative action contained in Sullivan II and III, and (3) Asheville has failed to show any other public water utility in North Carolina with a history "even remotely as complex, long-standing, and unique" as Asheville's.

As mentioned above, *Candler* chronicled the first thirty-five years of the history of this case and made the following findings:

> It is clear, under the facts disclosed on this record, that every purchaser of water in these water or water and sewer districts, from the City of Asheville, at the rates fixed for consumers of water within the city limits of Asheville, are paying as much of the debt service and interest, as well as the cost of operating, repairing, and maintaining the water and sewer systems of the City of Asheville, as any resident of the City who purchases a like amount of water. Moreover, in addition thereto, the persons, firms, and corporations in these water or water and sewer districts are being taxed to pay the debt service, including interest on bonds issued to construct the water or water and sewer system in these respective districts, as well as taxing themselves for the repair and maintenance of such water or water and sewer system. Asheville contributed nothing to the construction of these systems, neither does it contribute anything to the cost of repairing and maintaining them. Asheville renders no service except to pump the water into the water systems, read the meters, which it did not furnish and does not service, and to bill the consumers.
>
> It further appears from the record that a little over twenty-eight per cent of the meters through which the City of Asheville furnishes water are outside its corporate limits and the City derives a little over twenty-seven per cent of its total income from its water system from these outside consumers.

Candler, 247 N.C. at 410-11, 101 S.E.2d at 479. Since no party in the present case attempts to dispute the factual findings in *Candler* that chronicle the history of the water distribution system through

1958, we turn our attention to the history of the water system following *Candler*.

As discussed above, in 1960, Asheville annexed portions of the territory of the original water districts that were the subject of *Candler* and assumed $396,000.00 in bonded indebtedness as a pro-rata share of the existing principal balance from the water districts for areas annexed into Asheville that year. This bonded indebtedness was paid off in full in 1976.

In *Candler*, the parties stipulated that, of the total 20,977 water meters in operation for the water distribution system both inside and outside the corporate limits for the fiscal year ending 30 June 1956, 5,983 or 28.5% of the water meters were located in the water districts outside Asheville's corporate limits. *See id.* at 402, 101 S.E.2d at 473. Additionally, of the $1,056,703.00 generated in revenue from the sale of water through all water system meters, $285,483.00 or 27% of that revenue was generated from the sale of water to consumers located outside Asheville's city limits. *See id.* at 402-03, 101 S.E.2d at 473. Fifty years later, for the fiscal year ending 30 May 2006, of Asheville's 49,615 water system meters in operation, 28,044 accounts were inside its city limits while 21,571 or 43.5% were outside its city limits, the majority of which are in unincorporated areas of Buncombe County. And, of the $19,794,697.16 generated in revenue from the sale of water to all consumers, $8,477,640.07 or 42.8% was generated from the meters of consumers located outside Asheville's corporate limits.

An audit was conducted of the City of Asheville and the Asheville/Buncombe Water System for the fiscal years 1957 through 2005. According to the affidavit of certified public accountant Towson who supervised that audit, for the time period following *Candler*, Asheville reported a "total operating revenue for the water system of $447,142,263.00. Operating revenues are those funds received from the operation of the water system, primarily from the sale of water." For the same period of time, Asheville's reported net operating revenue for the water system, i.e., the operating revenues for the water system minus the system and "other" expenditures, totaled $113,929,113.00. Those "other" expenditures for the water system included categorizations by Asheville for "Administrative—reimburse general and other funds" ($52,473,739.00), "Department wide expenditures" ($39,324,144.00), and "Tax and franchise benefits paid to general fund" ($12,372,231.00). In sum, according to the record, practically all of the cost of the waterlines serving Buncombe County

outside Asheville's corporate limits has been paid by Buncombe County, by its various water and sewer districts, by the Asheville/Buncombe Water Authority pursuant to its duties to Buncombe County, and by private developers and landowners, desiring water service in such areas and not paid by Asheville. Further, according to his sworn deposition, Asheville's Director of the Water Resources Department Hanks was "not aware" of "any lines outside [Asheville's] city limits that the installation of which was paid for by [Asheville, exclusive of grant money]."

Asheville identifies five pairings of municipalities and counties to support its contention that other municipalities "currently operating municipally-owned water systems now receive or have historically received sizeable contributions toward the construction, maintenance, and operation of such systems from the counties in which the cities are located." Those pairings include Macon County and both the Town of Highlands and the Town of Franklin, Durham County and the City of Durham, Forsyth County and the City of Winston-Salem, and Cabarrus County and the City of Concord. According to Asheville, none of these municipalities are subject to the same restrictions as those embodied in Sullivan II and III. Asheville asserts that, while the examples are not the result of an exhaustive search, they simply "confirm Asheville's denial that there is anything unique about Buncombe County's participation in financing the construction and/or operation of the water system which is now owned by [Asheville]." Further supporting Asheville's contention is a study done for fiscal year 2005-06 by the North Carolina League of Municipalities in cooperation with the University of North Carolina Environmental Finance Center which suggests that most municipalities in North Carolina charge both residential and commercial water utility consumers located outside a city's limits rates higher than those charged to the same class of consumers located inside a city's limits. However, these data do not include the rationales for the rate differentials between inside and outside consumers within each municipality, nor do they report the financial histories of the construction of the water systems, stating only: "Compare with caution. High rates may be justified and necessary to protect public health."

While we find ample support in the record to justify the Legislature's findings that Asheville and Buncombe County have experienced a "complicated pattern of dealings" with respect to the development and maintenance of its water distribution system, *see* Sullivan II, ch. 140, 2005 N.C. Sess. Laws 246, it is not clear from the

record that this history is one of "manifest peculiarities clearly distinguishing" Asheville and Buncombe County from other municipalities and counties across the State. *See McIntyre*, 254 N.C. at 518, 119 S.E.2d at 894. Again, in order for Sullivan II and III to be classified as general laws, they must have been enacted based on circumstances that make the water distribution system in Asheville reasonably different from those municipalities and counties excluded from Sullivan II and III such that there is "a logical basis" for treating Asheville in a different manner. *See High Point Surplus Co.*, 264 N.C. at 656, 142 S.E.2d at 702.

We recognize that " '[t]here is no constitutional requirement that a regulation, in other respects permissible, must reach every class to which it might be applied—that the Legislature must be held rigidly to the choice of regulating all or none.' " *Adams*, 295 N.C. at 693, 249 S.E.2d at 408 (quoting *Silver v. Silver*, 280 U.S. 117, 74 L. Ed. 221 (1929)). " 'It is enough that . . . [a] statute strikes at the evil where it is felt, and reaches the class of cases where it most frequently occurs.' " *Id.* However, we are not persuaded that the history of the development of the water distribution system in Asheville is necessarily where "the evil" has exclusively and "most frequently occur[red]." *See id.* Therefore, it appears that Sullivan II and III may "embrace[] less than the entire class of places to which such legislation would be necessary or appropriate having regard to the purpose for which the legislation was designed." *See Williams*, 357 N.C. at 184, 581 S.E.2d at 426 (quoting *McIntyre*, 254 N.C. at 518, 119 S.E.2d at 894). Accordingly, we hold that Sullivan II and III are local acts.

B.

1. Relating to health and sanitation

[6] Since "an act is not constitutionally invalid merely because it is local," we must now determine whether Sullivan II and III violate Article II, Section 24 of the North Carolina Constitution. *See Cheape v. Town of Chapel Hill*, 320 N.C. 549, 558, 359 S.E.2d 792, 797 (1987). Asheville contends Sullivan II and III relate to health and sanitation, and are thus violative of Article II, Section 24(1)(a) because the Supreme Court has specifically held that local acts which prescribe provisions regarding sewer and water service necessarily relate to health and sanitation and because "it is absolutely plain from the text" that the subject of Sullivan II and III is Asheville's water system. We disagree.

Constitutional Subclause (a) of Article II, Section 24, Clause 1 provides that "[t]he General Assembly shall not enact any local, private, or special act or resolution . . . [r]elating to health, sanitation, and the abatement of nuisances." N.C. Const. art. II, § 24, cl. 1(a). However, the use of the nonspecific phrase "[r]elating to" suggests that even the mere mention of a subject which connotes any relationship to health or sanitation—no matter how tenuous—might constitute an act *relating to* health and sanitation and, thus, be violative of this constitutional provision. Nevertheless, a thorough review of earlier cases that examine whether specific legislative enactments *relate to* health or sanitation reveals that, in order for a court to determine that a legislative enactment *relates to* health or sanitation, the court must conclude that an act either plainly "state[s] that *its purpose is to regulate* sanitary matters, or to regulate health[, or must conclude that the purpose of the act is to regulate health or sanitary matters after a] . . . careful perusal of the entire act, . . . [wherein] *the entire act must be considered*." *Reed v. Howerton Eng'g Co.*, 188 N.C. 39, 44, 123 S.E. 479, 481 (1924) (emphasis added). Further, "[a]lthough the legislative findings and declaration of policy have no magical quality to make valid that which is invalid, and are subject to judicial review, they are entitled to weight in construing the statute and in determining whether the statute promotes a public purpose or use under the Constitution." *Redev. Comm'n. of Greensboro v. Sec. Nat'l Bank*, 252 N.C. 595, 611, 114 S.E.2d 688, 700 (1960).

In support of its contention that Sullivan II and III relate to health and sanitation, Asheville cites *Lamb v. Board of Education*, 235 N.C. 377, 70 S.E.2d 201 (1952), *Gaskill v. Costlow*, 270 N.C. 686, 155 S.E.2d 148 (1967), *City of New Bern v. New Bern-Craven County Board of Education*, 338 N.C. 430, 450 S.E.2d 735 (1994), and *Idol v. Street*, 233 N.C. 730, 65 S.E.2d 313 (1951).

In *Lamb*, where an act "impose[d] the duty upon the County Board of Education to make provision for 'a good supply of wholesome water,' " the Court concluded it related to health and sanitation because "its sole purpose [wa]s to prescribe provisions with respect to sewer and water service for local school children in Randolph County [since it] purport[ed] to limit the power of the County Board of Education to provide for sanitation and *healthful conditions* in the schools by means of a sewerage system and an *adequate water supply*." *Lamb*, 235 N.C. at 379, 70 S.E.2d at 203 (emphasis added).

In *Gaskill*, the Court concluded that an act was related to health and sanitation because, on its face, it provided that a municipality

"shall not be required to extend any sewerage outfalls into the area to be annexed" "in the event the sewerage system of the municipality shall have been *declared to be unfit, obsolete, or a source of unlawful pollution* to adjacent streams or waterways by the State Stream Sanitation Committee." *Gaskill*, 270 N.C. at 687, 155 S.E.2d at 149 (emphasis added).

In *City of New Bern*, the Court held that the acts which "shift[ed] the responsibility for enforcing the building code from the City to the county" were "inescapabl[y]" related to health and sanitation because "both the legislature's directions for the creation of the Code and the Building Code Council's stated purposes for the different inspections under the Code evince[d] an intent to protect the health of the general public." *City of New Bern*, 338 N.C. at 436, 440, 450 S.E.2d at 739, 741. The Court reasoned that "[t]he Code regulates plumbing in an effort to maintain sanitary conditions in the buildings and structures of this state and thus directly involves sanitation, and consequently the protection of the health of those who use the buildings[, while t]he enforcement of the fire regulations protects lives from fire, explosion and health hazards." *Id.* at 440, 450 S.E.2d at 741.

Finally, in *Idol*, the General Assembly enacted a local act which consolidated the public health agencies and departments of Forsyth County and the City of Winston-Salem, established a joint city-county board of health "for regulating the public health interests of Winston-Salem and Forsyth County," and appointed a joint city-county health officer "for administering public health laws and regulations in Winston-Salem and Forsyth County." *Idol*, 233 N.C. at 733, 65 S.E.2d at 315. The Court held that it was "clear beyond peradventure" that the act related to health. *Id.*

Asheville also cites *Pulliam v. City of Greensboro*, 103 N.C. App. 748, 407 S.E.2d 567, *disc. review denied*, 330 N.C. 197, 412 S.E.2d 59 (1991), to assert that Sullivan II and III relate to health and sanitation because "[w]ater is not only vital to our good health but 'vital to clean living.' " The logical conclusion of Asheville's assertion suggests that *Pulliam* supports the proposition that a legislative enactment's mere reference to or invocation of water or a water system necessitates a conclusion that an act *relates to* health or sanitation. However, the full excerpt from *Pulliam* does not compel such a broad interpretation:

> While we recognize the public's vital interest in dependable sanitary sewer service in municipal areas and that people living in

> cities and towns expect to have such service, it may be said that in today's society, electric service is also vital and that almost no one tries to live without its benefits. *We also note with interest that those customers who don't pay their water* and sewer *bills are doomed to deprivation of that service however vital to clean living that service may be.*

Pulliam, 103 N.C. App. at 754, 407 S.E.2d at 570 (emphasis added). Thus, while *Pulliam* acknowledges that water is "vital to clean living," it also recognizes that a municipality may deny water service to consumers for *purely economic reasons*, even though those consumers may then be "doomed to deprivation" of such a "vital" service. *See id.*

As excerpted in section II(A) above, the legislative findings in the preamble for Sullivan II provide:

> *[T]he citizens of Buncombe County outside the corporate limits* of the City of Asheville now, or in the future to be, supplied water from lines connected to the waterlines currently maintained by the Asheville/Buncombe Water Authority, and replacements, extensions, and additions thereto, *are entitled to obtain water at a fair rate from the water system for which they have paid*, through taxes, through payments for water, and through direct payments by the County of Buncombe and its water and sewer districts; and
>
> . . . .
>
> . . . the Asheville/Buncombe Water Authority has developed substantial excess capacity in anticipation of the growth of population in Buncombe County and of supplying water to the additional population from facilities the cost of which has been, and in the future will be, paid out of water system revenues; and
>
> . . . .
>
> . . . the complicated pattern of dealings between the City of Asheville and the County of Buncombe regarding the provision of water to water consumers in Buncombe County connected to the waterlines currently maintained by the Asheville/Buncombe Water Authority, and replacements, extensions, and additions thereto has now given rise to the issue of the rate that the City of Asheville may charge the water consumers in Buncombe County connected to the waterlines currently maintained by the

> Asheville/Buncombe Water Authority, and replacements, extensions, and additions thereto to whom it provides water even though the Sullivan Act remains in full force and effect . . . .

Sullivan II, ch. 140, 2005 N.C. Sess. Laws 245-46 (emphasis added). Section 1 of Sullivan II provides that "*it shall be unlawful* for the City of Asheville . . . *to charge*, exact, or collect from any water consumer in Buncombe County . . . *a rate for water consumed higher than the rate charged* for the same classification of water consumer residing or located within the corporate limits of the City of Asheville." Sullivan II, ch. 140, 2005 N.C. Sess. Laws 246 (emphasis added). Section 2 provides that Asheville "*may . . . cause any user of water who shall fail to pay promptly his water rent for any month to be cut off* and his right to further use of water from the city system to be discontinued until payment of any water rent arrearages." *Id.* (emphasis added). And section 3 of Sullivan II provides that "the Board of Commissioners of *Buncombe County . . . [shall] maintain the waterlines* owned by the County of Buncombe and such water districts in proper repair *in order that there may not be a waste of water by leakage*." Sullivan II, ch. 140, 2005 N.C. Sess. Laws 247 (emphasis added).

Thus, while we agree with Asheville that it is "absolutely plain from the text" that the subject of Sullivan II is Asheville's water distribution system, based on the express language of its preamble and enabling provisions, we conclude that Sullivan II relates only to matters which are purely economic in nature. While section 1 directly addresses the economic issue of equitable rates, we think that section 2 most strongly belies Asheville's contention, since section 2 provides that a water consumer who fails to promptly pay his or her water bill can and will be "cut off" from the water supply until all arrearages are fully paid. *See* Sullivan II, ch. 140, 2005 N.C. Sess. Laws 246. If the purpose of this enactment was "relat[ed] to health and sanitation" as interpreted by the Constitution, would it not be antithetical to that purpose to allow Asheville to deprive any of its citizens access to that which is so "vital to clean living"? *See Pulliam*, 103 N.C. App. at 754, 407 S.E.2d at 570. Further, while one could interpret section 3's mandate to "maintain the waterlines" as relating to the health and sanitation of the water system and its users, the enabling language expressly states that its purpose to maintain the lines is "in order that there may not be *a waste of water by leakage*." Sullivan II, ch. 140, 2005 N.C. Sess. Laws 247. Again, we find that this language principally contemplates preventing the economic impact of wastefulness on the

water distribution system, rather than prioritizing the system's health or sanitary conditions. Therefore, we hold that Sullivan II does not relate to health or sanitation and, thus, does not violate Article II, Section 24(1)(a) of the North Carolina Constitution.

With respect to Sullivan III, while its language implicates modifications to N.C.G.S. § 160A-312 that apply to "any public enterprise" in the City of Asheville, Asheville's City Manager Jackson stated that, at the time Sullivan III was enacted, Asheville had operated only three of the ten types of public enterprises it was authorized to operate under N.C.G.S. § 160A-311: a water supply and distribution system, a public transportation system, and several off-street parking facilities. *See* N.C. Gen. Stat. § 160A-311(2), (5), and (8). Accordingly, since Sullivan III "applies only to the City of Asheville[, and] . . . shall not apply to the operation of public transportation systems or off-street parking facilities and systems as public enterprises," Sullivan III, ch. 139, 2005 N.C. Sess. Laws 244, we agree with Asheville that the limitations of Sullivan III apply solely to Asheville's management of, and responsibility for, the operation of the water distribution system. Nevertheless, as we discussed above, the mere implication of water or a water system in a legislative enactment does not necessitate a conclusion that it relates to health and sanitation in violation of the Constitution.

"The best indicia of . . . legislative purpose are 'the language of the statute, the spirit of the act, and what the act seeks to accomplish.' " *State ex rel. Comm'r of Ins. v. N.C. Rate Bureau*, 300 N.C. 381, 399, 269 S.E.2d 547, 561 (quoting *Stevenson v. City of Durham*, 281 N.C. 300, 303, 188 S.E.2d 281, 283 (1972)), *reh'g denied*, 301 N.C. 107, 273 S.E.2d 300 (1980). "In addition, a court may consider 'circumstances surrounding [the statute's] adoption which throw light upon the evil sought to be remedied.' " *Id.* (alteration in original) (quoting *State ex rel. N.C. Milk Comm'n v. Nat'l Food Stores, Inc.*, 270 N.C. 323, 332, 154 S.E.2d 548, 555 (1967)).

Although the first three editions of the act included a preamble of legislative findings mirroring those in Sullivan II, Sullivan III as ratified does not include a preamble. Thus, we will examine the plain language of Sullivan III to determine whether its express or implied purpose relates to health or sanitation.

By its terms, in addition to deleting the provision that would otherwise prohibit Asheville from being held liable for damages to those outside the corporate limits for failure to furnish any services from

the water distribution system, Sullivan III provides that Asheville "shall account for . . . [the water distribution system] in a separate fund and may not transfer any money from that fund to another except for a capital project fund established for the construction or replacement of assets for [the water distribution system]." Sullivan III, ch. 139, 2005 N.C. Sess. Laws 244. In contrast to our review of Sullivan II's provision which mandated the maintenance of the waterlines "in order that there may not be a waste of water by leakage," Sullivan II, ch. 140, 2005 N.C. Sess. Laws 247, Sullivan III identifies no such purpose tying this provision to the "evil" of economic wastefulness. In our opinion, without such an expression or any other to explain its purpose, a plain reading of this provision establishing a capital project fund "for the construction or replacement of assets" for the water distribution system could be interpreted to indicate the Legislature's intent simply to concern the growth and maintenance of a fully-functioning water distribution system in Asheville. *See* Sullivan III, ch. 139, 2005 N.C. Sess. Laws 244. According to this interpretation, the creation of such a fund restricting the use of revenue to the limited purposes of growing and maintaining the water system could "provide for . . . healthful conditions in the [community] by means of . . . an adequate water supply," *see Lamb*, 235 N.C. at 379, 70 S.E.2d at 203, and could likely prevent Asheville's water distribution system from becoming "declared to be unfit [or] obsolete." *See Gaskill*, 270 N.C. at 687, 155 S.E.2d at 149. Further, the evidence shows that during the period from October 1981 through June 2005, the water system had "been allowed to fall farther into disrepair" while Asheville and Buncombe County were "taking money from the water system," a condition which might be corrected with the creation of a fund dedicated to supporting the growth and maintenance of the water distribution system.

However, as we stated above, "we are aware that . . . '[i]t is well settled in this State that the courts have the power, and it is their duty in proper cases, to declare an act of the General Assembly unconstitutional—but it must be plainly and clearly the case' "; " '[i]f there is any reasonable doubt, it will be resolved in favor of the lawful exercise of their powers by the representatives of the people.' " *Williams*, 357 N.C. at 183, 581 S.E.2d at 425 (quoting *Glenn*, 210 N.C. at 529-30, 187 S.E. at 784). Thus, since Sullivan III was enacted on the same day as Sullivan II and contained the same legislative findings as Sullivan II in its three earlier editions before it was ratified, we cannot be certain that the legislative purpose of Sullivan III is inconsistent with

that of Sullivan II. Since any reasonable doubt must be resolved in favor of presumed constitutionality, we conclude that Sullivan III, like Sullivan II, does not relate to health or sanitation and, therefore, we hold that Sullivan III does not violate Article II, Section 24(1)(a) of the North Carolina Constitution.

2. Regulating trade

Subclause (j) of Article II, Section 24, Clause 1 provides that "[t]he General Assembly shall not enact any local, private, or special act or resolution . . . [r]egulating labor, trade, mining, or manufacturing." N.C. Const. art. II, § 24, cl. 1(j). "In interpreting the meaning of Article II, section 24[(1)](j), [the Supreme] Court has previously defined the word 'trade' to mean a business venture for profit and includes any employment or business embarked in for gain or profit." *Cheape*, 320 N.C. at 558, 359 S.E.2d at 798 (internal quotation marks omitted); *see also High Point Surplus Co.*, 264 N.C. at 655, 142 S.E.2d at 701-02 ("An act which restricts or regulates the operation, engaging in or carrying on of business . . . *regulates trade*."). "The verb 'to regulate' has been defined as meaning to govern or direct according to *rule*, . . . to bring under *control* of law or constituted authority." *Cheape*, 320 N.C. at 559, 359 S.E.2d at 798 (internal quotation marks omitted). Thus, "[b]efore a local act will fall under the prohibition of Article II, section 24[(1)](j), its provisions must fairly be said to 'regulate trade' as defined herein." *Id.*

The Supreme Court has also determined that the term "trade" "refers to commerce *engaged in by citizens of the State*, *and not* a restricted activity *conducted by the State itself*." *Gardner v. City of Reidsville*, 269 N.C. 581, 591-92, 153 S.E.2d 139, 148 (1967) (emphasis added). The Court has further stated that "cities[] exist solely as political subdivisions of the State and are creatures of statute [enacted by the General Assembly]," *Davidson County v. City of High Point*, 321 N.C. 252, 257, 362 S.E.2d 553, 557 (1987), and so have "no inherent powers, and can exercise only such powers as are expressly conferred by the General Assembly and such as are necessarily implied by those expressly given." *High Point Surplus Co.*, 264 N.C. at 654, 142 S.E.2d at 701; *see also Cheape*, 320 N.C. at 560, 359 S.E.2d at 798 ("A municipality, . . . being merely a creature of the General Assembly with the ability to exercise only those powers expressly conferred upon it and those necessarily implied thereby, may require a specific grant of power before it has the capacity to engage in otherwise permissible activities.") (citation omitted).

Asheville argues that when a municipality is operating in a proprietary capacity, a municipality must be treated by the General Assembly in the same manner as a business or private corporation. In support of this assertion, Asheville cites the following language from *Piedmont Aviation*: "[T]he managing board of the [municipal airport a]uthority, [acting in its proprietary capacity] in determining landing fees and rentals which it will charge the users of its facilities, acts as does the board of directors of a private corporation owning and operating a like facility." *Piedmont Aviation*, 288 N.C. at 103, 215 S.E.2d at 555. However, it is our opinion that Asheville construes this language more broadly than its context supports:

> Thus, the managing board of the Authority, in determining landing fees and rentals which it will charge the users of its facilities, acts as does the board of directors of a private corporation owning and operating a like facility, *subject only to limitations imposed upon it by statute* or by contractual obligations assumed by it. Our attention has been directed to no statutory limitation imposed upon the Authority in the matter of fixing landing fees and rentals except the provision in Ch. 755 of the Session Laws of 1959 authorizing the Authority to charge "reasonable and adequate" fees and rents, and the provision of G.S. § 63-53(5) stating that the charges for the use of its properties "shall be reasonable and uniform for the same class of service and established with due regard to the property and improvements used and the expense of operation to the municipality." No provision in these statutes requires that the Authority conduct a hearing, receive evidence and make findings of fact or that it follow any other procedural course in determining the landing fees or rentals to be charged by it. Nothing in these statutes requires the Authority to give notice to present or prospective users of its properties that the Authority is contemplating a change in such fees and rental charges. The petitioners were notified of the increases more than three months before they were to become effective.

Id. (emphasis added). We interpret this full excerpt to mean that, while acting in its proprietary capacity, the municipal airport authority was not bound by the legislative enactments at issue in *Piedmont Aviation* to provide notice and a hearing while it was *considering* what fees it would charge users for landing fees or rentals; instead, it was bound only by the limiting enabling statutes that mandated the fees be "reasonable," "adequate," and "uniform." In

other words, but for the limiting enabling statutes, the municipality was not accountable to its users while it considered what fees it would charge and, *in that way only*, it had discretion similar to that of "the board of directors of a private corporation owning and operating a like facility." *See id.*

Asheville cites no other authority to support its assertion that, when a municipality acts in its proprietary capacity, it is no longer a political subdivision of the State, but rather *becomes* a citizen of the State and must be treated in the same manner as a business or private corporation, and we are not persuaded by its argument. Therefore, we hold that Asheville, acting in its proprietary capacity to operate the water distribution system, is not a citizen of the State engaging in "trade" for the purpose of Article II, Section 24(1)(j) of the North Carolina Constitution. Asheville's assignments of error that Sullivan II and III violate Article II, Section 24(1)(j) are overruled.

III.

Asheville next contends the trial court erred by concluding that Sullivan II and III do not (A) violate the rule established in *Asbury v. Town of Albemarle*, 162 N.C. 247, 78 S.E. 146 (1913), and (B) violate the "law of the land" clause set out in Article I, Section 19 of the North Carolina Constitution.

A.

[7] In *Asbury*, the Court heard an action in which the owner of a private waterworks plant ("plaintiff") sought to enjoin a municipality from constructing its own municipal waterworks. Plaintiff complained that the municipality was in violation of a general law known as the Battle Act, which provided:

> [W]henever any incorporated town or city, which under this or by special act has been or may be authorized, from the sale of bonds, or otherwise, to build, operate, and maintain a public waterworks . . . there shall have been constructed in said town or city by any private or *quasi*-public corporation . . . waterworks . . . then in active operation and serving the public, which construction or operation was authorized by said town or city . . . then before constructing any proposed system of waterworks . . . heretofore or hereafter authorized by law, along or upon the streets occupied by such private or *quasi*-public corporation, the town or city within which such utilities are located and owned, proposing to build any public system of

> waterworks, shall, before undertaking to do so, first acquire, either by purchase or condemnation, the property of such system already laid, operated, and maintained by such private or *quasi*-public corporation.

Asbury, 162 N.C. at 248, 78 S.E. at 147-48 (omissions in original). After a ruling for plaintiff at trial, the municipality appealed, challenging the "constitutionality of the [Battle Act] as being an invasion of the rights of municipal corporations under the organic law." *Id.* at 252, 78 S.E. at 149. The Court stated that compelling the municipality to purchase plaintiff's system of waterworks "would be *to take the money of the taxpayers and devote it to a private use* exclusively, and to give something for nothing—a result not contemplated by the statute." *Id.* (emphasis added). The Court stated that, "[i]f this be a valid exercise of legislative authority, then the right to exercise its own discretion in a purely local matter is taken from the municipality *and the money of the taxpayers may be donated to a private concern*." *Id.* (emphasis added). Thus, the Court reasoned that, as a result of this legislation, "the city may be compelled [by the General Assembly] to purchase something which, according to the judgment of its own authorities, is of no sort of value or use to it." *Id.* The Court held that "the statute under consideration is void in so far as it attempts to control the exercise of discretion by the defendant in the management of its purely private and property rights." *Id.* at 256-57, 78 S.E. at 151.

In the present case, Asheville contends Sullivan II and III "impermissibly intrude" on the decision-making authority of Asheville with respect to its purely proprietary and private activities, and directs our attention to the following excerpt from *Asbury*:

> It may be admitted that corporations . . . such as . . . cities, may in many respects be subject to legislative control. But it will hardly be contended that even in respect to such corporations the legislative power is so transcendent that it may, at its will, take away the private property of the corporation, or change the uses of its private funds acquired under the public faith.

Id. at 253-54, 78 S.E. at 149-50 (omissions in original) (internal quotation marks omitted). Asheville argues that Sullivan II and III achieve the same purpose of the Battle Act, specifically to compel the municipality to enter into a contract with another party which the municipality "deem[s] to be disadvantageous" and not in its best interests. Asheville suggests that the private entity which tried to compel the

municipality to give taxpayer money to its own private interest in *Asbury* is analogous to Buncombe County "procur[ing]" legislation that would secure for it all of the benefits enjoyed under the Water Agreement, without imposing upon Buncombe County any of the same responsibilities that had existed under the former contract. We are not persuaded that *Asbury* is analogous to the present case in the way that Asheville espouses.

The matter before the Court in *Asbury* was a cause of action arising out of "a result not contemplated by the [Battle Act]," wherein the General Assembly had effectively compelled the municipality "to take the money of [its] taxpayers and devote it to a private use exclusively"—to purchase a privately-owned waterworks facility which the municipality had determined to be "of no sort of value or use to it" because its capacity was well below that which the municipality required. *See id.* at 251-52, 78 S.E. at 149. Here, under Sullivan II and III, the General Assembly does not compel, either directly or indirectly, the transfer of taxpayer money to a private corporation to procure property from which its citizens do not derive a useful benefit. Additionally, neither Sullivan II nor Sullivan III compel Asheville to continue to operate the water distribution system and as such do not compel the use of taxpayer money for this public enterprise if Asheville determines that operating the water distribution system is no longer profitable to the municipality or its citizens. Further, as Sullivan II does not impose an upper limit on the rates Asheville may charge its consumers—requiring only that the rates charged for each classification of water consumer be uniform—Asheville is not forbidden to set the price for its service that it believes is necessary to yield a fair return on its property. For the same reason, Asheville is not prevented by either Sullivan II or III from offering its water services on whatever terms and conditions it believes are necessary to protect the operational and financial integrity of the system.

Asheville states that Sullivan II forbids it from giving preference in water rates to Asheville's citizens and taxpayers over Buncombe County citizens who reside outside Asheville's corporate limits. Asheville further asserts that, under Sullivan III, it is forbidden even to enjoy the profits from its property, being told that it may not use those profits for the benefit of Asheville's citizens in the manner thought best by the City Council of Asheville. Although we cannot disagree with these statements, "[i]t is critical to our system of government and the expectation of our citizens that the courts not assume the role of legislatures. . . . [J]udges have not been entrusted

by the people of this State to be legislators." *State v. Arnold*, 147 N.C. App. 670, 673, 557 S.E.2d 119, 121 (2001), *aff'd per curiam*, 356 N.C. 291, 569 S.E.2d 648 (2002). Accordingly, the power of this Court is limited to carrying out its duty "to examine a statute and determine its constitutionality when the issue is properly presented." *Id.* Since we do not agree with Asheville that Sullivan II and III are unconstitutional for the same reason that the Battle Act was unconstitutional in *Asbury*, we hold that Sullivan II and III do not violate the rule announced in *Asbury*.

B.

[8] Next, Asheville contends the trial court erred by concluding that Sullivan II and III do not violate the "law of the land" clause of Article I, Section 19 of the North Carolina Constitution. For the reasons stated below, we conclude that Asheville has abandoned this assignment of error.

Article I, Section 19 of the Constitution of North Carolina provides, in part, that "[n]o person shall be . . . in any manner deprived of his life, liberty, or property, but by the law of the land." N.C. Const. art. I, § 19. The North Carolina "law of the land" clause is interpreted to be analogous with the Fourteenth Amendment "due process of law" clause. *See Treants Enter., Inc. v. Onslow County*, 83 N.C. App. 345, 351, 350 S.E.2d 365, 369 (1986), *aff'd by* 320 N.C. 776, 360 S.E.2d 783 (1987); *see also Mark IV Beverage, Inc. v. Molson Breweries USA, Inc.*, 129 N.C. App. 476, 486, 500 S.E.2d 439, 446, *disc. review denied*, 349 N.C. 231, 515 S.E.2d 705 (1998). These clauses " 'have been consistently interpreted to permit the state, through the exercise of its police power, to regulate economic enterprises provided the regulation is rationally related to a proper governmental purpose.' " *Mark IV Beverage, Inc.*, 129 N.C. App. at 486, 500 S.E.2d at 446 (quoting *Poor Richard's, Inc. v. Stone*, 322 N.C. 61, 64, 366 S.E.2d 697, 699 (1988)). "A single standard has traditionally determined whether legislation . . . violate[s] the 'law of the land' clause: the law must have a rational, real and substantial relation to a valid governmental objective (i.e., the protection of the public health, morals, order, safety, or general welfare)." *Treants Enter., Inc.*, 83 N.C. App. at 352, 350 S.E.2d at 369-70. "The inquiry is thus two-fold: (1) Does the regulation have a legitimate objective? and (2) If so, are the means chosen to implement that objective reasonable?" *Id.* at 352, 350 S.E.2d at 370.

As the party challenging the constitutionality of the statute, Asheville has the burden of establishing its unconstitutionality. *See In re House of Raeford Farms, Inc. v. Brooks*, 63 N.C. App. 106, 109, 304 S.E.2d 619, 621 (1983), *disc. review denied*, 310 N.C. 153, 311 S.E.2d 291 (1984). In its brief, Asheville makes no argument challenging Sullivan II or III under the "law of the land" clause. For example, Asheville does not identify the relevant text of the constitutional provision it challenges; it does not identify the standard or test upon which courts must rely to determine whether a legislative act is violative of the "law of the land" clause; and most importantly, Asheville does not provide any argument as to *why* this Court should hold that Sullivan II and III do not "have a rational, real and substantial relation to a valid governmental objective." *See Treants Enter., Inc.*, 83 N.C. App. at 352, 350 S.E.2d at 369-70. In the section of its brief in which this assignment of error is referenced, Asheville directs its complete attention to arguing Assignment of Error 7, regarding its contention that Sullivan II and III violate the rule announced in *Asbury*, as addressed in section III(A) above. Asheville's only mention of the "law of the land" clause in this section of its brief is relegated to a footnote, which states:

> The trial court's only discussion of Article I, § 19 missed the mark completely, making the point that the Sullivan Acts do not violate the "equal protection" component of the constitutional provision. But *Asbury*, and Asheville's claim based on the case, are not grounded on the concept of equal protection but instead the doctrine of due process.

The Rules of Appellate Procedure "govern procedure in all appeals from the courts of the trial division to the courts of the appellate division," N.C.R. App. P. 1(a) (2008), and specify the required content in the parties' briefs. *See* N.C.R. App. P. 28. "It is not the role of the appellate courts . . . to create an appeal for an appellant." *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (per curiam), *reh'g denied*, 359 N.C. 643, 617 S.E.2d 662 (2005). Since "[q]uestions raised by assignments of error in appeals from trial tribunals but not then presented and discussed in a party's brief, are deemed abandoned," N.C.R. App. P. 28(a), we conclude that Asheville has abandoned this assignment of error.

IV.

[9] Finally, Asheville contends the trial court erred by rejecting its argument that section 1 of Sullivan III unconstitutionally creates spe-

cial privileges for an ineligible class of persons in violation of the exclusive emoluments prohibition contained in Article I, Section 32 of the North Carolina Constitution. Asheville argues that Sullivan III's modifications of N.C.G.S. § 160A-312(a) create a special class of persons upon whom an unparalleled benefit is conferred by allowing property owners in Buncombe County located outside the City of Asheville who buy water from Asheville to sue the City to recover damages in an action for negligence in the event Asheville fails to supply sufficient quantities of water for their uses and purposes. For the reasons discussed below, we overrule this assignment of error.

Article I, Section 32 of the North Carolina Constitution provides that "[n]o person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services." N.C. Const. art. I, § 32. The purpose of this constitutional provision, as articulated by our Supreme Court, is "to prevent 'the community' from surrendering its power to another 'person or set of persons' by grant of exclusive or separate emoluments or privileges unless they are granted 'in consideration of public services.' It is not retention of powers but alienation of powers that is prohibited." *Madison Cablevision, Inc. v. City of Morganton*, 325 N.C. 634, 655, 386 S.E.2d 200, 212 (1989). A statute which confers an exemption that benefits a particular group of persons is not an exclusive emolument or privilege within the meaning of Article I, Section 32 if: "(1) the exemption is intended to promote the general welfare rather than the benefit of the individual, and (2) there is a reasonable basis for the legislature to conclude the granting of the exemption serves the public interest." *Emerald Isle*, 320 N.C. at 654, 360 S.E.2d at 764. "Our case law, however, teaches that not every classification which favors a particular group of persons is an 'exclusive or separate emolument or privilege' within the meaning of the constitutional prohibition." *Lowe v. Tarble*, 312 N.C. 467, 470, 323 S.E.2d 19, 21 (1984), *aff'd on reh'g*, 313 N.C. 460, 329 S.E.2d 648 (1985). Accordingly, we must first determine whether Sullivan III's modifications to N.C.G.S. § 160A-312(a) confer an exclusive benefit on Buncombe County water consumers who live outside of Asheville's city limits.

Prior to Sullivan III, and as it currently applies to all municipalities except Asheville, N.C.G.S. § 160A-312(a) provides:

> A city shall have authority to acquire, construct, establish, enlarge, improve, maintain, own, operate, and contract for the oper-

> ation of any or all of the public enterprises as defined in this Article *to furnish services to the city and its citizens*. Subject to Part 2 of this Article, a city may acquire, construct, establish, enlarge, improve, *maintain, own, and operate any public enterprise outside its corporate limits, within reasonable limitations, but in no case shall a city be held liable for damages to those outside the corporate limits for failure to furnish any public enterprise service.*

N.C. Gen. Stat. § 160A-312(a) (emphasis added). As it currently applies to Asheville following Sullivan III, N.C.G.S. § 160A-312(a) provides:

> A city shall have authority to acquire, construct, establish, enlarge, improve, maintain, own, operate, and contract for the operation of any or all of the public enterprises as defined in this Article *to furnish services to the city and its citizens and other areas and their citizens located outside the corporate limits of the city*. Subject to Part 2 of this Article, a city may acquire, construct, establish, enlarge, improve, *maintain, own, and operate any public enterprise outside its corporate limits, within reasonable limitations.*

Sullivan III, ch. 139, 2005 N.C. Sess. Laws 243 (emphasis added). As discussed in section II(B)(1) above, Sullivan III applies only to the water distribution system Asheville operates in its proprietary capacity. Therefore, we must determine whether the Sullivan III modifications that allow water consumers located outside Asheville's corporate limits to hold Asheville liable for its failure to furnish water service actually confer an exclusive benefit on non-city consumers which is not available to water consumers located within Asheville's corporate limits.

At the outset of its argument under this assignment of error, Asheville states that, "[u]nder well-established doctrine," Asheville cannot be held liable in negligence for failure to supply a sufficient quantity of water to its own citizens, i.e., those water consumers located within its corporate limits. Asheville states that this rule "is an instance of the common law 'public duty' doctrine," which holds that a governmental entity cannot be sued in negligence "on account of its failure to perform a duty which it owed to the public generally and equally." *See generally Multiple Claimants v. N.C. Dep't of Health & Hum. Servs.*, 361 N.C. 372, 646 S.E.2d 356 (2007) (defining the rule of the common law public duty doctrine—that a municipality

will *not* be held liable when performing certain *governmental* functions—first articulated in *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), identifying its purpose and its two exceptions, and chronicling its limited expansion and clarification under *Stone v. N.C. Dep't of Labor*, 347 N.C. 473, 495 S.E.2d 711, *cert. denied*, 525 U.S. 1016, 142 L. Ed. 2d 449 (1998), *Hunt v. N.C. Dep't of Labor*, 348 N.C. 192, 499 S.E.2d 747 (1998), and *Myers v. McGrady*, 360 N.C. 460, 628 S.E.2d 761 (2006)). Asheville posits that Sullivan III confers a benefit on non-city water consumers which the public duty doctrine effectively disallows for its own citizens and property taxpayers. In support of this suggestion, Asheville directs this Court's attention to *Howland v. City of Asheville*, 174 N.C. 749, 94 S.E. 524 (1917), and *Mabe v. City of Winston-Salem*, 190 N.C. 486, 130 S.E. 169 (1925). However, based on the facts of the present case, we believe Asheville's reliance on these cases to sustain its argument is misplaced.

Howland and *Mabe* each involved claims made against a municipality by plaintiffs who alleged that the municipality's failure to provide sufficient water pressure from, and unobstructed access to, water hydrants connected to the municipally-owned waterworks system resulted in the negligent destruction of their homes by fire. In *Howland*, the Court concluded that when a city is exercising a governmental function "solely for the benefit of the public, *it incurs no liability for the negligence of its officers*, though acting under color of office, unless some statute [expressly or by necessary implication] subjects the corporation to pecuniary responsibility for such negligence." *Howland*, 174 N.C. at 806, 94 S.E. at 525 (emphasis added) (alteration in original) (internal quotation marks omitted); *see also id.* (Clark, C.J., concurring) ("[W]here a city or town is maintaining a system of municipal waterworks[,] . . . *the liability* of the municipality to employees, to the public, to patrons and to any others *is the same as a privately owned water company*, for the reason that *the municipality is then operating a business enterprise, and not governmentally*.") (emphasis added). In *Mabe*, the Court similarly concluded that the municipality could not be held liable for damage to plaintiff's home because it was acting in its governmental capacity. *See generally Mabe*, 190 N.C. 486, 130 S.E. 169 (1925).

As we have addressed throughout this opinion, and according to the words of its own brief, Asheville "ha[s] *repeatedly emphasized*" that the sale of water outside a municipality's limits is discretionary and not part of any public duty; it is done for profit and "not as a

means of regulating anything." (Emphasis added.) In fact, as we discussed in section I above, Asheville built its challenge to the Court's holding in *Candler* around its assertion that the Court erroneously concluded that Asheville's operation of its water distribution system was a *governmental*, *rather than a proprietary*, function. However, since *Howland* and *Mabe* held that the municipalities were not liable to plaintiffs *because* the Court determined that the municipality-owned systems were operated in their *governmental*, *not proprietary* capacities, *Howland* and *Mabe* and the public duty doctrine can *only* be relevant to this assignment of error *if* Asheville is contending that the operation of its water distribution system is a governmental, rather than proprietary, function.

We believe that *Bowling v. City of Oxford*, 267 N.C. 552, 148 S.E.2d 624 (1966), states the rule that is relevant to determining whether Sullivan III confers a benefit on non-city water consumers which Asheville's own citizens may not demand from the City:

> When a city or town engages in an activity which is not an exercise of its governmental function but is proprietary in nature, the city, like an individual or a privately owned corporation engaged in the same activity, is liable in damages for injury to persons or property due to its negligence or other wrongful act in the conduct of such activity. . . .
>
> . . . .
>
> When a municipal corporation operates a system of waterworks for the sale by it of water for private consumption and use, it is acting in its proprietary or corporate capacity and is liable for injury or damage to the property of others to the same extent and upon the same basis as a privately owned water company would be.

Bowling, 267 N.C. at 557, 148 S.E.2d at 628. Since the public duty doctrine and the immunity it grants Asheville and other municipalities from liability in tort by its own citizens is not applicable to a municipality's operation of a *proprietary* activity, we find that Sullivan III's modifications to N.C.G.S. § 160A-312(a) effectively put Asheville's non-city water consumers on equal footing with Asheville's city water consumers. Section 1 of Sullivan III simply allows Asheville to be held liable in tort by *all* water consumers of its proprietary water distribution system according to the rule stated in *Bowling*. Thus, we conclude that the modifications to N.C.G.S. § 160A-312(a) under Sullivan

III do not invoke Article I, Section 32 of the North Carolina Constitution because the modifications do not confer an exclusive benefit on water consumers located outside Asheville's corporate limits which is not already shared by water consumers located within Asheville's corporate limits.

The trial court's order granting defendants' cross-motions for summary judgment and denying Asheville's motion for summary judgment is affirmed.

Affirmed.

Judges STEELMAN and STEPHENS concur.

HARRIETT HURST TURNER AND JOHN HENRY HURST, PLAINTIFFS v. THE HAMMOCKS BEACH CORPORATION, NANCY SHARPE CAIRD, SETH DICKMAN SHARPE, SUSAN SPEAR SHARPE, WILLIAM AUGUST SHARPE, NORTH CAROLINA STATE BOARD OF EDUCATION, ROY A. COOPER, III, IN HIS CAPACITY AS ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA, DEFENDANTS

No. COA07-1287

(Filed 19 August 2008)

1. Appeal and Error— appealability—denial of motion to dismiss—collateral estoppel

Defendant's appeal from the trial court's interlocutory order denying its motion to dismiss based upon collateral estoppel was immediately appealable since it affected a substantial right, because: (1) in contrast to *Foster*, 181 N.C. App. 152 (2007), the prior action upon which defendant in the present case relied in support of its defense of collateral estoppel did result in a final adjudication on the merits; and (2) the present action presented the possibility of a result inconsistent with the prior court's decision.

2. Collateral Estoppel and Res Judicata— motion to dismiss—accounting—termination of trust—reversion to contingent beneficiaries—breach of fiduciary duty

The trial court erred in an accounting, termination of trust and reversion to contingent beneficiaries, and breach of fiduciary duty case by denying defendant corporation's motion to dismiss

under N.C.G.S. § 1A-1, Rule 12(b)(6) based on collateral estoppel, and the case is reversed and remanded with instructions to grant the motion to dismiss, because: (1) plaintiffs did not retain future interests in the property that vested in defendant following the 1987 consent judgment; and (2) this issue was litigated and decided against plaintiffs in the prior action, and plaintiffs cannot now relitigate the issue as a basis for the claims they assert in the present action.

Judge TYSON dissenting.

Appeal by Defendant The Hammocks Beach Corporation from order entered 23 August 2007 by Judge R. Allen Baddour, Jr. in Superior Court, Wake County. Heard in the Court of Appeals 2 April 2008.

The Francis Law Firm, PLLC, by Charles T. Francis, for Plaintiffs-Appellees.

Hunton & Williams LLP, by Anthony R. Foxx and Frank E. Emory, Jr., for Defendant-Appellant The Hammocks Beach Corporation.

McGEE, Judge.

The Hammocks Beach Corporation (Defendant) appeals from the trial court's order denying its motion to dismiss under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). For the reasons set forth herein, we reverse and remand with instructions to the trial court to grant Defendant's motion to dismiss.

Harriett Hurst Turner and John Henry Hurst (Plaintiffs) filed a complaint on 15 December 2006 against Defendant and several other defendants who are not parties to this appeal. Plaintiffs' claims arose out of the administration of a trust created by deed in 1950 (the 1950 deed) by Dr. William Sharpe (Dr. Sharpe).

Specifically, Plaintiffs alleged that in 1923, Dr. Sharpe, who was a neurosurgeon from New York, purchased 810 acres on the mainland in Onslow County, North Carolina. Subsequently, in 1930 and 1931, Dr. Sharpe "purchased adjacent property consisting of approximately 2,000 acres of sandy beach outer banks (known as Bear Island) and approximately 7,000 acres of marshland." The high land on the mainland portion of the property was known as "the Hammocks."

According to Plaintiffs' complaint, Dr. Sharpe became friends with John and Gertrude Hurst (the Hursts), an Onslow County couple who moved onto Dr. Sharpe's property as its managers and caretakers. After many years of a mutually beneficial business relationship and personal friendship between Dr. Sharpe and the Hursts, Dr. Sharpe advised the Hursts that he wanted to devise the Hammocks to them. However, as reflected in an agreement dated 6 September 1950 (the 1950 agreement), recorded in the Onslow County Registry, "Gertrude Hurst, having formerly served as a black teacher in the then racially segregated public school system, requested Dr. Sharpe instead make a gift of the property in such manner that African-American teachers and their then existing organizations could enjoy the property." Plaintiffs further alleged as follows:

> Pursuant to [Gertrude] Hurst's request, and rather than wait until his death, Dr. Sharpe, in 1950, by deed of gift, deeded certain real property to a nonprofit corporation, as trustee. The Hammocks Beach Corporation was the name given to the trustee entity, and its charter spelled out its purpose—to administer the property given to it by Dr. Sharpe "primarily for the teachers in public and private elementary, secondary and collegiate institutions for Negroes in North Carolina . . . and for such other groups as are hereinafter set forth." The deed to The Hammocks Beach Corporation as trustee restricted the use of the property "for the use and benefit of the members of The North Carolina Teachers Association, Inc., and such others as are provided for in the Charter of the Hammocks Beach Corporation." The deed is recorded in the Onslow County Register of Deeds at Deed Book 221, Page 636[.]

The 1950 deed specifically made provision for the property in the event that the purposes of the trust became impossible or impracticable:

> IT IS FURTHER PROVIDED AND DIRECTED by the said grantors, parties of the first part, that if at any time in the future it becomes impossible or impractical to use said property and land for the use as herein specified and if such impossibility or impracticability shall have been declared to exist by a vote of the majority of the directors of the Hammocks Beach Corporation, Inc., the property conveyed herein may be transferred to The North Carolina State Board of Education, to be held in trust for the purpose herein set forth, and if the North Carolina State

> Board of Education shall refuse to accept such property for the purpose of continuing the trust herein declared, all of the property herein conveyed shall be deeded by said Hammocks Beach Corporation, Inc. to Dr. William Sharpe, his heirs and descendants and to John Hurst and Gertrude Hurst, their heirs and descendants; The Hurst family shall have the mainland property and the Sharpe family shall have the beach property[.]

Plaintiffs further alleged that in a prior action filed by Defendant in 1986,

> the Sharpe and Hurst heirs contended that fulfillment of the trust terms had become impossible or impracticable, that The Hammocks Beach Corporation had acted capriciously and contrary to the intent of the settlor in not declaring its recognition of such, and that the court should declare the trust terminated and either mandate a conveyance of all of the property to the Sharpe and Hurst families or adjudicate title in their names.

However, prior to trial in the earlier action, the parties reached a settlement, which was approved by the trial court in a consent judgment (the 1987 consent judgment). Plaintiffs in the present action cited portions of the 1950 deed, the 1950 agreement, and the 1987 consent judgment in their complaint.

Plaintiffs also alleged that "[a]s in 1987, fulfillment of the trust terms has become impossible or impracticable." Plaintiffs alleged claims for (1) an accounting, (2) "Termination of Trust and Reversion to Contingent Beneficiaries," and (3) breach of fiduciary duty. In support of Plaintiffs' claim for an accounting, Plaintiffs alleged that they were "remainder beneficiaries and interested parties" under the 1950 deed. Similarly, under their claim for "Termination of Trust and Reversion to Contingent Beneficiaries," Plaintiffs alleged that they were "contingent beneficiaries" of the 1950 deed. In support of their claim for breach of fiduciary duty, Plaintiffs also alleged that they were "remainder beneficiaries and interested persons" under the 1950 deed.

Defendant filed a motion to dismiss and a motion for a protective order on 5 July 2007. Regarding its motion to dismiss, Defendant asserted as follows:

> Pursuant to the [1987] Consent Judgment, Plaintiffs have no rights to the property that is the subject of this lawsuit and therefore no further rights as beneficiaries of the trust to an account-

> ing or a claim of breach of fiduciary duty. To the extent Plaintiffs seek to relitigate that issue now, they are precluded from doing so by the doctrine of issue preclusion.

Defendant filed a memorandum in support of its motion to dismiss, and Plaintiffs filed a memorandum in opposition to Defendant's motion to dismiss. The trial court entered an order denying Defendant's motion to dismiss on 23 August 2007. Defendant appeals.

I.

[1] We first address the interlocutory nature of this appeal. "In general, the denial of a motion to dismiss is interlocutory and thus not immediately appealable." *McCarn v. Beach*, 128 N.C. App. 435, 437, 496 S.E.2d 402, 404, *disc. review denied*, 348 N.C. 73, 505 S.E.2d 874 (1998). However, immediate review of an interlocutory order is available: (1) where the trial court certifies, pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b), that there is no just reason for delay of an appeal from a final order as to one or more, but not all, of the claims; and (2) where the interlocutory order affects a substantial right in accordance with N.C. Gen. Stat. § 1-277(a). *Sharpe v. Worland*, 351 N.C. 159, 161-62, 522 S.E.2d 577, 579 (1999).

In the case before us, the trial court's order from which Defendant appeals does not contain a Rule 54(b) certification. Defendant thus argues that the trial court's order denying its motion to dismiss based upon collateral estoppel affects a substantial right.

Whether or not "a substantial right is affected is determined on a case-by-case basis." *McCallum v. N.C. Coop. Extension Serv.*, 142 N.C. App. 48, 50, 542 S.E.2d 227, 231, *disc. review denied*, 353 N.C. 452, 548 S.E.2d 527 (2001). In *McCallum*, our Court recognized that "[l]ike *res judicata*, collateral estoppel (issue preclusion) is ' "designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally." ' " *Id.* at 51, 542 S.E.2d at 231 (quoting *King v. Grindstaff*, 284 N.C. 348, 356, 200 S.E.2d 799, 805 (1973) (quoting *Commissioner v. Sunnen*, 333 U.S. 591, 599, 92 L. Ed. 898, 907 (1948))). Our Court further recognized that "[u]nder collateral estoppel, parties are precluded from retrying fully litigated issues that were decided in any prior determination, even where the claims asserted are not the same." *Id.* Therefore, our Court held as follows:

> The denial of summary judgment based on collateral estoppel, like *res judicata*, may expose a successful defendant to repeti-

> tious and unnecessary lawsuits. Accordingly, we hold that the denial of a motion for summary judgment based on the defense of collateral estoppel may affect a substantial right, and that [the] defendants' appeal, although interlocutory, is properly before us.

Id.

Our Court recently held that a trial court's order denying a Rule 12(b)(6) motion to dismiss based in part upon a rejection of the defendants' affirmative defense of collateral estoppel affected a substantial right in *Strates Shows, Inc. v. Amusements of Am., Inc.*, 184 N.C. App. 455, 646 S.E.2d 418 (2007). In *Strates*, as in the case before us, several of the defendants appealed from the denial of their motions to dismiss based upon collateral estoppel. *Id.* at 459, 646 S.E.2d at 422. Our Court held that "[the] defendants' appeal is properly before us[.]" *Id.* at 459, 646 S.E.2d at 422. Likewise, in the present case, we hold the trial court's order denying Defendant's motion to dismiss based upon collateral estoppel affects a substantial right, is immediately appealable, and is properly before us. *See id.*

The dissent cites *Foster v. Crandell*, 181 N.C. App. 152, 638 S.E.2d 526 (2007), and argues that "Defendant has failed to meet its burden of showing that the rejection of its issue preclusion or collateral estoppel defense will result in two inconsistent verdicts." Although *Foster* is distinguishable from the present case, *Foster* supports our decision to review this interlocutory appeal.

In *Foster*, the defendants filed an answer to the plaintiffs' complaint and later filed a motion for judgment on the pleadings. *Id.* at 159, 638 S.E.2d at 532. In support of their motion, the defendants argued that the plaintiffs' prior settlement with two non-parties barred the plaintiffs' recovery in the current action. *Id.* The trial court denied the defendants' motion. *Id.* Following discovery, the defendants moved for summary judgment, again arguing, *inter alia*, that the plaintiffs' prior settlement barred the plaintiffs' recovery in the current action. *Id.* The trial court denied the motion, and the defendants appealed. *Id.* at 159-60, 638 S.E.2d at 532. While recognizing that an order rejecting the defenses of *res judicata* and collateral estoppel can affect a substantial right, our Court in *Foster* held that the summary judgment order appealed from in that case did not affect a substantial right because the prior action on which the defendants relied in support of their defenses of *res judicata* and collateral estoppel did not result in a final determination on the merits "by either a jury or a judge[.]" *Id.* at 162-64, 638 S.E.2d at 533-34. Specifically, the

defendants asserted that the plaintiffs' prior settlement and accompanying dismissal barred the plaintiffs' current action. *Id.* at 163, 638 S.E.2d at 534. However, because the prior settlement was not a final adjudication on the merits for purposes of *res judicata* and collateral estoppel, our Court held that "there is no possibility of a result inconsistent with a prior jury verdict or a prior decision by a judge." *Id.*

In contrast to *Foster*, the prior action upon which Defendant in the present case relies in support of its defense of collateral estoppel did result in a final adjudication on the merits. Specifically, Defendant argues that the 1987 consent judgment was a final adjudication on the merits that bars the present action. A consent judgment is a final judgment on the merits for purposes of *res judicata* and collateral estoppel. *NationsBank of N.C. v. American Doubloon Corp.*, 125 N.C. App. 494, 504, 481 S.E.2d 387, 393, *disc. review denied*, 346 N.C. 282, 487 S.E.2d 551 (1997); *see also McLeod v. McLeod*, 266 N.C. 144, 153, 146 S.E.2d 65, 71 (1966) (holding that "a consent judgment is *res judicata* as between the parties upon all matters embraced therein"); *Nash Cty. Bd. of Ed. v. Biltmore Co.*, 640 F.2d 484, 487 n.5 (4th Cir. 1981), *cert. denied*, 454 U.S. 878, 70 L. Ed. 2d 188, *reh'g denied*, 454 U.S. 1117, 70 L. Ed. 2d 654 (1981) (noting that "North Carolina law gives *res judicata* effect to consent judgments" (citing *Simpson v. Plyler*, 258 N.C. 390, 397, 128 S.E.2d 843, 848 (1963); *McRary v. McRary*, 228 N.C. 714, 719, 47 S.E.2d 27, 31 (1948))). Therefore, because the prior action resulted in a final judgment on the merits, the present action presents the possibility of a result inconsistent with the prior trial court's decision. Accordingly, we hold Defendant has demonstrated that the order appealed from affects a substantial right and is immediately appealable.

II.

[2] We next determine whether the trial court's order denying Defendant's motion to dismiss was in error. In support of Plaintiffs' claims in the present action, Plaintiffs alleged that they were remainder or contingent beneficiaries under the 1950 deed. In response to these allegations, Defendant contends that Plaintiffs did not retain any rights to the real property that vested in Defendant based upon the provisions of the 1987 consent judgment. Therefore, Defendant argues that Plaintiffs' claims in this action are barred by collateral estoppel.

Collateral estoppel will apply to prevent the re-litigation of issues when: "(1) a prior suit result[ed] in a final judgment on the merits; (2)

identical issues [were] involved; (3) the issue was actually litigated in the prior suit and necessary to the judgment; and (4) the issue was actually determined." *McDonald v. Skeen*, 152 N.C. App. 228, 230, 567 S.E.2d 209, 211, *disc. review denied*, 356 N.C. 437, 571 S.E.2d 222 (2002). A consent judgment is a final judgment on the merits for purposes of collateral estoppel. *NationsBank of N.C.*, 125 N.C. App. at 504, 481 S.E.2d at 393.

When ruling upon a motion to dismiss pursuant to Rule 12(b)(6), "[t]he question for the court is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not."[1] *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987). "In ruling upon such a motion, the complaint is to be liberally construed, and the court should not dismiss the complaint 'unless it appears beyond doubt that [the] plaintiff could prove no set of facts in support of [the plaintiff's] claim which would entitle [the plaintiff] to relief.' " *Holloman v. Harrelson*, 149 N.C. App. 861, 864, 561 S.E.2d 351, 353 (quoting *Dixon v. Stuart*, 85 N.C. App. 338, 340, 354 S.E.2d 757, 758 (1987)), *disc. review denied*, 355 N.C. 748, 565 S.E.2d 665 (2002). We review the trial court's ruling on a Rule 12(b)(6) motion to dismiss *de novo*. *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003).

The central issue in the present case is whether Plaintiffs retained any interest in the real property that vested in Defendant based upon the 1987 consent judgment. In order to determine this issue, we must examine the 1987 consent judgment as well as the

1. We note that even though Plaintiffs did not attach the 1987 consent judgment, the 1950 deed, or the 1950 agreement to their complaint, it appears from the record that the trial court reviewed these documents when ruling upon Defendant's motion to dismiss. In that Plaintiffs referred to these documents in their complaint and because Plaintiffs' claims relied upon these documents, we hold that the trial court's review of these documents did not convert the motion to dismiss into a summary judgment motion. *See Brackett v. SGL Carbon Corp.*, 158 N.C. App. 252, 255, 580 S.E.2d 757, 759 (2003) (holding that "[a]lthough the trial court must have necessarily considered [the] plaintiff's administrative complaint and/or right-to-sue letter, documents not attached to the complaint, in ruling on the motion, because [the] plaintiff referred to these documents in the complaint and they form the procedural basis for the complaint, the trial court did not convert the motion into one for summary judgment by doing so"); *Robertson v. Boyd*, 88 N.C. App. 437, 441, 363 S.E.2d 672, 675 (1988) (holding that the trial court did not convert the defendants' motions to dismiss into motions for summary judgment by reviewing documents attached to the motions to dismiss "[b]ecause these documents were the subjects of some of [the] plaintiffs' claims and [the] plaintiffs specifically referred to the documents in their complaint").

1950 deed and the 1950 agreement referenced therein. In the 1987 consent judgment, the trial court made findings of fact summarizing the positions of the parties to the prior action:

> Hammocks Beach Corporation contends that either it should be vested with fee simple title to a portion of the trust property or that the terms of the trust should be modified so that an appropriate portion of the trust property may be held by it free of any rights vested in the Sharpe and Hurst families and with authority to mortgage and sell in its discretion.
>
> The Sharpe and Hurst defendants, on the other hand, contend that fulfillment of the trust terms has become impossible or impracticable, that Hammocks Beach Corporation has acted capriciously and contrary to the intent of the settlor in not declaring its recognition of such, and that the court should declare the trust terminated and either mandate a conveyance of all of the property to the Sharpe and Hurst families or adjudicate title in their names.

As the trial court stated, Defendant, who was the plaintiff in the prior action, sought either (1) termination of the trust in order to vest in Defendant fee simple title to a portion of the property, or (2) continuation of the trust with modifications to allow Defendant to hold a portion of the trust property free and clear of any rights of the Hurst family. However, the trial court made an additional finding of fact that after lengthy negotiations, the parties agreed that the trust should continue "so as to carry out the original intentions of Dr. Sharpe[.]"

In accordance with that disposition, the trial court ordered in its 1987 consent judgment that Defendant be vested with title to a certain portion of the property, and further ordered that Defendant, as trustee, hold title to that property "subject to the trust terms set forth in the [1950 deed] and in [the 1950 agreement]." We must now determine which trust terms remained in effect following the 1987 consent judgment.

Plaintiff contends, and the trial court in the present action necessarily concluded, that the following trust terms in the 1950 deed remained in full force and effect:

> IT IS FURTHER PROVIDED AND DIRECTED by the said grantors, parties of the first part, that if at any time in the future it becomes impossible or impractical to use said property and land for the use as herein specified and if such impossibility or

> impracticability shall have been declared to exist by a vote of the majority of the directors of the Hammocks Beach Corporation, Inc., the property conveyed herein may be transferred to The North Carolina State Board of Education, to be held in trust for the purpose herein set forth, and if the North Carolina State Board of Education shall refuse to accept such property for the purpose of continuing the trust herein declared, all of the property herein conveyed shall be deeded by said Hammocks Beach Corporation, Inc. to Dr. William Sharpe, his heirs and descendants and to John Hurst and Gertrude Hurst, their heirs and descendants; The Hurst family shall have the mainland property and the Sharpe family shall have the beach property[.]

Relying upon this provision, Plaintiffs now argue, as they did in the prior action, that because the terms of the trust have become impossible or impracticable, the trust should be terminated and Defendant should be compelled to convey to Plaintiffs the mainland property. We disagree.

> In the 1987 consent judgment, the trial court concluded:
>
> The settlement which has resulted from negotiations between the parties, whereunder Hammocks Beach Corporation as trustee would hold title to an appropriate portion of The Hammocks *free of any claims of the Sharpes and Hursts* and with broader administrative powers, with the remainder of said property being vested in the Sharpe and Hurst defendants, is fair, reasonable, and in the best interests of the present and prospective beneficiaries of the trust, as well as the public interest, and is accordingly approved.

(Emphasis added.) This conclusion demonstrates that the trial court intended for the consent judgment to adjudicate title to a portion of the property to Defendant "free of any claims of the Sharpes and Hursts[.]" Moreover, following the specific order in the 1987 consent judgment that states that Defendant holds title to an appropriate portion of real property subject to the trust terms, the trial court further concluded that "[s]aid real property so vested in Hammocks Beach Corporation as trustee shall be *free and clear of any rights of the heirs of Dr. William Sharpe or of Gertrude Hurst or of the heirs of John and Gertrude Hurst.*" (Emphasis added.)

Plaintiffs contend that by this language, the trial court simply intended to extinguish Plaintiffs' extensive use and occupancy rights

that had burdened the property, and the trial court did not intend to extinguish Plaintiffs' future interests. We cannot agree.

We examine the trial court's findings of fact in the 1987 consent judgment in order to determine which trust terms remained in effect following the 1987 consent judgment. The trial court specifically found that the parties intended for the trust to continue so as to effectuate its original purposes:

> In an effort to avoid the risk of a trial of this action and *in search of a means of continuing the trust so as to carry out the original intentions of Dr. Sharpe*, the parties have negotiated at great length. Through their counsel, they have stated to the court that, subject to the court's approval, they have agreed to the entry of a judgment which would (1) enable Hammocks Beach Corporation to retain title to a sufficient portion of the land *to serve the trust purposes*, with additional powers of administration which should enable it to improve the property to the extent reasonably necessary, and (2) vest in the Sharpe and Hurst families a reasonable portion of the land in exchange for their relinquishing rights in that portion to be vested solely in Hammocks Beach Corporation as trustee.

(Emphases added.) The trial court in the 1987 consent judgment summarized the purposes of the trust as follows:

> Eventually, Dr. Sharpe apprised John and Gertrude Hurst of his desire to devise The Hammocks to them. As stated in the [1950 agreement], Gertrude Hurst, having formerly served as a black teacher in the then racially segregated public school system, requested Dr. Sharpe instead to make a gift of the property in such manner that black teachers and various youth organizations could enjoy the property. Pursuant to that request, and rather than wait until his death, Dr. Sharpe, in 1950, by deed of gift, gave The Hammocks to a nonprofit corporation, most of the incorporators of which were black school teachers. Hammocks Beach Corporation was the name given to such entity, and its charter spelled out its purpose—to administer the property given to it by Dr. Sharpe "primarily for the teachers in public and private elementary, secondary and collegiate institutions for Negroes in North Carolina . . . and for such other groups as are hereinafter set forth." The deed to Hammocks Beach Corporation as trustee restricted the use of the property for the use and benefit of the members of "The North Carolina Teachers Association, Inc., and

> such others as are provided for in the Charter of Hammocks Beach Corporation."

Accordingly, when the trial court in the 1987 consent judgment ordered that Defendant hold title to the property subject to the trust terms, the trial court was referring to the trust purposes. Had the trial court intended for the impossibility and impracticability terms of the 1950 deed to remain in effect following the 1987 consent judgment, it would have so ordered. We hold that based upon the trial court's findings, conclusions, and order in the 1987 consent judgment, all of Plaintiffs' rights to the property that vested in Defendant by reason of the 1987 consent judgment, including any alleged future interests of Plaintiffs, were extinguished.

Our decision is further supported by the provisions in the 1987 consent judgment allowing Defendant to sell portions of the property that vested in Defendant. The provisions for sale do not require Plaintiffs' approval. In order to sell or encumber the property, Defendant need only apply to the trial court:

> Said trustee shall not, however, be under a prohibition against the mortgaging or sale of said property. On application to the court by motion, copy of which shall be served on the Attorney General, the Court may approve the encumbering of said property, or the sale of a portion thereof, for the purpose of generating funds for use *in furtherance of the terms of the trust.*

(Emphasis added.) These provisions are inconsistent with Plaintiffs' contention that they retained future interests in the property. Moreover, these provisions illustrate that the "terms of the trust" that remained in effect following the 1987 consent judgment relate to the original purposes for which the trust was created.

For the reasons stated above, we hold that Plaintiffs did not retain future interests in the property that vested in Defendant following the 1987 consent judgment. This issue was litigated and decided against Plaintiffs in the prior action, and Plaintiffs cannot now re-litigate the issue as a basis for the claims they assert in the present action. Therefore, we hold that Plaintiffs' claims are barred by collateral estoppel and that the trial court erred by denying Defendant's motion to dismiss. We reverse and remand with instructions to the trial court to grant Defendant's motion to dismiss. Because we hold for Defendant on its first argument, we do not reach Defendant's remaining arguments.

Reversed and remanded.

Judge STEPHENS concurs.

Judge TYSON dissents with a separate opinion.

TYSON, Judge dissenting.

Harriett Hurst Turner and John Henry Hurst (collectively, "plaintiffs") initially argue this appeal should be dismissed as interlocutory. I agree. The trial court did not certify this case as immediately appealable pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure and Hammocks Beach Corporation ("defendant") made no showing that the trial court's denial of its motion to dismiss affects a substantial right which will be lost without immediate review. I vote to dismiss defendant's appeal as interlocutory.

The majority's opinion finds a substantial right exists and reaches the merits of defendant's interlocutory appeal. On the merits, the majority's opinion erroneously reverses the trial court's order denying defendant's motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2005). Under the applicable standard of review, the trial court correctly ruled that plaintiffs' complaint stated a legal cause of action and claims for relief. Presuming *arguendo*, defendant's interlocutory appeal is properly before this Court, the trial court's order should be affirmed. I respectfully dissent.

I. Interlocutory Nature of the Appeal

On 14 November 2007, plaintiffs filed a motion to dismiss defendant's appeal as interlocutory. Plaintiffs correctly argued the trial court's denial of defendant's motion to dismiss does not affect a substantial right which would be lost without immediate review.

"Interlocutory orders are those made during the pendency of an action which do not dispose of the case, but instead leave it for further action by the trial court in order to settle and determine the entire controversy." *Carriker v. Carriker*, 350 N.C. 71, 73, 511 S.E.2d 2, 4 (1999) (citation omitted). "Ordinarily, a trial court's denial of a motion to dismiss pursuant to Rule 12(b)(6) of the Rules of Civil Procedure is an interlocutory order from which there is no right of appeal." *Grant v. Miller*, 170 N.C. App. 184, 185-86, 611 S.E.2d 477, 478 (2005) (citation omitted).

An interlocutory order is immediately appealable in only two instances: (1) if the trial court certifies that there is no just reason to delay the appeal pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b) or (2) when the challenged order affects a substantial right the appellant would lose without immediate review. *Embler v. Embler*, 143 N.C. App. 162, 164, 545 S.E.2d 259, 261 (2001). "In either instance, it is the appellant's burden to present appropriate grounds for this Court's acceptance of an interlocutory appeal, and not the duty of this Court to construct arguments for or find support for appellant's right to appeal." *Country Club of Johnston County, Inc. v. U.S. Fidelity and Guar. Co.*, 135 N.C. App. 159, 162, 519 S.E.2d 540, 543 (1999) (internal citations and quotations omitted), *disc. rev. denied*, 351 N.C. 352, 542 S.E.2d 207 (2000).

It is undisputed that defendant's appeal is interlocutory. The trial court did not certify its order as immediately appealable pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b). Therefore, defendant must show the trial court's order denying its Rule 12(b)(6) motion to dismiss affects a substantial right. *Embler*, 143 N.C. App. at 165, 545 S.E.2d at 261. "The question of whether an interlocutory appeal affects a substantial right must be considered in light of the 'particular facts of that case and the procedural context in which the order from which appeal is sought was entered.' " *Grant*, 170 N.C. App. at 186, 611 S.E.2d at 478 (quoting *Sharpe v. Worland*, 351 N.C. 159, 162-63, 522 S.E.2d 577, 579 (1999)). "Our courts generally have taken a restrictive view of the substantial right exception." *Embler*, 143 N.C. App. at 166, 545 S.E.2d at 262 (citation omitted).

This Court has recognized that "[w]hen a trial court enters an order rejecting the affirmative defenses of *res judicata* and collateral estoppel, the order *can* affect a substantial right and *may* be immediately appealed." *Foster v. Crandell*, 181 N.C. App. 152, 162, 638 S.E.2d 526, 533-34 (citation and quotation omitted) (emphasis supplied), *disc. rev. denied*, 361 N.C. 567, 650 S.E.2d 602 (2007). However, the procedural posture of *Foster* is distinguishable from the case at bar.

In *Foster*, the defendants answered the plaintiffs' complaint and moved for judgment on the pleadings, asserting the affirmative defenses of *res judicata* and collateral estoppel. *Id.* at 159, 638 S.E.2d at 532. The defendants' motion was denied. *Id.* Following discovery, the defendants moved for summary judgment on the same grounds. *Id.* The trial court entered an order, which partially denied the

defendants' motion for summary judgment and rejected the defendants' defenses of *res judicata* and collateral estoppel. *Id.* The defendants' appealed the trial court's order to this Court. *Id.* at 160, 638 S.E.2d at 532.

Here, defendant's Rule 12(b) motions to dismiss were made at the earliest stages of litigation. Defendant has not answered plaintiffs' allegations and is under a court order, not appealed from, to respond to plaintiffs' discovery requests. Defendant has not asserted any affirmative defenses by answer. Defendant failed to appeal the denial of an earlier motion to dismiss or the granting of plaintiffs' motion to compel discovery.

Further, this Court has held "[i]ncantation of the two doctrines does not . . . automatically entitle a party to an interlocutory appeal of an order rejecting those two defenses." *Id.* at 162, 638 S.E.2d at 534. Review of an interlocutory appeal is limited to situations where "the rejection of those defenses gave rise to a risk of two actual trials resulting in two different verdicts." *Id.*

Defendant has failed to meet its burden of showing that the rejection of its issue preclusion or collateral estoppel defense will result in two inconsistent verdicts. I vote to dismiss defendant's appeal as interlocutory and remand this case to the trial court for further proceedings.

II. Motion to Dismiss

A. Standard of Review

> On a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, the standard of review is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory. The complaint must be liberally construed, and *the court should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief.*

Hunter v. Guardian Life Ins. Co. of Am., 162 N.C. App. 477, 480, 593 S.E.2d 595, 598 (internal quotations omitted) (emphasis supplied), *disc. rev. denied*, 358 N.C. 543, 599 S.E.2d 49 (2004). "On a motion to dismiss . . . the evidence is to be taken in the light most favorable to the plaintiff, and he is entitled to the benefit of every reasonable

intendment upon the evidence and every reasonable inference to be drawn therefrom." *Gossett v. Insurance Co.*, 208 N.C. 152, 157, 179 S.E. 438, 441 (1935). "This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd*, 357 N.C. 567, 597 S.E.2d 673 (2003).

B. Analysis

The majority's opinion holds that the trial court's denial of defendant's motion to dismiss, based upon the affirmative defense of issue preclusion or collateral estoppel, affects a substantial right and reviews the merits of defendant's appeal. The majority's opinion further holds: (1) the 1987 consent judgment clearly and unambiguously extinguished all of plaintiffs' extensive use and occupancy rights, as well as their contingent reversionary interest in real property vested in and specifically held by defendant as "trustee" and (2) collateral estoppel compelled the trial court to grant defendant's Rule 12(b)(6) motion to dismiss. I disagree.

1. Contract Interpretation

"A consent judgment is a court-approved contract subject to the rules of contract interpretation." *Walton v. City of Raleigh*, 342 N.C. 879, 881, 467 S.E.2d 410, 411 (1996) (citation omitted). When interpreting a contract, the court is guided by the following principles:

> The goal of construction is to arrive at the intent of the parties when the contract was written. . . . The various terms of the contract are to be harmoniously construed, and if possible, every word and every provision is to be given effect. . . . If 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[,] [create or extend new rights,] 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 (citation and quotation omitted), *aff'd*, 361 N.C. 111, 637 S.E.2d 538 (2006). When a contract is clear and unambiguous on its face, it will be enforced as written by the court as a matter of law. *Dockery v. Quality Plastic Custom Molding, Inc.*, 144 N.C. App. 419, 421-22, 547 S.E.2d 850, 852 (2001).

Conversely:

> [i]f the agreement is ambiguous, . . . interpretation of the contract is a matter for the jury. Ambiguity exists where the contract's language is reasonably susceptible to either of the interpretations asserted by the parties. *The fact that a dispute has arisen as to the parties' interpretation of the contract is some indication that the language of the contract is, at best, ambiguous.*

Id. at 422, 547 S.E.2d at 852 (internal citation and quotation omitted) (emphasis supplied). This Court has also previously held that "[i]f the writing itself leaves it doubtful or uncertain as to what the agreement was, parol evidence is competent . . . to show and make certain what was the real agreement between the parties; and in such a case what was meant, is for the jury, under proper instructions from the court." *Cleland v. Children's Home*, 64 N.C. App. 153, 156, 306 S.E.2d 587, 589 (1983) (citation and quotation omitted).

Viewing the evidence in the light most favorable to plaintiffs and giving them the benefit of every reasonable inference to be drawn therefrom, the 1987 consent judgment, read as a whole, contains several provisions tending to show plaintiffs' contingent reversionary interests in the property were not extinguished. Alternatively, the terms of the 1987 consent judgment are ambiguous at best and the parties' intent is a question for the jury, not the court. The trial court correctly denied defendant's Rule 12(b)(6) motion to dismiss.

2. Terms of the Consent Judgment

Plaintiffs argued before the trial court and again before us that the provisions contained in the 1987 consent judgment only relinquished plaintiffs' extensive "current and present use" rights in the real property including, "the right to cultivate, to quarry, to raise livestock, to travel over the land incident to taking fin fish and shellfish in adjacent waters, and to reside there." Plaintiffs assert their contingent reversionary interest in the property was not compromised or extinguished by the 1987 consent judgment.

Defendant argues and the majority's opinion agrees that the 1987 consent judgment extinguished any and all rights plaintiffs acquired through Dr. William Sharpe's ("Dr. Sharpe") express reservation and contingent reversions to the property by the 1950 deed, agreement, and defendant's Certificate of Amendment to their 1948 Certificate of Incorporation. Defendant further asserts that plaintiffs have no right to litigate this issue.

To determine whether plaintiffs retained any future interest in the real property, the conditions contained in the 1950 deed, agreement, defendant's Certificate of Amendment to their 1948 Certificate of Incorporation, and subsequent 1987 consent judgment must be reviewed together and "harmoniously construed." *Duke Energy Corp.*, 178 N.C. App. at 65, 630 S.E.2d at 695. Defendant's stewardship over Dr. Sharpe's property arose *solely* from the 1950 deed, agreement, and defendant's Certificate of Amendment to their 1948 Certificate of Incorporation and is strictly limited to those purposes and uses contained within these documents, except as was expressly and unambiguously modified by the 1987 consent judgment.

In 1950, Dr. Sharpe deeded certain real property to defendant, "as trustee," for the purpose of overseeing and administering the property "primarily for the teachers in public and private elementary, secondary and collegiate institutions for Negroes in North Carolina . . . and for such other groups as are hereinafter set forth." The deed also included specific provisions and reservations in the event the trust purposes later became impossible, impractical, or unlawful:

> [I]f at any time in the future it becomes impossible or impractical to use said property and land for the use as herein specified . . . the property conveyed herein may be transferred to the North Carolina State Board of Education, *to be held in trust for the purpose herein set forth, and if the North Carolina State Board of Education shall refuse to accept such property for the purpose of continuing the trust herein declared, all of the property herein conveyed shall be deeded by said The Hammocks Beach Corporation, Inc., to Dr. William Sharpe, his heirs and descendants and to John Hurst and Gertrude Hurst, their heirs and descendants*; the Hurst family shall have the main land property and the Sharpe family shall have the beach property.

(Emphasis supplied). This language is virtually identical to a provision contained in defendant's Certificate of Amendment to their 1948 Certificate of Incorporation.

Dr. Sharpe, as settlor, expressly reserved a contingent reversionary interest in the property, first as "may be transferred" to the State of North Carolina, and upon the State's refusal to accept the property, Dr. Sharpe required that the property "shall be deeded" to himself and others as now represented by plaintiffs, if it became "impossible or impractical to use said property and land for the use as . . . specified"

in the trust. This express reservation and contingent reversion remained part of Dr. Sharpe's estate upon his death and vested in "his heirs and descendants and to John Hurst and Gertrude Hurst, their heirs and descendants[,]" subject to the initial contingent interest of the State of North Carolina. The State expressly renounced its interest in 1987 and again in this action, wherein the State sought and secured dismissal with prejudice.

In 1986, defendant herein originally brought suit as plaintiff seeking "declaratory relief in the form of a judgment quieting title to the property or, alternatively, ordering an alternative disposition of the property and administration of the trust to fulfill as nearly as possible the manifested general intention of the settlor, Dr. William Sharpe." The living Sharpe and Hurst family members filed an answer and counterclaims alleging Hammocks Beach Corporation had failed to properly administer the trust and asked the court to: (1) terminate the trust; (2) use the doctrine of *cy pres* to modify the trust and remove Hammocks Beach Corporation as trustee; or (3) clarify the property interests held by each party.

In 1987, all parties entered into a consent judgment, in which the trial court specifically stated:

> The dispute between plaintiff and defendants has continued for over a decade. The impediments to the administration of the trust as contemplated by the settlor have existed and frustrated the plaintiff's attempts to develop the property for over thirty years. Considering all circumstances, including the delays, uncertainties, risks, and prohibitive costs inherent in this litigation, the parties hereto, without in any way conceding error in their respective legal positions, have entered into a compromise resolution and agreement and consented to the entry of this Consent Judgment, fully intending to bind themselves, their heirs, assigns, and successors.

The trial court also made extensive findings of fact including the following:

> The trust is impossible or impracticable of fulfillment whether the trustee continues to be Hammocks Beach Corporation or whether, in the event the Board would so agree, the trust responsibilities should be assumed by it or by any other agency of state government. Thus, Dr. Sharpe's alternate plan of having the Board

assume the trust responsibilities in the event of the impossibility or impracticability of fulfillment of the trust terms also fails for the same reason.

. . . .

In an effort to avoid the risk of a trial of this action and ***in search of a means of continuing the trust so as to carry out the original intentions of Dr. Sharpe***, the parties have negotiated at great length. Through their counsel, they have stated to the court that, subject to the court's approval, they have agreed to the entry of a judgment which would (1) enable Hammocks Beach Corporation to retain title to a sufficient portion of the land *to* ***serve the trust purposes, with additional powers of administration*** which should enable it to improve the property to the extent reasonably necessary and (2) vest in the Sharpe and Hurst families a reasonable portion of the land in exchange for their relinquishing rights in that portion to be vested solely in Hammocks Beach Corporation *as trustee.*

(Emphasis supplied). The trial court also concluded that "[i]f this litigation is not compromised and a trial ensues, Hammocks Beach Corporation will incur a substantial risk that the counterclaims of the defendants Sharpe and Hurst would prevail, with resulting termination of the trust and a conveyance of the real property to the Sharpe and Hurst families."

As a result of the parties' negotiations, the trial court ordered:

1. [Defendant], trustee, is vested with title to the following described portion of the real property which was conveyed by Dr. William Sharpe to [defendant] . . . .

2. [Defendant], trustee, *holds title to said property subject to the trust terms* set forth in the aforesaid deed dated August 10, 1950, . . . and in Agreement dated September 6, 1950 . . . Said trustee shall not, however, be under a prohibition against the mortgaging or sale of said property. On application to the court by motion, copy of which shall be served on the Attorney General, the Court may approve the encumbering of said property, or the sale of a portion thereof, *for the purpose of generating funds for use in furtherance of the terms of the trust.*

> 3. Said real property so vested in [defendant] as trustee shall be free and clear of any rights of the heirs of Dr. William Sharpe or of Gertrude Hurst or of the heirs of John and Gertrude Hurst.

(Emphasis supplied).

Viewing all the evidence in a light most favorable to plaintiffs and giving them the benefit of every reasonable inference to be drawn therefrom, the consent judgment could be construed as a tolling agreement to allow defendant, as trustee, to attempt to continue to "carry out the original intentions of Dr. Sharpe." If this interpretation of the consent judgment is correct, plaintiffs' contingent reversionary interests in the property at issue were not extinguished in 1987. The consent judgment would have only extinguished plaintiffs' extensive use and occupancy rights in exchange for the property conveyed to plaintiffs in fee simple and allowed defendant to attempt to administer the property to accomplish the trust purposes. Under this position, plaintiffs' complaint asserting claims for breach of fiduciary duty and the accounting and termination of the trust could be viewed as a challenge to defendant's stewardship and expenditures during the twenty years that have elapsed since the consent judgment was entered in 1987.

Alternatively, these documents could be viewed as revealing contradictory provisions: (1) defendant, as trustee, holds fiduciary title to the property subject to the express trust terms set forth in the 1950 deed, agreement, and defendant's Certificate of Amendment to their 1948 Certificate of Incorporation, which reserved extensive use and occupancy rights and a contingent reversionary interest to Dr. Sharpe and later to plaintiffs and (2) defendant holds title to the property "free and clear of any rights of" plaintiffs. Based upon these provisions, it is impossible to ascertain the parties' intent regarding exactly what rights plaintiffs were relinquishing when they signed the consent judgment. Under this interpretation, the terms of the consent judgment would be ambiguous at best, could not be "harmoniously construed," and present a question for the jury to resolve. *Duke Energy Corp.*, 178 N.C. App. at 65, 630 S.E.2d at 695.

The assertion that the consent judgment is ambiguous is supported by the majority's opinion as it struggles to interpret and clarify the judgment by stating, "when the trial court in the 1987 consent judgment ordered that Defendant hold title to the property subject to the trust terms, the trial court was referring to the trust purposes."

If the consent judgment is ambiguous, the parties' intent is a question for the jury and not for the court as a matter of law, particularly at a very early stage of the litigation on a Rule 12(b)(6) motion to dismiss. *Dockery*, 144 N.C. App. at 422, 547 S.E.2d at 852. Liberally construing plaintiffs' complaint, I agree with the trial court that the allegations contained therein, treated as true, are sufficient to state a claim upon which relief may be granted. N.C. Gen. Stat. § 1A-1, Rule 12(b)(6); *Hunter*, 162 N.C. App. at 480, 593 S.E.2d at 598. The trial court correctly denied defendant's Rule 12(b)(6) motion to dismiss and its order should be affirmed.

III. Unintended Consequences

Presuming *arguendo*, the consent judgment clearly and unambiguously extinguished plaintiffs' contingent reversionary interest in the property, an examination of future and unintended implications of the majority's holding is necessary. The State of North Carolina expressly disavowed any interest in the property both in 1987 and again in the present action, removing that contingency. The 1987 consent judgment expressly found and it is also undisputed that defendant cannot accomplish the purposes for which the trust was created. If plaintiffs' contingent reversionary interests were extinguished by the 1987 consent judgment, several results may occur.

A. Escheat

First, if the trust is terminated, the trust *res* might be left without an owner. If property is left with no owner, is abandoned, or unclaimed, it will escheat to the State of North Carolina. *See* 1 James A. Webster, Jr., *Webster's Real Estate Law in North Carolina* § 4-10, at 65 (Patrick K. Hetrick & James B. McLaughlin, Jr. eds., 5th ed. 1999) ("In North Carolina, all unclaimed or abandoned property escheats to the Escheat Fund. The state becomes a custodian of the property or the property's proceeds for the rightful owners, holding the one or the other in perpetuity for the rightful owner."); N.C. Gen. Stat. § 116B-2 (2005). Because the State has repeatedly disavowed any interest in the trust *res*, this result would deny the natural objects of the settlor's bounty an asset in preference to total strangers.

B. *Cy Pres*

Second, if both the State's and plaintiffs' contingent reversionary interest were extinguished in 1987, then the settlor's "alternative plan in the event that the charitable trust is or becomes unlawful, impracticable, impossible to achieve, or wasteful" necessarily fails. N.C.

Gen. Stat. § 36C-4-413(d) (2005). If freed of Dr. Sharpe's "alternative plan" of transfer to the State or to the heirs, defendant, as trustee, would now be free to assert an action for *cy pres* under Article 2 of Chapter 36. N.C. Gen. Stat. § 36-4-413(b) (2005). In the *cy pres* proceeding, the trial court could modify the terms of the trust or terminate the trust as a whole. N.C. Gen. Stat. § 36C-4-413(a)(3) (2005). The import of the majority's holding is to not only extinguish plaintiffs' contingent reversionary interest, but to possibly: (1) extinguish the trust as a whole, and cause the property to escheat to the State or (2) subject Dr. Sharpe's original purposes to a wholly new and different purpose of defendant's choice, subject to court approval. Neither of these results can be what the majority's opinion intended to produce.

IV. Fee Simple Title

The only basis upon which the majority's holding could be predicated, is an unsubstantiated notion that the 1987 consent judgment vested defendant with fee simple title to the property. However, the parties and the court specifically chose not to use that operative language in describing the property to be vested in defendant, even though defendant's 1986 declaratory judgment action specifically sought that result. The 1987 consent judgment expressly conveyed that quality of title to the Sharpe and Hurst families in the property. The consent judgment states: "Said Sharpe and Hurst defendants are *the owners in fee simple* of the real property described, respectively, in the preceding paragraphs four and five, free and clear of any claim of Hammocks Beach Corporation, trustee." (Emphasis supplied).

This provision is substantial evidence that had the parties and the court intended for defendant to be vested with fee simple title, the consent judgment would have expressly stated such. Instead, the parties used language which tends to indicate defendant was vested with fiduciary title, subject to the express and continuing terms of the trust, but free of plaintiffs' extensive present and future use rights, which severely encumbered the development of the property.

The 1987 consent judgment also lifted the absolute prohibition against either sale or incurring debt by defendant in the 1950 deed, agreement, and defendant's Certificate of Amendment to their 1948 Certificate of Incorporation and provided for the possibility of both sales and encumbrances, subject to court approval. The majority's opinion asserts that the preceding provision supports the proposition

that all of plaintiffs' rights in the property at issue were extinguished in 1987. I disagree.

Persons or entities holding title to property in fee simple absolute, free of any claims of another party, need not and do not apply to the superior court to obtain approval of sale or to incur debt and encumber their property. See 1 James A. Webster, Jr., *Webster's Real Estate Law in North Carolina* § 4-6, at 60 (Patrick K. Hetrick & James B. McLaughlin, Jr. eds., 5th ed. 1999) ("Perhaps the most important quality of a fee simple estate is that the owner may voluntarily dispose of his land as he sees fit, either by deed or will, free from the control of third persons, so long as he complies with the legislative and constitutional requirements of the state and federal governments as they relate to land."). The consent judgment clearly shows defendant was not vested with fee simple title. At a minimum, a jury question exists regarding whether plaintiffs' contingent reversionary interest, as expressly reserved by Dr. Sharpe, was extinguished by the 1987 consent judgment.

V. Conclusion

Defendant has failed to show the trial court's denial of defendant's Rule 12(b)(6) motion to dismiss affects a substantial right. Defendant's appeal is interlocutory and should be dismissed.

Presuming defendant's appeal is properly before this Court, the trial court's order denying defendant's Rule 12(b)(6) motion should be affirmed. The 1987 consent judgment could be construed as a tolling agreement allowing defendant, as trustee, to continue to "carry out the original intentions of Dr. Sharpe." If so, plaintiffs' contingent reversionary interests were not extinguished in 1987. Alternatively, the consent judgment contains conflicting provisions which render the judgment ambiguous. If the consent judgment is ambiguous, the intent of the parties regarding the provisions of the consent judgment is a question for the jury. *Dockery*, 144 N.C. App. at 422, 547 S.E.2d at 852. The majority's opinion, in effect, grants defendant the relief it sought for fee simple title, but clearly did not obtain in the 1987 consent judgment.

"The polestar of trust interpretation is the settlors' intent." *Day v. Rasmussen*, 177 N.C. App. 759, 764, 629 S.E.2d 912, 915 (2006) (citation and quotation omitted). The majority's opinion allows defendant to freely manage, use, borrow against, or sell the trust *res* for purposes and uses Dr. Sharpe never intended. Defendant is also now free

of any expressly reserved rights to Dr. Sharpe's heirs to hold the trustee accountable for its fiduciary duties.

I vote to dismiss defendant's appeal as interlocutory or, in the alternative, to affirm the trial court's order and remand for further proceedings. I respectfully dissent.

BARTLETT MILLING COMPANY, L.P., PLAINTIFF v. WALNUT GROVE AUCTION AND REALTY CO., INC., ROCKY CREEK DAIRY, INC., AND BROKER DAIRY, INC., DEFENDANTS

No. COA07-329

(Filed 19 August 2008)

1. Creditors and Debtors— action between two creditors— note with mistaken interest rate—refusal to enforce

In an action between creditors arising from their efforts to secure their interests as a dairy farm failed, the trial court did not err by refusing to enforce a promissory note given in settlement of a default judgment and held by plaintiff, or by refusing to grant plaintiff's motions for directed verdict and judgment n.o.v. The parties were in accord that the agreement was executed under a mistaken belief concerning interest rates, and the trial court's determination that directing judgment on damages based on the agreement would be inequitable was not an abuse of discretion. It was therefore the province of the jury to weigh all the evidence and make a determination of plaintiff's damages resulting from the conversion of its property.

2. Unfair Trade Practices— actions between creditors—failing dairy farm

In an action between creditors arising from their efforts to secure their interests as a dairy farm failed, the trial court did not err by denying plaintiff's motions for directed verdict and judgment n.o.v. on an unfair and deceptive practices claim or by refusing to find unfair and deceptive actions as a matter of law following the jury's verdict. Some of plaintiff's argument was not sufficiently supported or abandoned under the Rules of Appellate Procedure; there were no findings or stipulations asserting a fiduciary duty to support the argument concerning unfair practices in breach of a fiduciary duty; and, while the stipulations and jury findings supported a conversion claim, the additional egregious

acts necessary for the heightened penalty of unfair and deceptive trade practices were not established.

4. Agriculture— failing dairy farm—cattle auction—conversion of proceeds

In an action arising from the efforts of creditors to secure their interests in a failing dairy farm, the trial court did not err by granting plaintiff's motion for summary judgment determining that defendants had converted the proceeds of a cattle auction in light of the unjustified manner in which defendants took possession of and auctioned the cattle, failed to adhere to an agreement to hold the auction proceeds in escrow pending resolution of the parties' rights to the auction proceeds, and dispersed the proceeds among themselves contrary to North Carolina law.

5. Pleadings— amendment—no delay or prejudice argued

The trial court did not abuse its discretion by allowing plaintiff's motion to amend its complaint where defendants made no argument that the motion to amend was for the purpose of undue delay, that it caused delay, or that they were prejudiced by any delay.

6. Agriculture— sale of cattle—refusal to escrow funds—motion in limine denied

The trial court did not err by denying defendants' motion in limine to exclude any evidence relating to their refusal to escrow funds received from the sale of cattle used as collateral for a failing dairy farm. Although defendants' argument was in part that the prior denial of plaintiff's motion to compel escrow decided the issue, there was no evidence that the denial of plaintiff's motion was a final disposition of the issue. The evidence was relevant and was not substantially outweighed by prejudice to defendants.

7. Evidence— mootness—evidence of dismissed claim

Defendants' argument about excluded evidence was moot where it concerned an unfair and deceptive trade practices claim that was dismissed as a matter of law.

8. Evidence— default judgment—incorrect interest rate—corrected by court—not prejudicial or misleading

In an action between creditors of a failed dairy farm, the trial court did not err by admitting evidence about plaintiff's default

judgment against the owner of the dairy farm, which included an illegal interest rate. The trial court reduced the interest rate, and defendants offered no evidence in support of how this evidence misled the jury, or prejudiced them in any way.

9. Agriculture— action between creditors—incorrect interest rate—corrected by trial court

In an action between the creditors of a failed dairy farm, the trial court did not err by denying defendants' motions for directed verdict based on an incorrect interest rate where the trial court applied the correct rate.

10. Agriculture— sale of dairy herd—action between creditors—unclean hands

The trial court did not abuse its discretion by refusing to instruct the jury on the principle of marshaling in an action rising from the efforts of creditors to protect their interests as a dairy farm failed. The facts before the trial court concerning the sale of cattle included defendants acting without clean hands.

11. Costs— not awarded—settlement offer—less than judgment plus costs awarded

The trial court did not err by not awarding defendants costs where the final judgment plus costs awarded to plaintiff exceeded the amount proffered in defendants' offer of judgment. N.C.G.S. § 1A-1, Rule 68.

Appeal by plaintiff and cross-appeal by defendant from an order entered 22 August 2006 by Judge Larry G. Ford in Iredell County Superior Court. Heard in the Court of Appeals 29 October 2007.

Blanco Tackabery Combs & Matamoros, P.A., by Peter J. Juran, for plaintiff-appellant / cross-appellee.

Hamilton Moon Stephens Steele & Martin, PLLC, by David G. Redding and Mark R. Kutny, for defendants-appellees/cross-appellants.

JACKSON, Judge.

Keith and Talley Stephens ("the Stephens") owned and operated a dairy farm that failed. The Stephens had numerous creditors, including Bartlett Milling Company, L.P. ("plaintiff"). On 19 July 1999, plaintiff obtained a judgment in the amount of $102,964.04, plus one

and a half percent monthly interest accruing from 17 August 1998, against the Stephens for defaulting on their payment for cattle feed purchased from Bartlett.

After entry of judgment, the Stephens requested assistance from plaintiff in restructuring their finances. Plaintiff agreed to remove its judgment from the record, accept a lower total payment, and accept payments over time, secured by a security interest in the Stephens' cattle herd ("the Stephens' herd") and its proceeds. A Promissory Note was executed on 11 August 2000, pursuant to which plaintiff agreed to accept $105,981.03, plus interest at a lower interest rate, instead of the full judgment, provided that the Stephens fulfilled the terms set forth in the Note. On 11 August 2000, the Stephens executed a security agreement (along with the 11 August 2000 note, "the Stephens agreement") securing all indebtedness of the Stephens to Bartlett and granting plaintiff a security interest in, *inter alia*, the Stephens' herd. Subsequent to the security agreement, defendants sold additional cattle to the Stephens. Defendants Rocky Creek Dairy, Inc. ("Rocky Creek") and Broker Dairy, Inc. ("Broker Dairy") perfected security interests in the cattle sold to the Stephens, though Walnut Grove Auction and Realty Co., Inc. ("Walnut Grove", and collectively with Rocky Creek and Broker Dairy, "defendants") failed to do so. The Stephens subsequently defaulted on the Stephens agreement, pursuant to which (1) the entire amount of the judgment plus accrued interest became due and payable, and (2) the security interest in the Stephens' herd remained intact.

As of May 2002, the Stephens continued having difficulty meeting their financial obligations. Walnut Grove, Rocky Creek, and Broker Dairy, along with Terry Jolly ("Jolly") of First Community Bank, held periodic meetings throughout the spring and summer of 2002 to discuss means of recouping the money owed to them by the Stephens. This group of creditors designated Jolly as the responsible party for maintaining the Stephens' dairy checkbook and payment of dairy expenses in order to control the flow of money in and out of the Stephens' farm. Plaintiff was not invited to participate in these meetings. Thereafter, defendants took possession of a portion of the Stephens' herd and made plans to sell it at an auction. The Stephens were not in default of their obligations to the creditors—except for plaintiff—at this time.

On 30 October 2002, defendants, acting under the name "State Road Dairy," sold approximately 300 cattle from the Stephens' herd at an auction run by Walnut Grove. Both before and after the auction,

plaintiff notified defendants and their attorneys that plaintiff held a senior security interest in the Stephens' herd and its proceeds. Walnut Grove informed plaintiff that the proceeds of the auction would be held in trust pending a determination of the parties' respective rights to the auction proceeds as required by North Carolina auction law. Plaintiff's attorney sent two letters, both prior to and after the auction, confirming that the auction proceeds would be held in escrow pending a determination of the creditors' priority rights. Plaintiff did not attempt to stop the auction.

The auction generated $357,275.00 in proceeds. After payment of the costs of the sale—which amounted to $17,000.00—Rocky Creek was to receive $165,000.00, Walnut Grove was to receive $110,000.00, and Broker Dairy was to receive $65,000.00. Defendants' answer to plaintiff's amended complaint states that all proceeds were disbursed pursuant to Chapter 25, Article 9 of the North Carolina General Statutes (Uniform Commercial Code), and presented as an affirmative defense that they were entitled to sell the cattle, and disburse the funds as they did pursuant to North Carolina General Statutes, sections 25-9-610 and 25-9-615. The Settlement Sheet did not provide that plaintiff would receive any of the proceeds.[1] After defendants refused to pay plaintiff according to its purported senior lien interest, plaintiff commenced this action on 7 February 2003.

On 21 December 2005, the trial court granted partial summary judgment in favor of plaintiff on the issue of liability on the conversion claim, leaving for trial the issues of unfair and deceptive trade practices, damages for conversion, and the unsettled issue of punitive damages.

During the course of the trial, the trial court, *sua sponte*, raised the issue of whether the Stephens agreement was flawed on the grounds that it was based upon a judgment bearing interest at a higher rate than that allowed by law. Specifically, the trial court held that because the Stephens' debt arose out of an agricultural loan, a default rate of eighteen percent was unenforceable under North Carolina General Statutes, section 24-5. The trial court reduced the amount of judgment interest to eight percent and maintained the interest of the Stephens agreement at eighteen percent. The trial court denied plaintiff's motion for directed verdict based upon the original amount of the Stephens agreement. The trial court also declined to send plaintiff's punitive damage claim to the jury.

1. Defendants received some portion of the proceeds in March and April of 2003.

On 26 May 2006, the trial court entered judgment for plaintiff in the amount of $44,232.88. This amount constituted $75,000.00 for plaintiff's claim of conversion, plus $19,232.88 in interest, for a total of $94,232.88, less $50,000.00 already paid to plaintiff in a settlement with an alleged joint tortfeasor. The trial court denied plaintiff's motion for judgment notwithstanding the verdict based upon the original amount of the Stephens agreement. Thereafter, both plaintiff and defendants filed timely notices of appeal. Additional relevant facts will be discussed below.

Plaintiff's Appeal

[1] In plaintiff's first two arguments, it contends that the trial court erred as a matter of law in refusing to enforce the promissory note of 11 August 2000 according to its terms, and by refusing to grant plaintiff's motions for directed verdict and judgment notwithstanding the verdict. We disagree.

"We review questions of law *de novo*." *Staton v. Brame*, 136 N.C. App. 170, 174, 523 S.E.2d 424, 427 (1999). "This Court's review of a trial court's grant of a JNOV is the same as the review of the grant of a motion for directed verdict." *Asfar v. Charlotte Auto Auction*, 127 N.C. App. 502, 504, 490 S.E.2d 598, 600 (1997) (citation omitted). The question is whether the non-moving party has presented essential evidence to support its claim; all evidence should be taken in the light most favorable to the non-moving party, and all discrepancies in the evidence should be resolved in the non-moving party's favor. *Id.*

On 19 July 1999 default judgment was entered by the Superior Court of Iredell County in *Bartlett Milling Co. v. Stephens*. This was a default judgment entered against the Stephens, declaring they were in default on their obligations to plaintiff, and ordering the Stephens to pay $102,964.04 plus eighteen percent interest from 17 August 1998 until paid. Defendants were not parties to this action. Both parties in the instant action agree the interest awarded on this default judgment was in error, as the maximum amount allowed by law for default on an agricultural loan is eight percent. N.C. Gen. Stat. §§ 24-5(a) and 24-1 (2007).

Plaintiff also argues in its brief, and argued at trial, that pursuant to the Stephens agreement, executed between them and the Stephens on 11 August 2000, the default judgment against the Stephens was satisfied. The parties agree that the interest rate calculated for the Stephens agreement was incorrect as a matter of law, as

it erroneously adopted the eighteen percent rate included in the default judgment in contravention to the maximum legal rate for the extension of credit for agricultural loans, which is capped at eight percent. *Id.*

Section 24-5, however, is limited to actions for breach of contract. Plaintiff had no action against defendants for breach of the Stephens agreement, as defendants were not parties thereto. The instant action is one for the tort of conversion. The provisions of section 24-5 do not directly apply to plaintiff's action against defendants in the instant case.

Our trial courts are general courts of both law and equity. *Kiser v. Kiser*, 325 N.C. 502, 507, 385 S.E.2d 487, 489 (1989); *Reynolds v. Reynolds*, 208 N.C. 578, 624, 182 S.E. 341, 369 (1935). Trial courts have the discretionary power to "grant, deny, limit, or shape" equitable relief as they deem just. *Sara Lee Corp. v. Carter*, 351 N.C. 27, 36, 519 S.E.2d 308, 314, *reh'g denied*, 351 N.C. 191, 541 S.E.2d 716 (1999). Unjust enrichment is an equitable doctrine. *Collins v. Davis*, 68 N.C. App. 588, 591, 315 S.E.2d 759, 761 (1984). It is clear from the record and transcripts that the trial court in the instant case was concerned that a directed verdict in favor of plaintiff for the amount due under the Stephens agreement would unjustly enrich plaintiff due to plaintiff's and the Stephens' mistaken beliefs of both fact and law that the amount of the interest award under the default judgment was correct and legal.

Instead, in an attempt to be fair to both parties, the trial court allowed evidence of the Stephens agreement to be presented to the jury as evidence of the damages suffered by plaintiff, along with other damages evidence.

The trial court informed the jury that the interest calculation mandated by the Stephens agreement was based upon a mutual mistake, and directed plaintiff to recalculate the amount due pursuant to that agreement based upon the trial court's understanding of the law. This calculation reduced the interest rate for the period between entry of the default judgment until execution of the Stephens agreement from eighteen percent to the legal rate of eight percent, but maintained the eighteen percent interest rate for the period following the execution of the Stephens agreement. We need not address the correctness of the trial court's decision requiring recalculation of the interest due on the Stephens agreement for reasons stated below.

This recalculated amount, presented to the jury as the amount the Stephens were obligated to plaintiff under their agreement, was $109,772.07. The jury returned a damages amount of $75,000.00 for plaintiff's conversion judgment against defendants, nearly $35,000.00 less than the $109,772.07 amount in evidence that the jury was informed the Stephens owed plaintiff for the breach of their agreement. It is clear the jury did not rely on the Stephens agreement to determine plaintiff's damages, but looked to the other evidence of plaintiff's actual losses based upon its issuance of credit to the Stephens. The measure of damages for conversion is the fair market value of the converted property at the time of the conversion, plus interest. *Marina Food Assoc., Inc. v. Marina Restaurant, Inc.*, 100 N.C. App. 82, 94, 394 S.E.2d 824, 831 (1990). In the instant case, defendants converted plaintiff's property by selling cattle in which it had a superior security interest and retaining the proceeds. It was the province of the jury to determine what the value of plaintiff's security interest in the converted cattle was at the time of the sale. *Di Frega v. Pugliese*, 164 N.C. App. 499, 510, 596 S.E.2d 456, 464 (2004).

We hold that the trial court did not abuse its discretion in refusing to direct verdict on damages based upon the Stephens agreement. The parties were in accord that this agreement was executed under a shared, mistaken belief that both it and the directed verdict were not contrary to law. The trial court's determination that doing so would be inequitable, and potentially lead to the unjust enrichment of plaintiff, was not "manifestly unsupported by reason" or "so arbitrary that it could not have been the result of a reasoned decision." *Pinewood Homes, Inc. v. Harris*, 184 N.C. App. 597, 607, 646 S.E.2d 826, 833 (2007). It was therefore the province of the jury to weigh all the evidence, and make a determination of plaintiff's damages resulting from defendants' conversion of its property. The jury's determination "must be given the utmost consideration and deference". *Pugliese*, 164 N.C. App. at 510, 596 S.E.2d at 464 (citations and quotations omitted). For the same reasons stated above concerning the trial court's denial of plaintiff's motion for a directed verdict, we hold that the trial court did not abuse its discretion in denying plaintiff's motion for judgment notwithstanding the verdict. These arguments are without merit.

[2] In plaintiff's third and fourth arguments, it contends the trial court erred in denying plaintiff's motions for directed verdict and judgment notwithstanding the verdict concerning its claim for unfair and deceptive trade practices (UDTP), and in failing to determine as

a matter of law following the jury's verdict that defendants' actions constituted unfair and deceptive trade practices. We disagree.

Initially, we note that plaintiff has provided no authority in support of its third argument, that the trial court should have granted its motions for directed verdict and judgment notwithstanding the verdict. Its argument consists of its bare assertion that because the jury found defendants had committed every action submitted in support of its unfair and deceptive trade practices claim (which, of course, had no bearing on the trial court's denial of its motion for directed verdict), "it follows as a matter of logic" that one or the other of its motions should have been granted. This constitutes a gross violation of Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure, and subjects this argument to dismissal. *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 200, 657 S.E.2d 361, 367 (2008); *Viar v. N.C. DOT*, 359 N.C. 400, 610 S.E.2d 360, *reh'g denied*, 359 N.C. 643, 617 S.E.2d 662 (2005).

In its fourth argument, plaintiff contends the trial court erred by refusing to determine that defendants' actions constituted unfair and deceptive trade practices. "[U]nder N.C.G.S. § 75-1.1, it is a question for the jury as to whether [a party] committed the alleged acts, and then it is a question of law for the court as to whether these proven facts constitute an unfair or deceptive trade practice." *Richardson v. Bank of Am., N.A.*, 182 N.C. App. 531, 540, 643 S.E.2d 410, 416 (2007) (citation and quotations omitted). "To succeed on a claim for UDTP, a plaintiff must prove: '(1) defendants committed an unfair or deceptive act or practice; (2) in or affecting commerce; and (3) that plaintiff was injured thereby.' " *Griffith v. Glen Wood Co.*, 184 N.C. App. 206, 217, 646 S.E.2d 550, 558 (2007) (citations omitted). " '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.' " *Id.* (Citations omitted).

Plaintiff argues that Walnut Grove, as the auctioneer, *per se* committed unfair and deceptive trade practices by violation of a regulatory statute. Although the jury found that "In Walnut Grove's case, [it failed] to comply with the regulatory requirements of the NCAC[,]" plaintiff fails to mention this finding in its brief, much less argue what provisions of the NCAC Walnut Grove violated, and why any such violation constituted a *per se* unfair and deceptive trade practice. Contrary to plaintiff's argument, there is no support for the proposition that "[v]iolation of statutes generally constitutes a *per se* decep-

tive or unfair trade practice . . . ." As one of the opinions plaintiff cites as authority for this position clearly states: the "North Carolina Supreme Court has held violation of a statutory provision designed to protect the consuming public *may* constitute an unfair and deceptive practice as a matter of law." *Moretz v. Miller*, 126 N.C. App. 514, 517, 486 S.E.2d 85, 87, *rev. denied*, 347 N.C. 137, 492 S.E.2d 24 (1997) (emphasis added) (citation omitted). *Moretz* further qualifies this statement by stating that whether violation of a statute constitutes unfair and deceptive trade practices generally depends on the facts of the case, and "when it offends established public policy or is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Id.* at 518, 486 S.E.2d at 88 (citations omitted). In fact, the *Moretz* Court used this analysis to hold that violation of the relevant statute in that case *did not* constitute unfair and deceptive trade practices. As plaintiff has failed to identify the regulation violated, and has made no argument concerning why any such violation should constitute unfair and deceptive trade practices, it has abandoned this argument. N.C. R. App. P., Rule 28(b)(6).

Plaintiff next argues that Walnut Grove committed unfair and deceptive trade practices because it breached a fiduciary duty owed to it through its actions related to the auction of the Stephens' herd. Unfortunately for plaintiff, there are no findings by the jury, nor stipulations by the parties, asserting that Walnut Grove owed plaintiff any fiduciary duty. Lacking such, it would have been error for the trial court to find unfair and deceptive trade practices on this basis.

Finally, plaintiff argues that all defendants should have been found to have committed unfair and deceptive trade practices, as they acted in concert to convert plaintiff's property. Although it is true that acts of conversion may constitute unfair and deceptive trade practices, *Love v. Pressley*, 34 N.C. App. 503, 239 S.E.2d 574 (1977), this determination must be made based upon the specific findings of the jury, along with any stipulations of the parties. Our review of the stipulations and jury findings in this case lead us to the conclusion that they do little more than support the claim for conversion, which already had been decided by directed verdict, and do not establish the additional egregious, immoral, oppressive, unscrupulous, or substantially injurious acts needed to impose the heightened penalty of unfair and deceptive trade practices. *Miller*, 126 N.C. App. at 518, 486 S.E.2d at 88. We affirm the trial court's denial of plaintiff's unfair and deceptive trade practices claim. These arguments are without merit.

[3] In plaintiff's sixth and final argument, it contends that the trial court erred in refusing to submit the issue of punitive damages to the jury. We disagree.

In the pre-trial conference, plaintiff stated its desire to include the issue of punitive damages in the trial, and defendants objected to the inclusion of that issue, arguing it had not been pled in either plaintiff's original or amended complaint. The trial court stated that it would conduct a bifurcated trial, and address the issue of punitive damages after the evidentiary portion of the trial, and before the damages portion. Upon reflection, the trial court offered to hear arguments and rule on the motion to amend at the pre-trial conference, but plaintiff responded:

> No, I'm not insistent that that be addressed now, because our evidence will not change throughout the course of the proceedings, and I think the Court will be better informed about the punitive damage element in this case at that time. So since it won't affect the jury's hearing, there's no need to address it at this point.

Defendants agreed that the issue would be best addressed after the evidentiary portion of the trial as well. The trial court further stated: "And then at that point in time, if you're eligible to have it, then we'll go ahead and hear your motion; and if I say I agree with you, then that will be the end of the case after the compensatory damages."

> Punitive damages are recoverable only in tort actions where there are allegations and proof of facts showing some aggravating factors surrounding the commission of the tort such as actual malice, oppression, gross and willful wrong, insult, indignity or a reckless or wanton disregard of plaintiff's rights. In order for a plaintiff to collect punitive damages there must be some additional element of asocial behavior which goes beyond the facts necessary to create a simple case of tort.

Shugar v. Guill, 51 N.C. App. 466, 469, 277 S.E.2d 126, 129, *modified and affirmed*, 304 N.C. 332, 283 S.E. 2d 507 (1981). One of the stated justifications for a trial court's denial of a plaintiff's motion to amend its complaint is futility of amendment. *Delta Envtl. Consultants, Inc. v. Wysong & Miles Co.*, 132 N.C. App. 160, 166, 510 S.E.2d 690, 694, *rev. denied*, 350 N.C. 379, 536 S.E.2d 70 (1999). Denial of a motion to amend is reviewed under an abuse of discretion standard, and the discretion of the trial court is given great deference. *North River Ins. Co. v. Young*, 117 N.C. App. 663, 670, 453 S.E.2d 205, 210 (1995).

Because plaintiff agreed to postpone hearing on its motion until after the evidentiary portion of the trial, it was within the discretion of the trial court to rule on the futility of amending the complaint to include the issue of punitive damages based upon the evidence presented, the findings of the jury, and the stipulations of the parties. We find no abuse of discretion in the trial court's denial of plaintiff's motion based upon this evidence, as we cannot hold that the trial court's failure to find the requisite aggravating factors necessary to support punitive damages as "manifestly unsupported by reason or . . . so arbitrary that it could not have been the result of a reasoned decision." ' " *Harris*, 184 N.C. App. at 607, 646 S.E.2d at 833.[2] This argument is without merit.

Defendants' Appeal

[4] In defendants' first argument, they contend that the trial court erred in failing to grant their motions for summary judgment and judgment on the pleadings for the conversion claim on the grounds that they were not obligated to apply the proceeds of the sale of the collateral to senior security interests. We disagree.

As this Court recently explained,

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

Wilkins v. Safran, 185 N.C. App. 668, 671-72, 649 S.E.2d 658, 661 (2007). "Moreover, 'all inferences of fact . . . must be drawn against the movant and in favor of the party opposing the motion.' The stand-

2. Although the trial court did not identify its reasons for denying the motion to amend, its ruling will be upheld as long as a valid reason therefore existed. *Wysong & Miles*, 132 N.C. App. at 166, 510 S.E.2d at 694.

ard of review for summary judgment is *de novo*." *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007) (citations omitted).

Pursuant to North Carolina General Statutes, section 25-9-315, except as otherwise provided either in section 25-2-403(2) or in Article 9 of the Uniform Commercial Code as enacted in this State, "[a] security interest or agricultural lien continues in collateral notwithstanding sale, lease, license, exchange, or other disposition thereof unless the secured party authorized the disposition free of the security interest or agricultural lien[.]" N.C. Gen. Stat. § 25-9-315(a)(1) (2001). Section 25-9-315(a) further provides that "[a] security interest attaches to any identifiable proceeds of collateral." N.C. Gen. Stat. § 25-9-315(a)(2) (2001). The term "proceeds" includes "[w]hatever is acquired upon the . . . disposition of collateral[,]" N.C. Gen. Stat. § 25-9-102 (64) (2001), and pursuant to section 25-9-315(c), "[a] security interest in proceeds is a perfected security interest if the security interest in the original collateral was perfected." N.C. Gen. Stat. § 25-9-315(c) (2001).

Section 25-9-315 "contains the general rule that a security interest survives disposition of the collateral. In these cases, the secured party may repossess the collateral from the transferee or, in an appropriate case, maintain an action for conversion." N.C. Gen. Stat. § 25-9-315, comment 2 (2001). "[C]onversion is defined as an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights." *Myers v. Catoe Constr. Co.*, 80 N.C. App. 692, 695, 343 S.E.2d 281, 283 (1986). "The essence of conversion is not the acquisition of property by the wrongdoer, but a wrongful deprivation of it to the owner . . . and in consequence it is of no importance what subsequent application was made of the converted property, or that defendant derived no benefit from the act." *Lake Mary Ltd. P'ship. v. Johnston*, 145 N.C. App. 525, 532, 551 S.E.2d 546, 552, *rev. denied*, 354 N.C. 363, 557 S.E.2d 539 (2001) (quotation marks and citation omitted). "[T]he general rule is that there is no conversion until some act is done which is a denial or violation of the plaintiff's dominion over or rights in the property." *Id.* (internal quotation marks and citation omitted). Therefore, two essential elements are necessary in a claim for conversion: (1) ownership in the plaintiff, and (2) a wrongful conversion by the defendant. *See id.*

In the instant case, by proving that it possessed a perfected security interest in the collateral and resulting proceeds, plaintiff satisfied

its burden of demonstrating ownership. Plaintiff also established that the defendants engaged in the wrongful deprivation of plaintiff's ownership interest in the collateral and resulting proceeds. Defendants were notified by plaintiff of its senior security interest, yet continued with the auction in derogation of plaintiff's rights.

Defendants base their argument in part on the following statutory provision: "After default, a secured party may sell, lease, license, or otherwise dispose of any or all of the collateral in its present condition or following any commercially reasonable preparation or processing." N.C. Gen. Stat. § 25-9-610(a) (2007). By the express terms of this provision, defendants could sell the Stephens' cattle only if 1) they proved they had a valid security interest in said cattle, and 2) they proved that the Stephens had defaulted in their obligations pursuant to that security interest.

Defendant Walnut Grove stipulated at trial that it had no security interest in the Stephens' cattle. Defendants Rocky Creek and Broker Dairy, through their presidents, testified at trial and by deposition that the Stephens were not in default on their security agreements. Therefore, defendants, through their own testimony and admissions, have provided facts which excluded them from a right to sell any part of the Stephens' Herd pursuant to Article 9, and specifically the provisions upon which they rely, sections 25-9-610 and 25-9-615. N.C. Gen. Stat. §§ 25-9-610(a) and 25-9-615(a) (2007).

Defendants argue that though they failed to provide plaintiffs with written notice of the auction, as required by North Carolina General Statutes, section 25-9-611, plaintiffs had actual notice, and therefore were barred from arguing the impropriety of the auction, or the disbursement of the proceeds. However, defendants had actual notice of plaintiff's claim of a superior security interest in the Stephens' herd before auction, through letters sent by plaintiff's attorney to defendants dated 21 October 2002. Plaintiff sent letters to defendant Walnut Grove, both prior to the auction and after, confirming conversations between plaintiff's counsel, Daniel C. Burton and Thomas W. Waldrep, Jr., and Lewis Harrison (Harrison), president of Walnut Grove, in which plaintiff informed Walnut Grove of its superior security interest in the Stephens' herd, stated that: "As you are aware, there are outstanding issues concerning the priority rights of various creditors, including [plaintiff], in the cattle to be sold at auction. Given that fact, you have stated that the proceeds of the auction sale will be held in escrow until such time as the priority rights of

creditors in the livestock can be fully determined." Harrison testified at trial he was made aware of plaintiff's claims of a superior security interest, and that he proceeded with the auction without attempting to determine the nature of plaintiff's security interest, and how it might pertain to the cattle sold at auction. He further testified that he was aware plaintiff had warned defendants not to disburse the proceeds from the auction without written agreement as to how to proceed, and that were defendants to do so, plaintiff would initiate a suit against them for conversion. Harrison testified that he did agree to hold the funds in escrow until proper distribution of the funds could be determined, and further admitted North Carolina law required him to do so. There is no doubt that Harrison was aware of the importance of holding the proceeds in escrow until priority rights could be determined, as Walnut Grove had been a named defendant in three prior lawsuits, and one complaint to the North Carolina Auctioneer Licensing Board for failing to pay proceeds to a party entitled to those funds. For this violation, the Licensing Board suspended Walnut Grove's auction license for two years.

The evidence clearly shows that plaintiff was defending its rights vigorously pursuant to its stated superior security interest in the Stephens' herd, both before and after the auction. *See* N.C. Gen. Stat. §§ 25-9-315 and comment 2; 25-9-322; 25-9-609 and comment 5; 25-9-610 comment 5. Even assuming *arguendo* that defendants had a right to auction the cattle pursuant to Article 9, and we hold that they did not, they may not claim any protection of a good faith justification for disbursing the proceeds among themselves. *See* N.C. Gen. Stat. § 25-9-615(g). The evidence shows that plaintiff made a decision to allow the auction to proceed instead of pursuing an injunction based upon the agreement pursuant to which the auction proceeds were to be held in escrow until the parties could agree upon proper disposition. This choice by plaintiff was in the interest of an expeditious and fair resolution of the dispute, potentially avoiding the costs and delay of trial for all parties, and we will not punish plaintiff for this reasonable course of action. In light of the unjustified manner in which defendants took possession of, and auctioned, the Stephens cattle, and in light of the fact that defendants did not adhere to the agreement to hold the proceeds in escrow pending final resolution, but disbursed the proceeds amongst themselves contrary to North Carolina law, we hold the trial court did not err in granting plaintiffs 21 December 2005 motion for summary judgment determining that defendants had converted the proceeds of the auction sale. We further hold that the trial court did not err in its 26 May 2006 judgment

in determining, as a matter of law, in favor of plaintiffs conversion claim. This argument is without merit.

In light of our holding in defendants' first argument, we need not address defendants' second argument.

[5] In defendants' third argument, they contend that the trial court erred in allowing plaintiff's motion to amend its complaint, because the motion to amend was done for the purpose of delay, and was futile. We disagree.

"[L]eave to amend should be freely given," and we review a trial court's ruling on a motion to amend pleadings for abuse of discretion. *Duncan v. Ammons Constr. Co.*, 87 N.C. App. 597, 599, 361 S.E.2d 906, 908 (1987). "An abuse of discretion will be found where a trial court's ruling 'is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.' " *Pinewood Homes, Inc. v. Harris*, 184 N.C. App. 597, 607, 646 S.E.2d 826, 833 (2007) (quotations and citations omitted). "Refusal to grant the motion without any justifying reason and without a showing of prejudice to defendant is considered an abuse of discretion." *Duncan*, 87 N.C. App. at 599, 361 S.E.2d at 908. Valid grounds for which a motion to amend may be denied include "undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies, undue prejudice and futility of the amendment." *Nationsbank of N.C., N.A. v. Baines*, 116 N.C. App. 263, 268, 447 S.E.2d 812, 815 (1994) (quotations and citation omitted).

Defendants make no argument in their brief supporting their assertion that the motion to amend was for the purpose of, or caused, undue delay. They further make no argument that they were prejudiced by any delay. Defendants do argue that the amended complaint was futile, because they "were entitled to foreclose on the Collateral and retain the proceeds." In light of our holding above, we hold that the trial court did not abuse its discretion in granting plaintiff's motion to amend. This argument is without merit.

[6] In defendants' fourth argument, they contend that the trial court erred in certain evidentiary admissions at trial. We disagree.

"A trial court's evidentiary rulings are subject to appellate review for an abuse of discretion, and will be reversed only upon a finding that the ruling was so arbitrary that it could not be the result of a reasoned decision." *Lord v. Customized Consulting Specialty, Inc.*, 182

N.C. App. 635, 644, 643 S.E.2d 28, 33-34, *disc. rev. denied*, 361 N.C. 694, 652 S.E.2d 647 (2007).

Defendants first argue that the trial court erred in denying their motion *in limine* to exclude any evidence relating to their refusal to place into escrow funds received from the sale of the Collateral. Defendant's motion was, in part, based upon the fact that the trial court previously had denied plaintiff's motion to compel defendants to escrow the proceeds. Therefore, defendants contend, the trial court not only allowed evidence of their decision not to escrow the proceeds through the trial, but also denied the opportunity to present evidence that such decision was lawful. We note that defendants do not direct this Court to the trial court's order denying plaintiff's motion to compel the escrow of the funds, and our review of the record fails to disclose that order. It is the defendants' duty to make sure the record contains all evidence relevant to its appeal, and its duty to direct this Court to that evidence in its brief. N.C. R. App. P., Rules 9 and 28(b)(6). Defendants contend that because a prior judge had denied plaintiff's motion to escrow the funds, the issue had been decided, and as a matter of law, defendants were allowed to disburse the proceeds in the manner they chose. Defendants direct this Court to no evidence that the denial of plaintiff's motion constituted a final disposition of that issue. It was a motion *in limine*. A motion *in limine* is interlocutory, and by its nature subject to being revisited by the trial court, as circumstances warrant. *See DOT v. Olinger*, 172 N.C. App. 848, 850, 616 S.E.2d 672, 674 (2005). Defendants further fail to cite any authority in their brief for their proposition, which is a violation of Rule 28(b)(6) of our Rules of Appellate Procedure. This violation subjects defendants argument to dismissal. In fact, the only legal citations in this argument are to Rules 402 and 403 of the North Carolina Rules of Evidence concerning relevant evidence and prejudice. Defendants argue evidence of their refusal to escrow the funds was irrelevant, based upon their argument, *supra*, that they were entitled pursuant to Article 9 to act as they did. As we have held against defendants on that issue, we hold against them on this issue as well. We further hold that the trial court's denial of defendants' motion to exclude any evidence that they failed to escrow the auction funds in violation of an agreement made between the parties was not an abuse of discretion, as that evidence was highly relevant to plaintiff's claims, and was not substantially outweighed by any prejudice to defendants. N.C. R. Evid., Rules 402 and 403.

[7] Defendants next argue that the trial court erred in excluding evidence that there was a reasonable basis for their retaining the auction proceeds, and in excluding defendants evidence of their offers to compromise or pay money to plaintiff. As defendants only argue error in the exclusion of this evidence based upon alleged prejudice concerning the unfair and deceptive trade practices claim against them, which the trial court dismissed as a matter of law, this argument is moot.

[8] Defendants next argue the trial court erred in allowing into evidence plaintiff's default judgment against the Stephens, which included an eighteen percent interest rate on monies owed. Defendants argue that the legal limit for interest on this kind of default was eight percent. The trial court reduced the pre-judgment rate from eighteen percent to eight percent, so there was no financial prejudice to defendants. They argue, however, that this evidence was irrelevant and unduly prejudicial, and could have misled the jury. They offer no evidence in support of how the admission of this evidence misled the jury, or prejudiced them in any way. This argument is without merit.

[9] In defendants' fifth argument, they contend the trial court erred in denying their motions for directed verdict on the grounds that the interest rate on the underlying secured debt owed plaintiff is unenforceable as a matter of law, and that plaintiff failed to establish any unfair or deceptive trade practice. We disagree.

As noted above, the trial court found no unfair or deceptive trade practice as a matter of law in its judgment. Defendants argue that the trial court should have directed a verdict enforcing a maximum of eight percent interest on the underlying pre-judgment secured debt owed plaintiffs. The actual pre-judgment interest applied to plaintiff's conversion award was eight percent. It is difficult to determine how defendants believe they have been prejudiced by either of these outcomes. In fact, as to the outcome of the unfair and deceptive trade practices issue, defendants stated at trial "we think the jury came to the right conclusion; and that the Court did as well . . . ." This argument is without merit.

[10] In defendants' sixth argument, they contend that the trial court erred by refusing to instruct the jury on the principle of marshaling. We disagree.

"The 'appealing party must show not only that error occurred in the jury instructions but also that such error was likely, in light of the

entire charge, to mislead the jury.' The trial court is 'required to instruct a jury on the law arising from the evidence presented.' " *Arndt v. First Union Nat'l Bank*, 170 N.C. App. 518, 525, 613 S.E.2d 274, 279 (2005) (citations omitted).

"As a general rule, before the doctrine of marshaling assets will be applied, there must be two funds or properties, at the time the equitable relief is sought, belonging to the common debtor of both creditors, on both of which funds one party has a claim or lien, and on one only of which the other party has a claim or lien." *Dixieland Realty Co. v. Wysor*, 272 N.C. 172, 181, 158 S.E.2d 7, 14 (1967) (quotations and citation omitted).

> The doctrine of marshaling applies only when it can be applied with justice to the paramount, or doubly secured, creditor, and without prejudicing or injuring him, or trenching on his rights. Such relief will not be given if it will hinder or impose hardships on the paramount creditor, or inconvenience him in the collection of his debt, or deprive him of his rights under his contract, by displacing or impairing a prior acquired lien or contract right; nor will it be given on any other terms than giving him complete satisfaction. The doctrine is never enforced where it will operate to suspend or put in peril the claim of the paramount creditor, or cause him risk of loss, or where the fund to be resorted to is one which may involve such creditor in litigation, especially if final satisfaction is somewhat uncertain, or where the effect of applying the doctrine would be to compel him to proceed by an independent action, such as one for the foreclosure of a mortgage, since that would place an additional burden on him. [T]he paramount creditor will not be compelled to collect his debt from the singly charged fund or property where such fund is of uncertain value, especially where long delay will necessarily ensue in converting it into money, or where that fund consists of property in the possession of third persons who claim title thereto, while the doubly charged fund is money in court.

Dixieland Realty, 272 N.C. at 181-82, 158 S.E.2d at 14 (quoting 55 C.J.S., Marshaling Assets and Securities, § 4, p. 962, quotations and citation omitted) (emphasis removed). "When equitable relief is sought, courts claim the power to grant, deny, limit, or shape that relief as a matter of discretion. This discretion is normally invoked by considering an equitable defense, such as unclean hands or laches, or by balancing equities, hardships, and the interests of the public and

of third persons." *Roberts v. Madison County Realtors Ass'n*, 344 N.C. 394, 399, 474 S.E.2d 783, 787 (1996); *see also Kennedy v. Kennedy*, 160 N.C. App. 1, 15, 584 S.E.2d 328, 337 (2003).

Defendants argue that because the Stephens' herd numbered between 600 and 700 at the time of auction, plaintiff was required to seek its relief from the cattle defendant did not sell at auction. However, marshaling is an equitable doctrine, and the trial court had discretion to grant or deny that relief based upon the facts before it. First, defendants fail to show that there were two separate sets of properties, where plaintiff had a security interest in both, but defendants had a security interest in only one. There was one Stephens' herd. Defendants, without consulting plaintiff, selected the best 300 head of cattle, making no attempt to determine if the cattle they selected were those sold by them to the Stephens, or the progeny or replacement for same. Defendants did not request the equitable doctrine of marshaling at this time. Defendants contend that plaintiff could have recovered its investment by selling the remaining cattle. However, in *voir dire*, defendants informed the trial court that the Stephens probably sold some of the remaining cattle, probably removed some cattle to Florida, and that "I think the evidence will not show where they all went. I think the evidence will be unclear as to that." Furthermore, there was a prior judgment in the case deciding as a matter of law that defendants had committed conversion by selling the 300 cattle at auction.

With these facts before the trial court, evidencing that defendants had not properly identified a separate property in which they held a security interest; that the location of the remaining cattle was unknown, and forcing plaintiff to attempt to recover its investment from those cattle would be burdensome, and potentially fruitless; and that in selling the 300 cattle, defendants were not acting with "clean hands", we hold the trial court did not abuse its discretion in denying the marshaling instruction, as it was not required under the facts of the case or the law. This argument is without merit.

[11] In defendants' seventh argument, they contend that the trial court erred by not awarding them costs, because the final judgment amount was less than an earlier proffered offer of judgment. We disagree.

Following the entry of judgment, defendants moved pursuant to Rules 59 and 68 of the North Carolina Rules of Civil Procedure for the trial court to amend its judgment and award defendants costs in

the action. Motions to amend pursuant to Rule 59 are matters within the discretion of the trial court. *Strickland v. Jacobs*, 88 N.C. App. 397, 399, 363 S.E.2d 229, 230 (1988). Rule 68(a) allows defendants to make an offer of judgment at any time more than ten days before the start of trial. If the offer of judgment is refused, and the final judgment at trial is less than the rejected offer, the offeree must pay the costs defendants incurred after submission of the offer. N.C. Gen. Stat. § 1A-1, Rule 68 (2007). Defendants properly submitted an offer of judgment to plaintiff in the amount of $52,660.74 before trial, which plaintiff rejected. Defendants argue that the final judgment was less than the offer of judgment, therefore the trial court was required to charge its post-offer costs to plaintiff. However, when we combine the judgment award of $44,232.88 with the costs awarded plaintiff, $11,776.05, as we are required to do, *Roberts v. Swain*, 353 N.C. 246, 538 S.E.2d 566 (2000), we reach a final judgment in favor of plaintiff in the amount of $56,008.93, which is more than the amount proffered in defendants offer of judgment. This argument is without merit.

Affirmed.

Chief Judge MARTIN and Judge ELMORE concur.

ANDREA GREGORY, EMPLOYEE, PLAINTIFF-APPELLEE v. W.A. BROWN & SONS, EMPLOYER, PMA INSURANCE GROUP, CARRIER, DEFENDANTS-APPELLANTS

No. COA07-1265

(Filed 19 August 2008)

1. Workers' Compensation— injury—specific traumatic incident—judicially cognizable time period

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff employee sustained a specific traumatic incident on some unknown date during the week of 11 October 2001 or on or about 10 October 2001 even though defendants contend that plaintiff was not at work at the time she claimed the incident occurred because: (1) while case law interpreting the specific traumatic incident provision of N.C.G.S. § 97-2(6) requires plaintiff to prove an injury at a cognizable time, it does not compel plaintiff to allege the specific

hour or day of the injury, and instead events which occur contemporaneously during a cognizable time period and which cause a back injury fit the definition intended by the legislature; (2) although plaintiff identified a particular date on which the incident occurred and her time records showed she did not work that particular morning, plaintiff's testimony, along with other evidence, placed the specific traumatic incident within a judicially cognizable time period; (3) plaintiff's testimony that the incident occurred on 11 October 2001, coupled with the evidence that she sought medical treatment on 14 October 2001 and could not work on 15 October 2001 or after 16 October 2001, establishes that the specific traumatic incident occurred on or about 10 October 2001 or on some unknown date during the week of 11 October 2001; and (4) plaintiff's treating neurosurgeon testified that plaintiff's work-related incident during the week of 11 October 2001 more likely than not exacerbated plaintiff's preexisting back condition.

2. Workers' Compensation— disability—sufficiency of testimony—failure to cite authority

The Industrial Commission did not err in a workers' compensation case by its conclusions regarding plaintiff employee's disability as a result of a lifting incident even though defendants contend no testimony was presented to support a finding that the described lifting incident occurred on any day during the week of 11 October 2001, nor did the Commission err by reserving the issue of plaintiff's continued disability beyond 5 March 2005, because: (1) the Court of Appeals already concluded plaintiff's testimony, coupled with the evidence, provided sufficient proof of disability; and (2) defendants abandoned its argument regarding continued disability by failing to cite any legal authority as required by N.C. R. App. P. 28(b)(6).

3. Workers' Compensation— failure to provide employer with written notice of injury—actual knowledge

The Industrial Commission did not err in a workers' compensation case by concluding plaintiff employee satisfied the requirements of N.C.G.S. § 97-22 because: (1) the failure of an employee to provide written notice of her injury within thirty days will not bar her claim where the employer has actual knowledge of her injury; (2) the findings of fact showed defendant employer had actual knowledge of plaintiff's injury; and (3) defendant was not prejudiced by plaintiff's failure to provide written notice.

4. Workers' Compensation— future medical compensation— limitation—failure to cite authority

The Industrial Commission did not err in a workers' compensation case by awarding medical compensation to plaintiff employee even though defendants contend the Commission failed to find or conclude that there was a substantial risk of the necessity of future medical compensation because: (1) defendants abandoned this argument by failing to cite authority in support of this argument as required by N.C. R. App. P. 28(b)(6); and (2) even assuming arguendo that this issue was properly before the Court of Appeals, the Commission's award was subject to the limitations of N.C.G.S. § 97-25.1 should the conditions arise under which the pertinent limitations operated.

5. Workers' Compensation— employer credit—entitlement

The Industrial Commission did not abuse its discretion in a workers' compensation case by concluding defendants were not entitled to a credit for compensation received by plaintiff employee under a disability policy provided by defendant employer because: (1) N.C.G.S. § 97-42 provides that the decision of whether to grant a credit is within the Commission's sound discretion; (2) neither our Supreme Court nor our Court of Appeals has held that an employer is necessarily entitled to a credit against a workers' compensation award for payments received by an injured employee under a benefits program that has been partially funded by the employee; and (3) defendants stipulated at the hearing before a deputy commissioner that the short-term and long-term disability plans giving plaintiff benefits were partially funded by plaintiff.

6. Workers' Compensation— coworker's testimony—improper service of subpoena—unusual circumstance—post-hearing deposition

Although plaintiff failed to comply with N.C.G.S. § 1A-1, Rule 45(b)(1) when she personally served a subpoena upon a coworker, plaintiff's failure to properly serve the subpoena was an unusual circumstance warranting the taking of the coworker's post-hearing deposition at plaintiff's expense pursuant to Workers' Compensation Rule 612(3) where credibility was an issue in the case, and the coworker had potentially pertinent information regarding that issue.

7. Workers' Compensation— disability and entitlement to indemnity and medical compensation—remand to deputy commissioner

The Industrial Commission did not err in a workers' compensation case by its remand to a deputy commissioner in its 2005 opinion and award instructing the commissioner to enter an opinion and award on the issue of plaintiff's disability and entitlement to indemnity and medical compensation because: (1) the Industrial Commission has authority to review, modify, adopt, or reject findings of a hearing commissioner; (2) the transcript was insufficient to resolve several of the issues, and thus the Commission properly remanded the case for further hearing before a deputy commissioner; (3) following entry of the commissioner's opinion and award, the Commission reviewed the evidence de novo and adopted the commissioner's opinion and award with two exceptions; and (4) the Commission properly entered its own opinion and award with its own findings of fact and conclusions of law.

Judge JACKSON concurring in part and dissenting in part.

Appeal by Defendants from opinion and award entered 11 May 2007 by the North Carolina Industrial Commission. Heard in the Court of Appeals 16 April 2008.

DeVore, Acton, & Stafford, P.A., by William D. Acton, Jr., for Plaintiff-Appellee.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Neil P. Andrews and Jennifer P. Pulley, for Defendants-Appellants.

McGEE, Judge.

Andrea Gregory (Plaintiff) filed a Form 18 on 5 February 2002 claiming benefits for a back injury allegedly caused by a specific traumatic incident that occurred while Plaintiff was working for W.A. Brown & Sons (Defendant-Employer). Defendant-Employer and its carrier, PMA Insurance Group (collectively Defendants), denied Plaintiff's claim, and Plaintiff requested that her claim be assigned for hearing.

Deputy Commissioner Morgan S. Chapman (Deputy Commissioner Chapman) held a hearing on 16 September 2003. One of Plaintiff's lay witnesses, Tony Harding (Mr. Harding), did not appear for the hearing, and Plaintiff testified that she had personally deliv-

ered a subpoena to Mr. Harding in advance of the hearing. At the close of the hearing, Plaintiff "moved that she be allowed to depose [Mr.] Harding who did not appear for the hearing to testify." The parties also requested additional time to depose necessary medical witnesses. Deputy Commissioner Chapman entered an order on 10 October 2003 allowing Plaintiff sixty days to depose Mr. Harding at Plaintiff's expense and thirty additional days in which to submit Mr. Harding's deposition transcript. Deputy Commissioner Chapman also allowed the parties sixty days to depose necessary medical witnesses at Defendants' expense and thirty additional days to submit their depositions.

Deputy Commissioner Chapman entered an opinion and award on 28 April 2004 denying Plaintiff's claim for benefits. Deputy Commissioner Chapman concluded that Plaintiff had sustained an injury by accident arising out of and in the course of her employment with Defendant-Employer on an unknown date during the week of 11 October 2001. However, Deputy Commissioner Chapman also concluded that Plaintiff's claim was barred because Plaintiff failed to give Defendant-Employer written notice of the injury within thirty days.

Plaintiff and Defendants appealed to the North Carolina Industrial Commission (the Commission), and the Commission filed an opinion and award on 18 January 2005 (2005 opinion and award) reversing Deputy Commissioner Chapman's opinion and award. The Commission concluded that "[o]n an unknown date during the week of October 11, 2001, [P]laintiff sustained an injury by accident arising out of and in the course of her employment with [D]efendant [-Employer] in that she sustained a back injury as the result of a specific traumatic incident of the work assigned." The Commission also concluded that "[t]he aggravation or exacerbation of [P]laintiff's preexisting back condition as a result of a specific traumatic incident, which has resulted in loss of wage earning capacity, is compensable under the Workers' Compensation Act." The Commission further concluded that Defendants had actual notice of Plaintiff's work-related injury. The Commission concluded that even if Defendants did not have actual notice, "[P]laintiff's failure to give written notice within thirty days [was] reasonably excused because [P]laintiff did not reasonably know of the nature, seriousness, or probable compensable character of her injury until after extensive treatment with Dr. Roy, her treating physician." The Commission remanded the matter for assignment to a deputy commissioner "for the taking of additional

evidence or further hearing, if necessary, and the entry of an Opinion and Award with findings on the issues of (1) the extent of [P]laintiff's disability; (2) the amount of indemnity benefits due [P]laintiff; and (3) the extent of medical compensation due [P]laintiff."

Defendants appealed to our Court, and Plaintiff filed a motion to dismiss Defendants' appeal on the grounds that Defendants' appeal was interlocutory and did not affect a substantial right. We entered an order on 3 June 2005 dismissing Defendants' appeal.

On remand of the Commission's 2005 opinion and award, Deputy Commissioner John B. Deluca (Deputy Commissioner Deluca) filed an opinion and award on 4 May 2006. Defendants appealed, and the Commission filed an opinion and award on 11 May 2007 (2007 opinion and award), adopting Deputy Commissioner Deluca's opinion and award "except with regard to the issue of the causal relationship of [P]laintiff's leg and hip pain to the compensable injury and the issue of ongoing disability." The Commission made numerous findings of fact, including a finding that the Commission's 2005 opinion and award "is incorporated by reference as if fully set forth herein." The Commission concluded that "[o]n or about October 10, 2001, [P]laintiff sustained a compensable injury as the result of a specific traumatic incident that aggravated her pre-existing back condition." However, the Commission concluded that Plaintiff had "failed to carry the burden of proving by competent evidence that a causal relationship existed between the work-related accident and her left leg and hip pain." The Commission concluded that as a result of her compensable specific traumatic incident, Plaintiff was totally disabled from 16 October 2001 until 31 May 2005, and also concluded that Plaintiff was entitled to receive disability compensation for that period of time. The Commission concluded that Defendants were not entitled to a credit for short-term and long-term disability payments received by Plaintiff and further concluded that "Defendants are required to provide [P]laintiff with reasonably necessary medical treatment related to her compensable back injury by accident that tends to effect a cure, provide relief, or lessen the period of disability." In its award, the Commission stated as follows: "In that the record contains insufficient evidence concerning the extent of [P]laintiff's disability, if any, after May 31, 2005, this issue is RESERVED for future determination." Defendants appeal.

Our review of an opinion and award by the Commission is limited to two inquiries: (1) whether there is any competent evidence in the

record to support the Commission's findings of fact; and (2) whether the Commission's conclusions of law are justified by the findings of fact. *Counts v. Black & Decker Corp.*, 121 N.C. App. 387, 389, 465 S.E.2d 343, 345, *disc. review denied*, 343 N.C. 305, 471 S.E.2d 68 (1996). If supported by competent evidence, the Commission's findings are conclusive even if the evidence might also have supported contrary findings. *Jones v. Candler Mobile Village*, 118 N.C. App. 719, 721, 457 S.E.2d 315, 317 (1995). We review the Commission's conclusions of law *de novo*. *Johnson v. Herbie's Place*, 157 N.C. App. 168, 171, 579 S.E.2d 110, 113, *disc. review denied*, 357 N.C. 460, 585 S.E.2d 760 (2003).

I.

[1] Defendants first argue the Commission erred by concluding that Plaintiff sustained a specific traumatic incident on some unknown date during the week of 11 October 2001 or on or about 10 October 2001. Specifically, Defendants argue that these conclusions "are not supported by the competent evidence regarding when Plaintiff's alleged lifting incident occurred." Defendants contend that Plaintiff "claims she was picking up a bucket of pods and felt pain in her lower back [on 11 October 2001]" and that "Plaintiff has never wavered in the identification of October 11, 2001, as the specific date she claims to have been injured at work." However, Defendants point to the Commission's finding in the 2005 opinion and award that "[Plaintiff's] time records show she did not work that particular morning." Defendants also argue that the Commission's conclusions are premised upon a misapprehension of law. Specifically, Defendants argue that "the caselaw does not permit the Commission to create a date of injury or to substitute its own findings when the evidence is insufficient."

In its 2005 opinion and award, the Commission found as follows: "Plaintiff alleges that she was injured on October 11, 2001, after her morning break; however, her time records show she did not work that particular morning. Nonetheless, the Full Commission finds that [P]laintiff did suffer an injury on an unknown date that same week." In its 2007 opinion and award, the Commission found that "Plaintiff sustained a back injury as a result of a specific traumatic incident on or about October 10, 2001."

These findings of fact are supported by competent evidence. Plaintiff testified that when she tried to pick up a bucket of metal pods weighing sixty to seventy pounds, she "felt a pop" in the lower

part of her back. Plaintiff testified that this occurred some time between 9:40 a.m. and 12:00 p.m. on Thursday, 11 October 2001. Plaintiff also testified that at the time of the incident, she was working with Mr. Harding, and that Mr. Harding came over to her and "asked what was wrong." Plaintiff testified that Mr. Harding called over Rick Dunaway (Mr. Dunaway) and that Mr. Dunaway went to get Plaintiff's supervisor, Barry Christy (Mr. Christy). Plaintiff also testified that Mr. Christy gave her a back brace.

Plaintiff further testified that she went to ProMed, a medical clinic, on Sunday, 14 October 2001, complaining of back pain. Plaintiff's testimony is corroborated by a ProMed medical report stating that Plaintiff was treated for low back pain on 14 October 2001. Plaintiff testified that she was unable to work on Monday, 15 October 2001 due to her back pain, and that she went to work on Tuesday, 16 October 2001, but that she only worked until 11:00 a.m. or 12:00 p.m. Specifically, Plaintiff testified that on Tuesday, 16 October 2001, Mr. Christy told Plaintiff that she should go home due to "the way [Plaintiff] was walking." Plaintiff further testified that Pam Cordts (Ms. Cordts) in Defendant-Employer's human resources department also told Plaintiff "that they [were] needing to get [her] out of Brown because of the way [she] was walking." Plaintiff testified that she left work on Tuesday, 16 October 2001, and that since then, she has not been able to return to work.

Mr. Harding testified that he was working with Plaintiff when she injured her back lifting a bucket of metal pods. Although Mr. Harding could not state with certainty whether he worked with Plaintiff on 11 October 2001, he did testify as to a previous statement that he had written, in which he stated:

> On 10/11/2001 [Plaintiff] and I were working on our jobs as process technicians. [Plaintiff] was my work partner on this day. When [Plaintiff] picked up a crate of metal pods, I noticed that her facial expression dramatically changed as if she had just felt pain. [Plaintiff] put the crate down and said her back was hurting. She then went and advised our team leader, [Mr.] Dunaway.

Mr. Harding testified that this statement was true and accurate.

Defendants argue that Plaintiff's time records show that she arrived at work on 11 October 2001 at 6:59 a.m., punched out at 8:31 a.m., and did not return to work until 12:05 p.m. Therefore, Defendants contend that Plaintiff was not at work at the time she

claimed the incident occurred. However, Plaintiff's testimony that the incident occurred on 11 October 2001, coupled with the evidence that she sought medical treatment on 14 October 2001 and could not work on 15 October 2001 or after 16 October 2001, establishes that the specific traumatic incident occurred on or about 10 October 2001 or on some unknown date during the week of 11 October 2001. Therefore, the Commission's findings of fact are supported by competent evidence and the Commission's findings of fact support the challenged conclusions of law.

Moreover, the Commission did not enter its conclusions of law under a misapprehension of the law. The Workers' Compensation Act provides:

> With respect to back injuries, . . . where injury to the back arises out of and in the course of the employment and is the direct result of a specific traumatic incident of the work assigned, "injury by accident" shall be construed to include any disabling physical injury to the back arising out of and causally related to such incident.

N.C. Gen. Stat. § 97-2(6) (2007). "While the case law interpreting the specific traumatic incident provision of N.C. Gen. Stat. § 97-2(6) requires the plaintiff to prove an injury at a cognizable time, this does not compel the plaintiff to allege the specific hour or day of the injury." *Fish v. Steelcase, Inc.*, 116 N.C. App. 703, 708, 449 S.E.2d 233, 237 (1994), *cert. denied*, 339 N.C. 737, 454 S.E.2d 650 (1995). Rather, "[e]vents which occur contemporaneously, during a cognizable time period, and which cause a back injury, fit the definition intended by the legislature." *Id.*

In *Fish*, our Court held that the Commission erred by determining that the plaintiff's injury did not occur at a judicially cognizable time. *Id.* at 709, 449 S.E.2d at 237. The findings established that the plaintiff identified mid-April 1989 as the time frame in which the injury occurred. *Id.* at 709, 449 S.E.2d at 237-38. The findings also established that the incident occurred at some time between 8 April and 1 May 1989. *Id.* at 709, 449 S.E.2d at 238. Our Court held: "Even though there are a variety of possible dates for the specific traumatic incident, the plaintiff's evidence, if believed, satisfies the judicially cognizable time requirement." *Id.* Our Court held that the plaintiff had satisfied this requirement even though the plaintiff identified 17 April 1989 as the specific date on which the injury occurred, and the Commission found this claim not credible. *Id.* Our Court held:

> This finding is simply a misunderstanding of the burden the plaintiff must meet to prove a back injury. *Judicially cognizable* does not mean "ascertainable on an exact date." Instead, the term should be read to describe a showing by [the] plaintiff which enables the Industrial Commission to determine when, within a reasonable period, the specific injury occurred. The evidence must show that there was some event that caused the injury, not a gradual deterioration. If the window during which the injury occurred can be narrowed to a judicially cognizable period, then the statute is satisfied.

Id.

In the present case, as in *Fish*, Plaintiff identified a particular date on which the incident occurred. However, as demonstrated by the Commission's finding in the present case, "[Plaintiff's] time records show she did not work that particular morning." Therefore, as in *Fish*, Plaintiff's identification of that specific time period is not credible. Nevertheless, Plaintiff's testimony, along with other evidence, placed the specific traumatic incident within a judicially cognizable time period. Plaintiff's testimony as to the date of the incident, which was corroborated by Mr. Harding's testimony, as well as Plaintiff's testimony that she sought treatment on 14 October 2001 and could not work on 15 October 2001 or after 16 October 2001, establishes that the specific traumatic incident occurred at a judicially cognizable time. Accordingly, we hold the Commission did not err.

In their reply brief, Defendants state that the Court of Appeals "has previously declined to follow *Fish* where the plaintiff was able to identify the actual date of the injury." In support of this proposition, Defendants cite *Rogers v. Smoky Mountain Petroleum Co.*, 172 N.C. App. 521, 617 S.E.2d 292 (2005). However, *Rogers* is inapposite. Even though the actual date of the alleged injury was not at issue in *Rogers*, our Court held that there was insufficient competent evidence regarding the cause of the plaintiff's alleged back injury. *Id.* at 528-29, 617 S.E.2d at 297. Therefore, we held that the plaintiff failed to prove he sustained a work-related injury to his back. *Id.* In contrast, and for the reasons that follow, Plaintiff in the present case presented sufficient evidence that her back injury was caused by a specific traumatic incident at work.

Defendants argue that Plaintiff failed to prove that the specific traumatic incident caused a compensable aggravation of her pre-

existing back condition. Specifically, Defendants argue that Plaintiff's medical records establish that she "had at least a six month history of back pain when she sought treatment on October 14, 2001." However, on appeal of an opinion and award of the Commission, our review is limited to a determination of whether the Commission's findings of fact are supported by competent evidence, even if the evidence would have supported contrary findings. *Jones*, 118 N.C. App. at 721, 457 S.E.2d at 317. We then determine whether the findings of fact support the conclusions of law, and whether the conclusions of law are correct. *Counts*, 121 N.C. App. at 389, 465 S.E.2d at 345.

In the case before us, Plaintiff's treating neurosurgeon, Dr. Ranjan Roy (Dr. Roy), testified that Plaintiff's work-related incident during the week of 11 October 2001 more likely than not exacerbated Plaintiff's pre-existing back condition. This evidence supports the Commission's finding that "[a]s a result of this specific traumatic incident, [Plaintiff] sustained an injury to her back that aggravated her preexisting degenerative condition." This finding, in turn, supports the Commission's conclusions that "[P]laintiff sustained an injury by accident arising out of and in the course of her employment with [D]efendant[-Employer] in that she sustained a back injury as the result of a specific traumatic incident of the work assigned" and that "[t]he aggravation or exacerbation of [P]laintiff's pre-existing back condition as a result of a specific traumatic incident, which has resulted in loss of wage earning capacity, is compensable under the Workers' Compensation Act." We overrule these assignments of error.

II.

[2] Defendants also argue that the Commission "rendered improper conclusions regarding Plaintiff's disability as a result of the lifting incident." Specifically, Defendants contend that "[a]s discussed above, no testimony was presented to support a finding that the described lifting incident occurred on any day during the week of October 11, 2001." In essence, Defendants make the same argument they made in Section I. For the same reasons, we overrule these assignments of error.

Defendants also argue that "there is no evidentiary support for the Commission's decision to reserve the issue of Plaintiff's continued disability beyond March 31, 2005." However, Defendants do not cite any legal authority in support of this argument, and we thus deem it abandoned. *See* N.C.R. App. P. 28(b)(6) (stating that "[a]ssignments of error . . . in support of which no reason or argument is stated or authority cited, will be taken as abandoned").

III.

[3] Defendants argue the Commission erred by concluding that Plaintiff satisfied the requirements of N.C. Gen. Stat. § 97-22, which provides:

> Every injured employee or his representative shall immediately on the occurrence of an accident, or as soon thereafter as practicable, give or cause to be given to the employer a written notice of the accident, and the employee shall not be entitled to physician's fees nor to any compensation which may have accrued under the terms of this Article prior to the giving of such notice, unless it can be shown that the employer, his agent or representative, had knowledge of the accident, or that the party required to give such notice had been prevented from doing so by reason of physical or mental incapacity, or the fraud or deceit of some third person; but no compensation shall be payable unless such written notice is given within 30 days after the occurrence of the accident or death, unless reasonable excuse is made to the satisfaction of the Industrial Commission for not giving such notice and the Commission is satisfied that the employer has not been prejudiced thereby.

N.C. Gen. Stat. § 97-22 (2007). Our Court has held that the "[f]ailure of an employee to provide written notice of her injury will not bar her claim where the employer has actual knowledge of her injury." *Lakey v. U.S. Airways, Inc.*, 155 N.C. App. 169, 172, 573 S.E.2d 703, 706 (2002), *disc. review denied*, 357 N.C. 251, 582 S.E.2d 271 (2003).

> In the case before us, the Commission concluded as follows:
>
> Defendants had actual notice of [P]laintiff's work-related injury, and resulting workers' compensation claim, (1) when [P]laintiff immediately reported her injury to her team leader, (2) when [P]laintiff's supervisor gave her a back support brace so that she could continue working; and (3) when her supervisor sent her to human resources to discuss her injury.

This conclusion is supported by several findings of fact. In finding of fact number five, the Commission found that after the incident at work, "Plaintiff immediately left her workstation to inform [Mr.] Dunaway, the team leader, about her injury. Plaintiff's statement that she reported the injury to [Mr.] Dunaway, as corroborated by [Mr.] Harding, is credible." Similarly, in finding of fact number nineteen, the Commission found that "[a]s soon as the injury occurred,

[P]laintiff left her work position to report the incident to her team leader, [Mr.] Dunaway, which is corroborated by her work partner, [Mr.] Harding."

These findings are supported by Plaintiff's testimony that after the incident, Mr. Harding came over to her and asked her what was wrong. Plaintiff then testified that Mr. Harding called over Mr. Dunaway and that Plaintiff told Mr. Dunaway that "[her] back had [gone] out. It popped." Mr. Harding corroborated Plaintiff's testimony by stating that after the incident, "[Plaintiff] then went and advised our team leader, [Mr.] Dunaway."

The Commission also found that "[Mr.] Dunaway reported the incident to [P]laintiff's supervisor, [Mr.] Christy, who subsequently gave [P]laintiff a back support belt." This finding is supported by Plaintiff's testimony that after she reported the incident to Mr. Dunaway, Mr. Dunaway went to find Plaintiff's supervisor, Mr. Christy. Plaintiff testified that she went to Mr. Christy's office and that Mr. Christy gave her a back brace.

The Commission also found that "[Plaintiff] reported for work on Tuesday but was so visibly impaired by pain that [Mr.] Christy referred [Plaintiff] to [Ms.] Cordts in human resources, which is corroborated by [Mr.] Christy's testimony." This finding is supported by Plaintiff's testimony that Mr. Christy told Plaintiff that she should go home on Tuesday, 16 October 2001, due to "the way [Plaintiff] was walking." Plaintiff testified that after she left Mr. Christy's office, "they carried [her] to [Ms.] Cordts[']s office" in human resources and Ms. Cordts also told Plaintiff "that they [were] needing to get [her] out of Brown because of the way [she] was walking."

We hold that these findings of fact, which are supported by competent evidence, support the Commission's conclusion of law that Defendant-Employer had actual knowledge of Plaintiff's injury. In light of this actual knowledge, we also hold that Defendant-Employer was not prejudiced by Plaintiff's failure to provide written notice of her injury within thirty days. *See Chilton v. School of Medicine*, 45 N.C. App. 13, 18, 262 S.E.2d 347, 350 (1980). We thus overrule these assignments of error.

IV.

[4] Defendants also argue that "the competent evidence does not support the . . . Commission's award of medical compensation to Plaintiff." Specifically, Defendants argue that the Commission erred

by failing to find or conclude that there was a substantial risk of the necessity of future medical compensation.

Defendants have failed to cite authority in support of this argument, and we thus deem it abandoned. *See* N.C.R. App. P. 28(b)(6) (stating that "[a]ssignments of error . . . in support of which no reason or argument is stated or authority cited, will be taken as abandoned"). However, even assuming *arguendo* that this issue is properly before us, we hold the Commission did not err.

N.C. Gen. Stat. § 97-25.1 (2007) provides as follows:

> The right to medical compensation shall terminate two years after the employer's last payment of medical or indemnity compensation unless, prior to the expiration of this period, either: (i) the employee files with the Commission an application for additional medical compensation which is thereafter approved by the Commission, or (ii) the Commission on its own motion orders additional medical compensation. If the Commission determines that there is a substantial risk of the necessity of future medical compensation, the Commission shall provide by order for payment of future necessary medical compensation.

Defendants' argument appears to be similar to the argument our Court rejected in *Guerrero v. Brodie Contrs., Inc.*, 158 N.C. App. 678, 582 S.E.2d 346 (2003). In *Guerrero*, the Commission declared in its award that the defendants "shall pay for all medical treatment incurred or to be incurred as a result of [the] [p]laintiff's compensable accident for so long as such treatment effects a cure, gives relief, or tends to lessen [the] [p]laintiff's period of disability." *Id.* at 685, 582 S.E.2d at 351 (quotation omitted). The defendants argued that "the Commission erred by awarding [the] plaintiff medical benefits without limitation, when, in fact, [t]he award . . . is necessarily limited by the operation of N.C.G.S. § 97-25[.1.]" *Id.* at 685, 582 S.E.2d at 350 (quotations omitted). Our Court held as follows:

> The award does not appear to override the provisions of G.S. § 97-25.1 and the record does not indicate that the issue of whether the two-year statute of limitations had begun to run was before the Commission. Therefore, we hold that the award is not overly broad and would be subject to the limitations of G.S. § 97-25.1, should the conditions arise under which the limitations operate.

Id. at 685, 582 S.E.2d at 351.

In the case before us, as in *Guerrero*, the Commission stated in its award that "Defendants shall pay all medical expenses incurred or to be incurred resulting from [P]laintiff's compensable back injury so long as it tends to [e]ffect a cure and give relief or lessen [P]laintiff's disability." Moreover, as in *Guerrero*, the record in the present case "does not indicate that the issue of whether the two-year statute of limitations had begun to run was before the Commission." *See id.* Therefore, as in *Guerrero*, we hold that the Commission's award is subject to the limitations of N.C.G.S. 97-25.1, "should the conditions arise under which the limitations operate." *See id.* We overrule these assignments of error.

V.

[5] Defendants also argue the Commission erred by concluding that "Defendants were not entitled to a credit for compensation received by Plaintiff pursuant to a disability policy provided by [Defendant-Employer]." N.C. Gen. Stat. § 97-42 (2007) provides:

> Payments made by the employer to the injured employee during the period of his disability, or to his dependents, which by the terms of this Article were not due and payable when made, may, subject to the approval of the Commission be deducted from the amount to be paid as compensation.

"Pursuant to the statute, '[t]he decision of whether to grant a credit is within the sound discretion of the Commission.' " *Cox v. City of Winston-Salem*, 171 N.C. App. 112, 115, 613 S.E.2d 746, 748 (2005) (quoting *Shockley v. Cairn Studios Ltd.*, 149 N.C. App. 961, 966, 563 S.E.2d 207, 211 (2002), *disc. review denied*, 356 N.C. 678, 577 S.E.2d 888 (2003)). In *Cox*, our Court recognized:

> [I]f an employer contests a worker's compensation claim, but nevertheless pays the employee wage-replacement benefits which are fully funded by the employer and are not due and payable to the employee, then the employer "should not be penalized by being denied full credit for the amount paid as against the amount which [is] subsequently determined to be due the employee under workers' compensation."

Id. (quoting *Foster v. Western-Electric Co.*, 320 N.C. 113, 117, 357 S.E.2d 670, 673 (1987)). However, our Court also recognized that "neither the Supreme Court nor this Court has held that an employer is necessarily entitled to a credit against a worker's compensation

award for payments received by an injured employee pursuant to a benefits program that has been partially funded by the employee." *Id.* Our Court then held that the defendant-employer was not entitled to a credit for payments received by the plaintiff-employee pursuant to a benefits program that was partially funded by the plaintiff-employee. *Id.* at 117-18, 613 S.E.2d at 749. Likewise, in the present case, Defendants stipulated at the hearing before Deputy Commissioner Chapman that the short-term and long-term disability plans under which Plaintiff received benefits were partially funded by Plaintiff. Therefore, we hold that the Commission did not abuse its discretion by concluding that Defendants were not entitled to a credit for these payments. *See id.*

VI.

[6] Defendants also argue that the Commission's "acceptance and consideration of [Mr.] Harding's testimony is contrary to law." Rule 612(3) of the Workers' Compensation Rules of the North Carolina Industrial Commission provides as follows:

> Except under unusual circumstances, all lay evidence must be offered at the initial hearing. Lay evidence can only be offered after the initial hearing by order of a Commissioner or Deputy Commissioner. The costs of obtaining lay testimony by deposition shall be borne by the party making the request unless otherwise ordered by the Commission.

Defendants argue that Plaintiff's method of attempted service upon Mr. Harding was ineffective and that this failure of service does not qualify as an unusual circumstance under Rule 612(3) warranting a post-hearing deposition. In that a subpoena may not personally be served by a party, it does appear that Plaintiff failed to comply with the rules related to method of service of a subpoena. *See* N.C. Gen. Stat. § 1A-1, Rule 45(b)(1) (2007) (stating: "Any subpoena may be served by the sheriff, by the sheriff's deputy, by a coroner, or by any person who is not a party and is not less than 18 years of age."). However, as Deputy Commissioner Chapman recognized:

> Since [P]laintiff did attempt to serve Mr. Harding and since credibility is at issue in this case and Mr. Harding would have potentially pertinent information regarding that issue, it appears that [P]laintiff should be allowed to take his deposition but only if she pays for the deposition and also pays for a videographer to film the proceeding.

We agree with this reasoning and hold that Plaintiff's failure to properly serve Mr. Harding was an unusual circumstance warranting the taking of his post-hearing deposition at Plaintiff's expense.

VII.

[7] Defendants also argue that the Commission's "remand to the Deputy Commission[er] contained in its . . . 2005 opinion and award was improper and contrary to law." Specifically, Defendants argue that while the Commission properly remanded the matter for further hearing, the Commission "improperly instructed the Deputy Commissioner hearing the matter on remand to enter an Opinion and Award on the issue of Plaintiff's disability and entitlement to indemnity and medical compensation. The Full Commission should have retained jurisdiction over the matter in the interest of avoiding unnecessary delay and confusion." We disagree.

In *Joyner v. Rocky Mount Mills*, 92 N.C. App. 478, 374 S.E.2d 610 (1988), our Court recognized that "when [the] transcript is insufficient to resolve all the issues, the full Commission must conduct its own hearing or remand the matter for further hearing." *Id.* at 482, 374 S.E.2d at 613. Our Court further stated:

> After the hearing or after review of the transcript of the hearing before the deputy commissioner or hearing officer, the full Commission must make findings of fact, draw conclusions of law therefrom and enter the appropriate order. As we have pointed out before, the better practice would be for the full Commission to make its own findings of fact and not adopt the findings of fact of the deputy commissioner or hearing officer.

Id. at 482-83, 374 S.E.2d at 613. Our Court has also stated that "[t]he Industrial Commission has authority to review, modify, *adopt*, or reject findings of a hearing commissioner[.]" *Garmon v. Tridair Industries*, 14 N.C. App. 574, 576, 188 S.E.2d 523, 524 (1972) (emphasis added).

In the case before us, the transcript was insufficient to resolve several of the issues, and the Commission properly remanded the case for further hearing before a deputy commissioner. Following the entry of Deputy Commissioner Deluca's opinion and award, the Commission reviewed the evidence *de novo* and adopted Deputy Commissioner Deluca's opinion and award with two exceptions. However, the Commission entered its own opinion and award with its own findings of fact and conclusions of law. This procedure was

permissible under *Joyner* and *Garmon*. We overrule these assignments of error.

Affirmed.

Judge ELMORE concurs.

Judge JACKSON concurs in part, and dissents in part, with a separate opinion.

JACKSON, Judge concurring in part, dissenting in part.

I concur in the majority opinion except as to its holding that defendant-employer was not prejudiced by plaintiff's failure to submit written notice of her injury within the thirty-day period mandated by North Carolina General Statutes, section 97-22. As to that portion of the majority opinion, I must respectfully dissent.

While I recognize that there is some divergence of opinion surrounding this issue, *see Booker v. Duke Med. Ctr.*, 297 N.C. 458, 256 S.E.2d 189 (1979); *Richardson v. Maxim Healthcare/ Allegis Grp.*, 188 N.C. App. 337, 657 S.E.2d 34 (2008); *Legette v. Scotland Mem'l Hosp.*, 181 N.C. App. 437, 640 S.E.2d 744 (2007), *rev. denied*, 362 N.C. 177, 658 S.E.2d 273 (2008); *Chavis v. TLC Home Health Care*, 172 N.C. App. 366, 616 S.E.2d 403 (2005), *appeal dismissed*, 360 N.C. 288, 627 S.E.2d 464, (2006); *Watts v. Borg Warner Auto., Inc.*, 171 N.C. App. 1, 613 S.E.2d 715, *aff'd*, 360 N.C. 169, 622 S.E.2d 492 (2005); *Davis v. Taylor-Wilkes Helicopter Serv.*, 145 N.C. App. 1, 549 S.E.2d 580 (2001); *Lakey v. United States Airways*, 155 N.C. App. 169, 573 S.E.2d 703 (2002), *rev. denied*, 357 N.C. 251, 582 S.E.2d 271 (2003); *Westbrooks v. Bowes*, 130 N.C. App. 517, 503 S.E.2d 409 (1998); *Jones v. Lowe's Cos.*, 103 N.C. App. 73, 404 S.E.2d 165 (1991); *Sanderson v. Northeast Construction Co.*, 77 N.C. App. 117, 334 S.E.2d 392 (1985); *Chilton v. School of Medicine*, 45 N.C. App. 13, 262 S.E.2d 347 (1980), I believe section 97-22 requires the Industrial Commission to make findings of fact and conclusions of law concerning whether an employee's failure to file written notice of the accident within thirty days of the accident prejudiced the employer. I do not believe this Court may infer a lack of prejudice when the Commission has not addressed that issue specifically.

Though there are opinions from this Court that may be interpreted as supporting a *per se* rule of no prejudice under section 97-22

when an employer had actual notice of the employee's accident, *see Legette*, 181 N.C. App. at 448, 640 S.E.2d at 752; *Davis*, 145 N.C. App. at 11, 549 S.E.2d at 586; *Sanderson*, 77 N.C. App. at 123, 334 S.E.2d at 395, I believe the weight of North Carolina law requires the Commission to make a conclusion of law stating that the employer was not prejudiced by the employee's failure to file within the thirty day mandate, and to support that conclusion with adequate findings of fact.

Section 97-22 specifically states in relevant part: "no compensation shall be payable unless such written notice is given within 30 days after the occurrence of the accident or death, unless reasonable excuse is made to the satisfaction of the Industrial Commission for not giving such notice *and* the Commission is satisfied that the employer has not been prejudiced thereby." N.C. Gen. Stat. § 97-22 (2008) (emphasis added). The burden is on the employer to prove prejudice. *Richardson*, 188 N.C. App. at 346, 657 S.E.2d at 40 (citation omitted). The Commission is *required* to make findings of fact concerning issues upon which the granting or denial of compensation depends. *Id.* (citation omitted) (emphasis added). I am in agreement with previous opinions of this Court which require: 1) a separate inquiry into the issue of prejudice, and 2) appropriate findings of fact and conclusions of law in support of the Commission's ruling on that issue. *See Id.*; *Westbrook*, 130 N.C. App. at 528-29, 503 S.E.2d at 417.

In light of the confusion engendered by seemingly conflicting opinions from the Court of Appeals regarding this issue, it is particularly useful to consult the only North Carolina Supreme Court opinion addressing the section 97-22 prejudice issue. In *Booker*, the Supreme Court held that the employer had waived the issue of section 97-22 notice, because it had failed to raise the issue before the Commission, and could not raise it for the first time on appeal. *Booker*, 297 N.C. at 482, 256 S.E.2d at 204. Although not decided on the prejudice issue, the Supreme Court "[found] that a claim for compensation under the Act is *barred* if the employer is not notified within 30 days of the date the claimant is informed of the diagnosis "unless reasonable excuse is made to the satisfaction of the Industrial Commission for not giving such notice *and* the Commission is satisfied that the employer has not been prejudiced thereby." *Id.* at 480-81, 256 S.E.2d at 203 (emphasis added). The Court then noted that there were no findings of fact by the Commission that the employee's failure to notify the employer within thirty days was "excusable *and* non-

prejudicial." *Id.* at 481, 256 S.E.2d at 203 (emphasis added). The Court stated that "it would be unrealistic [under the circumstances in that case] to assume that [the employer] did not immediately receive notice [of the employee's injury,]" and went on to add:

> The purpose of the notice-of-injury requirement is two-fold. It allows the employer to provide immediate medical diagnosis and treatment with a view to minimizing the seriousness of the injury, and it facilitates the earliest possible investigation of the circumstances surrounding the injury. *Had appellees squarely presented the issue of notice at the hearing before the Commission, it could have conducted an inquiry in accordance with G.S. 97-22 to determine whether or not [the employer] was prejudiced by the lack of notice.* To allow an employer to raise the issue for the first time on appeal deprives the claimants of the benefits of that determination and could easily lead to a denial of compensation in a case where the facts would justify a finding of no prejudice.

Id. at 481-82, 256 S.E.2d at 204 (emphasis added). Inherent in this reasoning is that even when an employer has actual notice of an employee's injury, inquiry into the issue of prejudice at the Commission level is proper, and indeed necessary, for the insurance of a just outcome pursuant to the requirements of section 97-22.

In the instant case, not only did the Commission fail to make any findings of fact to support a conclusion that defendant-employer was not prejudiced by plaintiff's failure to give written notice within thirty days of the accident, there is in fact *no conclusion of law addressing this issue* in the Commission's opinion and award. The Commission's findings of fact must support its conclusions of law, and its conclusions of law must support its award. *Allen v. Roberts Elec. Contrs.*, 143 N.C. App. 55, 64, 546 S.E.2d 133, 140 (2001). In the instant case, there are neither sufficient findings nor conclusions to support the Commissions award, because the necessary element of lack of prejudice, as required under section 97-22, simply has not been addressed.

Though our review of the Commission's conclusions is *de novo*, we may not usurp the jurisdiction of the Commission by inferring findings and conclusions where the Commission has been silent. "The Full Commission is charged with a duty 'to make detailed findings of fact and conclusions of law with respect to every aspect of the case before it.' " *Bolick v. ABF Freight Sys., Inc.*, 188 N.C. App. 294, 300, 654 S.E.2d 793, 797 (2008) (citation ommitted); *see also Vieregge*

v. N.C. State University, 105 N.C. App. 633, 637-38, 414 S.E.2d 771, 773-74 (1992); *Morgan v. Thomasville Furniture Industries, Inc.*, 2 N.C. App. 126, 162 S.E.2d 619 (1968).

In light of the plain language of section 97-22, the reasoning in our Supreme Court's opinion in *Booker*, and the Commission's complete lack of consideration of the prejudice issue in its opinion and award, I would remand to the Commission for findings of fact and conclusions of law addressing the issue of prejudice as required by section 97-22.

DOGWOOD DEVELOPMENT AND MANAGEMENT COMPANY, LLC, PLAINTIFF v. WHITE OAK TRANSPORT COMPANY, INC., DEFENDANT

No. COA06-1073-2

(Filed 19 August 2008)

1. Appeal and Error— nonjurisdictional appellate rules violations—sanctions—dismissal of assignments of error—double printing costs

Although defendant's numerous and uncorrected nonjurisdictional appellate rules violations in a breach of contract case (including failure to direct the attention of the appellate court to the particular error with clear and specific record or transcript references as required by N.C. R. App. P. 10(c)(1), failure to state the grounds for appellate review as required by N.C. R. App. P. 28(b)(4), failure to reference any assignments of error pertinent to the questions presented as required by N.C. R. App. P. 28(b)(6), and failure to state the applicable standard of review for each question presented as required by N.C. R. App. P. 28(b)(6)), coupled with his overly broad assignments of error numbered 1 and 2 that failed to be confined to a single issue of law as required by N.C. R. App. P. 10(c)(1), rose to the level of a substantial failure or gross violation, the errors were not so egregious as to warrant dismissal of defendant's appeal in its entirety. As a lesser sanction, defendant's assignments of error numbered 1 and 2 were dismissed, and in the exercise of its discretion, the Court of Appeals ordered defendant's attorney to pay double the printing costs of the appeal under N.C. R. App. P. 34(b).

2. Appeal and Error— appellate rule 2—exceptional circumstances—prevention of manifest injustice—public interest

In the exercise of its discretion, the Court of Appeals declined to invoke N.C. R. App. P. 2 to review defendant's assignments of error numbered 1 and 2 that were dismissed as broadside and ineffective because nothing in the record or briefs demonstrated any exceptional circumstances to suspend or vary the rules in order to prevent manifest injustice to a party or to expedite decision in the public interest.

3. Contracts— breach—motion for judgment notwithstanding verdict—motion for new trial

The trial court did not abuse its discretion in a breach of contract case by denying defendant's motions for judgment notwithstanding the verdict and a new trial because: (1) viewing the evidence in the light most favorable to the nonmoving party revealed that plaintiff presented sufficient evidence that tended to show, and for the jury to conclude, that defendant's agents agreed to pay plaintiff $0.50 per ton of waste defendant hauled from plaintiff's waste transfer station; and (2) although defendant relied on N.C.G.S. § 25-1-206, the statute of frauds provision in the Uniform Commercial Code, to attempt to limit plaintiff's recovery to $5,000, the parties' agreement was not for the sale of personal property, but was instead in the nature of a fee or charge to compensate plaintiff for its efforts to create the waste transfer station and to provide defendant the opportunity to haul waste from the transfer station.

Judge HUNTER concurring in a separate opinion.

Appeal by defendant from orders entered 3 January 2006 and 2 March 2006 by Judge Howard R. Greeson, Jr., in Forsyth County Superior Court. This case was originally heard in the Court of Appeals on 24 April 2007. *See Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 183 N.C. App. 389, 645 S.E.2d 212 (2007). Upon remand by order from the North Carolina Supreme Court, filed 7 March 2008. *See Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 657 S.E.2d 361 (2008).

J. Dennis Bailey, for plaintiff-appellee.

Steven D. Smith, for defendant-appellant.

TYSON, Judge.

This Court initially heard White Oak Transport Company, Inc.'s ("defendant") appeal from: (1) judgment and order entered after a jury found it breached a contract with Dogwood Development and Management Company, LLC ("plaintiff"); and (2) order entered, which denied its motion for judgment notwithstanding the verdict pursuant to N.C. Gen. Stat. § 1A-1, Rule 50 and its motion for a new trial pursuant to N.C. Gen. Stat. § 1A-1, Rule 59(a)(7) and (8). *See Dogwood*, 183 N.C. App. at 389-90, 645 S.E.2d at 214. A divided panel of this Court dismissed defendant's appeal based upon plaintiff's unanswered motion to dismiss defendant's appeal, which asserted numerous appellate rule violations. *See id.*

Defendant appealed pursuant to N.C. Gen. Stat. § 7A-30(2) (2007). Upon remand and after further review, we find no error in the jury's verdict and affirm the trial court's judgment and post-trial orders.

I. Background

This Court previously outlined the background leading to this appeal:

> On 29 April 2004, plaintiff filed suit against defendant for breach of contract. Plaintiff alleged: (1) defendant hauled waste for Republic Services of North Carolina, LLC ("Republic") from plaintiff's waste transfer station; (2) Republic paid defendant $10.00 per ton hauled; (3) defendant agreed to pay plaintiff $.50 per ton hauled; and (4) defendant breached its agreement with plaintiff.
>
> On 26 September 2005, the matter was tried before a jury and the jury found: (1) plaintiff and defendant entered into a contract; (2) defendant breached the contract; and (3) plaintiff was entitled to recover $155,365.00 from defendant. The trial court entered a judgment and order on 3 January 2006.
>
> On 13 January 2006, defendant moved for [judgment notwithstanding the verdict] pursuant to N.C. Gen. Stat. § 1A-1, Rule 50 and for a new trial pursuant to N.C. Gen. Stat. § 1A-1, Rule 59(a)(7) and (8). The trial court denied defendant's motions by order entered 2 March 2006. Defendant appeal[ed] from both the judgment and orders entered 3 January 2006 and 2 March 2006.

Dogwood, 183 N.C. App. at 390, 645 S.E.2d at 214.

On 20 December 2006, plaintiff moved to dismiss defendant's appeal based on violations of the North Carolina Rules of Appellate Procedure. *Id.* Defendant failed to respond to plaintiff's motion and has failed to correct its violations as of this date. *Id.* Plaintiff's motion to dismiss alleged defendant: (1) failed to state the grounds for appellate review in violation of Appellate Rule 28(b)(4); (2) failed to reference any assignments of error pertinent to the questions presented in its appellate brief in violation of Appellate Rule 28(b)(6); (3) failed to state the applicable standard of review for each question presented in its appellate brief in violation of Appellate Rule 28(b)(6); and (4) asserted arguments in its brief not the subject of the assignments of error as articulated in the record on appeal in violation of Appellate Rule 28(b)(6).

A divided panel of this Court granted plaintiff's motion to dismiss and dismissed defendant's appeal based upon the four violations enumerated above. *Id.* at 395, 645 S.E.2d at 217. Defendant appealed pursuant to N.C. Gen. Stat. § 7A-30(2). Our Supreme Court reversed and remanded this case to this Court "for consideration . . . of whether the appellate rules violations in this case implicate [Appellate] Rules 25 and 34, and if so, whether a sanction *other than dismissal* is appropriate." *Dogwood*, 362 N.C. at 201-02, 657 S.E.2d at 367 (emphasis supplied).

II. Rules of Appellate Procedure

[1] In *Dogwood*, our Supreme Court set out to "clarify the manner in which the appellate courts should address violations of the appellate rules." 362 N.C. at 193, 657 S.E.2d at 362. *Dogwood* does not address how this Court should alter our approach to "address violations of the appellate rules[]" when presented with an unanswered motion to dismiss, which asserts appellate rules violations, and a party's failure to correct or amend those violations. 362 N.C. at 193, 657 S.E.2d at 362.

Generally, where a party moves for relief and the opposing party fails to respond, the requested relief is granted. For example, if a defendant fails to answer a properly served complaint, the plaintiff is entitled to entry of default and may move for a default judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 55 (2007). If a party fails to respond to another party's requests for admissions, the matter is deemed admitted pursuant to N.C. Gen. Stat. § 1A-1, Rule 36 (2007).

> Our rules of civil procedure also provide:
>
> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

N.C. Gen. Stat. § 1A-1, Rule 56(e) (2007). This Court must decide how to address a party's motion to dismiss for violations of the appellate rules when the other party fails to respond or correct the violations. 362 N.C. at 191, 657 S.E.2d at 361. We are compelled in this case to review this appeal, and, in our discretion, to determine "whether a sanction *other than dismissal* is appropriate." *Id.* at 202, 657 S.E.2d at 367 (emphasis supplied).

"There is a presumption in favor of the regularity and validity of judgments in the lower court, and the burden is upon appellant to show prejudicial error." *London v. London*, 271 N.C. 568, 570, 157 S.E.2d 90, 92 (1967) (citation omitted). "Without preserved, assigned, and argued assignments of error that identify the pages where the alleged error occurred, the appellate court can only rummage through the record to ascertain error." Brantley Springett & Kelly Dellerba, *Much Ado About Nothing: Dismissals for Appellate Rules Violations*, North Carolina Lawyers Weekly, October 8, 2007, at 20NCLW0815, 20NCLW0818. "It is not the role of the appellate courts . . . to create an appeal for an appellant." *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005).

In *Dogwood*, our Supreme Court restated ninety-five years of precedent and "observe[d] that 'rules of procedure are necessary . . . in order to enable the courts properly to discharge their dut[y]' of resolving disputes." 362 N.C. at 193, 657 S.E.2d at 362 (quoting *Pruitt v. Wood*, 199 N.C. 788, 790, 156 S.E.2d 126, 127 (1930)). "It is, therefore, necessary to have rules of procedure and to adhere to them, and if we relax them in favor of one, we might as well abolish them." *Bradshaw v. Stansberry*, 164 N.C. 356, 356, 79 S.E. 302, 302 (1913).

Our Supreme Court noted in *Dogwood* that an "appellate court faced with . . . [nonjurisdictional rule violations] possesses discretion in fashioning a remedy to encourage better compliance with the rules." 362 N.C. at 198, 657 S.E.2d at 365. This Court filed 800 written

opinions from 1 January through 1 July 2008 and filed a total of 1,596 written opinions in 2007. Allowing this Court "discretion in fashioning a remedy[,]" given our case load, allows for the possibility of a "relax[ation] [of the rules] in favor of one[.]" *Id.*; *Bradshaw*, 164 N.C. at 356, 79 S.E. at 302. Our Supreme Court previously stated that "the Rules of Appellate Procedure must be consistently applied; otherwise, the Rules become meaningless, and an appellee is left without notice of the basis upon which an appellate court might rule." *Viar*, 359 N.C. at 402, 610 S.E.2d at 361 (citing *Bradshaw*, 164 N.C. at 356, 79 S.E. at 302).

More recently, in *State v. Hart*, our Supreme Court reaffirmed that uniform application of the Rules of Appellate Procedure is paramount and stated:

> [I]nconsistent application of the Rules [of Appellate Procedure] may detract from the deference which federal habeas courts will accord to their application. Although a petitioner's failure to observe a state procedural rule may constitute an "adequate and independent state ground" barring federal habeas review, *Wainwright v. Sykes*, 433 U.S. 72, 81, 97 S. Ct. 2497, 2503, 53 L. Ed. 2d 594, 604 (1977), a state procedural bar is not "adequate" unless it has been "consistently or regularly applied." *Johnson v. Mississippi*, 486 U.S. 578, 589, 108 S. Ct. 1981, 1988, 100 L. Ed. 2d 575, 586 (1988). Thus, if the Rules are not applied consistently and uniformly, federal habeas tribunals could potentially conclude that the Rules [of Appellate Procedure] are not an adequate and independent state ground barring review. Therefore, it follows that our appellate courts must enforce the Rules of Appellate Procedure uniformly.

361 N.C. 309, 317, 644 S.E.2d 201, 206 (2007).

A. Nature of Defendant's Appellate Rules Violations

In *Dogwood*, our Supreme Court stated "that the occurrence of default under the appellate rules arises primarily from the existence of one or more of the following circumstances: (1) waiver occurring in the trial court; (2) defects in appellate jurisdiction; and (3) violation of nonjurisdictional requirements." 362 N.C. at 194, 657 S.E.2d at 363. Here, defendant's noncompliance falls within the third category.

> 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 [Appellate] Rules 25 and

> 34. If it so concludes, it should then determine which, if any, sanction under [Appellate] Rule 34(b) should be imposed. Finally, if the court concludes that dismissal is the appropriate sanction, it may then consider whether the circumstances of the case justify invoking [Appellate] Rule 2 to reach the merits of the appeal.

Id. at 201, 657 S.E.2d at 367.

B. Appellate Rules 25 and 34

"Based on the language of [Appellate] 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.' " *Id.* at 199, 657 S.E.2d at 366 (emphasis supplied).

> In determining whether a party's noncompliance with the appellate rules rises to the level of a substantial failure or gross violation, the court may consider, among other factors, whether and to what extent the noncompliance impairs the court's task of review and whether and to what extent review on the merits would frustrate the adversarial process. *See Hart*, 361 N.C. at 312, 644 S.E.2d at 203 (noting that dismissal may not be appropriate when a party's noncompliance does not " 'impede comprehension of the issues on appeal or frustrate the appellate process' " (citation omitted)); Viar, 359 N.C. at 402, 610 S.E.2d at 361 (discouraging the appellate courts from reviewing the merits of an appeal when doing so would leave the appellee "without notice of the basis upon which [the] appellate court might rule" (citation omitted)). *The court may also consider the number of rules violated, although in certain instances noncompliance with a discrete requirement of the rules may constitute a default precluding substantive review. See, e.g.*, N.C.R. App. P. 28(b)(6) ("Assignment 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.").

Id. at 200, 657 S.E.2d at 366-67 (emphasis supplied).

Here, defendant failed to: (1) direct the attention of the appellate court to the particular error about which the question is made, with clear and specific record or transcript references, in violation of Appellate Rule 10(c)(1); (2) state the grounds for appellate review in violation of Appellate Rule 28(b)(4); (3) reference any assignments of error pertinent to the questions presented in violation of Appellate

Rule 28(b)(6); and (4) state the applicable standard of review for each question presented in violation of Appellate Rule 28(b)(6). *See Dogwood*, 183 N.C. App. at 389, 645 S.E.2d at 213.

In addition to the numerous appellate rules violations outlined above, defendant's assignments of error numbered 1 and 2 are not confined to a single issue of law and are overly broad in violation of Appellate Rule 10(c)(1). Defendant's assignments of error numbered 1 and 2 state:

> 1. The Court's granting Plaintiff judgment from Defendant in the sum of $155,365.00, plus interest which shall accrue at the legal rate from December 31, 2004, until paid and costs in the amount of $1,426.14 to be taxed against the Defendant.
>
> 2. The Court's denying Defendant's Motion For Judgment Notwithstanding the Verdict under Rule 50 of the North Carolina Rules of Civil Procedure and Defendant's Motion for New Trial pursuant to Rule 59(a)(7) and (8) of the North Carolina Rules of Civil Procedure.

"Th[ese] assignment[s]—like a hoopskirt—cover[] everything and touch[] nothing. [They are] based on numerous exceptions and attempt[] to present several separate questions of law—none of which are set out in the assignment[s] [themselves]—thus leaving [them] broadside and ineffective." *State v. Kirby*, 276 N.C. 123, 131, 171 S.E.2d 416, 422 (1970). We hold that defendant's appellate rules violations "rise to the level of a 'substantial failure' or 'gross violation.' " *Dogwood*, 362 N.C. at 199, 657 S.E.2d at 366.

The concurring opinion asserts that defendant's second assignment of error does not "impede comprehension of the issues on appeal or frustrate the appellate process." (Citing *Hart*, 361 N.C. at 312, 644 S.E.2d at 203). Our Supreme Court has repeatedly rejected this notion as a basis to review otherwise defective assignments of error. *See Viar*, 359 N.C. at 402, 610 S.E.2d at 361 ("The Court of Appeals majority asserted that plaintiff's Rules violations did not impede comprehension of the issues on appeal or frustrate the appellate process. It is not the role of the appellate courts, however, to create an appeal for an appellant." (Internal citation omitted)); *Hart*, 361 N.C. at 312-13, 644 S.E.2d at 203 ("In *Viar*, we neither admonished the Court of Appeals to avoid applying Rule 2, nor did we state that the court may not review an appeal that violates the Rules, even when rules violations d[o] not impede comprehension of the issues on

appeal or frustrate the appellate process. We simply noted that the Court of Appeals majority had justified its application of Rule 2 in *Viar* by using that phrase. Rather than approving this justification for applying Rule 2 to that scenario, we rejected it and dismissed the *Viar* appeal. In so doing, we held that the Court of Appeals improperly applied Rule 2 when it created an appeal for the appellant and addressed issues not raised or argued.") (Internal quotation omitted). We turn to "which, if any, sanction under [Appellate] Rule 34(b) should be imposed." *Dogwood*, 362 N.C. at 201, 657 S.E.2d at 367.

C. Appellate Rule 34(b)

Appellate Rule 34(b) states:

> 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.

N.C.R. App. P. 34(b) (2006).

"[A] party's failure to comply with nonjurisdictional rule requirements normally should not lead to dismissal of the appeal." *Dogwood*, 362 N.C. at 198, 657 S.E.2d at 365 (citation omitted); *see Hannah v. Nationwide Mut. Fire Ins. Co.*, 190 N.C. App. 626, 632, 660 S.E.2d 600, 604 (2008) ("As a result of counsel's failure to cite any authority at all in violation of Rule 28, we have not considered the merits of three of the assignments of error because that violation of the rules impaired our ability to review the merits of the appeal.").

Given defendant's failure to respond to the motion to dismiss and the nature and number of uncorrected nonjurisdictional appellate rules violations in this case, we hold plaintiff's noncompliance to be substantial, but not so egregious as to warrant dismissal of defendant's appeal in its entirety. *See Dogwood*, 362 N.C. at 200, 657 S.E.2d at 366 ("[O]nly in the most egregious instances of nonjurisdictional default will dismissal of the appeal be appropriate.") (Citation omitted). Defendant's "broadside and ineffective[]" assignments of error numbered 1 and 2 should be dismissed. *Kirby*, 276 N.C. at 131, 171 S.E.2d at 422. In the exercise of our discretion, defendant's attorney is ordered to pay double the printing costs of this appeal. N.C.R. App. P. 34(b); *Luther v. Seawell*, 191 N.C. App. 139, 145, —— S.E.2d ——, ——

(June 17, 2008) (No. COA07-830) ("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 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."). The Clerk of this Court is to enter an order accordingly. Having determined that defendant's first two assignments of error should be dismissed, we turn to "whether the circumstances of the case justify invoking [Appellate] Rule 2 . . . ." *Dogwood*, 362 N.C. at 201, 657 S.E.2d at 367.

D. Appellate Rule 2

[2] Appellate Rule 2 states:

> 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.

N.C.R. App. P. 2 (2006).

In *Dogwood*, our Supreme Court stated, Appellate Rule 2 "may only [be invoked] on rare occasions and under exceptional circumstances . . . ." 362 N.C. at 201, 657 S.E.2d at 367 (citation omitted). " 'Rule 2 relates to the residual power of [the] appellate courts to consider, in exceptional circumstances, significant issues of importance in the public interest or to prevent injustice which appears manifest to the [c]ourt and *only in such instances*.' " *Hart*, 361 N.C. at 315-16, 644 S.E.2d at 205 (quoting *Steingress v. Steingress*, 350 N.C. 64, 66, 511 S.E.2d 298, 299-300 (1999)) (emphasis supplied).

> Before exercising [Appellate] Rule 2 to prevent a manifest injustice, both this Court and the Court of Appeals must be cognizant of the appropriate circumstances in which the extraordinary step of suspending the operation of the appellate rules is a viable option. Fundamental fairness and the predictable operation of the courts for which our Rules of Appellate Procedure were designed depend upon the consistent exercise of this authority.

Id. at 317, 644 S.E.2d at 206.

The decision whether to invoke Appellate Rule 2 is purely discretionary and is to be limited to "rare occasions" in which a fundamental purpose of the appellate rules is at stake. *Dogwood*, 362 N.C. at 201, 657 S.E.2d at 367. Appellate Rule 2 has most consistently been invoked to prevent manifest injustice in appeals in which the substantial rights of a criminal defendant are affected. *Hart*, 361 N.C. at 316, 644 S.E.2d at 205 (citing *State v. Sanders*, 312 N.C. 318, 320, 321 S.E.2d 836, 837 (1984)).

Nothing in the record or briefs demonstrates any "exceptional circumstances" to suspend or vary the rules in order "to prevent manifest injustice to a party, or to expedite decision in the public interest." *Id.* at 315-16, 644 S.E.2d at 205 (citation omitted). Our Supreme Court's opinion in *Dogwood* did not validate "hoopskirt" assignments of error nor alter the Supreme Court's precedent in *Kirby* or this Court's numerous precedents dismissing "broadside and ineffective[]" assignments of error. *Dogwood*, 362 N.C. at 191, 657 S.E.2d at 361; *Kirby*, 276 N.C. at 131, 171 S.E.2d at 422; *see May v. Down East Homes of Beulaville, Inc.*, 175 N.C. App. 416, 418, 623 S.E.2d 345, 346, *cert. denied*, 360 N.C. 482, 632 S.E.2d 176 (2006) ("Plaintiff's repeated assertions that the trial court's rulings were 'contrary to the caselaw of this jurisdiction' fail to identify the issues briefed on appeal. We conclude these assignments of error are too broad, vague, and unspecific to comport with the North Carolina Rules of Appellate Procedure. . . . Because plaintiff failed to properly preserve for appellate review the issues presented on appeal, his appeal is [d]ismissed." (Internal quotation omitted)); *Calhoun v. WHA Med. Clinic, PLLC*, 178 N.C. App. 585, 602, 632 S.E.2d 563, 574 (2006), *disc. rev. denied*, 361 N.C. 350, 644 S.E.2d 5 (2007) ("Because the assignment of error at issue states that the challenged finding was 'contrary to law' without stating any specific reason that the finding is 'contrary to law' it fails to identify the issues briefed on appeal. Since plaintiffs failed to properly preserve this argument, we do not address it." (Internal citations omitted)).

In the exercise of our discretion, we decline to invoke Appellate Rule 2 to review defendant's assignments of error numbered 1 and 2. *Dogwood*, 362 N.C. at 201, 657 S.E.2d at 367. Defendant's assignment's of error numbered 1 and 2 are dismissed as "broadside and ineffective." *Kirby*, 276 N.C. at 131, 171 S.E.2d at 422. We now turn to the remaining assignments of error asserted in defendant's appeal.

III. Issues

Defendant argues the trial court erred when it failed to grant defendant's motions for judgment notwithstanding the verdict and a new trial.

IV. Standard of Review

A. Motion for Judgment Notwithstanding the Verdict

> [A] motion [for judgment notwithstanding the verdict] is essentially a renewal of an earlier motion for directed verdict. Accordingly, if the motion for directed verdict could have been properly granted, then the subsequent motion for judgment notwithstanding the verdict should also be granted. In considering any motion for directed verdict, the trial court must view all the evidence that supports the non-movant's claim as being true and that evidence must be considered in the light most favorable to the non-movant, giving to the non-movant the benefit of every reasonable inference that may legitimately be drawn from the evidence with contradictions, conflicts, and inconsistencies being resolved in the non-movant's favor. This Court has also held that a motion for judgment notwithstanding the verdict is cautiously and sparingly granted. It is also elementary that the movant for [judgment notwithstanding the verdict] must make a motion for directed verdict at the close of all the evidence.

Bryant v. Nationwide Mut. Fire Ins. Co., 313 N.C. 362, 368-69, 329 S.E.2d 333, 337-38 (1985) (internal citations omitted). "On appeal our standard of review for a judgment notwithstanding the verdict is the same as that for a directed verdict; that is, whether the evidence was sufficient to go to the jury." *Whitaker v. Akers*, 137 N.C. App. 274, 277, 527 S.E.2d 721, 724, *disc. rev. denied*, 352 N.C. 157, 544 S.E.2d 245 (2000) (internal citations and quotations omitted).

B. Motion for New Trial

The standard of review for a trial court's denial of a motion for a new trial based upon insufficiency of the evidence is abuse of discretion. *In Re Buck*, 350 N.C. 621, 624, 516 S.E.2d 858, 860 (1999). " 'An appellate court should not disturb a discretionary Rule 59 order unless it is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice.' " *Id.* at 625, 516 S.E.2d at 861 (quoting *Anderson v. Hollifield*, 345 N.C. 480, 483, 480 S.E.2d 661, 663 (1997)).

V. Defendant's Motions

[3] Defendant argues the trial court erred when it denied its motions for judgment notwithstanding the verdict and a new trial because: (1) plaintiff failed to prove there was a meeting of the minds between the parties and (2) N.C. Gen. Stat. § 25-1-206 limits plaintiff's recovery to $5,000.00.

A. Meeting of the Minds

"To constitute a valid contract the parties must assent to the same thing in the same sense, and their minds must meet as to all the terms. If any portion of the proposed terms is not settled, there is no agreement." *Goeckel v. Stokely*, 236 N.C. 604, 607, 73 S.E.2d 618, 620 (1952) (citations omitted). Viewed in the light most favorable to the nonmoving party, plaintiff presented sufficient evidence that tended to show and for the jury to conclude that defendant's agents agreed to pay plaintiff $0.50 per ton of waste defendant hauled from plaintiff's waste transfer station. The jury heard all the evidence and returned a verdict for plaintiff. The trial court correctly entered judgment consistent with the terms of the jury's verdict. The trial court properly denied defendant's motions for judgment notwithstanding the verdict and new trial wherein defendant asserted plaintiff's failure to prove a meeting of the minds between the parties. *Whitaker*, 137 N.C. App. at 277, 527 S.E.2d at 724; *In Re Buck*, 350 N.C. at 624, 516 S.E.2d at 860. This assignment of error is overruled.

B. N.C. Gen. Stat. § 25-1-206

N.C. Gen. Stat. § 25-1-206 (2005) states:

> (1) Except in the cases described in subsection (2) of this section a contract for the sale of personal property is not enforceable by way of action or defense beyond five thousand dollars ($5,000.00) in amount or value of remedy unless there is some writing which indicates that a contract for sale has been made between the parties at a defined or stated price, reasonably identifies the subject matter, and is signed by the party against whom enforcement is sought or by his authorized agent.
>
> (2) Subsection (1) of this section does not apply to contracts for the sale of goods (G.S. 25-2-201) nor of securities (G.S. 25-8-113) nor to security agreements (G.S. 25-9-203).

Defendant's reliance on N.C. Gen. Stat. § 25-1-206, the statute of frauds provision in the Uniform Commercial Code, is misplaced. The

parties' agreement was in the nature of a fee or charge to compensate plaintiff for its efforts to create the waste transfer station and to provide defendant the opportunity to haul waste from the transfer station. Because the parties's contract was not for the sale of personal property, N.C. Gen. Stat. § 25-1-206 does not limit plaintiff's recovery to $5,000.00. *See Rowell v. N.C. Equip. Co.*, 146 N.C. App. 431, 435, 552 S.E.2d 274, 277 (2001) ("We have previously determined that the contract between these parties was for repairs; therefore, [N.C. Gen. Stat. §§ 25-1-206, -2-201 (1999)] do not apply."). The trial court properly denied defendant's motions for judgment notwithstanding the verdict and new trial based on defendant's assertion that N.C. Gen. Stat. § 25-1-206 limited plaintiff's recovery. This assignment of error is overruled.

VI. Conclusion

Defendant's numerous and uncorrected appellate rules violations "rise to the level of a 'substantial failure' or 'gross violation.' " *Dogwood*, 362 N.C. at 199, 657 S.E.2d at 366. Defendant's assignments of error numbered 1 and 2 are dismissed as "broadside and ineffective[]" and defendant's attorney is ordered to pay double the printing costs of this appeal pursuant to N.C.R. App. P. 34(b). *Kirby*, 276 N.C. at 131, 171 S.E.2d at 422.

Plaintiff presented sufficient evidence to establish a *prima facie* breach of contract claim and for the jury to resolve the parties' factual dispute. *Whitaker*, 137 N.C. App. at 277, 527 S.E.2d at 724; *In Re Buck*, 350 N.C. at 624, 516 S.E.2d at 860.

We find no error in the jury's verdict or the judgment entered thereon. The trial court properly denied defendant's motions for judgment notwithstanding the verdict and a new trial. The trial court's denial of defendant's motions for judgment notwithstanding the verdict and for a new trial are affirmed.

No error in part and affirmed in part.

Judge CALABRIA concurs.

Judge HUNTER concurs by separate opinion.

HUNTER, Judge, concurring.

While I agree with the majority that there was no error in defendant's trial and that the trial court properly denied defendant's motions

for judgment notwithstanding the verdict and for a new trial, I write separately because I disagree with the majority's dismissal of defendant's second assignment of error and its characterization and analysis of our Supreme Court's recent decision in *Dogwood Dev. & Mmgt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 657 S.E.2d 361 (2008).

Appellate courts have a strong preference for deciding cases on the merits. Our Supreme Court's recent decisions in *State v. Hart*, 361 N.C. 309, 644 S.E.2d 201 (2007), and *Dogwood* expressed a policy to decide cases on their merits and thus refrain from dismissing cases for nonjurisdictional rules violations that do not impede the review of the case. This policy not only ensures fundamental fairness to the litigants involved, but also benefits the bar and facilitates open access to the equal administration of justice in our courts.

Defendant's second assignment of error states: "2. The Court's denying Defendant's Motion for Judgment Notwithstanding the Verdict under Rule 50 of the North Carolina Rules of Civil Procedure and Defendant's Motion for New Trial pursuant to Rule 59(a)(7) and (8) of the North Carolina Rules of Civil Procedure." I do not agree with the majority that defendant's second assignment of error constitutes a substantial violation of Rule 10(c)(1) warranting dismissal of the issue. As our Supreme Court has held, "[r]ules of practice and procedure are devised to promote the ends of justice, not to defeat them." *Dogwood*, 362 N.C. at 194, 657 S.E.2d at 363 (citation omitted; alteration in original). As such, "every violation of the rules does not require dismissal of the appeal *or the issue*[.]" *Hart*, 361 N.C. at 311, 644 S.E.2d at 202 (emphasis added). Indeed, "only in the most egregious instances of nonjurisdictional default will dismissal of the appeal be appropriate." *Dogwood*, 362 N.C. at 200, 657 S.E.2d at 366. Rather, "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.' " *Id.* at 199, 657 S.E.2d at 366.

In the case *sub judice*, defendant's second assignment of error did not "rise to the level of a 'substantial failure' or 'gross violation[,]' " *id.*, and certainly did not " 'impede comprehension of the issues on appeal or frustrate the appellate process.' " *Hart*, 361 N.C. at 312, 644 S.E.2d at 203 (citation omitted).[1] As our Supreme Court

1. It is of note that many of the procedural problems faced by the litigants in the case at bar and in other similar cases before our court arise from the violation of the assignment of error requirement found in Appellate Rule 10(c)(1). Recently, the North

indicated in *Dogwood*, dismissal of an issue is not appropriate unless a party's "noncompliance impairs the court's task of review" and "review on the merits would frustrate the adversarial process." *Dogwood*, 362 N.C. at 200, 657 S.E.2d at 366-67. Accordingly, this Court "should simply perform its core function[,]" *id.* at 199, 657 S.E.2d at 366, and review the merits of defendant's appeal as to the trial court's denial of his motions.[2]

Regarding defendant's other rules violations in this appeal, I agree with the majority that monetary sanctions are appropriate.

Thus, while I agree with the outcome of this decision, I concur in the result only and write separately for the aforementioned reasons.

MICHAEL A. KELLY, STEVEN WAYNE MOBLEY, PETITIONERS v. N.C. DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, RESPONDENT

No. COA07-881

(Filed 19 August 2008)

1. Public Officers and Employees— discipline of state employees—suspension for misconduct—fishing violations

In an action that began with NCDENR officials receiving citations for fishing violations and then being suspended for five days without pay, the trial court did not err by finding that the violations were not intentional, that the impact of the publicity on NCDENR was neutral and not negative, that there was no lasting negative effect from the conduct giving rise to the fishing tickets, and that there was no adverse impact on impairment of petitioners' ability to do their jobs.

2. Public Officers and Employees— fishing tickets—not conduct unbecoming

The trial court did not err by concluding that petitioners had not engaged in unacceptable personal conduct unbecoming a

---

Carolina Bar Association submitted to the Supreme Court a proposal to abolish the assignment of error requirement. This proposal was endorsed by the N.C. Advocates for Justice and the N.C. Association of Defense Attorneys.

2. I find it pertinent to remind the Bar that in future cases the offending attorney's response to a motion to dismiss for appellate rule violations should be to file a motion to amend his brief and correct those violations.

state employee where they had received fishing citations. The trial court made findings relating to each of the relevant factors and properly concluded that a rational nexus did not exist between the off-duty criminal activity giving rise to the fishing tickets and the potential adverse impact on petitioners' future ability to perform for the agency.

3. Public Officials and Employees— wrongful suspension— interest on back pay award

The trial court erred by awarding prejudgment and postjudgment interest on back pay awards for state employees wrongfully suspended. The State Personnel Commission rules specifically provide that the State shall not be required to pay interest on any back pay award.

4. Costs— attorney fees—insufficient findings

The trial court erred by awarding partial attorney fees to improperly disciplined state employees without making necessary findings as to the reasonableness of the fees awarded. N.C.G.S. §§ 6-19.1, 6-20.

Appeal by respondent from orders entered 19 April 2007 by Judge Ronald Stephens in Wake County Superior Court, and appeal by petitioners and respondent from order entered 4 June 2007 by Judge Ronald Stephens in Wake County Superior Court. Heard in the Court of Appeals 28 April 2008.

Shanahan Law Group, by Kieran J. Shanahan, Reef C. Ivey, II, and Steven K. McCallister, for petitioners-appellees.

Roy Cooper, Attorney General, by Tiare B. Smiley, Special Deputy Attorney General, and Edwin Lee Gavin II, Assistant Attorney General, for respondent-appellant.

MARTIN, Chief Judge.

Respondent North Carolina Department of Environment and Natural Resources ("NCDENR") appeals from orders of the Wake County Superior Court concluding that petitioners Michael Kelly and Steven Wayne Mobley had received employment discipline without just cause and awarding them back pay, interest on back pay, and partial attorney fees and costs. Petitioners also appeal from the order awarding attorney fees and costs.

During the period of time relevant to the facts of this case, petitioners were employees of NCDENR in the Division of Environmental Health ("DEH"). Michael Kelly was Deputy Director of DEH, while Steven Wayne Mobley was Chief of the Shellfish Sanitation Section of DEH. Petitioners had been employed by the State of North Carolina for fourteen and thirty-one years, respectively. On the evening of 14 June and the early hours of 15 June 2004, petitioners were fishing in the White Oak River. Over the course of the evening, petitioners gigged seventeen flounder and two red drum. While they were preparing to head inland at approximately 12:30 a.m., a Division of Marine Fisheries ("DMF") patrol boat stopped petitioners' boat. After talking with petitioners about their catch that night, DMF officers asked to inspect their fishing coolers, and petitioners consented to the inspection. DMF officers asked petitioners if they knew the minimum flounder size limit, and petitioners replied that they thought it was either thirteen or thirteen and one-half inches. In fact, the applicable flounder size regulation had recently changed from thirteen inches to fourteen inches. DMF officers informed petitioners that the size limit for the recreational taking of flounder was fourteen inches.

Upon inspecting petitioners' fishing coolers, DMF officers determined that twelve of the seventeen flounder were less than fourteen inches, and the two red drum had been gigged, which is not a permitted technique for taking red drum. The violations of applicable fishing laws were each a class one misdemeanor. DMF officers issued each petitioner a citation for taking six undersized flounder and possessing one gigged red drum. Petitioners were cooperative with DMF officers, and the following day they immediately notified their supervisors about the citations. The incident was reported in several local newspapers and a local sporting publication. NCDENR conducted an investigation of the incident to determine whether any disciplinary action was warranted. The investigation resulted in allegations against petitioners of unacceptable personal conduct unbecoming a state employee that is detrimental to state service. Because petitioners were salaried employees exempt from the overtime compensation provisions of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, the departmental human resources office stated that the choices for disciplinary action were either a written warning, suspension without pay for five days, or suspension without pay for ten days, pursuant to 25 N.C. Admin. Code 1J.0611. After holding a predisciplinary conference, Director of the Division of Environmental Health Terry Pierce on 29 July 2004 imposed disciplinary suspensions for five days with-

out pay for unacceptable personal conduct. Petitioners appealed to Secretary of NCDENR William Ross, who affirmed Director Pierce's disciplinary action. Petitioners filed petitions for contested case hearings with the Office of Administrative Hearings. On 28 December 2004, an administrative law judge ("ALJ") entered a written decision reversing their suspensions and finding that NCDENR lacked just cause to discipline petitioners and that their suspensions were arbitrary and capricious. The ALJ also found that petitioners were entitled to back wages and attorney fees and costs. The State Personnel Commission ("SPC") subsequently rejected the ALJ's decision and adopted new findings of fact and conclusions of law affirming NCDENR's decision to discipline petitioners. Petitioners sought judicial review of the SPC's decision in Wake County Superior Court, and the court found that petitioners did not intentionally violate the fishing laws, but rather their actions amounted to a careless mistake; that no lasting effects arose from petitioners' conduct; that a recurrence of petitioners' conduct was unlikely; and that petitioners' conduct had not impaired their ability to perform their job duties and would not adversely impact their future ability to perform for NCDENR. Accordingly, the court concluded that petitioners did not engage in unacceptable personal conduct that is detrimental to state service and that NCDENR did not have just cause to suspend petitioners from work for five days without pay. As a separate and independent basis for its decision, the court further concluded "that 25 N.C.A.C. 01J.0611 is void as applied on the particular facts in this case because it did not permit the exercise of discretion in determining appropriate disciplinary action." In a separate order filed 4 June 2007, the superior court awarded partial attorney fees and costs to petitioners. NCDENR appeals both of the superior court orders, and petitioners appeal the 4 June 2007 order to this Court.

In cases of judicial review of agency decisions, "[t]he scope of review to be applied by the appellate court under this section is the same as it is for other civil cases. In cases reviewed under G.S. 150B-51(c), the court's findings of fact shall be upheld if supported by substantial evidence." N.C. Gen. Stat. § 150B-52 (2007). N.C.G.S. § 150B-51(c) governs review by a superior court of "a final decision in a contested case in which an administrative law judge made a decision, in accordance with G.S. 150B-34(a), and the agency does not adopt the administrative law judge's decision." N.C. Gen. Stat. § 150B-51(c) (2007). Due to the procedural background in this case, the superior court reviewed the SPC's decision under § 150B-51(c).

Accordingly, we consider whether the findings of fact are supported by substantial evidence, defined as "relevant evidence a reasonable mind might accept as adequate to support a conclusion." N.C. Gen. Stat. § 150B-2(8b) (2007). Furthermore, where a party does not except to a finding of fact, it is "presumed to be correct and supported by evidence." *In re Moore*, 306 N.C. 394, 404, 293 S.E.2d 127, 133 (1982).

In examining the appellate standard of review in similar cases, this Court and our Supreme Court have noted that our review further entails "determining how the trial court *should have* decided the case upon application of the appropriate standards of review." *N.C. Dep't of Env't & Nat. Res. v. Carroll*, 358 N.C. 649, 665, 599 S.E.2d 888, 898 (2004). In the case before us, the trial court's standard of review is determined by N.C.G.S. § 150B-51(c), which states:

> In reviewing a final decision in a contested case in which an administrative law judge made a decision, in accordance with G.S. 150B-34(a), and the agency does not adopt the administrative law judge's decision, the court shall review the official record, de novo, and shall make findings of fact and conclusions of law. In reviewing the case, the court shall not give deference to any prior decision made in the case and shall not be bound by the findings of fact or the conclusions of law contained in the agency's final decision.

N.C. Gen. Stat. § 150B-51(c) (effective January 1, 2001).[1] Accordingly, the trial court examined both the findings of fact and the conclusions of law under a *de novo* standard of review and, therefore, we need not consider whether the trial court's review conformed to a more restrictive standard.

[1] We first consider NCDENR's argument that the trial court erred in making five findings of fact that were not supported by substantial evidence.

The trial court found:

> Petitioners acknowledged that they were mistaken in their understanding of the applicable fishing laws and that they should have known the rules. Petitioners were careless in their violation of the fishing laws; their violations were not intentional. Pe-

1. N.C.G.S. § 150B-51 was amended in 2000 to add subsection (c). 2000 N.C. Sess. Laws ch. 190, § 11. The amendment applies to contested cases commenced on or after 1 January 2001.

> titioners were apologetic, both privately within NCDNER [sic] and in public; they promptly acknowledged responsibility for their actions and promptly paid their $50.00 fines plus $100.00 in court costs.

NCDENR argues that the facts do not reflect carelessness but rather demonstrate a deliberate disregard for the rules. To the contrary, substantial evidence supported the court's finding that petitioners were mistaken and that their violations were not intentional or deliberate. The DMF officers who issued the citations wrote in a narrative of the event that Mr. Mobley "had made a mistake." In addition, petitioners described the incident as arising from the fact that they "both thought the minimum was 13 1/2 inches," Mr. Kelly was "totally unaware that it was illegal to gig a Drum," and "the second Drum was mistakenly taken." Mr. Kelly specifically wrote in his statement to Secretary Ross "[t]here was never any malicious attempt to break the law or intentionally take fish illegally." Secretary Ross testified that "they had made a mistake, yes. The mistake was not knowing the rules." Therefore, we affirm this finding of fact.

> The trial court next found:
>
> Only a few articles and commentaries were written about the incident in newspapers and a sporting publication. In general those articles demonstrated both the fact that two NCDNER [sic] employees violated fishing regulations, and the fact that NCDNER [sic] actually enforces those fishing regulations—even against its own employees. The impact of those articles and commentaries in the public, on balance, is neutral but certainly not negative. The articles show that the law is being enforced evenhandedly against anyone who violates the law, even unintentionally.

NCDENR argues that because news publications criticized petitioners, the overall impact of the publicity must be negative. NCDENR's argument fails to appreciate the aspect of the publicity which reported that petitioners were punished for their conduct, as any member of the general public would be, notwithstanding their position with the agency. Substantial evidence supported this neutralizing aspect of the publicity, where Secretary Ross testified:

> Q. In all of these articles, letters, editorials, whatever you wish to call them in the entire bunch, is it not fair to say that the Department is being lauded for busting its own officials?

A. Yes, to the extent the articles talk about that. It was uniformly reported, it seemed to me, that the Marine Patrol officers did what they should have done, did a good job.

Therefore, we also affirm this finding of fact.

The trial court also found "[no] lasting negative effects have arisen from the conduct giving rise to the fishing tickets." NCDENR argues that "potential lasting negative effects are self-evident," citing a negative impact on the public's voluntary compliance with fishing regulations as well as the public's perception that the agency was not abiding by the same rules it enforces against the general public. With regard to the effect on voluntary compliance, Director Pate testified:

Q. [S]ince [the incident], have you had wholesale increase of violations of gigged drums or flounders too small?

A. I'm not aware of any major changes in the incidents [sic] of those types of violations.

Secretary Ross testified that he did not know whether people were actually violating fishing regulations as a result of the publicity.

With regard to the effect the publicity had on public opinion about NCDENR, Director Pate was asked whether his concern about the way that petitioners' actions would be interpreted by the general public came to fruition. Director Pate testified "it has not been quantified. Reactions of that nature by the public and by my staff are very difficult to measure." Further, Director Pierce testified:

Q. [In] the eleven months since your deposition[, h]ave you seen anywhere on e-mail, on—in the newspapers on fishing—have you anywhere seen a discussion of this fishing incident again?

A. I have not looked for nor have I found.

When asked how he had followed up to assess the impact of petitioners' actions on the public, Director Pierce testified that he worked with two public information officers who scan newspapers in the state and the adjoining states for agency publicity, and neither officer had called any articles to his attention. By testifying that they were not aware of any increases in fishing violations or any instances of continued or lasting publicity of the incident, the witnesses' testimony was substantial evidence that no lasting negative effects had occurred.

The trial court subsequently found "[g]iven the circumstances surrounding this case, a recurrence of [p]etitioners' conduct giving rise to the fishing tickets is unlikely." NCDENR argues that, without employment discipline, petitioners would have no reason not to repeat their conduct. Evidence was presented to show that, in addition to employment discipline, petitioners were subject to embarrassment, both personally, at work, and publicly, and punishment under the law, including a monetary penalty of $150 each. Furthermore, petitioners' repeated apologies expressed their regret and indicated that they learned from their mistake. Therefore, we affirm this finding of fact.

Ultimately, the trial court found:

> At no point were [p]etitioners, as a consequence of the conduct giving rise to their fishing tickets, impaired to any extent in performing their job duties with NCDNER's [sic] Division of Environmental Health, or in interacting with their respective staffs, or in interacting with other Divisions within NCDNER [sic], nor was there ever a potential threat of any adverse impact on their future ability to perform for the agency. There was no adverse impact on [p]etitioners' colleagues or on the quality of [p]etitioners' work.

NCDENR argues that the "evidence showed that working relationships and interagency harmony were harmed," as was petitioners' relationship with the public. As previously noted, the evidence showed that NCDENR and petitioners' relationship with the public suffered no quantifiable or evident harm.

With regard to their ability to perform their job duties and interact with their own staff and the staff in other divisions of NCDENR, Director Pierce, Director Pate, and Secretary Ross all testified that no harm had resulted. Director Pierce, petitioners' supervisor in DEH, testified that he had not talked to any of the staff in the Shellfish Sanitation Section of his division about their feelings toward petitioners, but that he had received a letter of support from an employee in the Shellfish Sanitation Section. Director Pierce also indicated that both petitioners received a rating of "outstanding" on their performance evaluations after the fishing incident, which included an evaluation of "leadership qualities," "staff guidance," "how his subordinates viewed him," and "working relationship . . . with everybody else in the . . . Division and the Department."

Director Pate, head of DMF, testified:

Q. When you indicate you were concerned that you-all shared and have separate regulatory actions, was your concern that your people could not do their job based on Mr. Mobley's fishing citation?

A. No, it was not.

Q. Was your concern [that] Mr. Mobley could not do his job based on the fishing citation?

A. No.

Q. Was your concern that your officers would somehow feel that they couldn't do their job?

A. No.

. . . .

Q. Has [the incident] affected your working relationship [with Mr. Mobley]?

A. No, sir.

. . . .

Q. . . . So despite your concern, it has not manifested itself in any way?

A. That's correct.

Q. And do you know if it's manifested itself with any of your enforcement officers or any of your staff that deals with Mr. Mobley?

A. Not aware of it, and I would be disappointed if it did.

. . . .

Q. [I]s it fair to say that your relationship with Mr. Kelly hasn't been affected at all?

A. No, sir, it has not been changed.

Q. And at that point when this happened, did you have any concern that it would be affected with Mr. Kelly?

A. The concern was there, yes, but again, it has not manifested itself.

Secretary Ross testified:

> Q. . . . But the simple fact is, you never got any information after the phone call on June 21st expressing disappointment and concern—you never got any information from the Marine Patrol offices, officers, people that the relationship was not working, that this thing had caused problems?
>
> A. No. That's true.
>
> . . . .
>
> Q. Do you have any objective evidence after the hearing that there has been—or even before the hearing—that there has been any intradepartmental harm?
>
> A. No.

Although there was concern about potential harm to the agency, it is apparent from the testimony that those concerns were unfounded. We find substantial evidence was presented to support the trial court's finding of fact that there was no adverse impact on or impairment of petitioners' ability to do their jobs.

[2] By separate argument, NCDENR contends that the trial court erred in concluding that petitioners did not engage in unacceptable personal conduct "unbecoming a state employee that was detrimental to state service" and that NCDENR lacked just cause to discipline petitioners. Disciplinary actions for state employees are governed by N.C.G.S. § 126-35, which states: "No career State employee subject to the State Personnel Act shall be discharged, suspended, or demoted for disciplinary reasons, *except for just cause*." N.C. Gen. Stat. § 126-35(a) (2007) (emphasis added). "Disciplinary actions, for the purpose of this Article, are those actions taken in accordance with the disciplinary procedures adopted by the State Personnel Commission and specifically based on unsatisfactory job performance, unacceptable personal conduct or a combination of the two." N.C. Gen. Stat. § 126-35(b). In this case, NCDENR cited unacceptable personal conduct as the basis for discipline. Unacceptable personal conduct includes, in its definition, "conduct unbecoming a state employee that is detrimental to state service." 25 N.C. Admin. Code 1J.0614(i)(5) (2008).

Because the underlying conduct is undisputed, the only inquiry before this Court is whether just cause existed for petitioners' disci-

pline. *See Carroll*, 358 N.C. at 665, 599 S.E.2d at 898. We note our Supreme Court's language from *Carroll*:

> [T]he fundamental question in a case brought under N.C.G.S. § 126-35 is whether the disciplinary action taken was "just." . . .
>
> "Just cause," like justice itself, is not susceptible of precise definition. It is a flexible concept, embodying notions of equity and fairness, that can only be determined upon an examination of the facts and circumstances of each individual case. Thus, not *every* violation of law gives rise to "just cause" for employee discipline.

Id. at 669, 599 S.E.2d at 900-01 (citations and internal quotation marks omitted). As part of the just cause analysis, this Court has held:

> [W]here an employee has engaged in off-duty criminal conduct, the agency need not show actual harm to its interests to demonstrate just cause for an employee's dismissal. However, it is well established that administrative agencies may not engage in arbitrary and capricious conduct. Accordingly, we hold that in cases in which an employee has been dismissed based upon an act of off-duty criminal conduct, the agency must demonstrate that the dismissal is supported by the existence of a *rational nexus* between the type of criminal conduct committed and the potential adverse impact on the employee's future ability to perform for the agency.

Eury v. N.C. Emp. Sec. Comm'n, 115 N.C. App. 590, 611, 446 S.E.2d 383, 395-96 (citations omitted), *disc. review denied*, 338 N.C. 309, 451 S.E.2d 635 (1994). Although this Court in *Eury* discussed the issue of just cause specifically in the context of "dismissal," we note that the logic requiring a rational nexus applies equally in any case of state employee discipline. *See id.* at 610, 446 S.E.2d at 395 (referencing N.C.G.S. § 126-35(a) in its entirety in a discussion of the connection between conduct and negative consequences, where § 126-35(a) governs discharge, suspension, *and* demotion).

> In determining whether a rational nexus exists, the Commission may consider the following factors:
>
> —the degree to which, if any, the conduct may have adversely affected clients or colleagues;

—the relationship between the type of work performed by the employee for the agency and the type of criminal conduct committed;

—the likelihood of recurrence of the questioned conduct and the degree to which the conduct may affect work performance, work quality, and the agency's good will and interests;

—the proximity or remoteness in time of the conduct to the commencement of the disciplinary proceedings;

—the extenuating or aggravating circumstances, if any, surrounding the conduct;

—the blameworthiness or praiseworthiness of the motives resulting in the conduct; and

—the presence or absence of any relevant factors in mitigation.

Id. at 611, 446 S.E.2d at 396. This Court further noted that this list is not all-inclusive; however, it is instructive in any analysis of the existence of a rational nexus. *Id.*

The trial court made findings of fact relating to each of the relevant factors, as follows. With respect to any adverse effect on clients or colleagues, the trial court found "[t]here was no adverse impact on [p]etitioners' colleagues." As for the relationship between the criminal conduct and the type of work performed by the employee and the agency, the trial court concluded "[p]etitioners' job duties did not include enforcing regulations for fin fish, and there is, therefore, not a close relationship between the conduct at issue and the type of work performed by [p]etitioners." To the extent this conclusion of law is actually a finding of fact, we treat it as such. *See Gainey v. N.C. Dep't of Just.*, 121 N.C. App. 253, 257 n.1, 465 S.E.2d 36, 40 n.1 (1996) ("Although denominated as a conclusion of law, we treat this conclusion as a finding of fact because its determination does not involve the application of legal principles."). NCDENR does not challenge the fact that petitioners did not enforce fin fish regulations, and that fact supports the trial court's conclusion that a close relationship did not exist. With regard to the likelihood of recurrence of the questioned conduct, the trial court found "a recurrence of [p]etitioners' conduct giving rise to the fishing tickets is unlikely." As for the degree to which the conduct may affect work performance, and work quality, the trial court found:

> At no point were [p]etitioners, as a consequence of the conduct giving rise to their fishing tickets, impaired to any extent in performing their job duties . . . , or in interacting with their respective staffs, or in interacting with other Divisions within NCDNER [sic], nor was there ever a potential threat of any adverse impact on their future ability to perform for the agency. There was no adverse impact on [p]etitioners' colleagues or on the quality of [p]etitioners' work.

With respect to the effect on the agency's good will, the trial court found that the publicity was neutral and had no lasting effects. The trial court also found some mitigating factors, including "[p]etitioners were very cooperative and polite to the DMF Officers, and later were complimentary of the DMF Officers for issuing the citations," and "[p]etitioners were apologetic, both privately within NCDNER [sic] and in public; they promptly acknowledged responsibility for their actions and promptly paid their $50.00 fines plus $100.00 in court costs."

In light of these factors, the trial court properly concluded that "[a] 'rational nexus' does not exist in this matter between the off-duty criminal conduct at issue—conduct giving rise to the fishing tickets—and the potential adverse impact on [p]etitioners' future ability to perform for [NCDENR]." Where the agency fails to show a rational nexus, there cannot be just cause for discipline. *Eury*, 115 N.C. App. at 611, 446 S.E.2d at 395-96. Accordingly, the trial court properly concluded that petitioners had not engaged in unacceptable personal conduct that is detrimental to state service and that there was no just cause for discipline.

Next, NCDENR argues that the trial court erred in concluding:

> [A]s a separate and independent basis for overruling the disciplinary actions at issue in this case, . . . 25 NCAC 01J.0611 is void as applied on the particular facts in this case because it did not permit the exercise of discretion in determining appropriate disciplinary action[, and] on these specific facts, the disciplinary actions in this matter were arbitrary and capricious and not the product of reasoned decision making.

Because we affirm the trial court's reversal of the discipline for lack of just cause and because this conclusion was a separate and independent basis for reversing the SPC's decision, we need not address it.

[3] Additionally, NCDENR argues that the trial court erred in awarding prejudgment and postjudgment interest on petitioners' back pay awards. We note that "the State is not required to pay interest on its obligations unless it is required to do so by contract or by statute." *Faulkenbury v. Teachers' & State Employees' Ret. Sys.*, 132 N.C. App. 137, 149, 510 S.E.2d 675, 683 (1999). The State Personnel Commission rules specifically provide, "[t]he state shall *not* be required to pay interest on any back pay award." 25 N.C. Admin. Code 1B.0425 (2008) (emphasis added). Accordingly, we reverse the award of prejudgment and postjudgment interest on the back pay awards in the 19 April 2007 order.

[4] Finally, we must address an issue raised by NCDENR in its appeal and by petitioners in their cross-appeal. NCDENR argues that the 4 June 2007 order awarding attorney fees and costs to petitioners should be reversed because petitioners should not have been prevailing parties. In light of our analysis of the just cause issue, NCDENR's argument is without merit. Petitioners contend that the trial court erred in awarding partial attorney fees in the 4 June 2007 order because the court erred in failing to make findings of fact to support the reasonableness of the award. We agree.

A trial court's discretionary award of attorney fees and costs is governed by N.C.G.S. §§ 6-19.1 and 6-20, which provide:

> In any civil action . . . brought by a party who is contesting State action pursuant to G.S. 150B-43 . . . , unless the prevailing party is the State, the court may, in its discretion, allow the prevailing party to recover reasonable attorney's fees, including attorney's fees applicable to the administrative review portion of the case, in contested cases arising under Article 3 of Chapter 150B, to be taxed as court costs against the appropriate agency if:
>
> (1) The court finds that the agency acted without substantial justification in pressing its claim against the party; and
>
> (2) The court finds that there are no special circumstances that would make the award of attorney's fees unjust.

N.C. Gen. Stat. § 6-19.1 (2007). "[C]osts may be allowed in the discretion of the court." N.C. Gen. Stat. § 6-20 (2007).

In the case before us, the trial court concluded that NCDENR acted without substantial justification and that no special circumstances existed to make the award unjust. The court further found

that petitioners submitted information showing attorney fees of $102,239.40 and costs of $4,159.35. However, the court awarded only $51,119.70 in attorney fees and only $2,617.10 in costs. "Although the award of attorney's fees is within the discretion of the trial judge under N.C. Gen. Stat. § 6-19.1 (1986), the trial court must make findings of fact 'as to the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney.' " *N.C. Dep't of Corr. v. Myers*, 120 N.C. App. 437, 442, 462 S.E.2d 824, 828 (1995) (internal quotation marks omitted) (quoting *United Labs. v. Kuykendall*, 335 N.C. 183, 195, 437 S.E.2d 374, 381 (1993)), *aff'd per curiam*, 344 N.C. 626, 476 S.E.2d 364 (1996). Here the court failed to make necessary findings of fact about the reasonableness of the award of attorney fees to enable this Court to determine whether the award was within the trial court's sound discretion or was an abuse thereof. Therefore, we must reverse and remand the 4 June 2007 order for findings of fact consistent with this opinion.

19 April 2007 order affirmed in part, reversed in part; 4 June 2007 order reversed and remanded for findings of fact.

Affirmed in part, reversed in part, and remanded.

Judges BRYANT and ARROWOOD concur.

STATE OF NORTH CAROLINA, PLAINTIFF v. RICKEY NELSON SPENCER, DEFENDANT

No. COA07-1191

(Filed 19 August 2008)

1. Drugs— maintaining a dwelling for keeping or selling— residence

The trial court did not err by denying defendant's motion to dismiss the charge of maintaining a dwelling for the keeping or selling of controlled substances. The State presented a confession by defendant that he resided at the home, which is substantial evidence that defendant maintained the dwelling. Although the confession was incompetent, all of the evidence actually admitted which is favorable to the State is to be considered when ruling on the motion.

2. Drugs— possession of marijuana and intent to sell—same contraband

The trial court did not err by denying defendant's motion to dismiss one of two counts of possession of marijuana where he was charged with felony possession and possession with intent to sell or deliver based on marijuana found in a cigar box. A defendant can be convicted of both felony possession and possession with intent to sell or distribute based on the same contraband.

3. Drugs— instructions—possession of drug paraphernalia

Jury instructions on the intent for which defendant possessed drug paraphernalia substantially conformed to the pattern jury instruction to which defendant agreed.

4. Confessions and Incriminating Statements; Drugs— admission of unverified confession—erroneous—plain error on maintaining dwelling—not plain error on possession

The erroneous admission of a confession through an officer's rough, handwritten, non-verbatim and unverified notes did not produce plain error in convictions for possession of marijuana with intent to sell and deliver and possession of drug paraphernalia due to other evidence. However, the conviction for maintaining a dwelling for keeping or selling a controlled substance based on the confession was plain error.

Appeal by defendant from judgment entered on or about 30 January 2007 by Judge W. Erwin Spainhour in Superior Court, Iredell County. Heard in the Court of Appeals 19 March 2008.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Dennis Myers, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender David W. Andrews, for defendant-appellant.

STROUD, Judge.

Defendant Rickey Nelson Spencer appeals from judgment entered upon jury verdicts finding him guilty of felony possession of marijuana, possession with intent to sell or deliver marijuana, maintaining a dwelling for purposes of keeping or selling of a controlled substance, possession of drug paraphernalia, and attaining the status of habitual felon. Defendant contends the trial court erred when it denied his motion to dismiss the charge of maintaining a dwelling for

the keeping or selling of controlled substances; denied his motion to dismiss one of the two counts of possession of marijuana; admitted his purported confession; and failed to properly instruct the jury on the elements of possession of drug paraphernalia."

After careful review of the record, we conclude that the State presented sufficient evidence to support both of the possession counts and the charge of maintaining a dwelling for purposes of keeping or selling of a controlled substance. We also conclude the trial court's instructions on possession of drug paraphernalia were not error. However, we conclude that the trial court erred by admitting defendant's purported confession. This error did not rise to plain error as to the charge of possession of marijuana with intent to sell or deliver or the charge of possession of drug paraphernalia, but it did rise to plain error as to the charge of maintaining a dwelling for purposes of keeping or selling a controlled substance. Because the trial court committed plain error, defendant is entitled to a new trial on the charge of maintaining a dwelling for purposes of keeping or selling a controlled substance. The trial court consolidated defendant's convictions for the purpose of sentencing, so as a result of granting defendant a new trial on one of the convictions, we remand for resentencing on the remaining convictions.

I. Background

The State presented evidence at trial tending to show the following: On 23 November 2004, Sergeant Walter Meyer of the Iredell County Sheriff's Office went to 178 Loggerhead Road in Statesville, North Carolina, with Sergeant David Prevette and Sergeant Dale Hawkins. Upon arrival at 178 Loggerhead Road, the officers knocked on the front door and defendant answered. Defendant was asked if he owned the house and he replied that he did not own the house. Ms. Sheena Elmore was introduced as the homeowner and she gave permission for the officers to search the house for marijuana. While searching the guest bedroom, Sergeant Meyer saw a partially smoked marijuana cigarette in an ashtray beside the bed.

During Sergeant Meyer's search, Sergeant Prevette, Sergeant Hawkins and defendant were in the living room. Sergeant Prevette observed defendant acting "extremely nervous," so he asked defendant "if he needed to tell me something." Defendant nodded affirmatively. Sergeant Prevette asked defendant if there were drugs in the house. Defendant again nodded affirmatively. Finally Sergeant Prevette asked where the drugs were and how much; defendant

acknowledged there were about three ounces of marijuana "in the cabinet below the kitchen sink."

Sergeant Hawkins overheard the conversation between defendant and Sergeant Prevette and went into the kitchen. In the kitchen cabinet, Sergeant Hawkins discovered a cigar box containing three packages of marijuana weighing approximately one ounce each, two small brown bags of marijuana, "some drug paraphernalia," rolling papers, and a set of digital scales. The officers also discovered a semi-automatic pistol on top of the kitchen cabinet.

Sergeant Prevette arranged with defendant to come to the sheriff's office the next day to give a statement. The following day defendant and his mother arrived at the sheriff's office and met with Sergeant Prevette in an interview room. Defendant was informed that he wasn't in custody and that Sergeant Prevette wanted to hear about and write down what defendant had to say about the marijuana. During the interview, Sergeant Prevette asked questions and defendant answered while Sergeant Prevette recorded the conversation in scratch notes. At the end of the conversation, Sergeant Prevette began to write down what was said and read it back to defendant to make sure it was being recorded correctly. Before Sergeant Prevette finished writing the statement, defendant's mother needed to leave. She politely ended the interview and took defendant with her. When the meeting ended, defendant understood that Sergeant Prevette would continue writing down what had been discussed and that the officers expected defendant to return later to proofread and sign the statement. Defendant never returned to sign the statement written by Sergeant Prevette.

Sergeant Prevette weighed the marijuana on 23 November 2004 and determined that it weighed 87.4 grams, approximately three ounces.[1] On 6 February 2006, the marijuana was sent to the State Bureau of Investigation (SBI) laboratory for testing. Misty Icard, a special agent and forensic drug chemist with the SBI tested the marijuana on 26 May 2006. Her tests confirmed that the substance was marijuana and weighed 80.7 grams.[2]

On 31 January 2005, the Iredell County Grand Jury indicted defendant on charges of (1) possession of a controlled substance, (2)

1. One ounce weighs 28.35 grams while an ounce and a half weighs approximately 43 grams.

2. Agent Icard testified at trial that the difference in weight could have been the result of drying, weighing without the bags, or less accurate scales.

possession of a controlled substance with the intent to sell or deliver, (3) maintaining a place to keep controlled substances, (4) possession of drug paraphernalia, and (5) attaining the status of habitual felon. On 15 September 2005, defendant moved to suppress his purported confession made on 24 November 2004, and the evidence obtained during the search of the residence at 178 Loggerhead Road on 23 November 2004. On or about 2 February 2006, the trial court denied the motion to suppress.

Defendant was tried before a jury in Iredell County Superior Court on 29 and 30 January 2007. The jury found defendant guilty of (1) possession of more than one and one half ounces of marijuana, (2) possession with the intent to sell or deliver marijuana, (3) maintaining a dwelling for purposes of keeping or selling of a controlled substance, (4) possession of drug paraphernalia, and (5) attaining the status of habitual felon. Upon the jury verdict, the trial court sentenced defendant to 150 to 189 months. Defendant appeals.

II. Motions to Dismiss

A. Maintaining a Dwelling

[1] Defendant argues the trial court erred by denying his motion to dismiss the charge of maintaining a dwelling for the keeping or selling of controlled substances because the State failed to show that defendant kept or maintained the house at 178 Loggerhead Road. We disagree.

On a motion to dismiss for insufficient evidence to sustain a conviction, "the question for the [c]ourt is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). "[A]ll of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion." 299 N.C. at 99, 261 S.E.2d at 117. "The 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[.]" *Id.*

Defendant cites *State v. Bowens*, which listed seven factors to be considered in determining whether a dwelling is kept or maintained for purposes of N.C. Gen. Stat. § 90-108(a)(7), "none of which are dis-

positive" by themselves. 140 N.C. App. 217, 221, 535 S.E.2d 870, 873 (2000), *disc. review denied*, 353 N.C. 383, 547 S.E.2d 417 (2001). "Those factors include: ownership of the property; occupancy of the property; repairs to the property; payment of taxes; payment of utility expenses; payment of repair expenses; and payment of rent." 140 N.C. App. at 221, 535 S.E.2d at 873. Defendant argues that because the State presented only evidence of occupancy, it has not presented sufficient evidence to show that defendant maintained the dwelling, and the motion to dismiss should have been granted.

Defendant is correct that occupancy, without more, will not support the element of "maintaining" a dwelling. *State v. Kraus*, 147 N.C. App. 766, 768-69, 557 S.E.2d 144, 147 (2001). However, evidence of residency, standing alone, is sufficient to support the element of maintaining. *State v. Rosario*, 93 N.C. App. 627, 638, 379 S.E.2d 434, 440, *disc. review denied*, 325 N.C. 275, 384 S.E.2d 527 (1989); *State v. Rich*, 87 N.C. App. 380, 384, 361 S.E.2d 321, 324 (1987).

The State presented evidence, in the form of a purported confession by defendant to police, that defendant resided at the home at 178 Loggerhead Road.[3] This was substantial evidence that defendant maintained the dwelling. *Rosario*, 93 N.C. App. at 638, 379 S.E.2d at 440. Defendant did not argue that the State failed to present sufficient evidence on the other elements of the charge. Therefore, the trial court properly denied defendant's motion to dismiss the charge of maintaining a dwelling for purposes of keeping or selling of a controlled substance.

B. Two Counts of Possession

[2] Defendant also contends that the trial court erred by denying his motion to dismiss one of the two counts of possession of marijuana because the State failed to show that two felonies occurred. We disagree.

---

3. As we discuss *infra*, defendant's purported confession was incompetent evidence. However, "all of the evidence actually admitted, *whether competent or incompetent*, which is favorable to the State is to be considered by the court in ruling on the motion." *Powell*, 299 N.C. at 99, 261 S.E.2d at 117 (emphasis added); *see also State v. McMilliam*, 243 N.C. 771, 774, 92 S.E.2d 202, 205 (1956) ("Though the court below, in denying the motion for nonsuit, acted upon evidence, which we now hold to be incompetent, yet if this evidence had not been admitted, the State might have followed a different course, and produced in court a valid warrant to search defendants' home."); *Early v. Eley*, 243 N.C. 695, 700-01, 91 S.E.2d 919, 923 (1956) ("Though erroneously admitted, nevertheless, we must consider them as a part of the plaintiff's case on the question of nonsuit for the reason that their admission may have caused the plaintiff to omit competent evidence of the same import.").

Defendant was convicted of violating N.C. Gen. Stat. § 90-95(d)(4) (felony possession of marijuana) and N.C. Gen. Stat. § 90-95(a) (possession of marijuana with intent to sell or deliver). Defendant argues:

> the State was required to show that [defendant] possessed some amount of marijuana in order to prove each count. The State, however, failed to meet this burden because the evidence did not distinguish between the amount of marijuana necessary to prove the charge of possession of marijuana with intent to sell or deliver and the amount of marijuana necessary to prove the charge of possession of more than one and one-half ounces of marijuana. As a result, the State failed to present substantial evidence of both counts of possession of marijuana and the trial court erred by denying [defendant's] motion to dismiss.

Defendant cites *State v. Pagon*, 64 N.C. App. 295, 307 S.E.2d 381 (1983), in support of this argument. In *Pagon*, the police found marijuana in the defendant's pocket, and in two different places within the defendant's mobile home. *Id.* at 296, 307 S.E.2d at 382. The defendant was convicted and sentenced for both possession of marijuana with intent to sell and possession of more than one ounce of marijuana. *Id.* at 296-97, 307 S.E.2d at 383. On appeal, this Court held that the State had presented sufficient evidence of both charges to survive defendant's motion to dismiss.[4] *Id.* at 299, 307 S.E.2d at 384. Defendant ar-

4. Even though this Court held that the State had presented evidence of both charges sufficient to survive the defendant's motion to dismiss, *Pagon* went on to arrest judgment on the conviction of possession of marijuana with intent to sell, stating the rule that separate sentences for "both possession with intent to sell marijuana and possession of more than one ounce of marijuana, when the convictions are based upon possession of the same substance and arise out of the same transactions" violate the Double Jeopardy Clause. 64 N.C. App. at 299, 307 S.E.2d at 384 (citing *State v. McGill*, 296 N.C. 564, 251 S.E.2d 616 (1979)). However, the *Pagon* rule was expressly overruled in *State v. Hurst*, 320 N.C. 589, 591, 359 S.E.2d 776, 777 (1987), which defendant did not include in his citation to *Pagon*.

We note that *Hurst* itself was overruled in part by *State v. White*, 322 N.C. 506, 518, 369 S.E.2d 813, 819 (1988). However, we believe *White* should be read narrowly as applying only to the crimes of larceny and armed robbery and did not disturb *Hurst's* overruling of *Pagon*. In any event, *State v. Pipkins*, 337 N.C. 431, 434, 446 S.E.2d 360, 362 (1994), leaves no doubt that a conviction and sentence for more than one drug offense at the same trial based on the same contraband, when one offense is not a lesser included offense that merges into the other, does not violate the Double Jeopardy Clause. *Compare State v. Kemmerlin*, 356 N.C. 446, 474-75, 573 S.E.2d 870, 890 (2002) ("The Double Jeopardy Clauses of both the United States Constitution and the North Carolina Constitution prohibit multiple punishment for the same offense. North Carolina has adopted a definitional test for determining

gues that his case is distinguishable from *Pagon* on the basis that only the marijuana in the cigar box, and not the marijuana cigarette next to defendant's bed, was admitted into evidence.

Defendant's attempt to distinguish his case from *Pagon* is unconvincing, because *Pagon* considered all the marijuana seized from the defendant's pocket and from his home as a single quantity. 64 N.C. App. at 298-99, 307 S.E.2d at 384. Furthermore, defendant cites no cases in support of his argument, and we find none, that the State is required to divide a quantity of a controlled substance and to identify which portion supports a charge of felony possession and which portion supports a charge of possession with intent to sell or deliver. In fact, a defendant can be convicted of both felony possession and possession with intent to sell or distribute under N.C. Gen. Stat. § 90-95 based on the same contraband. *See State v. Pipkins*, 337 N.C. 431, 434, 446 S.E.2d 360, 362 (1994) (examining legislative intent and holding that the offenses of felonious possession of cocaine and trafficking in cocaine by possession, based on the same contraband, may be punished separately); *State v. Perry*, 316 N.C. 87, 104, 340 S.E.2d 450, 461 (1986) (A "defendant may be convicted and punished separately for trafficking in heroin by possessi[on] . . . , trafficking in heroin by manufacturing . . . , and trafficking in heroin by transport[ation] . . . even when the contraband material in each separate offense is the same heroin.")

III. Possession of Drug Paraphernalia

[3] Defendant assigns error to the jury instruction on the intent for which defendant possessed drug paraphernalia:

> That the defendant [possessed drug paraphernalia] with the intent to use said drug paraphernalia in order to smoke, buy or sell marijuana, a controlled substance which would be unlawful to possess. Again, marijuana is a controlled substance in North Carolina that is unlawful to possess.
>
> So if you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant unlawfully and knowingly possessed with intent to use certain drug paraphernalia in order to *smoke*, *buy or sell* marijuana, a controlled substance which would be unlawful to possess, then it would be your duty to return a verdict of guilty.

---

whether a crime is in fact a lesser offense that merges with the greater offense." (Internal citations omitted.)).

(Emphasis added.) Defendant argues that this instruction was error because it varied from the pattern jury instruction to which defendant agreed at trial.[5]

Word for word conformity of the jury instructions to the pattern instructions is not required; substantial conformity is all that is required. *State v. Brewington*, 352 N.C. 489, 523, 532 S.E.2d 496, 516 (2000) ("Even though the trial court's instructions were not precisely identical to the pattern jury instructions, they were substantially so, and defendant cannot show how the trial court's instruction prejudiced him. This assignment of error is overruled."), *cert. denied*, 531 U.S. 1165, 148 L. Ed. 2d 992 (2001).

We conclude that the jury instructions *sub judice* substantially conformed to the pattern jury instruction to which defendant agreed. The pattern jury instruction reads, in pertinent part:

> [T]hat the defendant [possessed drug paraphernalia] with the intent to use said drug paraphernalia in order to (*name unlawful use; e.g.*, *process*), a controlled substance which would be unlawful to possess. ((*Name substance*) is a controlled substance in North Carolina that is unlawful to possess.)
>
> If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant unlawfully and knowingly [used] [possessed with intent to use] certain drug paraphernalia in order to (*name unlawful use; e.g.*, *process*) a controlled substance which would be unlawful to possess, then it would be your duty to return a verdict of guilty.

N.C.P.I.—Crim. 260.95. The footnotes to N.C.P.I.—Crim. 260.95 note that "G.S. § 90-113.22 gives a shopping list of unlawful uses, i.e.: to plant, cultivate, manufacture, etc.[,]" *id.* n.1, and "G.S. § 90-113.21 [has] a more detailed definition of the term drug paraphernalia[,]" *id.* n.2. Therefore, substantial conformity to N.C.P.I.—Crim. 260.95 allows the trial court to insert any of the provisions of either section 90-113.21 or section 90-113.22, including the statutory provision that

5. Defendant also argues that this error was compounded because the jury instruction did not track the statutory language of N.C. Gen. Stat. § 90-113.22, and did not conform to the language of the indictment. However, defendant did not argue to the trial court or in his brief that the indictment was defective, or that the pattern instruction was at odds with the indictment or the statute, therefore we need only to measure the instruction given against the pattern jury instruction. *See* N.C. Gen. Stat. § 15A-1443(c) (2005) ("A defendant is not prejudiced by the granting of relief which he has sought . . . .").

" 'drug paraphernalia' means all equipment, products and materials of any kind that are used to facilitate, or intended or designed to facilitate, violations of the Controlled Substances Act," N.C. Gen. Stat. § 90-113.21(a) in the blank for *name unlawful use*.

The trial court inserted "smoke, buy or sell" in the blank. "Selling" a controlled substance is an act expressly prohibited by the Controlled Substances Act. N.C. Gen. Stat. § 90-95(a)(1) (2005). "Buying" a controlled substance implies taking possession, an act also prohibited by the Controlled Substances Act. N.C. Gen. Stat. 90-95(a)(3) (2005). "Smoking" a controlled substance is a way to "inhale, or otherwise introduce [it] into the body[,]" an act prohibited by N.C. Gen. Stat. § 90-113.22 (2005). Because each of the acts named as unlawful by the trial court in the jury instruction are prohibited by either the Controlled Substances Act or by N.C. Gen. Stat. § 90-113.22, we conclude that defendant's argument is without merit.

IV. Admission of Purported Confession

[4] Defendant contends that the trial court committed plain error by admitting his purported confession. Defendant, citing *State v. Walker*, 269 N.C. 135, 152 S.E.2d 133 (1967) and *State v. Bartlett*, 121 N.C. App. 521, 466 S.E.2d 302 (1996), argues that because defendant's purported confession was neither verified by defendant nor a verbatim record of defendant's words, it was not admissible. Defendant argues that because the purported confession included evidence relevant to possession with intent to sell or deliver marijuana, maintaining a dwelling for purposes of keeping or selling of a controlled substance, and possession of drug paraphernalia, he is entitled to a new trial on those three charges. However, defendant did not object to the admission of the purported confession at trial, so this Court may review only for plain error. N.C.R. App. P. 10(c)(4).

"A prerequisite to our engaging in a 'plain error' analysis is the determination that the [evidentiary admission] complained of constitutes 'error' at all." *State v. Torain*, 316 N.C. 111, 116, 340 S.E.2d 465, 468, *cert. denied*, 479 U.S. 836, 93 L. Ed. 2d 77 (1986). *Walker* states the general rule regarding the admission of a purported confession:

> If a statement purporting to be a confession is given by [the] accused, and is reduced to writing by another person, before the written instrument will be deemed admissible as the written confession of [the] accused, he must in some manner have indicated his acquiescence in the correctness of the writing itself. If the

> transcribed statement is not read by or to [the] accused, and is not signed by [the] accused, or in some other manner approved, or its correctness acknowledged, the instrument is not legally, or *per se*, the confession of [the] accused; and it is not admissible in evidence as the written confession of [the] accused.

269 N.C. at 139, 152 S.E.2d at 137 (citation and quotation marks omitted). *Bartlett* recognized an exception to the general rule of *Walker*, holding that even if the defendant fails to verify the correctness of a statement, the statement will still be admissible "if it is a verbatim record of the questions asked and the answers given by him." 121 N.C. App. at 522, 466 S.E.2d at 303 (citation, internal quotation marks, ellipses and brackets omitted).

In the case *sub judice*, it is undisputed that the only evidence of defendant's answers during his police interview was Sergeant Prevette's rough hand-written notes, which were not verbatim. Sergeant Prevette did not follow up with defendant to have defendant look over and confirm his notes as an accurate representation of defendant's answers. Defendant never returned to give his approval or indicate "his acquiescence in the correctness of the writing itself." 269 N.C. at 139, 152 S.E.2d at 137. Therefore, allowing defendant's purported confession to be read to the jury was error.

However, because defendant did not object at trial to the reading of the confession, we review only for plain error. N.C.R App. P. 10(c)(4). A plain error is an 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. Carroll*, 356 N.C. 526, 539, 573 S.E.2d 899, 908 (2002) (citations and quotation marks omitted), *cert. denied*, 539 U.S. 949, 156 L. Ed. 2d 640 (2003).

Absent defendant's confession, the jury had sufficient "weighty" evidence so that the admission of the purported confession did not have a probable impact on the outcome of the trial as to the charges of possession with intent to sell or deliver marijuana and possession of drug paraphernalia. *See Bartlett*, 121 N.C. App. at 523, 466 S.E.2d at 303. Even without the purported confession, the jury heard the officers' testimony about the nearly three ounces of marijuana, digital scales and other paraphernalia they discovered after defendant instructed them where the drugs were located. There was also evidence that the officers discovered the marijuana, paraphernalia and a semi-automatic handgun in close proximity. *See, e.g.*, *State v.*

Mitchell, 27 N.C. App. 313, 317, 219 S.E.2d 295, 298 (1975) ("The quantity of narcotics found in defendant's possession, its packaging, its location, and the paraphernalia for measuring and weighing were all circumstances from which it could properly be inferred that it was possessed for sale rather than for personal use." (Citation and quotation marks omitted.)), *disc. review denied*, 289 N.C. 301, 222 S.E.2d 701 (1976). Taken together, the State presented strong evidence that defendant possessed marijuana with the intent to sell or deliver and that he was also in possession of drug paraphernalia. Therefore, it is not probable that the jury would have reached a different verdict without the admission of defendant's purported confession. *Carroll*, 356 N.C. at 539, 573 S.E.2d at 908.

However, the only evidence before the jury that defendant maintained the dwelling at 178 Loggerhead Road was his purported confession. We conclude that it is probable that the jury would not have convicted him of the offense of maintaining a dwelling for purposes of keeping or selling of a controlled substance absent the erroneous admission of the purported confession. Accordingly, defendant is entitled to a new trial on that charge.[6] *State v. Collins*, 334 N.C. 54, 63, 431 S.E.2d 188, 193 (1993).

V. Conclusion

We conclude that the State presented sufficient evidence to support both of the possession counts and the charge of maintaining a dwelling for purposes of keeping or selling of a controlled substance. We also conclude the trial court's instructions on possession of drug paraphernalia were not error. However, we conclude that the trial court erred by admitting defendant's purported confession. The error did not rise to plain error as to the charge of possession of marijuana with intent to sell or deliver or the charge of possession of drug paraphernalia, but it did rise to plain error as to the charge of maintaining a dwelling for purposes of keeping or selling a controlled substance. Because the trial court committed plain error, defendant is entitled to a new trial on the charge of maintaining a dwelling for purposes of keeping or selling a controlled substance. The trial court consolidated defendant's convictions for the purpose of sentencing, so as a result of granting defendant a new trial on one of the convictions, we remand for resentencing on the remaining convictions.

---

6. Defendant assigned error to the trial judge's failure to include a definition of "maintain" in his instruction on the offense of maintaining a dwelling for the keeping or selling of controlled substances. Because we have granted a new trial on other grounds for that charge, the assignment of error is moot and will not be reviewed.

New trial in part, no error in part, remand for resentencing.

Judges HUNTER and ELMORE concur.

S.B. SIMMONS LANDSCAPING & EXCAVATING, INC., PLAINTIFF v. ROGER BOGGS AND WIFE, MARY BETH BOGGS, DEFENDANTS

No. COA07-1563

(Filed 19 August 2008)

1. Unfair Trade Practices— statute of limitations—accrual of claim

In an unfair and deceptive trade practice action rising from an arrangement to transfer land in exchange for forgiveness of a debt, the evidence supported the trial court's findings concerning the accrual of the claim which lead to the conclusion that the claim was barred by the statute of limitations.

2. Unfair Trade Practices— failure to disclose information—unsupported argument—bench trial judgment following denial of summary judgment

Plaintiff abandoned an argument concerning the failure of defendant Mary Beth Boggs to disclose information in a transaction by making an argument that consisted of a one sentence quote. A one sentence quote is not an argument; the appellate court could only make assumptions as to how plaintiff believed that the quote applied. Moreover, any error in granting partial summary judgment was made harmless by the judgment after the bench trial, where the trial court heard the issues and resolved them against plaintiff.

Appeal by plaintiff from order entered 16 May 2007 by Judge R. Stuart Albright and judgment entered 13 June 2007 by Judge Richard L. Doughton in Superior Court, Forsyth County. Heard in the Court of Appeals 15 May 2008.

Stephen E. Lawing, for plaintiff-appellant.

Roberson Haworth & Reese, P.L.L.C., by Christopher C. Finan and Robert A. Brinson, for defendant-appellees.

STROUD, Judge.

Plaintiff appeals from (1) order entered 16 May 2007 granting partial summary judgment to defendants on plaintiff's claims for specific performance of contract to convey land, action to quiet title, and all claims against defendant Mary Beth Boggs and (2) judgment entered 13 June 2007 following a bench trial dismissing plaintiff's remaining claim made pursuant to N.C. Gen. Stat. § 75-1.1 *et. seq*. For the following reasons, we affirm.

I. Background

Plaintiff's claims arose out of an alleged contract to purchase real property known as Tract 1. The relevant factual background of the dispute as found by the trial court in its unchallenged findings of fact is as follows:

> 1. The Defendant, Roger Boggs ("Boggs") is the joint owner, together with his wife, Mary Beth Boggs, of a certain parcel of real property located upon Barney Road in Forsyth County (the "Property"). Mr. and Mrs. Boggs have owned the Property for numerous years.
>
> 2. In approximately 1995, Boggs solicited various quotes from contractors and other parties, including the Plaintiff, to perform certain clearing and tree-removal services upon the Property.
>
> 3. Prior to receiving a quotation from the Plaintiff to perform the work, Boggs had received a quotation from another contractor who quoted a price of $5,000.00 to perform the requested work upon the Property.
>
> 4. Subsequently, Sam Simmons ("Simmons"), an owner and the president of the Plaintiff corporation, met with Boggs on the Property, and after being told by Boggs that the previous contractor he had interviewed would have performed the requested work for a total price of $5,000.00, Simmons indicated that he would perform the same work for a total price of $4,000.00.
>
> 5. Based upon the lower price, Boggs agreed and requested that Simmons perform the work on the Property for the sum of $4,000.00. Prior to beginning the work, neither Simmons nor the Plaintiff Corporation provided Boggs with a written price quote for the work to be performed.
>
> 6. Simmons or the Plaintiff Corporation completed the work requested by Boggs sometime in 1995.

7. However, Boggs received a bill purporting to be from the Plaintiff for the total amount of $11,600.00.

On May 24, 2006, plaintiff S.B. Simmons Landscaping and Excavating, Inc. ("S.B. Simmons") filed a complaint against defendant Roger Boggs and wife Mary Beth Boggs (collectively, "the Boggs"). The complaint alleged claims for specific performance of contract to convey land as to the Boggs ("specific performance"), unfair or deceptive trade practices as to Roger Boggs ("UDTP"), and an action to quiet title as to the Boggs.

The original complaint identified Barbara Sue Simmons, ("Mrs. Simmons") individually and as personal representative of Sanford Bobby Simmons ("Mr. Simmons"), as a plaintiff, although the case caption did not include Mrs. Simmons as a named party. The amended complaint filed on 21 July 2006 identified only S.B. Simmons as plaintiff, although the amended complaint refers in numerous allegations to "plaintiffs." For example, the amended complaint alleges a "contract and agreement" between "Plaintiffs" and "Defendants Boggs" for the sale of Tract 1 on Barney Road, though S.B. Simmons, the corporation, is the only named plaintiff. We mention this fact only because it sheds some light on the continuing confusion in the facts of this case as to whether the "agreement" in question was between the plaintiff corporation, S.B. Simmons, and defendants or between Mr. Simmons, individually, and defendants.

Plaintiff's amended complaint alleged that Roger Boggs was unable to pay plaintiff in full and had represented to Mr. Simmons that he was the owner of Tract 1 and would convey Tract 1 to plaintiff. Plaintiff agreed to cancel the Boggs' remaining indebtedness of $7,370.21 and to pay Roger Boggs an additional $35,000.00, for a total purchase price for Tract 1 of $42,370.21. Plaintiff further alleged that although it paid the Boggs for Tract 1, the sale did not close due to various title defects. Ultimately, plaintiff claims that in 2006 defendants repudiated the contract and refused to sell Tract 1. Plaintiff claims that Roger Boggs violated N.C. Gen. Stat. § 75-1.1 *et seq.* by his "misrepresentations and deceptive acts" in agreeing to convey Tract 1 and inducing plaintiff to pay him substantial sums of money.

The remaining undisputed findings of fact by the trial court are as follows:

14. The Plaintiff Corporation is in the business of landscaping, clearing and grading.

15. Regardless, during the approximately two and an [sic] half (2½) year period before September 15, 2000, the Plaintiff Corporation paid Boggs the total sum of $32,200.00, the last payment occurring on September 15, 2000 in the amount of $3,200.00. Boggs received and accepted all of these funds.

16. Following the payment of $3,200.00 on September 15, 2000, Boggs received and accepted no additional sums of money from either Simmons or the Plaintiff Corporation at any time.

17. At no time prior to September 15, 2000, nor at any time after that date, did Boggs and Mary Beth Boggs convey any portion of the Property to either Simmons or the Plaintiff Corporation.

. . . .

21. Simmons died in December, 2004. Neither Simmons nor the Plaintiff Corporation filed suit against Boggs during Simmons' lifetime, nor made any demand for the return of any portion of the money paid to Boggs.

22. The Plaintiff Corporation used the Property for several years by moving heavy equipment onto the Property in 1997. All equipment was removed from the Property after the death of Simmons.

. . . .

Defendants answered the amended complaint on 17 September 2006 and included in the answer a motion to dismiss the complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) as well as various affirmative defenses, including the statute of limitations and statute of frauds. On 5 April 2007, defendant filed a motion for summary judgment, with an affidavit by Mary Beth Boggs. Plaintiff likewise filed a motion for summary judgment on 3 May 2007, with affidavits by Mrs. Simmons and James C. Fulbright, Registered Land Surveyor.

On 16 May 2007, the trial court entered an order granting partial summary judgment for defendants on plaintiff's claims for specific performance, the action to quiet title, and all claims against Mary Beth Boggs. The only claim then remaining was plaintiff's claim for UDTP against Roger Boggs.

The remaining claim for UDTP against Roger Boggs was tried, after both parties waived a jury trial. The court concluded that the plaintiff's claim against Roger Boggs for UDTP was barred by the statute of limitations and therefore dismissed the claim. Plaintiff

appeals from both the partial summary judgment order and the judgment granting dismissal.

Plaintiff has not argued in its brief its assignments of error as to the trial court's granting partial summary judgment for defendants as to specific performance and on the action to quiet title and has therefore abandoned these issues. *See* N.C.R. App. P. Rule 28(b)(6). Therefore, the only issues before this Court involve the claims for UDTP under N.C. Gen. Stat. § 75-1.1 *et seq.*

II. UDTP Claim as to Roger Boggs

[1] Plaintiff first argues that the evidence does not support certain findings of fact regarding the date of accrual of plaintiff's claim for UDTP. Plaintiff's argument relates to the time of accrual of an UDTP action when there are allegedly continuing misrepresentations which induce plaintiff not to take action against defendant sooner and not to discover the alleged misrepresentations.

The case was tried as a bench trial before Judge Richard L. Doughton, Superior Court Judge. For a bench trial,

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

Luna v. Div. of Soc. Servs., 162 N.C. App. 1, 4, 589 S.E.2d 917, 919 (2004) (citation and ellipses omitted) (quoting *Shear v. Stevens Building Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992)). We therefore review the record to determine if there was competent evidence to support the trial court's findings of fact, and if such evidence does exist, the findings are conclusive on this appeal. *See id.*

The findings of fact to which plaintiff assigns error, and the related conclusions of law, are as follows:

> 8. Sometime in 1997, Boggs and Simmons discussed an arrangement in which Boggs would convey a portion of the Property to Simmons in exchange for: 1) the forgiveness of the disputed debt allegedly owing to Simmons or the Plaintiff, 2) the clearing of the portion of the Property which was to be retained by Boggs

and Mary Beth Boggs, 3) the agreement to the location of an easement across the portion of the Property to be conveyed and the cutting and clearing of the same, and 4) the hauling off of all stumps and brush.

9. In addition to the foregoing, as a final condition to the conveyance of a portion of the Property to Simmons, Simmons was to pay Boggs the total sum of $35,000.00 in cash within ninety (90) days of the date of the parties agreement. If Simmons failed to pay the full $35,000.00 within that time period, Simmons agreed to pay interest upon the outstanding balance due at a rate of 9% per annum, together with all property taxes which accrued during the time the balance remained unpaid.

10. There is no writing or combination of writings in existence that 1) specifically describe the portion of the Property which was to have been conveyed to Simmons or the Plaintiff Corporation, 2) is signed by Boggs and Mary Beth Boggs acknowledging that any particular portion of the Property was to be conveyed, or 3) which describes the details of the arrangement described hereinabove discussed by Boggs and Simmons.

11. There was conflicting evidence presented by the Plaintiff with regard to whether this arrangement was made between Boggs and Simmons or Boggs and the Plaintiff Corporation.

12. There was no evidence presented by the Plaintiff indicating that the Plaintiff Corporation had formally adopted the purchase of a portion of the Property by resolution or otherwise. No corporate minute, resolution or other document indicating the Plaintiff Corporation's consent to this purchase was presented to the Court.

13. Based on the evidence presented, the Court is unable to determine whether the arrangement discussed by Boggs and Simmons was an act of the Plaintiff Corporation or an act of Simmons.

. . . .

18. Any alleged misrepresentation made by Boggs with regard to his intent to actually convey a portion of the Property to either Simmons or the Plaintiff Corporation, should have been discovered by either of them, with the exercise of reasonable diligence, no later than September 15, 2000.

19. Neither Simmons nor the Plaintiff Corporation exercised reasonable diligence to discover any alleged misrepresentation by Boggs.

20. Any misrepresentation by Boggs which was actually relied upon by Simmons or the Plaintiff Corporation to the detriment of the Plaintiff Corporation and which was the proximate cause of any harm to the Plaintiff Corporation, occurred, if at all, in 1997, but in any case, no later than September 15, 2000.

. . . .

7. Based upon the findings of fact set forth above, the Court concludes that any cause of action under N.C. Gen. Stat. § 75-1.l, *et seq.* alleged by Simmons or the Plaintiff Corporation against Boggs likely accrued in 1997, when the misrepresentations of Boggs, if any, were made, but in any case, such cause of action certainly accrued no later than September 15, 2000, the date of the last receipt of money by Boggs.

8. The present action is barred by N.C. Gen. Stat. § 75-16.2 and must be dismissed, the same having been filed on May 24, 2006, more than four (4) years after the Plaintiff's claim under N.C. Gen. Stat. § 75-1.1, *et seq.*, accrued.

Plaintiff argues that the trial court's finding that Roger Boggs' most recent misrepresentations, if any, were made no later than 15 September 2000 is not supported by the evidence. Plaintiff contends that the UDTP action accrued no earlier than 27 September 2002. Plaintiff correctly states the rule of law as to accrual of the action for UDTP as determined by *Nash v. Motorola Commuc'ns and Elecs*, 96 N.C. App. 329, 385 S.E.2d 537 (1989), and the trial court expressly relied upon this case in its judgment. *Nash* involved an action "under G.S. 75-1.1 . . . based on fraudulent misrepresentation." *Nash v. Motorola Commc'ns and Elecs*, 96 N.C. App. 329, 331, 385 S.E.2d 537, 538 (1989), *disc. rev. denied*, 326 N.C. 483, 392 S.E.2d 94 (1990), *aff'd per curiam*, 328 N.C. 267, 400 S.E.2d 36 (1991). This Court stated that "[u]nder North Carolina law, an action accrues at the time of the invasion of plaintiff's right. For actions based on fraud, this occurs at the time the fraud is discovered or should have been discovered with the exercise of reasonable diligence." *Nash* at 331, 385 S.E.2d at 538 (internal citation and internal quotation marks omitted).

As to the time that a "fraud is discovered or should have been discovered with the exercise of reasonable diligence," *id.*, our courts

have determined that a plaintiff cannot simply ignore facts which should be obvious to him or would be readily discoverable upon reasonable inquiry. *See Peacock v. Barnes*, 142 N.C. 215, 218, 55 S.E. 99, 100 (1906).

> A man should not be allowed to close his eyes to facts readily observable by ordinary attention and maintain for its own advantage the position of ignorance. Such a principle would enable a careless man, and by reason of his carelessness, to extend his right to recover for an indefinite length of time, and thus defeat the very purpose the statute was designed and framed to accomplish. In such case, a man's failure to note facts of this character should be imputed to him for knowledge, and in the absence of any active or continued effort to conceal a fraud or mistake or some essentiial [sic] facts embraced in the inquiry, we think the correct interpretation of the statute should be that the cause of action will be deemed to have accrued from the time when the fraud or mistake was known or should have been discovered in the exercise of ordinary diligence.

Id.

Plaintiff was seriously handicapped in presenting its case due to the death of Mr. Simmons, who plaintiff alleges "was the sole owner, sole director, president, and manager" of plaintiff, in December 2004. Only Mr. Simmon's widow remained to testify on behalf of plaintiff regarding the alleged "arrangement" between plaintiff and Roger Boggs, but she was admittedly not personally involved in nor did she even witness any of the relevant communications between Mr. Simmons and Roger Boggs. For these reasons, the trial court sustained many of defendants' objections and motions to strike as to Mrs. Simmons' testimony, leaving little substantive evidence of record from her testimony. Nevertheless, plaintiff's arguments in its brief focus primarily upon the facts that the trial court did *not* find, for which plaintiff argues that it did present evidence. These facts relate primarily to Boggs' continuing representations that "he would take care of" the conveyance of Tract 1 to plaintiff, which plaintiff argues continued at least up until 27 September 2002.

However, plaintiff's argument overlooks the

> well settled law that although the sufficiency of the evidence to support the trial court's findings may be raised on appeal, the appellate courts are bound by the trial courts' findings of fact

where there is some evidence to support those findings, even though the evidence might sustain findings to the contrary.

Cardwell v. Henry, 145 N.C. App. 194, 195, 549 S.E.2d 587, 588 (2001) (citation and internal quotation marks omitted). There was competent evidence to support each of the findings of the trial court. Even if there was evidence that could have supported a finding by the court that Roger Boggs' misrepresentations, if any, continued until 2002 or even later, the trial judge was the sole judge of the credibility of the witnesses and the weight to give to all of the evidence. See *Floto v. Pied Piper Resort, Inc.*, 96 N.C. App. 241, 243, 385 S.E.2d 157, 159 (1989), *disc. rev. denied*, 326 N.C. 47, 389 S.E.2d 87 (1990). The trial court declined to find that Roger Boggs' representations continued until 2002. These assignments of error are therefore overruled.

Plaintiff also argues that the trial court erred in dismissing its UDTP claim based upon its findings that there was "no evidence as to the issue of whether the 'arrangement' was between S.B. Simmons or Plaintiff and the Defendant Boggs" and that there was "no evidence that Simmons was dealing as an agent of the corporation[.]" (Emphasis in original.) Based upon our ruling on the statute of limitations issue above, we need not address this issue. Even assuming *arguendo* that the "arrangement" was between plaintiff and the Boggs, the statute of limitations had run.

We also note that the assignments of error misstate the trial court's findings. The trial court did *not* find that there was "no evidence"; it found that there was "conflicting evidence" regarding "whether this arrangement was made between Boggs and Simmons or Boggs and the Plaintiff Corporation" and that there was "no evidence presented . . . indicating that the Plaintiff Corporation had formally adopted the purchase of a portion of the Property by resolution or otherwise." In effect, the trial court found that plaintiff did not meet its burden of proof to show any agreement or "arrangement" between plaintiff and Boggs. As the judge stated to counsel when he rendered his ruling and gave instructions to counsel as to drafting of the order: "And also I want you to find that there's been a failure of proof of the Plaintiff to show exactly who the contract was made with, whether it was made with the company or with the deceased individual." These assignments of error are therefore without merit.

III. UDTP claim as to Mary Beth Boggs

[2] The UDTP claim as to Mary Beth Boggs was dismissed by the 16 May 2007 order granting partial summary judgment. Therefore, the

standard of review is "whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law." *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998) (citation omitted). Summary judgment is appropriate when "viewed in the light most favorable to the nonmovant," *id.* (citation omitted), "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).

> The moving party must establish the lack of any triable issue of material fact by proving that an essential element of the opposing party's claim is non-existent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim.

Smith-Price v. Charter Behavioral Health Sys., 164 N.C. App. 349, 352, 595 S.E.2d 778, 781 (2004) (citation and internal quotation marks omitted).

Although the trial court's order does not state its specific reason for granting summary judgment against plaintiff as to Mary Beth Boggs on the UDTP claim, we presume that the trial court did not grant summary judgment on this issue based upon the statute of limitations defense, as it left this issue for trial as to Roger Boggs. However, when we review the pleadings, we first question whether plaintiff even originally intended to bring a claim for UDTP against Mary Beth Boggs. Plaintiff's original and amended complaints both included as "COUNT TWO" a claim entitled "UNFAIR AND DECEPTIVE TRADE PRACTICES AGAINST ROGER BOGGS" (Emphasis in original.) The factual allegations in Count Two refer specifically to "misrepresentations and deceptive acts of Defendant Boggs"[1] only. Furthermore, there are no specific allegations as to Mary Beth Boggs within all of Count Two, the UDTP claim. In any event, the trial court construed the allegations of the complaint quite indulgently in even considering that plaintiff brought a claim for UDTP against Mary Beth Boggs.

---

1. The amended complaint notes in paragraph two that the two defendants "are collectively referred to herein as 'Boggs.' " Therefore, "Defendants Boggs" refers to both defendants, and "Defendant Boggs" in the context of the complaint, refers only to Roger Boggs.

If Mary Beth Boggs' potential liability for UDTP were only derivative from the acts of Roger Boggs, we would not need to address this issue any further, as we have previously determined that the claim against him is barred by the statute of limitations; however, plaintiff claims in its brief that Defendant Mary Beth Boggs' "unfair or deceptive" act was her failure "to inform Simmons of her objection" to selling Tract 1 while acquiescing in Roger Boggs' acceptance of payments from plaintiff. Plaintiff's entire legal argument in support of this theory consists of a one sentence quote:

> "A duty to disclose material facts arises '[w]here material facts are accessible to the vendor only, and he knows them not to be within the reach of the diligent attention, observation and judgment of the purchaser.' " *Everts v. Parkinson*, 147 N.C. App. 315, 555 S.E.2d 667, 674 (N.C.Ct.App. 2001) (quoting *Brooks v. Ervin Constr. Co.*, 253 N.C. 214, 116 S.E.2d 454, 457 (1960)).

A one-sentence quote from a case is not an argument. We can only make assumptions as to how plaintiff believes that this quote applies to the fact of this case. *See Viar v. N.C. Dep't. of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) ("It is not the role of the appellate courts . . . to create an appeal for an appellant."). We therefore deem that plaintiff has abandoned this assignment of error by its failure to address the issue in any substantive way in its brief. *See* N.C.R. App. P. 28(b)(6).

We also note that even if plaintiff had addressed this issue and demonstrated some rationale for its contention that there was a genuine issue of a material fact existing as to Mary Beth Boggs' liability for UDTP at the summary judgment stage of this case, any error in the partial summary judgment order was rendered harmless by the judgment after the bench trial, where the trial court heard the factual issues and resolved them against plaintiff. *See Starco, Inc. v. AMG Bonding and Ins. Servs*, 124 N.C. App. 332, 335, 477 S.E.2d 211, 214 (1996) ("[T]o obtain relief on appeal, an appellant must not only show error, but that appellant must also show that the error was material and prejudicial, amounting to denial of a substantial right that will likely affect the outcome of an action."). Since the issue as to Mary Beth Boggs relates only to her failure to inform plaintiff of her objections, as a co-owner of Tract 1, to its sale, the trial court's finding that "[n]either Simmons nor the Plaintiff Corporation exercised reasonable diligence to discover any alleged misrepresentation by Boggs" would necessarily also apply to any alleged failure to inform by Mary Beth Boggs. This assignment of error is also without merit.

IV. Conclusion

For the reasons stated above, we affirm the 16 May 2007 order granting partial summary judgment in favor of defendants and the 13 June 2007 judgment dismissing plaintiff's UDTP claim against defendant Roger Boggs.

AFFIRMED.

Judges McCULLOUGH and TYSON concur.

JEFFREY T. LANIER, Employee, Plaintiff v. EDDIE ROMANELLE'S, Employer, KEY RISK MANAGEMENT SERVICES, Carrier, Defendants

No. COA07-1154

(Filed 19 August 2008)

1. Workers' Compensation— injury by accident—neck—specific traumatic incident

The Industrial Commission did not err in a workers' compensation case by concluding plaintiff employee's neck injury was not compensable as an injury by accident because: (1) although plaintiff testified that his neck injury arose from a specific traumatic incident, the law required plaintiff to prove by a preponderance of the evidence that his neck injury was the direct result of a specific traumatic incident of the work assigned; (2) the Commission, as fact-finder, was free to reject plaintiff's testimony as to the cause of his neck injury and rely on other testimony of causation; and (3) the Commission expressly relied on a doctor's testimony as to the causation of plaintiff's neck injury, and the doctor acknowledged on cross-examination that he did not have any documented cause for plaintiff's cervical condition and that his opinion on causation was mere speculation.

2. Workers' Compensation— occupational disease—synovitis in wrist—trauma in employment

The Industrial Commission did not err in a workers' compensation case by its finding of fact that plaintiff employee's synovitis in his wrist was not compensable as an injury by accident because: (1) although plaintiff contends the Commission misap-

prehended the law since synovitis is a listed occupational disease that did not require plaintiff to show his job placed him at an increased risk for developing the disease, the Commission found that there was no medical evidence of record that plaintiff's employment with defendant employer exposed him to an increased risk of developing a partial scapholunate ligament tear, a disease which was not included on the occupational disease list and for which plaintiff was required to prove it was due to causes and conditions which were characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of employment; (2) N.C.G.S. § 97-53(20) required plaintiff to show that the synovitis was caused by trauma in employment, meaning a series of events in employment occurring regularly, or at frequent intervals, over an extended period of time and culminating in the condition technically known as synovitis; (3) a doctor who examined plaintiff testified that a scapholunate ligament tear normally is caused by an acute injury and not by a repetitive process, and that the synovitis was probably the result of the ligament tear; and (4) although the evidence showed plaintiff's synovitis did result from the tear, the tear was not caused by plaintiff's employment.

3. Workers' Compensation— occupational disease—ulnar neuropathy—no showing of increased risk

The Industrial Commission did not err in a workers' compensation case by failing to conclude that plaintiff employee's ulnar neuropathy in his elbow was an occupational disease under N.C.G.S. § 97-53(13) because: (1) there was no evidence that plaintiff was exposed to an increased risk of developing ulnar neuropathy in his job to a far greater degree and in a wholly different manner than is the public generally; (2) at best, plaintiff presented some evidence that repetitive motions such as those he used in his job as a sauté cook could aggravate a pre-existing ulnar neuropathy; (3) the Commission's findings of fact support its conclusion that plaintiff's ulnar neuropathy was not compensable, and plaintiff failed to assign error to those findings, thus making them binding on appeal; and (4) plaintiff did not point to any record evidence that was improperly ignored by the Commission, nor was any found, that plaintiff's ulnar neuropathy existed before he began his employment with defendant or before he lifted the sauté grate on 12 May 2004, and thus, a doctor's opin-

ion that plaintiff quoted in his brief regarding the aggravation of a pre-existing ulnar neuropathy was therefore conjectural and could not have been relied upon by the Commission to conclude it was compensable.

4. Workers' Compensation— disability—findings of fact— conclusions of law

Although plaintiff employee contends the Industrial Commission erred in a workers' compensation case by its findings of fact and conclusions of law on all of the issues before the Commission regarding the extent of plaintiff's disability, there was no need for the Commission to address the extent of plaintiff's disability because of its findings and conclusions that plaintiff did not suffer a compensable injury by accident or from a compensable occupational disease.

Appeal by plaintiff from Opinion and Award entered 22 June 2007 by the North Carolina Industrial Commission. Heard in the Court of Appeals 5 March 2008.

Brumbaugh, Mu & King, P.A., by Leah L. King, for plaintiff-appellant.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Erica B. Lewis and Erin T. Collins, for defendant-appellees.

STROUD, Judge.

Plaintiff appeals from the Opinion and Award of the Industrial Commission entered on 22 June 2007, denying benefits to plaintiff based upon its conclusions that plaintiff sustained neither an injury by accident nor a compensable occupational disease arising out of and in the course of his employment. For the reasons stated herein, we affirm.

I. Background

Plaintiff began his employment with defendant-employer Eddie Romanelle's[1] in 1996 as a part-time sauté cook. He became a full-time employee in about May 1999, working as kitchen supervisor. In this

1. The employer is identified as Atlantic Quest Corporation on the initial filings and on the deposition transcripts. Later, for no apparent reason, the employer's name changes to Eddie Romanelle's. As best we can tell, Atlantic Quest Corporation was doing business as Eddie Romanelli's restaurant. We also note that "Romanelle's" appears to be misspelling of "Romanelli's."

role, he was responsible for all of the kitchen activities as well as remaining an active cook. He spent most of his ten hour shifts working as a sauté cook. At the end of each shift, as part of his normal job duties, plaintiff removed and cleaned two sauté grates which weighed approximately forty pounds each. On 12 May 2004, plaintiff was lifting a sauté grate in his usual manner when he allegedly experienced a "shocking type sensation" followed by numbness in his left arm and hand. Plaintiff finished his shift but reported his alleged injury the next day, complaining that his arm felt "dead." Plaintiff then began a complicated course of treatment with several doctors over the next two years which resulted in at least four diagnoses involving his cervical spine, left arm, and wrist.

Plaintiff filed Form 18 with the North Carolina Industrial Commission on or about 20 August 2004 alleging that he had injured his "left hand and arm" as a result of "lifting [a] sauté grate from the grill" "about 5/12/04[.]" He filed an amended Form 18 on 29 July 2005, alleging additional injury to his neck arising from the same incident. Defendants denied compensability on the grounds that plaintiff had not been injured by accident at work and had no compensable occupational disease. The case was heard by Deputy Commissioner Bradley W. Houser on 23 August 2005. On 12 October 2006 the deputy commissioner concluded that plaintiff's injuries and diseases had not been caused by his employment with defendant-employer and denied workers' compensation benefits accordingly. Plaintiff appealed to the Full Commission.

The Full Commission heard plaintiff's case on 16 March 2007. In an Opinion and Award entered 22 June 2007, the Full Commission also concluded that plaintiff's injuries and diseases had not been caused by his employment with defendant-employer and denied workers' compensation benefits. Plaintiff appeals.

II. Issues

The argument in plaintiff's brief focuses primarily on the long course of plaintiff's medical treatment which he alleges arose from one incident, lifting a sauté grate, on 12 May 2004. His treatment was complex as he was eventually diagnosed with and treated for four separate medical conditions involving three parts of his body: a cervical radiculopathy in his neck, a ulnar neuropathy in his left elbow, and a scapholunate tear and synovitis in his left wrist.

Plaintiff's brief conflates the various theories and standards for injury by accident, specific traumatic incident, and occupational dis-

ease as to all of plaintiff's four conditions. However, after we have sorted out all of the various theories and contentions, the real issue is causation of plaintiff's injuries, not whether he suffered from the alleged injuries or conditions.

Plaintiff primarily argues that the Commission erred by concluding that plaintiff's neck, wrist, and elbow conditions were not caused by a compensable injury by accident or occupational disease because the Commission's findings of fact were not supported by competent evidence and its conclusions were based upon unsupported findings and misapprehension of applicable law. His specific contentions are: (1) the neck injury was compensable as an injury by accident under N.C. Gen. Stat. § 97-2(6) because it arose from a specific traumatic incident; (2) the elbow injury is compensable because ulnar neuropathy meets the criteria for an unlisted occupational disease set forth in N.C. Gen. Stat. § 97-53(13); and (3) the wrist injuries are compensable as occupational diseases because synovitis is specifically listed in N.C. Gen. Stat. § 97-53(20). Plaintiff additionally argues that the Commission erred by failing to make findings of fact and conclusions of law on the extent of plaintiff's disability.

III. Standard of Review

In order to prevail on a disability claim for workers' compensation, the plaintiff bears the burden of proving by a preponderance of the evidence the existence and extent of his disability, *Fletcher v. Dana Corporation*, 119 N.C. App. 491, 494, 459 S.E.2d 31, 34, *disc. review denied*, 342 N.C. 191, 463 S.E.2d 235 (1995), and that the disability was caused by a disease or injury reasonably related to his employment. *Holley v. ACTS, Inc.*, 357 N.C. 228, 231-32, 581 S.E.2d 750, 752 (2003). In deciding whether a plaintiff has met his burden, the Industrial Commission must consider all competent evidence presented, *Weaver v. American National Can Corp.*, 123 N.C. App. 507, 510, 473 S.E.2d 10, 12 (1996), and make specific findings of fact to support its conclusions for all "crucial questions." *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 596, 290 S.E.2d 682, 684 (1982).

"The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998) (citation and quotation marks omitted). The Commission is given deference as finder of fact on appeal to this Court, and if "there is some evidence of substance which directly or by reasonable inference tends to support the findings, this Court is bound by such evidence, even though there is

evidence that would have supported a finding to the contrary." *Ard v. Owens-Illinois*, 182 N.C. App. 493, 496, 642 S.E.2d 257, 259-60, *disc. review denied*, 361 N.C. 690, 652 S.E.2d 254 (2007) (citations and quotation marks omitted). The Commission's legal conclusions will not be disturbed on appeal if the Commission has correctly apprehended the relevant law, *Clark v. Wal-Mart*, 360 N.C. 41, 43, 619 S.E.2d 491, 492 (2005), and "there are sufficient findings of fact based on competent evidence to support the [Commission's] conclusions, [even if there are also] erroneous findings which do not affect the conclusions." *Estate of Gainey v. Southern Flooring and Acoustical Co.*, 184 N.C. App. 497, 503, 646 S.E.2d 604, 608 (2007) (citation and quotation marks omitted).

IV. Injury by Accident

[1] Plaintiff first contends that the Commission erred in concluding his neck injury was not compensable as an injury by accident. Plaintiff assigns error to the Commission's fifteenth and sixteenth findings of fact:

> 15. On the issue of causation, Dr. Brown initially testified in his deposition that if plaintiff never experienced neck problems prior to May 12, 2004, then he was comfortable stating to a medical degree of probability that lifting of the grate as described by plaintiff caused the neck condition for which surgery was performed. Dr. Brown further testified that the lifting incident could have aggravated a pre-existing cervical condition. However, upon further questioning, Dr. Brown stated that he did not have any documented cause for plaintiff's cervical condition and that, ultimately, any causation opinion he rendered was "mere speculation."
>
> 16. There is insufficient competent medical evidence of record upon which to find by the greater weight that the incident at work on May 12, 2004 was the cause of the neck condition for which plaintiff underwent surgery.

Plaintiff argues "the Commission has made findings against the competent evidence of record on the compensability of the neck injury" because:

> In the case at hand, the plaintiff was able to pin down exactly what he was doing when he injured his neck, arm and wrist. He described a severe, sharp shooting pain upon the lifting of the

> grate. This is the specific traumatic incident and nothing further is required by the law.

We disagree.

Generally, a compensable "injury by accident" requires a showing of an unusual and unanticipated event which is not part of an "employee's normal work routine and normal working conditions[.]" *Raper v. Mansfield Sys., Inc.*, 189 N.C. App. 277, 284, 657 S.E.2d 899, 906 (2008) (citation and quotation omitted). "[O]nce an activity, even a strenuous or otherwise unusual activity, becomes part of the employee's normal work routine, an injury caused by such activity is not the result of an interruption of the work routine or otherwise an 'injury by accident' under the Workers' Compensation Act." *Bowles v. CTS of Asheville*, 77 N.C. App. 547, 550, 335 S.E.2d 502, 504 (1985). However, in the case of a back injury, the requirement of an unusual circumstance is relaxed and an injury by accident may also be proved "where injury to the back arises out of and in the course of the employment and is the direct result of a specific traumatic incident of the work assigned[.]" N.C. Gen. Stat. § 97-2(6) (2005); *Raper*, 189 N.C. App. at 284, 657 S.E.2d at 906.

Although plaintiff testified that his neck injury[2] arose from "a specific traumatic incident," this was not all that the law required. The law required plaintiff to prove by a preponderance of the evidence, *Holley*, 357 N.C. at 232, 581 S.E.2d at 752, that his neck injury was "the direct result of a specific traumatic incident of the work assigned," N.C. Gen. Stat. § 97-2(6). The Commission, as finder of fact, was free to reject plaintiff's testimony as to the cause of his neck injury and rely on other testimony of causation. *Cross v. Blue Cross/Blue Shield*, 104 N.C. App. 284, 288, 409 S.E.2d 103, 105 (1991). Because the Commission is afforded deference as finder of fact, our review is limited to whether the Commission's findings on causation were supported by competent evidence in the record. *Id.* at 285, 409 S.E.2d at 104.

The Commission's fifteenth finding of fact expressly relies on Dr. Brown's testimony as to the causation of plaintiff's neck injury. Dr. Brown testified on direct examination as follows:

---

2. Plaintiff consistently refers to his cervical radiculopathy as a "neck injury." However, defendants do not dispute that cervical radiculopathy is a back injury for purposes of N.C. Gen. Stat. § 97-2(6) or argue that the "specific traumatic incident" standard is inapplicable. *See Raper*, 189 N.C. App. at 284, 657 S.E.2d at 906 ("Defendants concede that plaintiff's injury to his cervical spine was a back injury [subject to the] specific traumatic incident [standard]." (Original brackets and quotation marks omitted.)).

Q: Okay. Assuming the facts I've provided to you are true, do you have an opinion to a medical degree of probability as to whether the lifting incident as described by Mr. Lanier on May 12, 2004 was a cause for the C4-C5, C5-C6 problem which required the anterior cervical diskectomy and fusion?

A: It's a tough question. It certainly could be—it certainly could be a—is it possible; yes. Is it a certainty; no. Could it be a contributing factor; I would say probably so.

Q: And what would your opinion be to a medical degree of probability versus certainty?

A: I don't know. I don't know if I can answer that question. It's a year and a half before I saw him. I didn't—because I didn't know [injury from lifting sauté grates] was a possibility I didn't ask him specifically about it, nor did he tell me. Can I say that this is too difficult a question to answer?

It would be difficult to interpret this testimony as providing evidence that plaintiff's neck injury was caused by plaintiff's lifting of the grates on 12 May 2004. However, even if it could be so construed, Dr. Brown further acknowledged on cross examination that he did not have any documented cause for plaintiff's cervical condition and that his opinion on causation was "mere speculation." The Commission considered Dr. Brown's testimony on both direct and cross examination and did not err in finding that the plaintiff's cervical condition was not caused by lifting the sauté grate. The Commission's findings as to the cause of plaintiff's neck injury were therefore based upon competent evidence. This assignment of error is without merit.

V. Occupational Disease

A. Synovitis in Wrist

[2] Plaintiff assigns error to the Commission's nineteenth finding of fact:[3]

19. Although based upon Dr. Moore's expert opinion, plaintiff's partial ligament tear was causally related to plaintiff's job duties, there is no medical evidence of record that plaintiff's employment with defendant-employer exposed him to an increased risk

3. Plaintiff also assigned error to the Commission's twentieth finding of fact. However, because plaintiff did not bring this assignment of error forward and argue it in the brief it is deemed abandoned. N.C.R. App. P. 28(b)(6).

> of developing a partial scapholunate ligament tear. There also is no medical evidence of record that plaintiff's synovitis was caused by trauma in the employment, in that the medical evidence showed that the abnormality of the ligament tear within the wrist led to the synovitis. Therefore, the Commission finds by the greater weight of the medical evidence that these conditions are not compensable occupational diseases.

Plaintiff argues the Commission misapprehended the law because synovitis is a listed occupational disease and a workers' compensation plaintiff therefore does not need to show "his job placed him at an increased risk for developing the disease[,]" as is required for unlisted occupational diseases under N.C. Gen. Stat. § 97-53(13). Plaintiff correctly states that N.C. Gen. Stat. § 97-53(20) deems "[s]ynovitis, caused by trauma in employment" as an occupational disease. Plaintiff then argues that the record contains evidence that his wrist synovitis was caused by the trauma of lifting sauté grates over the years of his employment with defendant-employer, and if the Commission had used the correct standard, it would have found that plaintiff's synovitis was compensable as an occupational disease.

However, plaintiff has misapprehended the Commission's findings. The Commission found that "there is no medical evidence of record that plaintiff's employment with defendant-employer exposed him to an increased risk of developing a *partial scapholunate ligament tear*[,]" a disease which is not included on the list and for which plaintiff was required to prove it was "due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment." N.C. Gen. Stat. § 97-53(13) (2005).

Though synovitis is identified on the list of occupational diseases, N.C. Gen. Stat. § 97-53(20), inclusion on the list did not "relax[] the fundamental principle which requires proof of causal relation between injury and employment. . . . [A]n occupational disease [is not compensable] unless it [is] shown that the disease was incident to or the result of the particular employment in which the work[er] was engaged." *Duncan v. Charlotte*, 234 N.C. 86, 91, 66 S.E.2d 22, 25 (1951). Accordingly, N.C. Gen. Stat. § 97-53(20) requires a plaintiff to show that the synovitis was "caused by trauma in employment." The "phrase, 'caused by trauma in employment' . . . necessarily mean[s] a series of events in employment occurring regularly, or at frequent intervals, over an extended period of time, and culminating in the

condition technically known as []synovitis." *Henry v. A. C. Lawrence Leather Co.*, 234 N.C. 126, 131, 66 S.E.2d 693, 697 (1951). Furthermore, a plaintiff may not bootstrap a disease which results from a prior injury without appropriate medical testimony to link the disease to a *compensable* injury. *See Coe v. Haworth Wood Seating*, 166 N.C. App. 251, 254, 603 S.E.2d 549, 551 (2004) (affirming an award of compensation for a left arm injury when a medical expert testified that the left arm injury was caused by overuse of the left arm while working under restrictions imposed because of a compensable right arm injury).

Dr. Moore examined plaintiff in November 2005. According to Dr. Moore, a scapholunate ligament tear normally is caused by an acute injury, not by a repetitive process. He testified that "the synovitis is probably a result of the [partial scapholunate] ligament tear." Dr. Moore also testified that plaintiff had given a history of wrist pain dating back to 2002, and he had no way of knowing whether the scaphoid injury pre-dated the 12 May 2004 incident. He further testified that the likelihood of a scapholunate ligament tear from "pure[ly] lifting" the grate "would be low." The Commission's nineteenth finding quoted *supra* is therefore fully supported by Dr. Moore's testimony and binding on appeal.

In sum, the evidence shows plaintiff's synovitis did result from the tear, but the Commission found that the tear was not caused by plaintiff's employment. The Commission therefore applied the correct standard to plaintiff's synovitis under N.C. Gen. Stat. § 97-53(20) and found based upon the evidence that the synovitis was caused not by "trauma in employment," but as a consequence of the scapholunate tear, a condition which it properly evaluated under N.C. Gen. Stat. § 97-53(13) and determined was not caused by plaintiff's employment. This assignment of error is without merit.

B. Ulnar Neuropathy in Elbow

[3] Plaintiff contends the Commission erred in failing to conclude that his ulnar neuropathy was an "occupational disease" under N.C. Gen. Stat. § 97-53(13). Again, we disagree.

Plaintiff specifically argues:

> In regards to the plaintiff's ulnar neuropathy for which he primarily treated with Dr. Bahner, the Commission erred by finding that there was no evidence that plaintiff's job with the defendant employer exposed him to an increased risk of developing these

> conditions [and] that the plaintiff did not contract a compensable occupation [sic] disease pursuant to N.C. Gen. Stat. § 97-53(13).
>
> . . . .
>
> Dr. Bahner [said] that he could state to a medical degree of certainty that "a job of the labor and repetitive action and use that he described and related to me and that I have observed by being a patron in the restaurant, by the way, could aggravate an existing ulnar neuritis or ulnar neuropathy."
>
> . . . .
>
> [Therefore, t]he Commission erred on this issue and should be reversed with a finding that the plaintiff's employment significantly aggravated his pre-existing ulnar condition and it is therefore compensable.

N.C. Gen. Stat. § 97-53 lists twenty-eight different types of occupational diseases and includes provision for compensability of an unlisted disease not in the list, if the disease "is proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment." N.C. Gen. Stat. § 97-53(13). In other words, for an unlisted disease to be deemed an "occupational disease" under N.C. Gen. Stat. § 97-53(13), the plaintiff must show that he "was exposed in his employment to the *risk* of contracting [the disease] in a far greater degree and in a wholly different manner than is the public generally." *Booker v. Duke Medical Center*, 297 N.C. 458, 475, 256 S.E.2d 189, 200 (1979) (emphasis added, citation and quotation marks omitted). Furthermore, in addition to showing that the disease should be deemed an "occupational disease" pursuant to N.C. Gen. Stat. § 97-53(13), plaintiff bears the burden of proving that his contraction of the disease was caused by his employment rather than some other means. *Booker* at 475-76, 256 S.E.2d at 200 (citing *Duncan* at 91, 66 S.E.2d at 25).

On careful review of the record, we find no evidence that plaintiff was exposed to an increased risk of developing ulnar neuropathy in his job to a "far greater degree and in a wholly different manner than is the public generally." *Booker*, 297 N.C. at 475, 256 S.E.2d at 200 (citation and quotation marks omitted). At best, plaintiff presented some evidence that repetitive motions such as those he used in his job as a sauté-cook could aggravate a preexisting ulnar neuropathy,

but no evidence comparing plaintiff's job duties or his development of the neuropathy to the manner and degree of the development of this same disease as it occurs in the general public.

The Commission's tenth and eleventh findings state in pertinent part:

> 10. . . . The therapist reported to Dr. Bahner that plaintiff had no swelling or discoloration, but demonstrated a lot of facial grimacing with attempted use. Dr. Bahner testified that this supported his opinion that plaintiff's reports of symptoms might be out of proportion to the objective medical evidence.
>
> 11. At his deposition Dr. Bahner was unable to state with medical certainty that plaintiff's job duties caused the ulnar neuropathy, but did give an opinion that the labor and repetitive action of plaintiff's job could aggravate an existing ulnar neuritis or neuropathy.

Plaintiff did not assign error to either of those findings; therefore they are binding on appeal, *Gainey*, 184 N.C. App. at 501, 646 S.E.2d at 607, and they support the Commission's conclusion that plaintiff's ulnar neuropathy was not compensable.

Plaintiff also has not pointed us to any record evidence which was improperly ignored by the Commission, and we find none, that plaintiff's ulnar neuropathy existed before he began his employment with defendant-employer or before he lifted the sauté grate on 12 May 2004. Dr. Bahner's opinion which plaintiff quoted in his brief, *supra*, as to aggravation of a pre-existing ulnar neuropathy was therefore conjectural and could not have been relied on by the Commission to conclude plaintiff's ulnar neuropathy was compensable. *Seay v. Wal-Mart Stores, Inc.*, 180 N.C. App. 432, 437, 637 S.E.2d 299, 303 (2006) ("An expert's opinion that was solicited through the assumption of facts unsupported by the record is entirely based on conjecture."). Without competent evidence in the record that plaintiff's ulnar neuropathy was caused by his employment with defendant-employer, we conclude that this assignment of error is also without merit.

VI. Extent of Disability

[4] Plaintiff last argues that the Commission failed to make findings of fact and conclusions of law on all of the issues that were before the Commission, specifically as to the extent of plaintiff's disability. However, given our ruling above that the Commission did not err

by its findings and conclusions that plaintiff did not suffer a compensable injury by accident or from a compensable occupational disease, there was no need for the Commission to address the extent of plaintiff's disability. There is likewise no need for us to address this issue.

VII. Conclusion

The Industrial Commission concluded that plaintiff had not proven that any of his diseases or injuries resulted from plaintiff's employment with defendant-employer. Because its conclusions were based on correct apprehension of the law and supported by its findings of fact which in turn were supported by competent evidence, we affirm the Commission's 22 June 2007 Opinion and Award.

AFFIRMED.

Judges HUNTER and ELMORE concur.

STATE OF NORTH CAROLINA v. ANGEL E. RODRIGUEZ

No. COA07-1525

(Filed 19 August 2008)

1. Kidnapping— first-degree—sufficiency of indictment—failure to allege victims seriously injured or not released in safe place

The trial court erred by entering judgments against defendant for first-degree kidnapping when the indictments failed to allege necessary elements that the victims were seriously injured or not released in a safe place, and the judgments of first-degree kidnapping are vacated and remanded for entry of judgments on verdicts of guilty of second-degree kidnapping.

2. Kidnapping— first-degree—second-degree—motion to dismiss—sufficiency of evidence—intent to terrorize—subjective fears

The trial court did not err by failing to dismiss the first-degree and second-degree kidnapping charges based on the State's alleged failure to present sufficient substantial evidence as to each element of kidnapping based on the wording of the actual

indictments in each case because: (1) defendant did not properly preserve this issue based on his failure to object to the jury instructions, offer alternative instructions, or specifically and distinctly contend the instruction amounted to plain error; (2) a coparticipant's testimony revealed that one victim was not only removed from his apartment and taken to a house, but was confined and restrained in the process of doing so; (3) a defendant's intent is rarely susceptible to proof by direct evidence, and the jury could have inferred that defendant's intent was to terrorize based on the State's evidence that defendant physically abused some of the victims and put them in a high degree of fear for their safety and well-being, and evidence that defendant instilled an intense fear in the victims by threatening them; and (4) the victim's subjective fears are relevant in determining whether the victim was terrorized; one victim testified that he was very frightened since defendant's men seemed to get angrier and he thought they were going to kill him; another victim testified that he feared for his family's safety if he went to the police; and although three of the victims did not testify, there was evidence to support the jury's conclusion that defendant intended to terrorize them as well.

3. Kidnapping— second-degree—failure to instruct on lesser-included offense of false imprisonment—plain error analysis

The trial court did not commit plain error by failing to instruct on the lesser-included offense of false imprisonment in the three cases where defendant was convicted of second-degree kidnapping, based on alleged insufficient evidence to prove a purpose to terrorize, because: (1) the trial court does not have to instruct on false imprisonment if there is sufficient evidence that defendant acted with a purpose enumerated under N.C.G.S. § 14-39; (2) defense counsel did not request an instruction on false imprisonment, nor did he object or request any additional jury instruction at the charge conference; and (3) defendant failed to show that the jury probably would have convicted him of false imprisonment rather than kidnapping if the judge had given the instruction.

Appeal by defendant from judgments entered 31 July 2007 by Judge W. Osmond Smith, III, in Wake County Superior Court. Heard in the Court of Appeals 20 May 2008.

Attorney General Roy Cooper, by Assistant Attorney General Leonard G. Green, for the State.

Crumpler Freedman Parker & Witt, by Vincent F. Rabil, for defendant.

ELMORE, Judge.

Angel Rodriguez (defendant) was charged with five counts of first-degree kidnapping and four counts of attempted first degree murder. At the close of the State's case in chief, the trial court granted defendant's motion to dismiss all counts of attempted murder and three counts of first degree kidnapping, which were allowed to proceed as second degree kidnapping.

The evidence presented by the State tended to show: Defendant, known as "The Don," rented a house at 5329 Wenesly Court in Raleigh. Defendant was informed by a friend that "El Flaco," later identified as Miguel Alvarado (Alvarado), had drugs. Pena (Pena), one of defendant's accomplices, was instructed by defendant to drive a van to Windsor Falls Apartments off of Wake Forest Road, where Alvarado lived. Defendant and several accomplices drove in a separate car, which was equipped with flashing lights and a siren. When Pena arrived, defendant instructed him to park the van at a car wash to give the appearance that Pena was washing the van. Defendant instructed Pena to keep watch for the police and to wait for a phone call. Two of the men in the car with defendant had police shirts, badges, and guns underneath their outer clothing. When these men arrived at Alvarado's apartment, they removed their outer clothing and revealed their police badges.

Approximately ten to fifteen minutes after defendant and his accomplices arrived at Alvarado's apartment, defendant called Pena and told him to come to the apartment with the van because Alvarado had been captured. Pena drove the van to the front of Alvarado's apartment. Defendant and his accomplices placed Alvarado in the van. Pena drove the van to the house at 5329 Wenesly Court.

After being driven to the house, Alvarado was confined in a bedroom and questioned about drugs by defendant and four of his accomplices. Pena testified that he heard defendant's accomplices tell Alvarado that if he did not tell them where the drugs were "it was going to go bad for him." Alvarado informed defendant and his accomplices that two disc jockeys at Ambis, a Hispanic Club, had

cocaine. The two disc jockeys were Juan Lezama (Lezama) and Ricardo Martinez (Martinez).

Martinez and Lezama lived in Windsor Falls Apartments in the same apartment with Alvarado. Pena testified that defendant directed him and the others to follow the same pattern they had used to kidnap Alvarado to kidnap Martinez and Lezama. Martinez was alone in the apartment when defendant and his accomplices entered the apartment claiming to be police officers. Martinez testified that the four people who entered the apartment broke the phone, threw him on the ground, and put ties on his hands. Lezama testified that when he returned to the apartment, a man he did not recognize forced him inside at gunpoint. Defendant and the others acted as though they were narcotics police officers. Lezama was handcuffed, taken to the bedroom, and questioned about drugs and money. Defendant and his accomplices told Lezama that they were taking him to the police precinct. Pena was instructed to drive the van over from the car wash. Lezama and Martinez were placed in the van and their heads were covered.

Defendant and his accomplices continued to interrogate Lezama and Martinez about the location of drugs for approximately eight hours. Lezama's wife, Luz Martinez (Luz), continually made contact with defendant and his accomplices via telephone. Luz was told that no harm would come to her husband or Martinez and that they would be released in a few hours. On one occasion when Luz was allowed to speak with her husband, she informed him of her discovery that defendant and his accomplices were not police officers.

Lezama testified that while confined at 5329 Wenesly Court, he could hear a man screaming and being hit. Lezama further testified that he could smell something burning. Later, Lezama heard a window break and a person yelling for help. Lezama and Martinez saw a man come in the room with a sledgehammer. The man came towards Lezama and Martinez as if he were going to hit them with the sledgehammer. Someone screamed "hey, hey, hey, no, no." Lezama and Martinez were told that if they called the police they would be killed. The men removed the handcuffs from Lezama and Martinez and released them. Lezama saw Alvarado as he was leaving defendant's house. He testified that Alvarado looked "extremely beat up . . . his face was swollen . . . [and] he could barely run."

Because Lezama and Martinez were unable to provide defendant with information about where the drugs and money were located,

defendant's accomplices questioned Alvarado again. Pena testified that defendant's accomplices told Alvarado that they knew he was lying about having no knowledge of the drugs or the money. Alvarado eventually informed defendant's accomplices that he knew someone who could bring him drugs. Defendant allowed Alvarado to call someone, and Alvarado requested that the person on the phone bring ten to fifteen kilos of drugs. Alvarado arranged to meet the person at a fast food restaurant in Raleigh.

Defendant ordered Pena to go to the restaurant at the agreed-upon time and wait for the person bringing the drugs. While Pena was waiting for the person to arrive, defendant and the others parked in the parking lot of a hotel adjacent to the meeting place. A car matching the description given to Pena by defendant pulled into the parking lot. There were two men in the car who were later identified as Gustavo Carbajal (Carbajal) and Miguel Hernandez (Hernandez). Carbajal, the person Alvarado requested the drugs from, got into the van with Pena. Pena, with Carbajal as a passenger, and Hernandez following in the car, drove to an apartment complex off of Capital Boulevard to complete the purchase.

Defendant's accomplices had been following Pena, Carbajal, and Hernandez from a distance in the car equipped with the police lights and siren. Once Pena pulled into the apartment complex, defendant's accomplices pulled in front of Hernandez and put on their police lights and sirens. Two of defendant's accomplices got out of the car dressed as police officers, grabbed Hernandez from his car, and took him into the van. Carbajal and Hernandez were laid on the floor of the van. Pena drove Carbajal and Hernandez to the house at 5329 Wenesly Court.

Once at the house, defendant and his accomplices put Carbajal and Hernandez into a room and questioned them about where the drugs were located within Hernandez's car. Carbajal explained that the drugs were hidden and told defendant and his accomplices how to get to the hidden location. Defendant and his accomplices were still unable to find the drugs. One of defendant's accomplices brought Carbajal to the car. The car was running, so defendant's accomplice put a gun to Carbajal's ribs and told him if he tried to move the car he would be killed. Carbajal opened the compartment where the drugs were. Defendant and his accomplices removed the drugs from the car.

Stanley Marrin (Marrin) lived at 5333 Wenesly Court. He testified that on 14 September 2005, he heard a large breaking sound, and saw a man, later identified as Carbajal, running from a broken window at the house next door. John Williams (Williams), a construction worker, was working at a house near Wenesly Court on September 14. Williams testified that he heard someone screaming for help. He saw Carbajal come from the house wearing only his underwear and bound by handcuffs. Williams testified that Carbajal seemed extremely frightened. He furthered testified that Carbajal had multiple cuts, was bleeding from a large cut on his thigh, and appeared to have had candle wax poured on him. Williams helped Carbajal hide from defendant's accomplices, who were chasing him. Williams called 911.

Raleigh police officer Branford Winston (Winston) responded to the call from the area of 5329 Wenesly Court. Winston observed Williams talking to and providing first aid to a partially clothed and handcuffed Carbajal. Winston testified that Carbajal's face was swollen and bruised, that he had melted wax on him, that there was a deep cut on his thigh, and that he was in a lot of pain. Raleigh Detective Randy Miller (Miller) testified that the window at 5329 Wenesly Court had been broken from the inside. Miller furthered testified that in the house he located an air mattress, a large duffle bag full of stacks of money, a walkie-talkie, a police badge, a bathtub full of water, two candles, a sledgehammer, a cell phone, and charger.

Defendant presented no evidence.

[1] Defendant first argues that "the trial court lacked jurisdiction to enter judgment against the defendant . . . for first degree kidnapping where the indictments . . . failed to allege necessary elements that the victims were seriously injured or not released in a safe place." We agree.

An indictment must contain "[a] plain and concise factual statement in each count which . . . asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation." N.C. Gen. Stat. § 15A-924(a)(5) (2007). An indictment is the means by which a court obtains jurisdiction to prosecute a criminal case. *State v. Stokes*, 274 N.C. 409, 411, 163 S.E.2d 770, 772 (1968).

> The established rule is that an indictment will not support a conviction for a crime unless all the elements of the crime are accu-

> rately and clearly alleged in the indictment. The Legislature may prescribe a form of indictment sufficient to allege an offense even though not all of the elements of a particular crime are required to be alleged. The Legislature has not, however, established a short-form indictment for kidnapping. Accordingly, the general rule governs the sufficiency of the indictment to charge the crime of kidnapping.

State v. Jerrett, 309 N.C. 239, 259, 307 S.E.2d 339, 350 (1983).

There are two degrees of kidnapping. N.C. Gen. Stat. § 14-39(b) (2007). The elements set forth in subsection (a) of N.C. Gen. Stat. § 14-39 are required for both degrees of kidnapping. Subsection (b) sets forth the difference between the two degrees of kidnapping. N.C. Gen. Stat. § 14-39 provides in relevant part:

> (a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person . . . shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
>
> * * *
>
> (3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person . . . .
>
> * * *
>
> (b) There shall be two degrees of kidnapping as defined by subsection (a). If the person kidnapped either was not released by the defendant in a safe place or had been seriously injured . . . the offense is kidnapping in the first degree . . . . [I]f the person kidnapped was released in a safe place by the defendant and had not been seriously injured . . . the offense is kidnapping in the second degree . . . .

N.C. Gen. Stat. §14-39(a), (b) (2007).

At issue are defendant's two first degree kidnapping convictions for the kidnapping of Alvarado and Carbajal. As to Alvarado and Carbajal, the indictments read:

> The jurors for the State upon their oath present that on or about the 13th day of September, 2005, in Wake County the defendant named above unlawfully, willfully and feloniously did kidnap [vic-

> tim's name], a person who has attained the age of sixteen years, by confining, restraining and removing him without the his [sic] consent, for the purpose of terrorizing and doing other serious bodily harm to him.

Both of the indictments allege the purposes of confining, restraining, and removing in accordance with N.C. Gen. Stat. § 14-39(a). However, neither indictment alleges that the victims were seriously injured or not released in a safe place. N.C. Gen. Stat. § 14-39(b) requires these additional elements to elevate a kidnapping from second degree to first degree. The State contends that the indictment was not defective because it included the language "for the purpose of . . . doing other serious bodily harm." However, "for the purpose of . . . doing other serious bodily harm" is not the same as "had been seriously injured." One refers to intent, while the other refers to the victim's actual condition. Although the State presented substantial evidence that both Alvarado and Carbajal were seriously injured while being confined, interrogated, and physically abused, it failed to include language to that effect in the indictment.

Because the indictments did not clearly allege the essential elements of first degree kidnapping—that the victims were seriously injured or not released in a safe place—they are insufficient to charge kidnapping in the first degree. However, the indictments are valid for second degree kidnapping. Because the jury found all of the elements of second-degree kidnapping beyond a reasonable doubt by virtue of its guilty verdict of first degree kidnapping, defendant stands convicted of second degree kidnapping under this indictment.

> Since all of the elements of second degree kidnapping were found beyond a reasonable doubt by the jury by virtue of its guilty verdict of first degree kidnapping, defendant under this indictment stands convicted of second degree kidnapping. Because the indictment never charged defendant with first degree kidnapping, that offense was erroneously submitted to the jury as a possible verdict. . . . We therefore hold that judgment for first degree kidnapping must be arrested and remand for resentencing on second degree kidnapping.

State v. Moore, 316 N.C. 328, 336-37, 341 S.E.2d 733, 739 (1986).

[2] Next, defendant argues that "the trial court erred by not dismissing the first and second degree kidnapping charges for failure of the State to present sufficient substantial evidence as to each element of

kidnapping in each case, based on the wording of the actual indictments in each case." We disagree.

Defendant asserts that the trial court's instructions to the jury were erroneous because the indictments did not allege that the victims were removed "from one place to another." Defendant, citing *Jerrett*, asserts that " 'removed' cannot be understood as sufficient to aver 'removal from one place to another' as instructed by the trial court in this case . . . ." As to Alvarado and Carbajal, the trial judge instructed the jury:

> [I]f you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant, acting together with others, unlawfully confined the alleged victim [victim's name], restrained the alleged victim [victim's name], or removed the alleged victim [victim's name] from one place to another and that [victim's name] did not to consent to this confinement, restraint or movement, and that this was for the purpose of terrorizing the alleged victim [victim's name] . . . and that alleged victim [victim's name] had been seriously injured, it would be your duty to return a verdict of first degree kidnapping of the alleged victim [victim's name].

As to Lezama, Hernandez, and Martinez, the trial judge instructed the jury:

> [I]f you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant, acting together with others, unlawfully confined the alleged victim [victim's name], restrained the alleged victim [victim's name], or removed the alleged victim [victim's name] from one place to another, and that [victim's name] did not consent to this confinement, restraint or removal, and this was for the purpose of terrorizing the alleged victim [victim's name] . . . it would be your duty to return a verdict of guilty of second-degree kidnapping of the alleged victim [victim's name].

Defendant did not object to these instructions or offer alternative instructions.

> A party may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection; provided, that opportu-

> nity was given to the party to make the objection out of the hearing of the jury . . . .

N.C. R. App. P., Rule 10(b)(2) (2007).

> In criminal cases, a question which was not preserved by a objection noted at trial and which is not deemed preserved by rule or law without any such action, nevertheless may be made the basis of an assignment of error where the judicial action questioned is *specifically and distinctly contended* to amount to plain error.

N.C. R. App. P., Rule 10(c)(4) (2007) (emphasis added). Defendant did not specifically and distinctly contend that the jury instruction amounted to plain error as required by Rule 10(c)(4) and thus failed to properly preserve this assignment of error for appellate review.

Defendant asserts that there is no evidence that Alvarado was removed from one place to another. Pena testified about Alvarado's removal from his apartment and Alvarado's transport to the house at 5329 Wenesly Court. Pena stated that he "went to the front of the apartments where they had [Alvarado] handcuffed and I opened the side door of the van. . . . and we put him inside [the van]." Alvarado was handcuffed. Pena further testified that once they got Alvarado to the house on Wenesly Court, they "put [Alvarado in a bedroom in the house." Pena's testimony reveals that Alvarado was not only removed from his apartment and taken to the house, but was confined and restrained in the process of doing so.

Kidnapping is a specific intent crime, and therefore the State must prove that defendant unlawfully confined, restrained, or removed the victim for one of the specified purposes outlined in the statute. *State v. Moore*, 315 N.C. 738, 743, 340 S.E.2d 401, 404 (1986). Defendant argues that there was not substantial evidence of intent to terrorize the three victims of his second degree kidnapping charges, Lezama, Martinez, and Hernandez. Defendant contends that Lezama "never said he was 'terrorized' or 'extremely afraid' . . . [he] merely testified he was 'frightened.' " The Supreme Court has defined terrorizing as "putting [a] person in some high degree of fear, a state of intense fright or apprehension." *Id.* at 745, 340 S.E.2d at 405 (citation and quotations omitted).

A defendant's intent is rarely susceptible to proof by direct evidence; rather, it is shown by his actions and the circumstances surrounding his actions. *See State v. Pigott*, 331 N.C. 199, 211, 415 S.E.2d

555, 562 (1992) ("Intent is a condition of the mind ordinarily susceptible of proof only by circumstantial evidence.") (citations omitted). Intent must be determined by a jury. *State v. Moore*, 77 N.C. App. 553, 558, 335 S.E.2d 535, 538 (1985) (citing *State v. White*, 307 N.C. 42, 296 S.E.2d 267 (1982)). There are several ways the jury could have inferred that defendant's intent was to terrorize.

First, the State presented evidence that defendant physically abused some of the victims, putting them in a high degree of fear for their safety and well being. Alvarado was dunked under water and burned so severely that his skin was peeling. Carbajal had candle wax dripped on him. Some of the victims who were not physically abused were able to hear and smell the abuse of others within the house. Lezama testified that he was slapped on the head after becoming emotional. Lezama also testified that he and Martinez heard screams, a person yelling for help, someone being hit with a fist, and smelled something burning. Defendant's message to Lezama and Martinez was that if they refused to talk, they would suffer the same fate as those who were being physically abused.

Second, the State presented evidence that defendant instilled an intense fear in the victims by threatening them. Pena testified that he heard defendant and his accomplices tell Alvarado that if he did not tell them where the drugs were "it was going to go bad for him." Lezama testified that he and Martinez were blindfolded and handcuffed together while being held for about twenty-four hours. When defendant's accomplices removed Lezama and Martinez's blindfolds, there was a person coming at them with a sledgehammer. They were also threatened with death if they went to the police. The fear created by defendant and his accomplices' threats was enough to prompt Carbajal to risk jumping through a window to escape.

In *State v. Surrett*, we held that the victim's subjective fears are relevant in determining whether the victim was terrorized. 109 N.C. App. 344, 427 S.E.2d 124 (1993). In *Surrett*, the defendant grabbed the victim and pushed her into his car. *Id.* at 346, 427 S.E.2d at 125. The victim screamed, fought, and struggled with him, and the defendant demanded that she lie down and be quiet. *Id.* The victim stated that she was "scared to death." *Id.* at 347, 427 S.E.2d at 125. In fact, the victim was so scared that she risked injury by crawling out of the window of the defendant's moving vehicle. *Id.* at 346, 427 S.E.2d at 125. This Court held that, "[c]onsidered in the light most favorable to the State, this evidence would support a finding that the defendant

intended by his actions and commands to put the victim in a state of intense fright or apprehension and that he grabbed her and threw her into his car for that purpose." *Id.* at 350, 427 S.E.2d at 127.

Martinez testified that he was very frightened because the defendant's men seemed to get angrier and he thought they were going to kill him. Lezama testified that he feared for his family's safety if he went to the police. Although Alvarado, Hernandez, and Carbajal did not testify, there is evidence to support the jury's conclusion that defendant intended to terrorize them. Alvarado was dunked under water and severely burned. Carbajal was so afraid of what would happen if he remained in the house on 5329 Wenesly Court that he jumped from a window handcuffed and in only his underwear. Hernandez was held in the same room as Carbajal. Witnessing these events put a high degree of fear and apprehension in Hernandez about his fate.

[3] Finally, defendant argues that "the trial court committed plain error in failing to instruct on the lesser offense of false imprisonment in the three cases where [defendant] was convicted of second degree kidnapping due to insufficient evidence to prove a purpose to terrorize." We disagree.

Defendant correctly argues that false imprisonment is a necessary lesser included offense of kidnapping. *See Surrett* at 350, 427 S.E.2d at 127.

> The difference between kidnapping and the lesser included offense of false imprisonment is the *purpose* of the confinement, restraint, or removal of another person. If the purpose of the restraint was to accomplish one of the purposes enumerated in the kidnapping statute then the offense is kidnapping. If, however, an unlawful restraint occurs without any of the purposes specified in the statute the offense is false imprisonment. Thus, the State must prove that the defendant kidnapped with the intent to commit the particular felony charged in the indictment.

Id. at 350, 427 S.E.2d at 127-28 (citations omitted; emphasis in original). However, the trial court does not have to instruct on false imprisonment if there is sufficient evidence that the defendant acted with a purpose enumerated in N.C. Gen. Stat. § 14-39. *See, e.g.*, *State v. Baldwin*, 141 N.C. App. 596, 605-07, 540 S.E.2d 815, 821-22 (2000) (holding that the trial court properly denied the defendant's request for a false imprisonment jury instruction because the evidence

showed that the defendant intended to terrorize the victim by forcing her to watch him to commit suicide).

Additionally, defendant's trial counsel did not request an instruction on false imprisonment, nor did he object or request any additional jury instruction at the charge conference. Thus, defendant is left with plain error as the standard of appellate review. *See* N.C. R. App. P., Rule 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)). Defendant has not shown that the jury probably would have convicted him of false imprisonment rather than kidnapping if the judge had given an instruction on false imprisonment.

Accordingly, we vacate the judgments of first degree kidnapping and remand for entry of judgment on verdicts of guilty of second degree kidnapping, and for resentencing. We hold that the trial court correctly concluded that there was substantial evidence that defendant was guilty of kidnapping all five victims. Finally, we hold that the trial judge did not commit plain error by not instructing the jury on the lesser offense of false imprisonment.

Vacated and remanded in part; no error in part.

Judges WYNN and ARROWOOD concur.

MARTHA ODOM, GUARDIAN *AD LITEM* FOR SHERICKA WALLACE, MINOR CHILD, PLAINTIFF v. DOUGLAS H. CLARK, MD, PIEDMONT PRIMARY CARE, INC. F/K/A PIEDMONT PEDIATRIC CLINIC, P.A., AND CABARRUS MEMORIAL HOSPITAL D/B/A NORTHEAST MEDICAL CENTER, DEFENDANTS

No. COA07-775-2

(Filed 19 August 2008)

1. Appeal and Error— appellate rules violations—sanction—double costs

A review of defendant hospital's nonjurisdictional rules violations under N.C. R. App. P. 25 and 34 revealed that defendant's assignments of error constituted gross and substantial violations

of N.C. R. App. 10(c)(1), and double costs are assessed against defendant's attorney as a sanction.

2. Appeal and Error— appealability—denial of motion for change of venue—statutory venue

Although an appeal from the denial of a change of venue is an appeal from an interlocutory order, it is immediately appealable because the grant or denial of venue established by statute is deemed a substantial right.

3. Venue— motion for change—county agency

The trial court did not abuse its discretion by denying a change of venue in a medical malpractice case even though defendant hospital contends it was an agency of the pertinent county entitled to venue in that county based on the decision in *Sides*, 287 N.C. 14 (1975), because: (1) N.C.G.S. § 1-77 provides that an action against a public officer or person especially appointed to execute his duties, for an act done by him by virtue of his office, or against a person who by his command or in his aid does anything touching the duties of such officer, is to be brought in the county where the cause of action arose; (2) the trial court concluded as a matter of law that defendant was not entitled to venue in the pertinent county as a matter of right since it was not a county agency within the meaning of N.C.G.S. § 1-77, and the unchallenged findings of fact indicated the trial court's careful consideration of those factors it considered in making its determination; (3) several statutory revisions have been made to the county hospital enabling statutes to diminish the ties between defendant and the county; (4) there were no outstanding county bonds, the hospital did not benefit from any county taxes, the hospital followed anti-discrimination policies, and the hospital's bylaws identified it as a private nonprofit corporate hospital; and (5) the trial court was required to change venue only upon appropriate findings that venue was improper, it made no such findings of fact, and those it made were supported by the evidence of record.

4. Appeal and Error— appealability—denial of motion for change of venue—N.C.G.S. § 1-83

Although defendant contends the trial court erred in a medical malpractice case by denying its motion for a change of venue under N.C.G.S. § 1-83, this assignment of error is not properly before the Court of Appeals because: (1) defendant acknowl-

edged that its appeal was from an interlocutory order; and (2) although defendant requested that the Court of Appeals treat his appeal as a petition for writ of certiorari for this issue, the Court declined to exercise its discretion to do so.

Judge TYSON concurring in part and dissenting in part.

On remand to the Court of Appeals from an order of the Supreme Court of North Carolina remanding the decision of this Court in *Odom v. Clark*, 188 N.C. App. 165, 654 S.E.2d 833 (2008) (unpublished) for reconsideration in light of the decision of *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Trans. Co.*, 362 N.C. 191, 657 S.E.2d 361 (2008). Appeal by defendant hospital from an order entered 22 May 2007 by Judge Richard D. Boner in Mecklenburg County Superior Court. Originally heard in the Court of Appeals on 13 December 2007.

Ferguson Stein Chambers Gresham & Sumter, P.A. by William Simpson, James E. Ferguson, II, and Margaret Errington, for plaintiff-appellee.

Sharpless & Stavola, P.A., by Joseph M. Stavola and Joseph P. Booth, III, for defendant-appellant CMC-Northeast, Inc.

JACKSON, Judge.

This case is heard on remand from the Supreme Court. A more complete recitation of the facts may be found in the original opinion, *Odom v. Clark*, 188 N.C. App. 165, 654 S.E.2d 833, COA 07-775, 2008 WL 132127 (Jan. 15, 2008) (unpublished); however, for the convenience of the reader, a summary of the facts is set forth below.

Martha Odom ("plaintiff") is the duly appointed guardian *ad litem* of Shericka Wallace who suffered personal injuries related to her birth at Cabarrus Memorial Hospital, now operated by CMC-Northeast, Inc. ("defendant"). The original action was filed in Mecklenburg County where plaintiff resides; however, defendant filed a motion to change venue to Cabarrus County. The motion was denied and defendant appealed to this Court.

In our original opinion, we dismissed defendant's appeal for violations of the North Carolina Rules of Appellate Procedure. *Odom*, 188 N.C. App. 165, 654 S.E.2d 833, (2008). On 18 February 2008, defendant filed a petition for discretionary review in the North Carolina Supreme Court, arguing that this Court erred in dismissing the appeal for Rules violations. Subsequently, on 7 March 2008, the

Supreme Court issued its decision in *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Trans. Co.*, 362 N.C. 191, 657 S.E.2d 361 (2008), which provided clarification as to when violations of our appellate rules warrant dismissal. On 11 March 2008, defendant filed a Memorandum of Additional Authority with the Supreme Court, citing the *Dogwood* decision. The Supreme Court allowed defendant's petition on 10 April 2008, for the limited purpose of remanding the matter to this Court for reconsideration in light of *Dogwood*. Therefore, we reconsider defendant's appeal in light of the *Dogwood* decision.

[1] Pursuant to *Dogwood*, we first must determine if defendant's nonjurisdictional rules violations are "gross" or "substantial" violations pursuant to North Carolina Rules of Appellate Procedure 25 and 34. If so, we may impose sanctions as directed by Rules 25 and 34. If we determine that the violations are so "gross" and "substantial" as to warrant dismissal, we are to consider whether the circumstances justify invoking Rule 2 to reach the merits of the case. *Dogwood*, 362 N.C. at 201, 657 S.E.2d at 367.

Defendant's appeal originally was dismissed primarily for violation of Rule 10(c)(1) which provides in relevant part:

> Each assignment of error . . . shall state plainly, concisely and without argumentation the *legal basis* upon which error is assigned. An assignment of error is sufficient if it directs the attention of the appellate court to the *particular error* about which the question is made, with clear and *specific* record or transcript references.

N.C. R. App. P. 10(c)(1) (2007) (emphasis added).

We held that defendant's assignments of error "essentially amount to no more than . . . allegation[s] that the court erred because its ruling was erroneous." *Odom*, 188 N.C. App. 165, 654 S.E.2d 833, 2008 WL 132127 at *2 (citation omitted). We noted that "Such . . . assignment[s] of error [are] designed to allow counsel to argue anything and everything they desire in their brief on appeal. Th[ese] assignment[s]—like a hoopskirt—cover[] everything and touch[] nothing." *Id.* (citations omitted). North Carolina courts historically have dismissed such assignments of error. *See State v. Kirby*, 276 N.C. 123, 131, 171 S.E.2d 416, 422 (1970) (dismissing an assignment of error that was "based on numerous exceptions and attempt[ed] to present several separate questions of law—none of which are set out in the assignment itself—thus leaving it broadside and ineffective.");

Calhoun v. WHA Med. Clinic, PLLC, 178 N.C. App. 585, 602, 632 S.E.2d 563, 574 (2006) (declining to address assignment of error challenging findings as merely "contrary to law" because the assignment of error failed to properly preserve the issue for appeal), *disc. rev. denied*, 361 N.C. 350, 644 S.E.2d 5 (2007) ; *State v. Patterson*, 185 N.C. App. 67, 72-73, 648 S.E.2d 250, 254 (2007) (dismissing overly broad assignment of error as failing to comply with the North Carolina Rules of Appellate Procedure), *disc. rev. denied*, 362 N.C. 242, 660 S.E.2d 538 (2008). *See also Wetchin v. Ocean Side Corp.*, 167 N.C. App. 756, 759, 606 S.E.2d 407, 409 (2005) (invoking Rule 2 to reach merits despite defective assignment of error which failed to specify which of the court's three rulings was erroneous); *State v. Mullinax*, 180 N.C. App. 439, 443, 637 S.E.2d 294, 297 (2006) (noting that appeal could be dismissed for violating Rule 10(c)(1) but electing to invoke Rule 2 to prevent manifest injustice).

Because of this long tradition of dismissing such assignments of error, we determine that defendant's assignments of error constituted "gross" and "substantial" violations of Rule 10(c)(1). Therefore, we must determine what sanctions are appropriate.

Dogwood instructs that in most cases the appellate courts should impose less drastic sanctions than dismissal and reach the merits of the case. *Dogwood*, 362 N.C. at 198-99, 657 S.E.2d at 365-66. Although this Court traditionally has dismissed assignments of error such as those presented in this appeal, we proceed with caution in this remanded case and, instead, impose double costs against defendant's attorney. We direct the Clerk of this Court to enter an order accordingly.

The dissenting opinion concludes that mere monetary sanctions are insufficient and that dismissal is warranted in this case. However, we must conclude that the Supreme Court did not remand this case in order for us to reach the same conclusion we reached in our prior opinion. At the time this case was remanded, the Supreme Court had available for its review the prior decision of this Court—dismissing the appeal for inadequate assignments of error, the same basis upon which the dissent still proposes to dismiss the appeal. It strains credulity to believe that our Supreme Court, having reviewed defendant's petition and our prior decision, would have remanded this matter anticipating that we again would reach the same conclusion. Were that the case, notions of judicial economy would have dictated that the Supreme Court deny discretionary review.

Defendant first argues that the trial court erred in denying a change of venue, because it is entitled to remain in Cabarrus County pursuant to North Carolina General Statutes, section 1-77. We disagree.

[2] We note that ordinarily an order denying a change of venue is deemed interlocutory and is not subject to immediate appeal. *See Frink v. Batten*, 184 N.C. App. 725, 727, 646 S.E.2d 809, 811 (2007) ("the order denying the motion to change venue is an interlocutory order"). However, because the grant or denial of venue established by statute is deemed a substantial right, it is immediately appealable. *Gardner v. Gardner*, 300 N.C. 715, 719, 268 S.E.2d 468, 471 (1980) (citations omitted).

[3] "[W]hen the venue where the action was filed is not the proper one, the trial court does not have discretion, but must upon a timely motion *and upon appropriate findings* transfer the case to the proper venue." *Cheek v. Higgins*, 76 N.C. App. 151, 153, 331 S.E.2d 712, 714 (1985) (emphasis added). Here, defendant has not challenged any of the trial court's findings of fact. "Findings of fact not challenged by an exception or assignment of error are binding on appeal." *Griffis v. Lazarovich*, 164 N.C. App. 329, 332, 595 S.E.2d 797, 800 (2004) (citing *Tinkham v. Hall*, 47 N.C. App. 651, 653, 267 S.E.2d 588, 590 (1980)).

Pursuant to North Carolina General Statutes, section 1-77, an action "[a]gainst a public officer or person especially appointed to execute his duties, for an act done by him by virtue of his office[,] or against a person who by his command or in his aid does anything touching the duties of such officer[,]" is to be brought in the county where the cause of action arose. N.C. Gen. Stat. § 1-77(2) (2005). In *Coats v. Hospital*, 264 N.C. 332, 141 S.E.2d 490 (1965), our Supreme Court held that a corporate hospital was an agency of Sampson County for purposes of venue. *Id.* at 334, 141 S.E.2d at 492. In determining whether a corporate entity should be treated as an agency of local government, "we . . . must look at the nature of the relationship between the [corporation] and the county[.]" *Publishing Co. v. Hospital System, Inc.*, 55 N.C. App. 1, 11, 284 S.E.2d 542, 548 (1981), *cert. denied*, 459 U.S. 803, 74 L. Ed. 2d 42 (1982).

In 1975, the Supreme Court engaged in a detailed analysis to conclude that defendant's predecessor in interest—Cabarrus Memorial Hospital—was an agency of Cabarrus County. *See Sides v. Hospital*, 287 N.C. 14, 20, 213 S.E.2d 297, 301 (1975) ("we hold that Cabarrus

Memorial Hospital is an agency of Cabarrus County"). Defendant's contention in *Sides* was that it was not an agency of Cabarrus County, but rather an agency of the State of North Carolina. *Id.* at 16, 213 S.E.2d at 299.

In the instant case, defendant contends that it is an agency of Cabarrus County entitled to venue in Cabarrus County pursuant to the *Sides* decision. The trial court concluded as a matter of law that defendant was not entitled to venue in Cabarrus County as a matter of right because it was not a county agency within the meaning of section 1-77. The unchallenged findings of fact indicate the trial court's careful consideration of those factors it considered in making this determination. Since the *Sides* decision, several statutory revisions have been made to the Cabarrus Memorial Hospital enabling statutes, diminishing the ties between defendant and Cabarrus County.

For example, in 1981, the medical staff of the hospital was given the ability to nominate two practicing physicians to serve as honorary and advisory members of the executive committee of the hospital's board of trustees. An Act to Modify the Powers and Duties of Cabarrus Memorial Hospital, 1981 N.C. Sess. Laws 277, s. 1. Also in 1981, the treasurer of the executive committee was no longer required to be the county treasurer. *Id.* at s. 2. The hospital also was exempted from Chapter 159 of the General Statutes relating to permissible investments and Chapter 160A with respect to certain private leases. *Id.* at s. 3.

In 1989, further statutory revisions fully exempted the hospital and its executive committee from the provisions of Chapter 159 and any other statutory provisions relating to public hospitals so long as (1) the hospital held no outstanding county bonds, (2) no county taxes were levied for the hospital's direct benefit, and (3) the hospital did not discriminate, thus allowing the hospital to operate in the same manner as a private, non-profit corporate hospital. An Act Relating to Cabarrus Memorial Hospital, 1989 N.C. Sess. Laws 982, s. 1. There are no outstanding county bonds; the hospital does not benefit from any county taxes; and the hospital follows anti-discrimination policies. The hospital's bylaws identify it as a private, non-profit corporate hospital.

The trial court was required to change venue only upon appropriate findings that venue in Mecklenburg County was improper. Because the trial court made no such findings of fact, and those it made were supported by the evidence of record, there was no error.

[4] Defendant also argues that the trial court erred in denying its motion for a change of venue pursuant to North Carolina General Statutes, section 1-83. This assignment of error is not properly before this Court.

Appellants have the burden of showing that an appeal is proper. *Johnson v. Lucas*, 168 N.C. App. 515, 518, 608 S.E.2d 336, 338, *aff'd*, 360 N.C. 53, 619 S.E.2d 502 (2005) (per curiam). "[N]o appeal lies to an appellate court from an interlocutory judgment unless that ruling deprives the appellant of a substantial right which it would lose if the ruling were not reviewed before final judgment." *State ex rel. Employment Security Comm. v. IATSE Local 574*, 114 N.C. App. 662, 663-64, 442 S.E.2d 339, 340 (1994) (citing *Blackwelder v. Dept. of Human Resources*, 60 N.C. App. 331, 299 S.E.2d 777 (1983)). Defendant acknowledges that its appeal from the trial court's denial to change venue pursuant to North Carolina General Statutes, section 1-83 is interlocutory and not entitled to immediate appeal. Although defendant requests that we treat his appeal as a petition for a writ of *certiorari* as to this assignment of error, we decline to exercise our discretion to do so at this time.

Affirmed.

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

Judge ARROWOOD concurs.

TYSON, Judge concurring in part and dissenting in part.

I concur in that portion of the majority's opinion which: (1) holds Cabarrus Memorial Hospital d/b/a Northeast Medical Center's ("defendant") assignments of error constituted "gross" and "substantial" violations of Appellate Rule 10(c)(1); (2) holds defendant's appeal of the trial court's denial of defendant's motion for a change of venue for convenience of the witnesses to be interlocutory; and (3) declines to treat defendant's appeal of the trial court's denial of defendant's motion for a change of venue for convenience of the witnesses as a petition for writ of *certiorari*.

I disagree with that portion of the majority's opinion which imposes a sanction of double costs against defendant's attorney. I vote to dismiss defendant's unperfected and contradictory arguments on the remaining issue and respectfully dissent.

I. Interlocutory Appeal

The majority's opinion correctly states, defendant conceded in its brief that its appeal of the trial court's denial of its "motion to change venue for convenience of witnesses is interlocutory and denial of such a motion does not necessarily affect a substantial right entitling a party to an immediate appeal." Defendant's assignment of error numbered 2 is properly dismissed as interlocutory.

II. Defendant's Remaining Assignment of Error

With the dismissal of defendant's assignment of error numbered 2 as interlocutory, only one purported assignment of error remains:

> 1. Rendition and entry of the Order of the Hon. Richard D. Boner rendered May 7, 2007 during the May 7, 2007 Civil Session of Mecklenburg County Superior Court denying [defendant]'s motion to change venue pursuant to G.S. §§ 1-77 and 1-83 as a matter of right in accordance with Rule 12(b)(3) of the North Carolina Rules of Civil Procedure. The Order was subsequently entered on May 22, 2007. (R. pp. 211-216).

Many previous cases have addressed similar unperfected and contradictory assignments of error. "This assignment-like a hoop-skirt-covers everything and touches nothing." *State v. Kirby*, 276 N.C. 123, 131, 171 S.E.2d 416, 422 (1970). I concur with the majority's opinion that this violation of Appellate Rule 10(c)(1) "rise[s] to the level of a 'substantial failure' or 'gross violation.' " *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 199, 657 S.E.2d 361, 366 (2008).

As the majority's opinion correctly notes, "North Carolina courts historically have dismissed such assignments of error." (Citing *Kirby*, 276 N.C. at 131, 171 S.E.2d at 422, *Calhoun v. WHA Med. Clinic, PLLC*, 178 N.C. App. 585, 602, 632 S.E.2d 563, 574 (2006); *State v. Patterson*, 185 N.C. App. 67, 72-73, 648 S.E.2d 250, 254 (2007); *Wetchin v. Ocean Side Corp.*, 167 N.C. App. 756, 759, 606 S.E.2d 407, 409 (2005); *State v. Mullinax*, 180 N.C. App. 439, 443, 637 S.E.2d 294, 297 (2006)). Consistent with our Supreme Court's reasoning in *Kirby*, and this Court's numerous precedents, defendant's "broadside and ineffective[]" assignment of error numbered 1 is unperfected, contradictory, vague, and should be dismissed. 276 N.C. at 131, 171 S.E.2d at 422. The majority's opinion erroneously holds that a sanction of double costs should be imposed against defendant's counsel under Appellate Rule 34(b).

Having determined that defendant's "broadside and ineffective[]" assignment of error numbered 1 should be dismissed, I turn to "whether the circumstances of the case justify invoking [Appellate] Rule 2 . . . ." *Id.*; *Dogwood*, 362 N.C. at 201, 657 S.E.2d at 367.

Appellate Rule 2 states:

> 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.

N.C.R. App. P. 2 (2007).

In *Dogwood*, our Supreme Court stated, Appellate Rule 2 "may only [be invoked] on rare occasions and under exceptional circumstances . . . ." 362 N.C. at 201, 657 S.E.2d at 367 (citation omitted). " 'Rule 2 relates to the residual power of [the] appellate courts to consider, in exceptional circumstances, significant issues of importance in the public interest or to prevent injustice which appears manifest to the [c]ourt and *only in such instances*.' " *State v. Hart*, 361 N.C. 309, 315-16, 644 S.E.2d 201, 205 (2007) (quoting *Steingress v. Steingress*, 350 N.C. 64, 66, 511 S.E.2d 298, 299-300 (1999)) (emphasis supplied).

> Before exercising [Appellate] Rule 2 to prevent a manifest injustice, both this Court and the Court of Appeals must be cognizant of the appropriate circumstances in which the extraordinary step of suspending the operation of the appellate rules is a viable option. Fundamental fairness and the predictable operation of the courts for which our Rules of Appellate Procedure were designed depend upon the consistent exercise of this authority.

Id. at 317, 644 S.E.2d at 206.

The decision whether to invoke Appellate Rule 2 is purely discretionary and is to be limited to "rare occasions" in which a fundamental purpose of the appellate rules is at stake. *Dogwood*, 362 N.C. at 201, 657 S.E.2d at 367. Appellate Rule 2 is most consistently invoked to prevent manifest injustice in appeals in which the substantial rights of a criminal defendant are affected. *Hart*, 361 N.C. at 316, 644

S.E.2d at 205 (citing *State v. Sanders*, 312 N.C. 318, 320, 321 S.E.2d 836, 837 (1984)).

Nothing in the record or briefs demonstrates and defendant has failed to show any "exceptional circumstances" to suspend or vary the rules in order "to prevent manifest injustice to a party, or to expedite decision in the public interest." *Id.* at 315-16, 644 S.E.2d at 205 (citation omitted). There is no basis to exercise our discretion to invoke Appellate Rule 2 to review defendant's assignment of error numbered 1. *Dogwood*, 362 N.C. at 201, 657 S.E.2d at 367. Defendant's assignment of error numbered 1 presents no meritorious issue for this Court to consider and should be dismissed as "broadside and ineffective." *Kirby*, 276 N.C. at 131, 171 S.E.2d at 422.

Here, our Supreme Court's order, which remanded this case to this Court, stated *in toto*:

> Defendant's (Cabarrus Memorial Hospital) Petition for Discretionary Review is allowed for the limited purpose of remanding this matter to the Court of Appeals for reconsideration in light of *Dogwood Development and Management Co., LLC v. White Oak Transport Co., Inc.*, 362 N.C. 191, 657 S.E.2d 361 (2008).
>
> By order of the Court in Conference, this 10th day of April, 2008.

Odom v. Clark, 362 N.C. 360, 661 S.E.2d 736, 736 (2008).

Our analysis on remand is entirely different from that originally articulated by this Court in *Odom v. Clark*, 188 N.C. App. 165, 654 S.E.2d 833 (2008) (unpublished). On remand, defendant's appeal of the trial court's denial of defendant's motion for a change of venue for convenience of witnesses is evaluated on the merits and is dismissed as interlocutory. This Court did not conduct this analysis in its original opinion. *See id.* Defendant's remaining assignment of error is then properly analyzed "in light of *Dogwood Development and Management Co., LLC v. White Oak Transport Co., Inc.*, 362 N.C. 191, 657 S.E.2d 361 (2008)[]" as requested by our Supreme Court. *Odom*, 362 N.C. at 360, 661 S.E.2d at 736. Nothing in our Supreme Court's order on remand or in *Dogwood* validates "hoopskirt" assignments of error nor alters the Supreme Court's precedent in *Kirby* or this Court's numerous precedents cited above. *Dogwood*, 362 N.C. at 191, 657 S.E.2d at 361; *Kirby*, 276 N.C. at 123, 171 S.E.2d at 416.

III. Conclusion

I concur that defendant's appeal of the trial court's denial of its motion for a change of venue for convenience of witnesses is inter-

locutory and agree not to view defendant's appeal as a petition for writ of *certiorari*. The majority's opinion also correctly concludes that defendant's remaining assignment of error constitutes a "gross" and "substantial" violation of Appellate Rule 10(c)(1).

Defendant's remaining assignment of error with regard to its motion for a change of venue based on a matter of right is "broadside and ineffective[]" and should be dismissed. *Kirby*, 276 N.C. at 131, 171 S.E.2d at 422; *see also Calhoun*, 178 N.C. App. at 602, 632 S.E.2d at 574; *Patterson*, 185 N.C. App. at 72-73, 648 S.E.2d at 254. I concur in part and respectfully dissent in part.

CAROLINA POWER & LIGHT CO., PETITIONER v. EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA; AND HERMAN D. ROBERTS, RESPONDENTS

No. COA07-1247

(Filed 19 August 2008)

1. Unemployment compensation— acceptance of voluntary early retirement package—leaving work with good cause attributable to employer

The superior court did not err by affirming the Employment Security Commission's conclusion that respondent employee's decision to retire under a voluntary early retirement package (VERP) constituted leaving work with good cause attributable to the employer, because taking into consideration our case law which is favorable toward applicants for unemployment benefits under the Employment Security Act and construing the unchallenged findings of fact liberally in favor of respondent, he has met his burden of showing that his acceptance of petitioner's VERP was valid and not indicative of an unwillingness to work, and that such acceptance was a result of actions by the employer.

2. Unemployment compensation— receipt of pension benefits—reduction in benefits not required

The superior court did not err by affirming the Employment Security Commission's conclusion that respondent employee's unemployment compensation benefit should not be reduced by the amount of pension benefits received based on its determination that the lump sum rollover payment transferred to plaintiff's IRA was not a payment to an individual for retirement purposes and thus did not reduce unemployment benefits under N.C.G.S.

§§ 97-12(f) and 96-14(9) because: (1) although petitioner cites several cases from other jurisdictions which hold unemployment insurance benefits are reduced whenever an employee receives employer-funded retirement benefits regardless of whether those benefits are paid periodically or in a lump sum, our Court of Appeals is not bound by the manner in which other states interpret their statutes with respect to unemployment benefits; (2) the Federal Employment and Training Administration's treatment of lump sum rollover distributions with regard to reductions in unemployment compensation insurance benefits is that a nontaxable rollover does not represent a payment to the individual for purposes of retirement; and (3) the United States Supreme Court has stated that the power of an administrative agency to administer a congressionally created program requires the formulation of policy and the making of rules to fill any gaps, and such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.

Judge JACKSON dissenting.

Appeal by petitioner from judgment entered 28 August 2006 by Judge A. Leon Stanback and from order entered 19 July 2007 by Judge Paul G. Gessner in Wake County Superior Court. Heard in the Court of Appeals 18 March 2008.

Cranfill, Sumner & Hartzog, LLP, by Norwood P. Blanchard, III, for the petitioner-appellant.

Thomas S. Whitaker and Thomas H. Hodges, Jr., for respondent-appellee Employment Security Commission of North Carolina.

BRYANT, Judge.

Carolina Power & Light Co. (petitioner) appeals from a judgment entered 28 August 2006 affirming the decision of the North Carolina Employment Security Commission in Commission Decision No. 06(UI)0997 and an order entered 19 July 2007 affirming the decision of the Employment Security Commission under Docket No. 06(UI)0997.

Herman D. Roberts (Roberts) began working for petitioner 21 March 1981 and in January 2005 worked for petitioner as a field service representative in Whiteville, North Carolina. In January

2005, petitioner began downsizing its field service positions and informed Roberts his position had been eliminated. Roberts was assigned to a temporary position in Clinton, North Carolina. Petitioner informed Roberts he would remain in Clinton until the downsizing was complete.

Roberts asked his supervisor and operations manager if he was going to be transferred back to his original field service representative position or if he was going to Wilmington, North Carolina. Petitioner never responded.

In January 2005, petitioner offered several employees, including Roberts, a voluntary early retirement package (VERP). Roberts asked his supervisors if he would still have a job if he did not accept early retirement. Petitioner did not respond. Roberts accepted the VERP. On 24 July 2005, Roberts filed a claim for unemployment insurance benefits. He certified to the Employment Security Commission (ESC) staff that the reason for his separation from employment was "early retirement."

The matter was referred to the ESC Adjudicator on the issue of separation from last employment. The Adjudicator determined Roberts was disqualified from benefits because he left the job "by his own actions" to accept a voluntary early retirement package. Roberts appealed the decision to an ESC Appeals Referee who reversed the adjudicator's decision. The referee concluded Roberts had good cause for leaving his job, that cause was attributable to his employer, and Roberts was not disqualified from benefits. Petitioner appealed to the ESC.

Before the ESC, Petitioner argued the referee erred in concluding that Roberts had good cause for leaving his job and such cause was attributable to Petitioner. Petitioner also argued that the referee erred by not reducing Roberts' benefit amount by the amount of any pension benefits received pursuant to N.C. Gen. Stat. §§ 96-12(f) and 96-14(9).

On 24 March 2006, the ESC rendered a decision finding Roberts was not disqualified from unemployment insurance benefits, and Roberts "left work within the meaning of the law." The ESC concluded that Roberts' decision to take petitioner's voluntary retirement package was "good cause attributable to [petitioner]." The ESC did not address petitioner's argument that Roberts' benefit amount should be reduced to his receipt of pension benefits.

On 24 April 2006, petitioner filed a Petition for Judicial Review of the ESC 24 March 2006 decision in Wake County Superior Court. On 28 August 2006, Judge Stanback entered a judgment affirming the ESC's determination that Roberts left work with good cause attributable to petitioner and remanded the matter to the ESC "to conduct a fact finding and make a determination on whether the claimant's benefit amount should be reduced by the amount of pension benefits received pursuant to N.C.G.S. §§ 96-12(f) and 96-14(9)."

On 15 December 2006, the ESC issued a decision concluding that Roberts' unemployment benefits should not be reduced by the amount of the claimant's pension benefits rollover under the VERP.

On 12 January 2007, petitioner filed a second petition for judicial review in Wake County Superior Court asserting that the ESC erred in concluding that Roberts' benefit should not be reduced by the amount of pension benefits received under the VERP. On 18 June 2007, Judge Paul Gessner entered an order affirming the ESC's decision that Roberts' benefits should not be reduced by the amount of the pension benefits rollover. From the 28 August 2006 judgment and the 12 January 2007 order, petitioner appeals.

On appeal, petitioner raises the following two issues: did the superior court err in affirming the ESC's conclusions that (I) Roberts left work with "good cause attributable to the employer" and that (II) Roberts' benefit should not be reduced by the amount of pension benefits received.

I

[1] Petitioner questions whether Roberts' decision to leave work to retire under the VERP constitutes leaving work with "good cause attributable to the employer," as the term is used in North Carolina's Employment Security Law.

Petitioner contends that quitting a job to accept an early retirement package is not, as a matter of law, "good cause attributable to the employer." Petitioner cites North Carolina General Statute 96-14(1).

> Where an employee is notified by the employer that such employee will be separated from employment on some future date and the employee leaves work prior to this date because of the impending separation, the employee shall be deemed to have

> left work voluntarily and the leaving shall be without good cause attributable to the employer.

N.C.G.S. § 96-14(1) (2005). Petitioner adds that where an employee voluntarily leaves work without notification from an employer that the employee's job will be terminated, that too is "without good cause attributable to the employer." Petitioner argues that as a result, an employee's decision to leave work because the employer stated the employee will or will not be separated from his employment achieves the same result—the employee is deemed to have left work voluntarily.

"Where an individual leaves work, the burden of showing good cause attributable to the employer rests on said individual, and the burden shall not be shifted to the employer." N.C. Gen. Stat. § 96-14(1a) (2005). "Attributable to the employer as used in G.S. 96-14(1) means produced, caused, created, or as a result of actions by the employer." *Sellers v. National Spinning Co.*, 64 N.C. App. 567, 569, 307 S.E.2d 774, 775 (1983) (citation and internal quotations omitted). " 'Good cause,' as used in the statute, connotes a reason for rejecting work that would be deemed by reasonable men and women as valid and not indicative of an unwillingness to work." *Id.* (citation omitted).

In *Marlow v. N.C. Empl. Sec. Comm'n*, this Court stated the public policy of the Employment Security Act as follows:

> The [Employment Security Act, N.C.G.S. § 96-1 *et seq.*] is to be liberally construed in favor of applicants. Further, in keeping with the legislative policy to reduce the threat posed by unemployment to the "health, morals, and welfare of the people of this State," statutory provisions allowing disqualification from [unemployment] benefits must be strictly construed in favor of granting claims.

127 N.C. App. 734, 735, 493 S.E.2d 302, 303 (1997) (internal citations omitted). Our courts have also recognized that "[e]mployees are often discharged for various reasons which do not operate to disqualify the individual for benefits under the Act . . . [such as] reduction in work force . . . ." *In re Werner*, 44 N.C. App. 723, 727, 263 S.E.2d 4, 6 (1980); *see also Boyland v. Southern Structures, Inc.*, 172 N.C. App. 108, 115, 615 S.E.2d 919, 924 (2005) (citations omitted) ("An employee may be disqualified from receiving unemployment benefits if there is substantial fault connected with the employee's work.

Substantial fault . . . shall not include (1) minor infractions of rules unless such infractions are repeated after a warning was received by the employee, (2) inadvertent mistakes made by the employee, nor (3) failures to perform work because of insufficient skill, ability, or equipment."); *West v. Georgia-Pacific Corp.*, 107 N.C. App. 600, 604, 421 S.E.2d 395, 398 (1992) ("[M]isconduct sufficient to disqualify a discharged employee from receiving unemployment compensation is conduct which shows a wanton or willful disregard for the employer's interest, a deliberate violation of the employer's rules, or a wrongful intent.").

In *Werner*, this Court addressed whether employees who resigned at their employer's request left their employment "voluntarily" within the meaning of N.C. Gen. Stat. § 96-14(1). Based on strong public policy concerns for not discouraging employers from this practice, this Court held that those "employees who quit or resign employment because they are asked by their employer to leave do not leave 'voluntarily' within the meaning of G.S. 96-14(1). " *Werner*, 44 N.C. App. at 727, 263 S.E.2d at 7.

Here, the ESC made the following unchallenged findings:

3. The [petitioner] began downsizing its field service representative positions in January 2005. During this time, [Roberts] was informed that his position as a field service representative had been eliminated and that he was going to be reassigned to a temporary position in Clinton, North Carolina. [Roberts] was told that he would be in Clinton until the downsizing was completed.

4. [Roberts] asked his supervisor and operations manager if he was going to be transferred back to his field service representative position . . . . [Roberts] was never given an answer.

5. In January 2005, [petitioner] offered several employees, including [Roberts], an early retirement package. [Roberts] asked his supervisors if he would still have a job if he did not accept the early retirement package. [Roberts'] question was never answered so he accepted the early retirement package.

Taking into consideration our case law which is favorable toward applicants for unemployment benefits under the Employment Security Act and construing the unchallenged findings of fact liberally in favor of Roberts, we hold that Roberts has met his burden of showing that his acceptance of petitioner's voluntary early retirement

package was "valid and not indicative of an unwillingness to work" and that such acceptance was a "result of actions by the employer." Accordingly, petitioner's assignment of error is overruled.

II

[2] Next, petitioner questions whether the Wake County Superior Court erred in affirming the ESC's determination that Roberts' benefits should not be reduced by the amount of the pension benefits received.

Petitioner argues that the ESC erroneously concluded the lump sum rollover payment transferred to Roberts' IRA was not a payment to an individual "for retirement purposes" and thus did not reduce unemployment benefits under N.C. Gen. Stat. §§ 96-12(f) and 96-14(9).

Under North Carolina General Statutes, section 96-14(9), the General Assembly has stated that

> [t]he amount of benefits payable to an individual for any week . . . which begins in a period with respect to which such individual is receiving a . . . periodic payment which is based on the previous work of such individual shall be reduced (but not below zero) by the amounts of any such . . . other payment contributed to in part or in total by the individual's base period employers . . . .

N.C. Gen. Stat. § 96-14(9) (2005).

Petitioner points out that the language under N.C. Gen. Stat. § 96-14 is similar to the language under 26 U.S.C.A. § 3304(a)(15), which states the following:

> [T]he amount of compensation payable to an individual for any week . . . which begins in a period with respect to which such individual is receiving a . . . periodic payment which is based on the previous work of such individual shall be reduced (but not below zero) by an amount equal to the amount of such . . . other payment, which is reasonably attributable to such week . . . .

26 U.S.C.A. § 3304(a)(15) (2005).

Here, the dispositive issue is whether Roberts "received" his lump sum which he had rolled over from petitioner directly into an Individual Retirement Account (IRA).

Petitioner cites several cases from other jurisdictions which hold unemployment insurance benefits are reduced whenever an employee receives employer-funded retirement benefits regardless of whether those employer-funded retirement benefits are paid periodically or in a lump-sum. *See In re Cooney*, 2 A.D.3d 1025, 1025, 768 N.Y.S.2d 526, 527 (2003) (unemployment insurance benefits reduced where employee rolled lump sum pension payout into an IRA); *Koontz v. Ameritech Servs., Inc.*, 466 Mich. 304, 320-24, 645 N.W.2d 34, 43-45 (2002) (employee's lump sum "received" when she requested the funds be transferred and subsequently had the authority to withdraw them); *Giesler v. Bd. of Review*, 315 N.J. Super. 28, 32, 716 A.2d 547, 549 (1998) (employee "received" funds when employee had authority to receive or not receive funds). However, we are not bound by the manner in which other states interpret their statutes with respect to unemployment benefits.

To the contrary, the Federal Employment and Training Administration, a division of the Department of Labor, which interprets Federal law requirements pertaining to unemployment compensation and issues those interpretations to State Employment Security Agencies, stated its interpretation of the treatment of lump sum rollovers with regard to unemployment compensation in pertinent part as follows:

> If a rollover from a qualified trust into an eligible retirement plan is not subject to Federal income tax, then it is not considered to be "received" by the individual for purposes of Section 3304(a)(15), FUTA. A non-taxable rollover does not represent a payment to the individual for purposes of retirement.

Unemployment Insurance Program Letter (UIPL) No. 22-87, Change 1 (June 19, 1995) *available at* http://www.ows.doleta.gov/dmstree/uipl/uipl87/uipl_2287c1.htm.[1] Additionally, the United States Supreme Court has stated the following, with respect to federal agencies:

> [T]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation

1. FUTA was amended 17 August 2006 by the Pension Protection Act of 2006, P.L. 109-280. Section 1105 of the Pension Protection Act, entitled "No Reduction in Unemployment Compensation as a Result of Pension Rollovers," amended 26 U.S.C.A. § 3304(a) by adding the following language: "Compensation shall not be reduced under paragraph (15) for any . . . payment which is not includible in gross income of the individual for the taxable year in which paid because it was part of a rollover distribution." *See* 26 U.S.C.A. § 3304(a) (2007).

> of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress. . . . Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-44, 81 L. Ed. 2d 694, 703 (1984) (internal citation omitted).

Acknowledging an absence of prior holdings interpreting North Carolina law on this issue and giving deference to the interpretation of the Federal Employment and Training Administration's treatment of lump sum rollover distributions with regard to reductions in unemployment compensation insurance benefits, we hold that the Wake County Superior Court did not err in affirming the ESC's determination that Roberts' unemployment compensation insurance benefits should not be reduced by the amount of the pension benefits received.

Accordingly, petitioner's assignment of error is overruled.

Affirmed.

Judge WYNN concurs.

Judge JACKSON dissents in a separate opinion.

JACKSON, Judge dissenting.

I respectfully dissent because I believe the facts of this case demonstrate that Roberts was disqualified from receiving unemployment insurance benefits pursuant to North Carolina General Statutes, section 96-14(1).

"Where an individual leaves work, the burden of showing good cause attributable to the employer rests on said individual, and the burden shall not be shifted to the employer." N.C. Gen. Stat. § 96-14(1a) (2007). I note that the portion of section 96-14(1) cited by the majority is not applicable on the instant facts. Roberts was not "notified by the employer that such employee will be separated from employment on some future date . . . ." N.C. Gen. Stat. § 96-14(1). Therefore, the first section of section 96-14(1) is the portion of that statute applicable in the instant case: "An individual shall be disqualified for benefits:

> (1) For the duration of his unemployment beginning with the first day of the first week after the disqualifying act occurs with respect to which week an individual files a claim for benefits if it is determined by the Commission that such individual is, at the time such claim is filed, unemployed because he left work without good cause attributable to the employer.

In this case, the disqualifying act was Roberts' acceptance of the early retirement package offered by petitioner. Roberts voluntarily accepted petitioner's offer of compensation in return for his agreement to participate in petitioner's "Voluntary Early Retirement Package," or VERP. I do not question that Roberts had a difficult decision to make—accept the voluntary early retirement offered by petitioner, or continue to work for petitioner with no guarantee that he would be safe from petitioner's continued downsizing. Roberts could have made the decision to continue employment with petitioner, possibly surviving the downsizing in effect, or possibly being terminated by petitioner. Were Roberts to have been terminated, he then could have applied for unemployment insurance benefits pursuant to Article 2 of Chapter 96. Roberts made a choice that his interests were best served by accepting petitioner's offer of voluntary early retirement, and he received the full benefits of that package.

I would hold, having made an election between two avenues of compensation—one the immediate compensation offered by the VERP, the other the opportunity for continued employment with the safety net of Article 2 of Chapter 96 should he eventually be terminated—that section 96-14(1) disqualifies Roberts from unemployment insurance benefits. Although petitioner offered Roberts the voluntary early retirement package, I do not consider this act, which petitioner did not force upon Roberts, establishes that Roberts' current unemployment is a result of "good cause attributable to the employer." I believe Roberts has failed in his burden of proving otherwise. N.C. Gen. Stat. § 96-14 (1a) (2007). For the foregoing reasons, I respectfully dissent. Because I would reverse on this issue, I do not address petitioner's second issue on appeal.

DEBORAH A. POLK, EMPLOYEE, PLAINTIFF v. NATIONWIDE RECYCLERS, INC., EMPLOYER; TRAVELERS INSURANCE CO., CARRIER, DEFENDANTS

No. COA07-1001

(Filed 19 August 2008)

1. Workers' Compensation— post-injury employment—new employer—not make-work

Plaintiff did not show that the Industrial Commission misapplied the law in a workers' compensation case or that its findings were not based on competent evidence where plaintiff contended that the Commission erred by concluding that she was not entitled to benefits under N.C.G.S. § 97-29. Plaintiff argued that her post-injury job was so modified as to constitute make-work, but plaintiff was hired after her injury by a separate company with knowledge of her restrictions, and the Commission had before it testimony from plaintiff's new supervisor that her position was not heavily modified.

2. Workers' Compensation— election of remedies—not available

The plaintiff in a workers' compensation case incorrectly argued that the Commission could not force her to elect a remedy for her disability. Defendant was permitted by statute to request a hearing as to plaintiff's benefits, and the plaintiff in this case did not have two remedies from which to choose.

3. Workers' Compensation— findings by full Commission—restatement of unmodified deputy commissioner's findings—not necessary

The Industrial Commission in a workers' compensation case was required to consider and evaluate all of the evidence, but was not required to restate findings from the original deputy commissioner's order that did not need modification.

4. Workers' Compensation— findings by full Commission—new evidence

The Industrial Commission erred in a workers' compensation case by not addressing a Form 22 ordered by the deputy commissioner and subsequently completed by defendant. The Full Commission must address the new evidence.

Appeal by plaintiff from an opinion and award entered 4 April 2007 by the North Carolina Industrial Commission. Heard in the Court of Appeals 20 February 2008.

Poisson, Poisson & Bower, PLLC, by Fred D. Poisson, Jr., and E. Stewart Poisson, for plaintiff-appellant.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Neil P. Andrews and Jennifer P. Pulley, for defendant-appellees.

HUNTER, Judge.

Deborah A. Polk ("plaintiff") appeals from an opinion and award by the Industrial Commission resolving her claim for workers' compensation against former employer Nationwide Recyclers, Inc. ("defendant").[1] After careful review, we affirm in part and reverse in part.

I.

Defendant hired plaintiff to work as a wastewater operator on 3 June 2000. On 3 July 2000, plaintiff sustained a compensable injury to her elbow. Plaintiff was diagnosed with a contusion on her left elbow causing labored motion and lateral tenderness. The diagnosing doctor restricted plaintiff's gripping and other activities at work. After seeing a series of doctors and undergoing numerous tests and surgery, plaintiff was released to light duty work status on 7 May 2001. When plaintiff experienced no relief from her pain, she underwent further testing on 2 May 2002. She was released at maximum medical improvement on 1 July 2002 by her treating physician, who assigned her left arm a twelve percent permanent partial impairment rating.

Plaintiff was out of work and received benefits for this permanent partial disability under the Workers' Compensation Act from 5 April 2002 through 23 April 2003. When defendant could not accommodate her physical restrictions, she was terminated on 3 July 2002. Plaintiff continued to receive medical treatment. On 23 April 2003, plaintiff was hired as a dispatcher by Carolina By-Products.

On 4 February 2005, defendant filed Form 33, requesting that plaintiff's claim be assigned for hearing; per the form, defendant

1. Although both Nationwide Recyclers, Inc., and Travelers Insurance Co. are defendants in this action, for ease of reference, we use "defendant" to refer only to Nationwide Recyclers, Inc., plaintiff's employer.

wished to begin paying permanent partial disability benefits to plaintiff and was requesting an order to do so. The deputy commissioner's opinion and award held that plaintiff was entitled to benefits under both N.C. Gen. Stat. § 97-29 (2007) for constructive (temporary total) disability and N.C. Gen. Stat. § 97-31 (2007) for her permanent partial disability, but that she was not required to make an election of these remedies. Defendant appealed to the Full Commission, which reversed the deputy commissioner and held that plaintiff was eligible for benefits only under N.C. Gen. Stat. § 97-31 and awarded her benefits under that statute, as well as attorney's fees and continuing medical treatment. Plaintiff appeals to this Court.

II.

Plaintiff makes two arguments pertaining to one of the few modifications made by the Full Commission to the deputy commissioner's order. Whereas the deputy commissioner awarded benefits to plaintiff under N.C. Gen. Stat. § 97-29, the Full Commission held that while plaintiff was not entitled to benefits under that statute, she *was* entitled to benefits under N.C. Gen. Stat. § 97-31(13) and could not delay filing for compensation under that statute. Plaintiff argues that the Full Commission erred in both conclusions. We consider plaintiff's arguments in turn.

A.

[1] Plaintiff first argues that the Full Commission's conclusion that she failed to show she is entitled to benefits under N.C. Gen. Stat. § 97-29 was in error both because it misapplies the law and because it is based upon findings of fact that are not supported by competent evidence in the record. Both points are without merit.

The deputy commissioner's order stated that plaintiff's "position with Carolina By-Products is overly modified and is not indicative of her wage-earning capacity in the competitive labor market." Pursuant to the Supreme Court's holding in *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 438, 342 S.E.2d 798, 806 (1986), the deputy commissioner concluded there was insufficient evidence in the record to make findings as to plaintiff's wage-earning capacity.

The Full Commission's opinion distinguished *Peoples* and reversed this conclusion, stating:

> In asserting that she is entitled to temporary total disability benefits under N.C. Gen. Stat. § 97-29 for constructive disability,

> plaintiff has relied on *Peoples* [], claiming that her current job is modified and, thus, an unreliable basis for determining her wage earning capacity. . . . The [Supreme] Court stated "proffered employment would not accurately reflect earning capacity . . . if [it] is so modified because of the employee's limitations that it is not ordinarily available in the competitive job market." [] However, the Full Commission finds the present case to be distinguished from *Peoples* in that the employment at issue with Carolina By-Products was actually obtained by plaintiff in the competitive market, and was not proffered by the defendant-employer. The Full Commission declines to interpret *Peoples* as holding that employment that was obtained in the competitive job market, and not proffered by the defendant-employer, is insufficient evidence of wage-earning capacity. The Full Commission further finds there to be insufficient evidence to find that plaintiff's job duties with Carolina By-Products have been modified and, thus, finds that plaintiff has shown that she is capable of employment in the competitive market at wages that are equal to or greater than her pre-injury average weekly wage. Thus, plaintiff has failed to show that she is entitled to temporary total disability benefits under N.C. Gen. Stat. § 97-29 for constructive disability.

Plaintiff argues that the Full Commission misapplied the law on this point. We disagree.

> N.C. Gen. Stat. § 97-29 applies only to cases of total disability.
>
> To support a conclusion of disability, the Commission must find: (1) that the plaintiff was incapable after his injury of earning the same wages he earned before his injury in the same employment, (2) that the plaintiff was incapable after his injury of earning the same wages he earned before his injury in any other employment and (3) that the plaintiff's incapacity to earn was caused by his injury.

Hendrix v. Linn-Corriher Corp., 317 N.C. 179, 186, 345 S.E.2d 374, 378-79 (1986). Plaintiff testified that she earned more post-injury than she had pre-injury. Per *Peoples*, however, the post-injury job must have been attained in a competitive market; if the job provided post-injury was " 'so modified because of the employee's limitations that it is not ordinarily available in the competitive job market,' the job is 'make work' and is not competitive." *Jenkins v. Easco Aluminum*,

165 N.C. App. 86, 95, 598 S.E.2d 252, 258 (2004) (quoting *Peoples*, 316 N.C. at 438, 342 S.E.2d at 806).

Plaintiff argues that her position with Carolina By-Product—her post-injury employment—was so modified as to constitute make work. Plaintiff makes much of the fact that other employees had to assist her with her duties; however, as the Full Commission noted, when plaintiff was hired by Carolina By-Products after her injury, the company "was aware of her restrictions[.]" Plaintiff does not dispute the Full Commission's conclusion that the employment with Carolina By-Products "was actually obtained by plaintiff in the competitive market, and was not proffered by the defendant-employer."

Plaintiff argues that the position was thereafter modified to the extent that it is not indicative of her ability to find employment elsewhere. *See Peoples*, 316 N.C. at 438, 342 S.E.2d at 806. This argument bleeds into her next argument: That the Full Commission's conclusion on this point was not based on competent findings of fact. Essentially, plaintiff argues that the Commission should have believed her version of the facts (wherein her duties were heavily modified to suit her physical limitations) rather than the testimony of Roger Dunhoft ("Dunhoft") (wherein her duties were not heavily modified) because he did not have adequate knowledge of her situation. She asks this Court to disregard his testimony on that basis. However,

> [t]he Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony. The courts may set aside findings of fact only upon the ground they lack evidentiary support. The court does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding.

Anderson v. Construction Co., 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965) (citations omitted).

It is clear from the record that Dunhoft was plaintiff's direct supervisor for nearly a year and had contact with her on a daily basis. He testified as to her assigned work, the work of persons in the same job, and modifications that had been made for plaintiff because of her disability. This testimony is covered in detail in the Full Commission's findings of fact 21 and 22. We cannot say, therefore, that no evidentiary basis exists to support the Full Commission's findings on these points.

Because plaintiff has not shown that the Full Commission misapplied the law nor that its findings of fact were not based on competent evidence, we overrule these assignments of error.

B.

[2] As this Court has noted before, the other method by which benefits may be claimed under the Workers' Compensation Act is provided by N.C. Gen. Stat. § 97-31. The Full Commission's conclusion as to this statute stated:

> [T]he only remedy available to plaintiff at this juncture is to receive payment for the twelve percent (12%) permanent partial disability rating to her left arm per N.C. Gen. Stat. § 47-31(13). [Plaintiff's doctor] found plaintiff to be at maximum medical improvement following her second surgery on July 1, 2002, and assigned the twelve percent (12%) rating to plaintiff's left arm. Maximum medical improvement is defined as the point [at] which the condition or injury has stabilized with respect to further improvement. . . . [Plaintiff's doctor] testified that as of July 1, 2002, plaintiff's injury had stabilized. Based on the evidence of record, plaintiff has provided no rational basis—in law or fact—upon which to find that plaintiff should be able to defer the only remedy available to her at this juncture, which is to receive payment for the twelve percent (12%) permanent partial disability rating to her left arm per N.C. Gen. Stat. § 97-31(13).

Plaintiff argues that defendant cannot force her to elect a remedy for her disability. This argument is flawed in two respects: First, per N.C. Gen. Stat. § 97-83 (2007), "upon the arising of a dispute under this Article, either party may make application to the Commission for a hearing in regard to the matters at issue, and for a ruling thereon"; thus, defendant was permitted to request a hearing as to plaintiff's benefits under the Act in the first place. Second, per the Full Commission's ruling, plaintiff does not have two remedies between which to pick; the Full Commission held that she is entitled to benefits only under N.C. Gen. Stat. § 97-31, a ruling we affirmed above. Thus, this argument is without merit.

We note that plaintiff argues at length that *Knight v. Wal-Mart Stores, Inc.*, "expressly gives the choice solely to the claimant as to when to make an election with regard to benefits for permanent injury" and states that "the right to petition the Commission to seek indemnity compensation lies with the claimant, not the defendants[.]"

Knight, 149 N.C. App. 1, 16, 562 S.E.2d 434, 445 (2002). This argument misconstrues the holding of *Knight*. Plaintiff quotes this portion of the opinion in support of her argument: "MMI represents the first point in time at which the employee may elect, if the employee so chooses, to receive scheduled benefits for a specific physical impairment under N.C. Gen. Stat. § 97-31[.]" *Id.* (emphasis omitted). However, this statement is a summary point within an extended explanation of how the concept of MMI relates to N.C. Gen. Stat. §§ 97-29 and -31, as shown in this quote:

> There is a great deal of confusion regarding what significance, if any, the concept of MMI has within the context of a loss of wage-earning capacity pursuant to either N.C. Gen. Stat. § 97-29 or § 97-30, and this confusion has produced two lines of case law exemplified recently in two opinions simultaneously issued by this Court. . . .
>
> We have concluded that the primary significance of the concept of MMI is to delineate a crucial point in time only within the context of a claim for scheduled benefits under N.C. Gen. Stat. § 97-31, and that the concept of MMI does not have any direct bearing upon an employee's right to continue to receive temporary disability benefits once the employee has established a loss of wage-earning capacity pursuant to N.C. Gen. Stat. § 97-29 or § 97-30.

Id. at 13-14, 562 S.E.2d at 443 (emphasis omitted). This meaning can also be seen if the context of the quote plaintiff uses is given:

> The primary significance of the concept of MMI . . . is to delineate when "the healing period" ends and the statutory period begins in cases involving an employee who may be entitled to benefits for a physical impairment listed in N.C. Gen. Stat. § 97-31. In other words, MMI represents the first point in time at which the employee may elect, *if the employee so chooses*, to receive scheduled benefits for a specific physical impairment under N.C. Gen. Stat. § 97-31 (without regard to any loss of wage-earning capacity). MMI does not represent the point in time at which a loss of wage-earning capacity under N.C. Gen. Stat. § 97-29 or § 97-30 automatically converts from "temporary" to "permanent."

Id. at 16, 562 S.E.2d at 445 (footnote omitted). Plaintiff misconstrues the holding of *Knight*, which in no way bars defendant from asking the Full Commission to resolve this case.

III.

[3] Plaintiff next argues that the Full Commission did not, as it is required to do, consider all evidence presented. Essentially, plaintiff's argument is that the Full Commission must not have considered the evidence presented because it did not indicate having done so by making findings of fact regarding them. Part of her argument is that the deputy commissioner's order did so, and thus the Full Commission erred in not including them as well. This argument is without merit.

It is true that "before finding the facts, the Industrial Commission must consider and evaluate all of the evidence[,]" *Lineback v. Wake County Board of Commissioners*, 126 N.C. App. 678, 680, 486 S.E.2d 252, 254 (1997), and "may not discount or disregard any evidence, but may choose not to believe the evidence after considering it." *Weaver v. American National Can Corp.*, 123 N.C. App. 507, 510, 473 S.E.2d 10, 12 (1996) (emphasis omitted). However, in this case, the Full Commission's opinion states outright that it "affirms the Opinion and Award of Deputy Commissioner Deluca *with modifications*." (Emphasis added.) That is, the Full Commission's opinion is not an order meant to stand on its own, but rather a modification of the deputy commissioner's order. As plaintiff herself states, the facts at issue were included in the deputy commissioner's order. We see no reason to require that such an order restate all the findings of fact and conclusions of law from the original order that need no modification. Considering that defendants filed an appeal containing thirty-two alleged errors, it is not surprising that the Full Commission did not address each individually.

[4] However, the same does not hold true for plaintiff's argument about the Full Commission's failure to address the adjustment of her weekly wage in its order. The deputy commissioner's order stated: "Defendants[2] shall complete a Form 22 and pay any arrearages that it may indicate." Defendant subsequently completed a Form 22 and filed a notice of appeal as to that portion of the order. The Full Commission's opinion and award does not address the form or that appeal, which plaintiff argues was error. We agree. The Full Commission's opinion and award simply repeats the finding of fact as to plaintiff's weekly wage made by the deputy commissioner's opinion and award, with no reference to the Form 22 filed by defendant in the interim. Whereas with other omitted findings we may assume that the

2. "Defendants" (plural) here refers to both defendant-employer and defendant Travelers Insurance Co.

Full Commission simply wished to affirm the deputy commissioner's opinion and award, here new evidence has arisen between the hearings, and the Full Commission must address that new evidence in its opinion and award. As such, we reverse only the portion of the opinion and award that calculates plaintiff's weekly wage and remand to the Full Commission for findings only as to this figure.

IV.

Because there is no evidence in the record that the Full Commission considered the Form 22 filed by defendant, we remand to the Full Commission for findings only as to the calculation of plaintiff's weekly wage. Because the Full Commission did not otherwise err in its opinion and award, we affirm as to the remainder.

Affirmed in part; reversed in part.

Judges BRYANT and JACKSON concur.

KEITH SMITH AND MARY SMITH, PLAINTIFFS v. BLYTHE DEVELOPMENT COMPANY, DEFENDANT

No. COA07-1576

(Filed 19 August 2008)

Construction Claims; Negligence— causation—flooding—summary judgment—expert witness testimony not required—sufficiency of lay witness testimony

The trial court erred by granting defendant construction company's motion for summary judgment on the erroneous basis that an expert witness was required to prove negligence arising from the flooding of plaintiffs' basement soon after defendant's completion of construction work for the North Carolina Department of Transportation on the portion of a road directly in front of plaintiffs' residence, because the facts were such that a layperson could form an intelligent opinion about the causation of the flood based on evidence that: (1) plaintiffs submitted sworn affidavits and averred that they had lived in their current residence for twenty-two years and had never experienced any flooding prior to the pertinent incident; (2) plaintiffs asserted their yard, including the grading, was neither changed prior to nor has it been

changed since the flooding; (3) plaintiffs' allegations of flooding were substantiated by defendant's own employees who acknowledged that there was runoff onto plaintiffs' front lawn; and (4) a grade foreman stated that at the time he arrived at plaintiffs' residence, the draining pipe was completely clogged up and full of debris, and plaintiffs have not experienced any type of flooding issue since defendant subsequently ordered that the pertinent drainage ditch be cleared. Although defendant submitted the sworn affidavit of a registered engineer as an expert witness who gave a conflicting opinion, the question of causation created a genuine issue of material fact that should have been submitted to the jury.

Judge JACKSON dissenting.

Appeal by plaintiffs from order entered 1 October 2007 by Judge Richard D. Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 11 June 2008.

Grier, Furr & Crisp, P.A., by Alan M. Presel, for plaintiff-appellants.

York, Williams, Barringer, Lewis & Briggs, L.L.P., by Gregory C. York and Angela M. Easley, for defendant-appellee.

TYSON, Judge.

Keith and Mary Smith (collectively, "plaintiffs") appeal from order entered granting Blythe Development Company's ("defendant") motion for summary judgment. We reverse and remand for further proceedings.

I. Background

In December 2003, defendant entered into a contract with the North Carolina Department of Transportation ("NCDOT") to widen, resurface, and expand the shoulder of John Russell Road in Charlotte, North Carolina. On or about 24 September 2004, defendant performed construction work on the portion of John Russell Road located directly in front of plaintiffs' residence. Soon after completion of the construction work, a heavy rain flooded plaintiffs' basement.

On 7 February 2007, plaintiffs filed a complaint against defendant alleging one count of negligence. Plaintiffs asserted "[b]y closing up,

blocking, removing and/or taking similar action with respect to the drainage ditch in front of [plaintiffs'] [p]roperty, [d]efendant failed to adhere to the accepted standard of care in performing its services." Plaintiffs further asserted "[a]s a direct and proximate result of [d]efendant's failure to adhere to the accepted standard of care in performing its services, [p]laintiffs have suffered damages[.]" Plaintiffs prayed for actual damages and reasonable attorney's fees. On 10 April 2007, defendant filed an answer denying the material allegations therein and sought the costs of the action be taxed against plaintiffs.

On 27 August 2007, plaintiffs filed a motion for summary judgment. On 30 August 2007, defendant also filed a motion for summary judgment and sought dismissal of plaintiffs' action with prejudice. On 1 October 2007, the trial court entered its order, which: (1) denied plaintiffs' motion for summary judgment; (2) granted defendant's motion for summary judgment; and (3) dismissed plaintiffs' claim with prejudice. Plaintiffs appeal.

II. Issue

Plaintiffs argue the trial court erred by granting defendant's motion for summary judgment.

III. Summary Judgment

A. Standard of Review

> Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. The party moving for summary judgment ultimately has the burden of establishing the lack of any triable issue of fact.
>
> A defendant may show entitlement to summary judgment by (1) proving that an essential element of the plaintiff's case is non-existent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense. Summary judgment is not appropriate where matters of credibility and determining the weight of the evidence exist.
>
> Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a

> forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial.
>
> We review an order allowing summary judgment *de novo*. If the granting of summary judgment can be sustained on any grounds, it should be affirmed on appeal.

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

B. Analysis

Plaintiffs argue the trial court erred by granting summary judgment in favor of defendant "on the basis that an expert witness is required to prove negligence." We agree.

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. *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 (1979) (citation omitted).

This Court has addressed the issue of whether expert testimony is required to establish the element of causation in flooding cases with differing results based upon the complexity of the facts presented. *See BNT Co. v. Baker Precythe Dev. Co.*, 151 N.C. App. 52, 564 S.E.2d 891, *disc. rev. denied*, 356 N.C. 159, 569 S.E.2d 283 (2002); *Davis v. City of Mebane*, 132 N.C. App. 500, 512 S.E.2d 450 (1999), *disc. rev. improvidently allowed*, 351 N.C. 329, 524 S.E.2d 569 (2000). In *Davis v. City of Mebane*, the plaintiffs' properties were repeatedly flooded after a hydroelectric dam was constructed upstream from their respective properties. 132 N.C. App. at 501, 512 S.E.2d at 451. The plaintiffs contended the flooding was due to the negligent design and location of the dam, but were forced to rely solely upon lay testimony to support their assertion. *Id.* at 501-02, 512 S.E.2d at 451-52. The defendants argued that "lay testimony that there was no flooding before the dam was built and significant flooding after the dam was built [was] not sufficient to survive a motion for summary judgment."

Id. at 504, 512 S.E.2d at 453. This Court agreed with the defendants' assertion and stated "lay testimony would not be sufficient to explain changes in the watershed or in the downstream water flow." *Id.* This Court ultimately held that expert testimony was required to establish causation "[w]here . . . the subject matter . . . is 'so far removed from the usual and ordinary experience of the average man that expert knowledge is essential to the formation of an intelligent opinion . . . as to the cause of . . . [the] condition.' " *Id.* (quoting *Gillikin v. Burbage*, 263 N.C. 317, 325, 139 S.E.2d 753, 760 (1964)).

Several years later in *BNT Co. v. Baker Precythe Dev. Co.*, this Court revisited the issue of causation in negligence actions arising from repeated flooding. 151 N.C. App. at 52, 564 S.E.2d at 891. This Court acknowledged that the factual scenario presented in *BNT* was clearly distinguishable from the facts presented in *Davis*. *Id.* at 57, 564 S.E.2d at 895. In *BNT*, the plaintiffs owned 12 acres immediately south of the defendant's 17.472 acre tract. *Id.* at 54, 564 S.E.2d at 894. The defendant intentionally closed a drainage ditch located on its property, which caused repeated flooding and substantial damage to plaintiffs' properties. *Id.* at 55, 564 S.E.2d at 894.

An expert witness testified on behalf of the defendant and opined that the closing of the ditch had "an insignificant effect" on the plaintiffs' properties during the major storm events and that the flooding was due to "low elevation." *Id.* at 55, 564 S.E.2d at 894. The defendant argued that the plaintiffs had failed to present expert testimony to establish the element of causation. *Id.* at 57, 564 S.E.2d at 895. This Court stated, "[u]nlike the unusual circumstances in *Davis*, the facts of the instant case are such that a layperson could form an intelligent opinion about whether the flooding was caused by the closing of the ditch." *Id.*

This Court held that the plaintiffs had presented sufficient evidence to support the jury's verdict on the element of causation based upon testimony indicating: (1) one of the plaintiffs had owned his property since 1962 and had never experienced any flooding prior to the defendant closing the ditch in 1998; (2) once the ditch was closed the plaintiffs' land flooded "every time it rained[;]" (3) BNT properties did not flood during the rainstorms that accompanied Hurricanes Bertha and Fran in 1996, but following the closing of the ditch in June 1998, those properties flooded on several occasions; and (4) BNT was unable to rent the houses on its lots due to repeated flooding. *Id.* at 57, 564 S.E.2d at 895-96. Plaintiffs argue the reasoning in *BNT* controls the outcome of the case at bar. We agree.

Here, plaintiffs submitted sworn affidavits and averred that they had lived in their current residence for twenty-two years and had never experienced any flooding prior to the incident now at issue. Plaintiffs further asserted that "[their] yard, including the grade, was neither changed prior to nor has it been changed since the flood[.]"

It is undisputed that defendant performed construction work on John Russell Road directly in front of plaintiffs' residence prior to the flooding. Specifically, defendant resurfaced the road and reconstructed the shoulders. In order to reconstruct the shoulders of the road, "dirt" and "earth material" were used to "fill the gap between the new inch and a half of asphalt that's placed over the existing road and what is currently existing[.]" A project manager for defendants also admitted in his deposition testimony that no "erosion control fencing" was installed prior to or after the shoulder reconstruction.

On 27 September 2004, after a heavy rainstorm, plaintiffs discovered their basement was flooded with approximately one foot of water. Plaintiffs alleged: (1) the drainage ditch located in front of their property had been "filled in" and (2) that the cause of the flood was evidenced by a "path of debris, including dirt and asphalt, from the front of [their] house toward the backyard." Plaintiffs' allegations were substantiated by defendant's own employees. Three different employees acknowledged there was "runoff" onto plaintiffs' front lawn. Further, Patrick Stewart, a grade foreman for Blythe Brothers Asphalt, stated that at the time he arrived at plaintiffs' residence, "the [drainage] pipe was completely clogged up" and "full of debris." Defendant subsequently ordered the drainage ditch to be cleared. Since that time, plaintiffs have not experienced any type of flooding issue. Following the reasoning in *BNT*, this lay witness testimony is sufficient to raise an inference to support the element of causation.

However, defendant submitted the sworn affidavit of Steven W. Morris ("Morris"), a registered engineer, as an expert witness to testify on its behalf. Morris averred in his sworn affidavit that "[a]ny alterations of the ditch . . . would not have substantively changed the surface water runoff on the property [and] [n]o work performed by the [d]efendant . . . changed the surface water runoff at the rear of the [p]laintiffs' residence." Morris further averred "pre-existing conditions in the backyard of the [p]laintiffs' residence and/or a breach of the residence's waterproofing and/or ground water perking up through the joints in the basement slab" caused the flooding in plaintiffs' basement.

Because a conflict in the forecasted evidence exists, the question of causation created a genuine issue of material fact and should be submitted for a jury's determination. *See Bjornsson v. Mize*, 75 N.C. App. 289, 292, 330 S.E.2d 520, 523 (1985) ("There is a conflict in the forecasts of evidence offered by the parties. The plaintiffs offered affidavits from which a jury could find that the flooding was caused in part by the Mize development and in part by the downstream drainage system. In opposition to this showing the Mizes offered affidavits which tended to show that the flooding was caused entirely by an inadequate drainage system downstream from the plaintiffs' property. *The question of causation is a question of fact; therefore, the trial court erred in granting summary judgment in favor of the Mize defendants.*" (Emphasis supplied)).

IV. Conclusion

Genuine issues of material fact exist regarding whether defendant was negligent in the reconstruction of John Russell Road and proximately caused the flood damage to plaintiffs' basement and its contents. The trial court erred by granting defendant's motion for summary judgment. The trial court's order is reversed. This matter is remanded for further proceedings not inconsistent with this opinion.

Reversed and Remanded.

Judge HUNTER concurs.

Judge JACKSON dissents by separate opinion.

JACKSON, J., dissenting.

Because plaintiffs failed to specifically rebut defendant's expert testimony, I must respectfully dissent. I would affirm.

The majority is correct in stating that when a conflict in the forecasted evidence exists, there is a genuine issue of material fact that should be submitted to the jury for its determination. However, " '[o]nce the party seeking summary judgment makes the required showing [that an essential element of the opponent's case is nonexistent], 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.' " *Wilkins v. Safran*, 185 N.C. App. 668, 672, 649 S.E.2d 658, 661 (2007) (quoting *Draughon v. Harnett County Bd. of Educ.*, 158 N.C.

App. 208, 212, 580 S.E.2d 732, 735 (2003) (quotations omitted), *aff'd*, 358 N.C. 131, 591 S.E.2d 521 (2004) (per curiam)). It is by this method that parties to a hearing on summary judgment establish that there is, or is not, a genuine issue of material fact.

Here, defendant provided expert testimony indicating that plaintiff could not prove the element of causation. Specifically, defendant provided an affidavit in which its expert concluded that in his opinion, "any work performed by [defendant] did not cause the basement flooding alleged by [plaintiffs] or the subsequent damage to [p]laintiffs' property." This conclusion was based on several underlying expert opinions:

> 4. Any alterations of the ditch on the Plaintiffs' property by the Defendant, Blythe Development Company, would not have substantively changed the surface water runoff on the property.
>
> 5. No work performed by the Defendant, Blythe Development Company, changed the surface water runoff at the rear of the Plaintiffs' residence.
>
> 6. Pre-existing conditions at the back basement door of the Plaintiffs' residence would have directed some surface water runoff towards the residence.
>
> 7. No work performed by the Defendant, Blythe Development Company, altered the pre-existing conditions at the back basement door of the Plaintiffs' residence.
>
> 8. Except for the pre-existing conditions noted in Number 6, the general grading at the Plaintiffs' property would be expected to direct surface water runoff away from the residence's back basement door such that surface water runoff from the front yard of the residence would not be directed towards the back basement door.
>
> 9. Any work performed by the Defendant, Blythe Development Company, did not alter the general grading at the Plaintiffs' property.
>
> 10. Whatever water was in the basement of the Plaintiffs' residence on or about September 27, 2004 was caused by the pre-existing conditions in the backyard of the Plaintiffs' residence and/or a breach of the residence's waterproofing and/or ground water perking up through the joints in the basement slab.

After having made this showing, it was incumbent upon plaintiffs to "produce a forecast of evidence demonstrating specific facts, as opposed to allegations," rebutting defendant's evidence.

In support of their motion for summary judgment, plaintiffs filed five affidavits—their own and those of family members. None of the affidavits forecast specific facts to rebut defendant's expert opinions. Therefore, plaintiffs failed to meet their burden to establish the existence of a genuine issue of material fact requiring summary judgment be denied. Having failed to meet this burden, the trial court did not err in granting summary judgment in defendant's favor. Therefore, I would affirm.

KEITH CHRISTMAS, AS EXECUTOR AND PERSONAL REPRESENTATIVE FOR THE ESTATE OF ALEXANDR RAYMOND JOHNSON-CHRISTMAS, PLAINTIFF v. CABARRUS COUNTY; CABARRUS COUNTY DEPARTMENT OF SOCIAL SERVICES; JAMES F. COOK, JR., INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE CABARRUS COUNTY DEPARTMENT OF SOCIAL SERVICES; CONNIE POLK, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS SUPERVISOR/PROGRAM ADMINISTRATOR OF CABARRUS COUNTY DEPARTMENT OF SOCIAL SERVICES; HOPE MOOSE, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS SUPERVISOR OF CABARRUS COUNTY DEPARTMENT OF SOCIAL SERVICES; ANGELA BEAMER RATLIFF, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS SUPERVISOR OF CABARRUS COUNTY DEPARTMENT OF SOCIAL SERVICES; JANE DOE AND JOHN DOE, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES AS SUPERVISORS/PROGRAM ADMINISTRATORS OF THE CABARRUS COUNTY DEPARTMENT OF SOCIAL SERVICES; CRYSTALLE WILLIAMS, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS SOCIAL WORKER FOR THE CABARRUS COUNTY DEPARTMENT OF SOCIAL SERVICES; TONYA HART, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS SOCIAL WORKER FOR THE CABARRUS COUNTY DEPARTMENT OF SOCIAL SERVICES; ROBIN FOX, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS SOCIAL WORKER FOR THE CABARRUS COUNTY DEPARTMENT OF SOCIAL SERVICES; CHRISTY BELK, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS SOCIAL WORKER FOR THE CABARRUS COUNTY DEPARTMENT OF SOCIAL SERVICES; CAROLINE LEAVELLE, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS SOCIAL WORKER FOR THE CABARRUS COUNTY DEPARTMENT OF SOCIAL SERVICES; DONNA DOE AND DAVID DOE, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES AS SOCIAL WORKERS FOR THE CABARRUS COUNTY DEPARTMENT OF SOCIAL SERVICES, DEFENDANTS

No. COA07-1301

(Filed 19 August 2008)

1. Appeal and Error— appealability—sovereign immunity—substantial right

Although defendant's appeal in a wrongful death case from the denial of its motion to dismiss was from an interlocutory order, it was immediately appealable because cases present-

ing defenses of governmental or sovereign immunity affect a substantial right.

2. Counties; Immunity— official capacity—home assessment performed by Department of Social Services—public duty doctrine inapplicable

The trial court did not err in a wrongful death action, alleging negligence of a county department of social services (DSS), by denying defendants' motion to dismiss plaintiff's complaint against them in their official capacities based on the public duty doctrine because: (1) although our Supreme Court has extended the public duty doctrine to cover state agencies where a duty is conferred on the agency by statute and the General Assembly intends for the statute to protect the public as a whole, the public duty doctrine has not been expanded to any local government agencies other than law enforcement departments when they are exercising their general duty to protect the public as a whole; and (2) the home assessment performed by DSS that is required by N.C.G.S. § 7B-302 is different from the mandatory statutory requirements of state agencies to protect the public in general and law enforcement departments who exercise a general duty to protect the public at large, and thus the public duty doctrine did not cover defendants.

Appeal by defendant from orders filed 23 July 2007 and 7 August 2007 by Judges Susan C. Taylor and Clarence E. Horton, Jr., in Cabarrus County Superior Court. Heard in the Court of Appeals 20 March 2008.

Law Office of G. Lee Martin, P.A., by G. Lee Martin; and Law Offices of Mary Beth Smith, by Mary Beth Smith, for plaintiff appellee.

Templeton & Raynor, P.A., by Kenneth R. Raynor, for Cabarrus County, Cabarrus County Department of Social Services, James F. Cook, Jr., Connie Polk, Hope Moose, Angela Beamer Ratliff, Christy Belk, Robin Fox, Crystalle Williams, and Tonya Hart, defendant appellants.

Teague, Campbell, Dennis & Gorham, by Courtney C. Britt, for Caroline Leavelle defendant appellant.

McCULLOUGH, Judge.

On 29 March 2003, Tanya Yevette Johnson ("Johnson") gave birth to Alexandr Raymond Johnson-Christmas ("decedent"), son of Keith Christmas ("plaintiff"). Between 16 November 2004 and 24 December 2004, the Cabarrus County Department of Social Services ("DSS") received reports that decedent had various injuries, which included: knots and bruises on his body, head, and face; cuts on his lip and eye; and injuries to his hands and right buttock. On 16 November 2004 and 6 December 2004 DSS investigated and determined that decedent's household was conditionally safe. A physician at Northeast Medical Center notified DSS, on 24 December 2004, that decedent had possibly suffered a non-accidental trauma. Without an assessment of Johnson, the on-call social worker for DSS determined that decedent could be released back into her care and DSS would assess the case on 27 December 2004.

At the time of these events Johnson was living with her boyfriend Trevor Brown ("Brown"). On 31 December 2004, a social worker visited the home in response to the physician's 24 December 2004 report to DSS; however, no one answered the door. A note was left requesting Johnson to contact DSS. On 2 January 2005, Cabarrus County Emergency Medical Services ("EMS") was called to the home. Johnson informed EMS that decedent had been left at home with Brown for the day and when she returned decedent was vomiting and thirsty, but would not eat. Ultimately, around 4:00 a.m. decedent fell asleep. When Johnson awoke around 8:00 a.m., he was unresponsive. At 8:20 a.m., EMS pronounced decedent dead. An autopsy revealed multiple bodily injuries, and the cause of death was blunt trauma abdominal and head injuries. After an investigation was conducted, Brown was charged and convicted of felony child abuse with serious bodily injury and second-degree murder. Johnson was charged with involuntary manslaughter.

Plaintiff, on behalf of decedent's estate, brought this wrongful death action against Cabarrus County ("County"), Cabarrus County Department of Social Services ("DSS"), Director of DSS James Cook ("Cook"), DSS Supervisor/Program Administrator Connie Polk ("Polk"), DSS Supervisors Hope Moose ("Moose"), Angela Ratliff ("Ratliff"), DSS Social Workers Crystalle Williams ("Williams"), Tonya Hart ("Hart"), Robin Fox ("Fox"), and Christy Belk ("Belk"), and Intern Caroline Leavelle ("Leavelle"). In the complaint plaintiff alleges that DSS supervisory employees failed to adequately train and supervise subordinate employees. Plaintiff further alleges that Cook

negligently failed to adequately assign personnel, maintain workloads, request sufficient resources, implement policies and procedures needed to perform essential DSS functions, and comply with applicable guidelines and laws.

On 9 March 2007, Leavelle amended her answer to plaintiff's complaint, which raised governmental and public official immunity. Leavelle included a motion to dismiss plaintiff's claims in her individual and official capacity pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure and raised immunity under the public duty doctrine. Subsequent to Leavelle's motion, the rest of defendants filed timely motions to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure in their individual and official capacities. On 23 July 2007 and 16 August 2007, motions filed by defendants were heard in Cabarrus County Superior Court. The Honorable Susan C. Taylor and the Honorable Clarence E. Horton, Jr., granted the motions to dismiss plaintiff's claims against defendants in their individual capacities and denied motions to dismiss plaintiff's claims against defendants in their official capacities. All defendants filed timely notice of appeal.[1]

Preliminary Matter

[1] This is an interlocutory appeal, since it fails to "dispose[] of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *Veazey v. Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). Generally, there is no immediate appeal from an interlocutory order. *Harris v. Matthews*, 361 N.C. 265, 269, 643 S.E.2d 566, 568 (2007). "Appellate procedure is designed to eliminate the unnecessary delay and expense of repeated fragmentary appeals, and to present the whole case for determination in a single appeal from the final judgment." *Raleigh v. Edwards*, 234 N.C. 528, 529, 67 S.E.2d 669, 671 (1951). Where, however, the interlocutory order deprives the appellant of a substantial right which would be lost if not reviewed prior to final judgment, an appeal will lie. *See* N.C. Gen. Stat. § 1-277 (2007).

Cases which present defenses of governmental or sovereign immunity are immediately appealable because such orders affect a substantial right. *See*, *i.e.*, *Smith v. Jackson Cty. Bd. of Educ.*, 168 N.C. App. 452, 458, 608 S.E.2d 399, 405 (2005). The rationale for the exception to the general rule stems from the nature of the immunity

1. On 25 September 2007, defendants gave notice of joinder of their appeals pursuant to Rule 5 of the North Carolina Rules of Appellate Procedure and filed one brief.

defense. "A valid claim of immunity is more than a defense in a lawsuit; it is in essence immunity from suit. Were the case to be erroneously permitted to proceed to trial, immunity would be effectively lost." *Slade v. Vernon*, 110 N.C. App. 422, 425, 429 S.E.2d 744, 746 (1993). In the instant case, defendants have asserted they are not liable for decedent's death because the public duty doctrine provides immunity. Defendants' appeal is therefore properly before this Court.

I.

[2] Defendants argue the trial court erred by denying their motion to dismiss plaintiff's complaint against them in their official capacities. Specifically, defendants contend the public duty doctrine bars plaintiff's claims against defendants in their official capacity; therefore, the trial court erred in not granting their motion. We disagree.

On appeal from a motion to dismiss under Rule 12(b)(6), this Court reviews *de novo* "whether, as a matter of law, the allegations of the complaint . . . are sufficient to state a claim upon which relief may be granted[.]" *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987). We consider the allegations in the complaint true, construe the complaint liberally, and only reverse the trial court's denial of a motion to dismiss if plaintiff is entitled to no relief under any set of facts which could be proven in support of the claim. *Hyde v. Abbott Laboratories*, 123 N.C. App. 572, 575, 473 S.E.2d 680, 682, *disc. review denied*, 344 N.C. 734, 478 S.E.2d 5 (1996).

A county's liability for the torts of its officers and employees depends on whether the activity involved is "governmental" or "proprietary" in nature. *Hare v. Butler*, 99 N.C. App. 693, 698, 394 S.E.2d 231, 235, *disc. review denied*, 327 N.C. 634, 399 S.E.2d 121 (1990). Traditionally, a county was immune from torts committed by an employee carrying out a governmental function, but was liable for torts committed by an employee engaged in a proprietary function. *Id.*

Our Supreme Court has laid out the following distinction between governmental and proprietary acts:

> When a municipality is acting "in behalf of the State" in promoting or protecting the health, safety, security or general welfare of its citizens, it is an agency of the sovereign. When it engages in a public enterprise essentially for the benefit of the compact community, it is acting within its proprietary powers. In either event it must be for a public purpose or public use.

> So then, generally speaking, the distinction is this: If the undertaking of the municipality is one in which only a governmental agency could engage, it is governmental in nature. It is proprietary and "private" when any corporation, individual, or group of individuals could do the same thing. Since, in either event, the undertaking must be for a public purpose, any proprietary enterprise must, of necessity, at least incidentally promote or protect the general health, safety, security or general welfare of the residents of the municipality.

Britt v. Wilmington, 236 N.C. 446, 450-51, 73 S.E.2d 289, 293 (1952).

"Investigations by a social service agency of allegations involving child sexual abuse are in the nature of governmental functions." *Hare*, 99 N.C. App. at 699, 394 S.E.2d at 235. Such activities are performed for the public good; therefore, a county is normally immune from liability for injuries caused by negligent social services employees working in the course of their duties. *Id.* However, the General Assembly has authorized suit when counties purchase liability insurance. In such cases the county waives immunity from negligent actions that occur in the performance of governmental functions. N.C. Gen. Stat. § 153A-435(a) (2007). Here, plaintiff has alleged that defendants purchased liability insurance. If this is true, DSS, as a county agency, and the county employees may be liable for negligent or intentional actions carried out in the performance of their social services duties. *See Hare*, 99 N.C. App. at 699, 394 S.E.2d at 236.

In this case, the County was performing a governmental function designed to benefit a narrow class of people in assessing the physical safety of the decedent. According to plaintiff, defendants negligently performed their governmental functions. However, defendants claim they are not responsible for these allegations of negligence because they possessed immunity from such claims under the public duty doctrine.

Our Supreme Court specifically adopted the public duty doctrine for the first time in *Braswell v. Braswell*, 330 N.C. 363, 410 S.E.2d 897, *reh'g denied*, 330 N.C. 854, 413 S.E.2d 550 (1991):

> The general common law rule, known as the public duty doctrine, is that a municipality and its agents act for the benefit of the public, and therefore, there is no liability for the failure to furnish police protection to specific individuals. This rule recognizes the limited resources of law enforcement and refuses to judicially

> impose an overwhelming burden of liability for failure to prevent every criminal act.

Id. at 370-71, 410 S.E.2d at 901 (citations omitted) (discussing the public duty doctrine in terms of plaintiff's claims against the Sheriff of Pitt County for failure to provide the plaintiff with protection). Since *Braswell*, the Supreme Court of North Carolina has applied the public duty doctrine in limited situations. *See, e.g.*, *Stone v. N.C. Dept. of Labor*, 347 N.C. 473, 495 S.E.2d 711, *reh'g denied*, 348 N.C. 79, 502 S.E.2d 836, *cert. denied*, 525 U.S. 1016, 142 L. Ed. 2d 449 (1998) (holding the public duty doctrine applies because the Department of Labor's duty to inspect workplaces serves the public at large, not individual employees); *Hunt v. N.C. Dept. of Labor*, 348 N.C. 192, 499 S.E.2d 747 (1998) (holding the public duty doctrine applies to claims for failure to properly inspect go-carts because the claim was brought under the Tort Claims Act and the plaintiff failed to establish an exception to the doctrine based on a special relationship or a special duty); *Myers v. McGrady*, 360 N.C. 460, 628 S.E.2d 761 (2006) (holding the public duty doctrine applied because the state agency owed a general statutory duty to the public at large to make a public highway safe where the highway is adjacent to a natural fire).

Our Supreme Court has extended the public duty doctrine to cover state agencies where a duty is conferred on the agency by statute and the General Assembly intends for the statute to protect the public as a whole. *Myers*, 360 N.C. at 468, 628 S.E.2d at 767. However, they have not expanded the public duty doctrine to any local government agencies other than law enforcement departments when they are exercising their general duty to protect the public as a whole. *See Isenhour v. Hutto*, 350 N.C. 601, 608, 517 S.E.2d 121, 126 (1999) (refusing to extend the public duty doctrine to shield a city from liability for the allegedly negligent acts of a school crossing guard); *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) (refusing to extend the public duty doctrine to shield a city from liability for the allegedly negligent acts of a 911 operator). "This Court has not heretofore applied the public duty doctrine to a claim against a municipality or county in a situation involving any group or individual other than law enforcement." *Thompson v. Waters*, 351 N.C. 462, 465, 526 S.E.2d 650, 652, *reh'g denied*, 352 N.C. 157, 544 S.E.2d 244 (2000).

N.C. Gen. Stat. § 7B-302 (2007) requires DSS to perform an assessment of the child's home environment to ascertain the facts of

the case. N.C. Gen. Stat. § 7B-302(2007). Based on this statute the assessment of the individual's home occurs after a report of "abuse, neglect, or dependency" to DSS. This home assessment is different from the mandatory statutory requirements of state agencies to protect the public in general and law enforcement departments who exercise a general duty to protect the public at large as discussed in *Lovelace* and *Isenhour*. Therefore, we decline to extend the public duty doctrine to cover defendants. *See Lovelace*, 351 N.C. 458, 526 S.E.2d 652; *Isenhour*, 350 N.C. 601, 517 S.E.2d 121. After reviewing the record, we hold plaintiff's allegations are sufficient to state a claim upon which relief may be granted. Thus, defendants' argument is without merit.

II.

Defendants argue the trial court erred in denying their motion to dismiss because plaintiff did not specifically allege an exception to the public duty doctrine. Because we hold the public duty doctrine does not apply, it is irrelevant that plaintiff failed to allege an exception to the doctrine. We find this issue moot.

No error.

Judges STEELMAN and ARROWOOD concur.

BRENDA LIVESAY, Trustee of the Ronald Livesay and Brenda Livesay Family Trust dated March 26, 1998, BRENDA LIVESAY, Guardian ad Litem for Candice Livesay and Ron Livesay, Jr., and BRENDA LIVESAY, Individually, Plaintiff v. CAROLINA FIRST BANK, SAFECO CORPORATION, FIRST NATIONAL INSURANCE COMPANY OF AMERICA, and E.K. MORLEY, Administrator C.T.A. of the Estate of Ronald B. Livesay, Deceased, Defendants

No. COA07-1578

(Filed 19 August 2008)

1. Trusts— assets subject to debts—revocability of trust

There was no genuine issue of material fact concerning the revocability of a trust, and the court did not err by granting partial summary judgment for defendants in a declaratory judgment action to determine whether trust assets were subject to the debts of the trustor-decedent's estate.

2. Trusts— assets subject to debts—applicable statute

The trial court properly followed N.C.G.S. § 36C-5-505 rather than N.C.G.S. § 36A-115 in granting partial summary judgment for defendants in a declaratory judgment action to determine whether trust assets were subject to the debts of trustor-decedent's estate. This was not a discretionary, support, or protective trust.

3. Trusts— revocable—no vested rights—assets subject to debts

The beneficiaries of a revocable trust have no vested rights, merely an expectancy, and no constitutionally protected rights to trust assets. The grant of partial summary judgment against plaintiff in a declaratory judgment action to determine whether trust assets were subject to the debts of the trustor-debtors estate was not erroneous.

Appeal by plaintiff from an order entered 20 July 2007 by Judge Mark E. Powell in Henderson County Superior Court. Heard in the Court of Appeals 21 May 2008.

Gary A. Dodd and Charles Brewer, for plaintiff-appellant.

Smith Moore LLP, by James G. Exum, Jr.; Poyner & Spruill LLP, by Judy Thompson; and Robinson, Bradshaw & Hinson, P.A., by Scott W. Gaylord, for defendants-appellees.

JACKSON, Judge.

Brenda Livesay ("plaintiff"), individually and in her capacities as the Trustee of the Ronald Livesay and Brenda Livesay Family Trust ("the trust"), and as the guardian *ad litem* for Candice Livesay and Ron Livesay, Jr., appeals the trial court's granting of partial summary judgment in favor of Carolina First Bank, Safeco Corporation, First National Insurance Company of America, and E.K. Morley—Adminstrator CTA of the Estate of Ronald B. Livesay ("defendants"). For the reasons stated below we affirm.

In 1998, plaintiff and Ronald Livesay ("decedent"), as trustors, entered into a trust agreement, creating the trust for the benefit of the trustors and their children. Pursuant to the trust instrument, during their joint lives, the trustors enjoyed (1) the right to distributions of income, (2) the right to distributions of principal, (3) the right to revoke the trust in whole or in part, and (4) the right to alter or amend

the trust. Further, contributions to the trust assets were to retain their original character such that in the event of revocation, no rights existing prior to contribution would be diminished. Decedent was the initial trustee.

Upon the death of either trustor, the trust was to inure to the benefit of the surviving trustor and the trustors' children for their "health, education, and welfare." Upon the death of the surviving trustor, the trust was to inure to the benefit of the trustors' children, but no principal would be distributed until they reached the age of twenty-five. Decedent died on 1 July 2005.

On 30 December 2005, plaintiff—in her capacity as successor trustee of the trust, and otherwise—filed a declaratory judgment action seeking a declaration that the trust assets were not subject to the debts of decedent's estate. On 22 February 2006, the case was removed to the United States District Court for the Western District of North Carolina. On 7 June 2006, defendant E.K. Morley—as Administrator CTA of decedent's estate—moved to intervene in the federal action, which motion was granted by order dated 14 July 2006. He further counterclaimed, seeking to make the trust assets subject to the claims of estate creditors.

Defendants filed a joint motion for partial summary judgment in federal court on 10 November 2006. On 3 January 2007, plaintiff filed a motion to dismiss, or in the alternative, to remand to state court. Plaintiff's motion to remand was granted by order filed 9 May 2007.

Defendants filed a joint motion for partial summary judgment in state court on 6 June 2007. Defendants' motion was heard on 3 July 2007, and granted by order filed 20 July 2007. Plaintiff filed a notice of appeal on 27 July 2007, and posted an appeal bond that same day. She voluntarily dismissed, without prejudice, her remaining cause of action on 3 August 2007, and re-filed a notice of appeal on 8 August 2007.

[1] Plaintiff first argues that there are genuine issues of material fact such that the granting of defendants' motion for partial summary judgment was in error. We disagree.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2007). "An issue is 'genuine'

if it can be proven by substantial evidence and a fact is 'material' if it would constitute or irrevocably establish any material element of a claim or a defense." *Lowe v. Bradford*, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982) (citing *Bone International, Inc. v. Brooks*, 304 N.C. 371, 374-75, 283 S.E.2d 518, 520 (1981)).

In deciding a motion for summary judgment, a trial court must consider the evidence in the light most favorable to the non-moving party. *See Summey 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). We review an order allowing summary judgment *de novo*. *Summey*, 357 N.C. at 496, 586 S.E.2d at 249.

The moving party bears the burden of showing that no triable issue of fact exists. *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985) (citing *Texaco, Inc. v. Creel*, 310 N.C. 695, 314 S.E.2d 506 (1984)). This burden can be met by proving: (1) that an essential element of the non-moving party's claim is nonexistent; (2) that discovery indicates the non-moving party cannot produce evidence to support an essential element of his claim; or (3) that the non-moving party cannot surmount an affirmative defense which would bar the claim. *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989) (citations omitted). Once the moving party has met its burden, the non-moving party must forecast evidence that demonstrates the existence of a *prima facie* case. *See id.*

Here, defendants brought a motion for partial summary judgment based on the defense that the trust in question was revocable at the time of decedent's death and, therefore, pursuant to the Uniform Trust Act, the assets were subject to the claims of creditors of his estate. The fact that was 'material' to its motion was whether the trust was revocable.

Having pled the revocability of the trust as a bar to plaintiff's claim, it was incumbent upon plaintiff to rebut defendants' evidence with specific facts to the contrary. In response to defendants' motion, plaintiff filed an affidavit[1] in which she did not specifically allege that the trust was *not* revocable. She attached a copy of the trust document to her affidavit, which serves as substantial evidence. Pursuant

1. Although the affidavit was not filed timely, the court considered it in reaching its decision.

to the terms of the trust document, as explained *infra*, there was no genuine issue of material fact with respect to the revocability of the trust. Therefore, this argument is without merit.

[2] Plaintiff next argues that in granting partial summary judgment, the trial court did not follow the applicable law. We disagree.

Defendants contend that North Carolina General Statutes, section 36C-5-505 applies, pursuant to which:

> the property of a trust that was revocable at the settlor's death is subject to claims of the settlor's creditors, costs of administration of the settlor's estate, the expenses of the settlor's funeral and disposal of remains, and statutory allowances to a surviving spouse and children to the extent that the settlor's probate estate is inadequate to satisfy those claims, costs, expenses, and allowances, unless barred by applicable law.

N.C. Gen. Stat. § 36C-5-505(a)(3) (2007). The section was enacted in 2005, became effective on 1 January 2006, and applies to

> (i) all trusts created before, on, or after that date; (ii) all judicial proceedings concerning trusts commenced on or after that date; and (iii) judicial proceedings concerning trusts commenced before that date unless the court finds that application of a particular provision of Chapter 36C of the General Statutes would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of Chapter 36C of the General Statutes does not apply and the superseded law applies.

2005 N.C. Sess. Laws 192 § 7(a). Plaintiff contends section 36C-5-505 does not apply, but that instead section 36A-115 applies, which provides that "all estates or interests of trust beneficiaries are alienable either voluntarily or involuntarily to the same extent as are legal estates or interests of a similar nature[,]" except for (1) discretionary trusts, (2) support trusts, or (3) protective trusts. N.C. Gen. Stat. § 36A-115 (2003) (repealed effective 1 January 2006).

Plaintiff's contention is based upon the fact that upon decedent's death, the trust became irrevocable. However, this argument ignores the fact that up until the moment of his death, decedent possessed the power to enjoy (1) the right to distributions of income, (2) the right to distributions of principal, (3) the right to revoke the trust in whole or in part, and (4) the right to alter or amend the trust.

Pursuant to the United States Internal Revenue Code,

> The value of the gross estate shall include the value of all property . . . [t]o the extent of any interest therein of which the decedent has at any time made a transfer . . . , by trust or otherwise, *where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power . . . to alter, amend, revoke, or terminate* . . . .

26 U.S.C.A. § 2038(a)(1) (2002). Here, decedent died with the power to alter, amend, revoke, or terminate the trust. Therefore, the trust would be included in decedent's gross estate for estate tax purposes. Similarly, irrespective of the fate of the trust after decedent's death, until the moment of his death, the trust was revocable.

Section 36A-115 defines the inalienable trusts to which subsection (a), quoted *supra*, does not apply as follows:

> (1) Discretionary Trust.—A trust wherein the amount to be received by the beneficiary, including whether or not the beneficiary is to receive anything at all, is within the discretion of the trustee. A discretionary trust within the meaning of this subsection shall also include a trust for the benefit of one or more classes of beneficiaries as defined in the trust, wherein the amount to be received by any beneficiary or class of beneficiaries, including whether or not that beneficiary or class of beneficiaries is to receive anything at all, is determined by the board of directors of a certification entity. A certification entity is one that delivers on a yearly basis to the trustee a plan describing the categories of persons or entities to whom trust distributions will be made and explaining how each category falls within the definition of class or classes of beneficiaries defined in the trust.
>
> (2) Support Trust.—A trust wherein the trustee has no duty to pay or distribute any particular amount to the beneficiary, but has only a duty to pay or distribute to the beneficiary, or to apply on behalf of the beneficiary such sums as the trustee shall, in his discretion, determine are appropriate for the support, education or maintenance of the beneficiary.
>
> (3) Protective Trust.—A trust wherein the creating instrument provides that the interest of the beneficiary shall cease if
>
> > a. The beneficiary alienates or attempts to alienate that interest; or

b. Any creditor attempts to reach the beneficiary's interest by attachment, levy, or otherwise; or

c. The beneficiary becomes insolvent or bankrupt.

N.C. Gen. Stat. § 36A-115(b) (2003) (repealed effective 1 January 2006).

The trust was not a discretionary trust because the trustee had no discretion with respect to distributions upon the trustors' demand. Neither was it a support trust because there was no requirement for the assets and income to be used for the health, education, and welfare of the beneficiaries until after the death of a trustor. None of the trust terms fell within the meaning of a protective trust. Therefore, section 36A-115 cannot apply.

Pursuant to 2005 Session Laws, Chapter 192, section 7, the applicable law is section 36C-5-505 of the North Carolina General Statutes, "unless the court finds that application of [that provision] would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties[.]" 2005 N.C. Sess. Laws 192 § 7(a). The trial court did not so find.

The 2007 official comment to section 36C-5-505 clarifies that "[s]ubsection (a) is generally consistent with North Carolina case law with respect to the ability of a creditor to reach the property in a trust for the benefit of the settlor." N.C. Gen. Stat. § 36C-5-505 am. cmt. (2007) (citing *Pilkington v. West*, 246 N.C. 575, 580, 99 S.E.2d 798, 802 (1957)). As the statute is consistent with case law, we cannot say the trial court erred in finding it applicable to plaintiff's case. Therefore, this argument is without merit.

[3] Plaintiff next argues that the grant of partial summary judgment against her was erroneous because the trust assets are constitutionally protected. We disagree.

Plaintiff is correct in asserting that " '[a] retrospective statute, affecting or changing vested rights, is founded on unconstitutional principles and consequently void.' " *Bank v. Derby*, 218 N.C. 653, 659, 12 S.E.2d, 260, 264 (1940) (citations omitted). However, the beneficiaries of the trust at issue here had no vested rights affected or altered by the enactment of section 36C-5-505.

The official comments to section 36C-5-505 note that "[s]ubsection (a)(3) recognizes that a revocable trust is usually employed as a will substitute." N.C. Gen. Stat. § 36C-5-505 cmt. (2007). One other will substitute is a life insurance policy.

> It is well settled that under a contract granting the policy owner the right to change beneficiaries, the rights of a designated beneficiary do not vest until the death of the insured. The designated beneficiary has a mere expectancy, which cannot ripen into a vested interest before the death of the insured. This is true, because the beneficiary whose right, under the policy, or certificate, may thus be taken away, has only a contingent interest therein, which will not vest until the death of the insured.

Pierson v. Buyher, 330 N.C. 182, 185, 409 S.E.2d 903, 905 (1991) (internal quotation marks and citations omitted). As with the beneficiaries of a will or a life insurance policy, the beneficiaries of a revocable trust have no vested rights, merely an expectancy. As such, they have no constitutionally protected rights to the trust assets. Therefore, this argument is without merit.

Finally, defendants have cross-assigned error to the trial court's consideration of plaintiff's affidavit which was not timely served and filed. Because we affirm the granting of partial summary judgment in defendants' favor, we need not address defendants' assignment of error.

Because there was no genuine issue of material fact and defendants were entitled to judgment as a matter of law, the trial court's granting of partial summary judgment in defendants' favor was without error.

Affirmed.

Judges HUNTER and STEPHENS concur.

STATE OF NORTH CAROLINA v. WESLEY DAVID BOLLINGER

No. COA07-1062

(Filed 19 August 2008)

Firearms and Other Weapons— carrying concealed weapon— variance between indictment and instruction—plain error analysis

The trial court did not commit plain error by entering judgment for the offense of carrying a concealed weapon even though the jury was instructed it could find defendant guilty only upon a

finding that defendant intentionally carried and concealed about his person one or more knives while the indictment alleged only that defendant unlawfully carried a concealed weapon consisting of a metallic set of knuckles because: (1) an indictment is sufficient if it charges the substance of the crime, puts defendant on notice of the crime, and alleges all essential elements of the crime; (2) allegations beyond the essential elements of the crime sought to be charged are irrelevant and may be treated as surplusage; (3) in the instant case, the additional language "to wit: a Metallic set of Knuckles" was merely surplusage and not an essential element of the crime of carrying a concealed weapon; and (4) assuming arguendo the trial court erred by instructing on a theory different from that in the indictment, the evidence introduced at trial without objection consisted of two knives and a set of metallic knuckles found to be concealed upon defendant's person at the time of his arrest, the mention of knives in the jury instruction as opposed to metallic knuckles was inadvertent and did not affect the State's burden of proof or constitute a substantial change or variance from the indictment, and there was no reasonable possibility that a different result would have been reached absent the alleged error.

Judge WYNN concurring in part and dissenting in part.

Appeal by defendant from judgment entered 21 February 2007 by Judge Christopher M. Collier in Cabarrus County Superior Court. Heard in the Court of Appeals 18 March 2008.

Attorney General Roy Cooper, by Assistant Attorney General Robert M. Wilkins, for the State.

Jarvis John Edgerton, IV for defendant-appellant.

BRYANT, Judge.

Defendant Wesley David Bollinger appeals from a criminal conviction for carrying a concealed weapon. For the reasons stated herein, we find no prejudicial error.

At approximately 3:30 a.m., on 24 September 2005, Sergeant Mark Davis, Officer Heather Delaney, and Officer Jeffrey Baucom of the Concord Police Department reported to the scene of a two-vehicle accident. Upon arrival, the officers interviewed witnesses in order to fill out the accident report. During his interview, defendant informed Sgt. Davis that he did not have a license.

At that time, Sgt. Davis asked for and received permission from defendant to conduct a pat-down of his person. Upon conducting the pat-down, Sgt. Davis discovered metallic knuckles and knives. Defendant was arrested for carrying a concealed weapon and driving with a revoked license.

Defendant was indicted for carrying a concealed weapon. The indictment stated defendant "unlawfully and willfully did carry a concealed deadly weapon while off his premises, to wit: *a Metallic set of Knuckles*." (Emphasis added).

At trial, Officer Baucom testified that he observed Sgt. Davis pat-down defendant and discover "[a] set of metallic knuckles from [defendant's] left rear pocket, a knife from his belt, another knife from his right front pocket and a fixed-blade sheath knife that was on some type of lanyard around his neck." The State introduced into evidence a knife, metallic knuckles, and a fixed blade sheath knife all taken from defendant's person at the time he was arrested.

After the close of the evidence, the trial court instructed the jury, regarding the charge of carrying a concealed weapon, as follows:

> The defendant has been charged with carrying a concealed weapon. For you to find the defendant guilty of this offense, the State must prove three things beyond a reasonable doubt. First, that the defendant carried *one or more knives*. Second, that the weapon was concealed, that is, hidden from the view of others on or about the defendant's person in such a way that he could quickly use it if prompted to do so by any violent motive. And, third, that the defendant acted willfully and intentionally, that is, that he intended to carry and conceal the weapon.
>
> So if you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant willfully and intentionally carried and concealed about his person *one or more knives*, it will be your duty to return a verdict of guilty. If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

(Emphasis added).

The jury returned a verdict of guilty, and the trial court entered judgment. Defendant appealed.

On appeal, defendant argues only one issue: whether the trial court committed jurisdictional error by entering judgment against

him for carrying a concealed weapon. Although defendant raised six assignments of error in the record, he has not brought them forth in his brief. Therefore, pursuant to Rule 28, we deem them abandoned. N.C.R. App. P. 28(b)(6) (2008).

Defendant argues the trial court committed jurisdictional error by entering judgment for the offense of carrying a concealed weapon, after the jury was instructed it could find defendant guilty only upon a finding that defendant "intentionally carried and concealed about his person *one or more knives*" (emphasis added) while the indictment alleged only that defendant unlawfully carried a concealed weapon "to wit: *a Metallic set of Knuckles*."

We note defendant failed to object to the indictment and failed to object to the jury instruction. Under North Carolina Rules of Appellate Procedure, Rule 10(b)(2), "[a] party may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict . . . ." N.C.R. App. P. 10(b)(2) (2007). However, "[t]he North Carolina Supreme Court has chosen to review such unpreserved issues for plain error when . . . the issue involves either errors in the trial judge's instructions to the jury or rulings on the admissibility of evidence." *State v. Holbrook*, 137 N.C. App. 766, 768, 529 S.E.2d 510, 511 (2000) (citation and internal quotations omitted).

> [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.

Id. at 767-68, 529 S.E.2d at 511 (citation and internal quotations omitted).

Our General Assembly has, under North Carolina General Statute section 15A-641, defined an indictment as "a written accusation by a grand jury, filed with a superior court, charging a person with the

commission of one or more criminal offenses." N.C. Gen. Stat. § 15A-641 (2007). "It is a well-established rule in this jurisdiction that it is error, generally prejudicial, for the trial judge to permit a jury to convict upon some abstract theory not supported by the bill of indictment." *State v. Taylor*, 301 N.C. 164, 170, 270 S.E.2d 409, 413 (1980) (citations omitted). Here, defendant does not argue the indictment was facially invalid or otherwise insufficient to confer subject matter jurisdiction upon the trial court. It is clear the indictment charging carrying a concealed weapon pursuant to N.C. Gen. Stat. § 14-269(a) is valid on its face. Defendant merely alleges the indictment is insufficient to support the conviction. Defendant is in essence arguing there exists a fatal variance between the offense charged in the indictment and the evidence presented (and instructions given) at trial.

We note defendant cites (incorrectly) as an example but does not otherwise argue *McClure v. State*, 267 N.C. 212, 148 S.E.2d 15 (1966), for the proposition that a judgment is void when there is no valid indictment properly charging the offense for which a defendant is convicted. *McClure* is inapposite as the defendant in *McClure* pled guilty to the crime of assault with intent to commit rape, a charge separate and distinct, i.e. consisting of different elements, from the crime for which he was indicted—statutory rape. *Id.*

In his reply brief, defendant cites *State v. Thorp*e, 274 N.C. 457, 164 S.E.2d 171 (1968), as indicating that an indictment is insufficient to support a conviction if it does not conform to material elements in the jury charge required to support the conviction. However, while we accept this as a correct legal premise of *Thorpe*, defendant's reliance is misplaced. The indictment in *Thorp*e charged first degree burglary which requires a specific intent to commit a felony. "[I]t is not enough in an indictment for burglary to charge generally an intent to commit a felony . . . . The particular felony which it is alleged the accused intended to commit must be specified." *Id.* at 463, 164 S.E.2d at 175. In other words, where the felony is required to be and is described in the indictment, it must be proved at trial and supported by the evidence. However, unlike first-degree burglary, specific allegations are not required to support a conviction for carrying a concealed weapon. *See, e.g.*, *State v. Pickens*, 346 N.C. 628, 646, 488 S.E.2d 162, 172 (1997) (where "the gist of the offense" was discharging a firearm into an occupied dwelling, an indictment alleging defendant "did discharge a shotgun, a firearm, into the dwelling" was deemed to contain unnecessary surplusage, where evi-

dence at trial showed the firearm defendant discharged was a handgun, not a shotgun).

As we have said before, an indictment is sufficient if it charges the substance of the offense, puts the defendant on notice of the crime, and alleges all essential elements of the crime. *See State v. Teel*, 180 N.C. App. 446, 637 S.E.2d 288 (2006). "Allegations beyond the essential elements of the crime sought to be charged are irrelevant and may be treated as surplusage." *State v. Westbrooks*, 345 N.C. 43, 57, 478 S.E.2d 483, 492 (1996) (citation omitted). In the instant case, the additional language, "to wit: *a Metallic set of Knuckles*"(emphasis added) is mere surplusage and not an essential element of the crime of carrying a concealed weapon. The gist of the offense is carrying a concealed *weapon.* As in *Pickens*, the fact that the indictment alleged metallic knuckles while the evidence introduced at trial showed defendant carried knives in addition to metallic knuckles, the trial court's instructions on carrying a concealed weapon were not erroneous.

However, even if we agree with defendant and assume *arguendo* it was error for the trial court to instruct on a theory different from that in the indictment, a prejudicial error analysis is proper under these circumstances. In *State v. Joyce*, 104 N.C. App. 558, 410 S.E.2d 516 (1991), the State sought to amend an indictment charging robbery with a dangerous weapon by changing the word "knife" to "firearm." This Court dismissed the assignment of error holding the change "[did] not substantially alter the burden of proof or constitute a substantial change which would justify returning the indictment to the grand jury. [Moreover, the] Defendant also cannot demonstrate how he suffered any prejudice due to this amendment." *Id.* at 573, 410 S.E.2d at 525. *See also State v. Hill*, 185 N.C. App. 216, 224, 647 S.E.2d 475, 480 (2007) (Tyson, J., dissenting) ("A change in an indictment does not constitute an amendment where the variance was inadvertent and defendant was neither misled nor surprised as to the nature of the charges.") (citation omitted), *rev'd per curiam*, 362 N.C. 169, 655 S.E.2d 831 (2008).

In *State v. Clinding*, 92 N.C. App. 555, 374 S.E.2d 891 (1989), the trial court instructed the jury on a different theory of kidnapping than was charged in the indictment. This Court noted that while it was error, "[e]ssentially the same evidence was required to prove the State's theory and the theory in the erroneous instruction." *Id.* at 562, 374 S.E.2d at 895. This Court held that where there was no reasonable possibility that a different result would have been reached had the

trial court's error not been committed, the error was harmless beyond a reasonable doubt. *Id.*; *see also State v. Joyner*, 301 N.C. 18, 29-30, 269 S.E.2d 125, 132-33 (1980) (finding that although it was error to submit to jury a charge not alleged in the indictment, i.e. breaking and entering with intent to commit rape or larceny versus the indicted charge of breaking and entering with intent to commit larceny, such error was harmless where evidence showed defendant committed both rape and larceny).

Again, the evidence introduced at trial without objection consisted of two knives and a set of metallic knuckles found to be concealed upon defendant's person at the time of his arrest. We hold the mention of "knives" in the jury instructions as opposed to "metallic knuckles" was inadvertent and did not affect the burden of proof required of the State or constitute a substantial change or variance from the indictment. Moreover, as there is no reasonable possibility that a different result would have been reached had the trial court's error not been committed, the error was harmless beyond a reasonable doubt.

No prejudicial error.

Judge JACKSON concurs.

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

WYNN, Judge, dissenting in part, concurring in part.

Because the trial judge instructed the jury that it could find Defendant guilty if it found he concealed "one or more knives," which was not the basis of the offense that Defendant faced at trial under the indictment of carrying a concealed weapon, "to wit: a Metallic set of Knuckles," I would hold that the trial court committed prejudicial error.

It is well established that the purpose of a bill of indictment is: (1) to give a defendant notice of the charge against him so he may prepare his defense and be in a position to plead prior jeopardy if he is again brought to trial for the same offense; and (2) to enable the court to know what judgment to pronounce in case of conviction. *State v. Burton*, 243 N.C. 277, 278, 90 S.E.2d 390, 391 (1955). Thus, "[i]t is a well-established rule in this jurisdiction that it is error, generally prejudicial, for the trial judge to permit a jury to convict upon some

abstract theory not supported by the bill of indictment." *State v. Taylor*, 301 N.C. 164, 170, 270 S.E.2d 409, 413 (1980) (citations omitted). The bill of indictment in this case charged that Defendant "unlawfully and willfully did carry a concealed weapon while off his premises, to wit: *a Metallic set of Knuckles*." (Emphasis added). However, in the jury charge, the trial court instructed that the jury could find Defendant guilty of carrying a concealed weapon upon a finding that he "carried and concealed about his person *one or more knives*." (Emphasis added). Indeed, the trial judge made no mention of a metallic set of knuckles in the jury charge. While the "knives" theory of the case might have been supported by the evidence, it was not charged in the indictment.

Because the indictment and jury charge allege two distinctively different theories of carrying a concealed weapon, the trial court committed prejudicial error by failing to instruct on the theory charged in the bill of indictment. Therefore, the jury's verdict was based on jury instructions that fatally varied from the theory of the offense charged under the indictment. *See Taylor*, 301 N.C. at 171, 270 S.E.2d 414 ("[The trial court's] failure to instruct on the theory charged in the bill of indictment, in addition to its instructions on theories not charged, constitutes prejudicial error entitling defendant to a new trial on the charge . . . .").

JACK ALBERT HAWKINS, AN INCOMPETENT PERSON, BY AND THROUGH HIS GUARDIAN AD LITEM, BRYAN C. THOMPSON, PLAINTIFF v. CURLEY MAE WISEMAN HAWKINS, DEFENDANT

No. COA07-1146

(Filed 19 August 2008)

Marriage— action for annulment—discovery sanction—default not allowed

A marriage may not be annulled by default, and the trial court here erred by entering a default judgment annulling a purported marriage between an Alzheimer's victim and his caretaker as a sanction for refusing to comply with discovery.

Appeal by defendant from order entered 20 June 2007 by Judge Denise Hartsfield in Forsyth County District Court. Heard in the Court of Appeals 5 March 2008.

Crumpler Freedman Parker & Witt, by Dudley A. Witt and Tyler B. Kline, for plaintiff.

Wood, Rabil & Peake, LLP, by Thomas R. Peake II, for defendant.

ELMORE, Judge.

Jack Albert Hawkins (the deceased) was an elderly man, suffering from the effects of Alzheimer's disease and dementia. On 23 June 2004, when the deceased was eighty-three years old, he entered into a purported marriage with his fifty-five-year-old live-in caretaker, Curley Mae Wiseman (defendant). A court declared the deceased incompetent on 1 December 2004[1] and the Clerk appointed Bryan C. Thompson as his guardian on 7 December 2004. The decedent passed away on 10 January 2007.

On 3 May 2005, the guardian instituted an action requesting the annulment of the purported marriage on behalf of the deceased. Defendant filed her answer on 10 June 2005.

The deceased's estate (plaintiff)[2] served a first set of interrogatories and request for production on 7 February 2006. However, defendant issued no response, despite receiving an extension of time with plaintiff's consent. On 4 April 2006, eight days before the extended due date, defendant's attorney moved and was allowed to withdraw as counsel.

On 18 April 2006, plaintiff filed a motion to compel discovery, which the court scheduled for hearing on 15 May 2006. On that date, however, the court granted defendant a two-week continuance to allow her to secure new counsel. The court held the hearing on 5 June 2006, and ordered defendant to serve complete discovery answers by 5 July 2006. Defendant did not do so.

On 20 July 2006, defendant's attorney moved to withdraw based on defendant's failure to pay his firm, and the court allowed the withdrawal on 11 September 2006.

---

1. That same day, defendant, who was present at the incompetency hearing and aware of the court's decision, took the deceased to the bank and attempted to withdraw more than $500,000.00.

2. On 12 January 2007, the estate moved to be substituted for the deceased in the action, which motion the court granted with defendant's consent. For the purposes of this opinion, this Court will refer to the estate as plaintiff throughout its discussion, regardless of whether the events described took place before or after plaintiff's motion.

On 8 December 2006, plaintiff moved the trial court for sanctions against defendant for her refusal to comply with discovery. After receiving notice of the hearing, defendant executed "incomplete, evasive and [noncompliant]" answers to plaintiff's interrogatories and requests for production. Likewise, defendant's 5 February 2007 supplements to her answers, delivered on the day of the sanction hearing, were also incomplete.

On 9 February 2007, the trial court granted plaintiff's request for sanctions, striking defendant's answer and entering judgment by default against her. Accordingly, after making extensive findings, the trial court decreed that the purported marriage was annulled.

In a motion entered 6 March 2007, defendant moved for Rule 60 relief from the 9 February 2007 order. The trial court denied defendant's motion in an order entered 20 June 2007. It is from this order that defendant now appeals.

Defendant's first argument on appeal is that her Rule 60 motion should have been granted on the grounds that the annulment order was void. Preliminarily, we note that defendant did not argue that the trial court erred by imposing sanctions under N.C. Gen. Stat. § 1A-1, Rule 37(b)(2) for her failure to respond to discovery requests. Defendant's sole argument is that the trial court could not enter a judgment of annulment by default, thus rendering the judgment void *ab initio*. Because defendant did not appeal from the underlying judgment which grants annulment, but only from the order which denied her Rule 60 motion for relief from that order, defendant's entire argument in this appeal rests upon her assertion that the annulment judgment is void.

In support of this argument, defendant claims that the trial court lacked the authority to enter a judgment of annulment by default under N.C. Gen. Stat. § 50-10 (2005). That statute states, in pertinent part:

> [T]he material facts in every complaint asking for a divorce or for an annulment *shall be deemed to be denied by the defendant*, whether the same shall be actually denied by pleading or not, and no judgment shall be given in favor of the plaintiff in any such complaint *until such facts have been found by a judge or jury.*

N.C. Gen. Stat. § 50-10(a) (2005) (emphases added). *See also Allred v. Tucci*, 85 N.C. App. 138, 142, 354 S.E.2d 291, 294 (1987) (("In North Carolina, jurisdiction over the subject matter of actions affecting the

marriage relationship is authorized only by statute. Included within that grant of authority are the provisions of G.S. 50-10 . . . .") (citations omitted)). A marriage may not be annulled by a default judgment. *Adair v. Adair*, 62 N.C. App. 493, 498-99, 303 S.E.2d 190, 194 (1983) (("In North Carolina a plaintiff cannot obtain judgment by default in a divorce proceeding. A divorce will be granted only after the facts establishing a statutory ground for divorce have been pleaded and actually proved.") (citing N.C. Gen. Stat. § 50-10) (additional citations omitted)); *see* N.C. Gen. Stat. § 50-10(a) (2005); *see generally* Black's Law Dictionary 449 (8th ed. 2004) (defining a default judgment as "a penalty against a party who does not comply with an order, esp. an order to comply with a discovery request")). Although most of the cases which have arisen under this statute have dealt with an absolute divorce instead of annulment, the plain language of the statute says that its prohibition against default applies to *every complaint* asking for a divorce or *for an annulment*. N.C. Gen. Stat. § 50-10(a) (2005). Defendant is correct that a judgment for annulment cannot be entered by default.

Further, we note that the facts found by the trial court from the testimony and affidavits refer to the failure of defendant to comply with the court's discovery orders and support only the trial court's decision to impose sanctions pursuant to Rule 37. Those facts were not material to whether or not plaintiff was entitled to an annulment. The only facts which would be material to the annulment were facts which would tend to prove that the deceased was legally incompetent to marry on 23 June 2004, at the precise time of the wedding of defendant and the deceased. N.C. Gen. Stat. § 51-3 (2005); *Geitner v. Townsend*, 67 N.C. App. 159, 162, 312 S.E.2d 236, 238 (1984); *see also Allred*, 85 N.C. App. at 142-43, 354 S.E.2d at 295 ("[M]aterial facts [within the meaning of N.C. Gen. Stat. § 50-10(a)] include not only the jurisdictional facts required by G.S. 50-8 to be set forth in the complaint, but also facts constituting the grounds for the claim for relief.").

The trial court expressly deemed admitted the material facts as alleged by the complaint, and the record does not indicate that the trial court heard testimony or weighed evidence in order to find any facts relevant to the legal incompetence of the deceased at the time of his wedding to plaintiff. Specifically, the "Findings of Fact" in the order granting annulment state:

> 28. The court determines in its discretion that the appropriate sanctions to be applied for the defendant's willful and inten-

tional *failure to comply* with the Order previously entered in this matter is that an Order should be entered striking out the defendant's answer and *rendering judgment by default* against the defendant.

***

30. By entering a default in this matter, *defendant has admitted the allegations contained in the complaint*, including but not limited to, the following:

    8. At the time the parties were married, the *plaintiff* was suffering the effects of Alzheimer's disease and dementia and *was not competent to enter into a contract of marriage*. He was often unaware of his surroundings and was not able to identify or remember close family members.

***

    11. Upon information and belief, the defendant took advantage of the plaintiff, lying in wait until the plaintiff's first wife died, in order to take him to the Register of Deeds office and the magistrate to marry him in hopes of inheriting from him upon his death.

    12. The plaintiff is entitled to have his marriage to the defendant annulled.

31. *As a result of the defendant's admissions to the allegations contained in the complaint*, *the plaintiff is entitled to the relief requested* in the complaint to wit: plaintiff be granted an annulment and that the marriage between the parties be declared null and void *ab initio*.

(Emphases added).

The order indicates that the trial court did hear testimony from witnesses, but because there is no transcript in the record on appeal, we are unable to determine if any of the testimony addressed the facts supporting the annulment. Even if there were such testimony, the trial court expressly based all of its findings relevant to the annulment upon the allegations of the complaint, which the trial court deemed admitted based upon striking defendant's answer, ignoring the fact that N.C. Gen. Stat. § 50-10(a) requires that the allegations of the complaint are "deemed to be denied" even in the absence of an answer.

The trial court is empowered in its discretion to render a judgment of default for failure to comply with an order made pursuant to Rule 37 so long as that judgment is just. N.C. Gen. Stat. § 1A-1, Rule 37(b)(2) (2005). However, the general rules of discovery found in Rule 37 of the North Carolina Rules of Civil Procedure do not trump the very specific rule concerning annulment and divorce found in N.C. Gen. Stat. § 50-10(a), which gives the court subject matter jurisdiction over the annulment action. The trial court did not find from the evidence any material facts regarding the annulment claim upon which it could grant the relief sought by plaintiff.

As we noted in *Adair*, the default judgment "does not dispose of the underlying action for absolute divorce. The court's ruling that the allegations contained in plaintiff's complaint are deemed admitted does not relieve plaintiff of the burden of appearing in court to prove the grounds alleged in the complaint." *Adair* at 489, 303 S.E.2d at 193-94. We therefore leave the sanction in place, but otherwise reverse and remand the case to the trial court for further proceedings consistent with this opinion.

Reversed and remanded.

Judges HUNTER and STROUD concur.

STATE OF NORTH CAROLINA v. DWIGHT McDOUGALD

No. COA06-164-2

(Filed 19 August 2008)

Search and Seizure— warrantless search of shared dwelling— express refusal of consent by physically present resident— motion to suppress evidence—error not harmless beyond reasonable doubt

The trial court erred in a trafficking by possessing 100 or more but less than 500 dosage units of methylenedioxyamphetamine (MDA) and sale of Schedule I substance (MDA) case by denying defendant's motion to suppress evidence seized from his apartment when defendant refused consent but his wife agreed to allow the search to proceed, and defendant is entitled to a new trial, because: (1) a warrantless search of a shared dwelling for

evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident; and (2) although there was overwhelming evidence of a coparticipant's criminal activity, aside from the MDA and ecstasy found in defendant's apartment as a result of the illegal search, the evidence connecting defendant to the crimes for which he was convicted was far from overwhelming and thus failed to provide the threshold of evidence necessary to render the error harmless beyond a reasonable doubt.

Upon remand to the Court of Appeals by order of the North Carolina Supreme Court, filed 7 March 2008, remanding the decision of this Court in *State v. McDougald*, 181 N.C. App. 41, 638 S.E.2d 546 (2007). We are to determine if any error pursuant to *Georgia v. Randolph*, 547 U.S. 103, 164 L. Ed. 2d 208 (2006) was harmless beyond a reasonable doubt. *See State v. McDougald*, No. 64A07, 2008 N.C. LEXIS 136 (N.C. Mar. 7, 2008). Appeal by defendant from judgments entered 12 April 2005 by Judge Jerry Cash Martin in Guilford County Superior Court. Originally heard in the Court of Appeals on 19 October 2006.

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

Irving Joyner, for defendant-appellant.

JACKSON, Judge.

This case is heard on remand from the Supreme Court. A detailed recitation of the facts may be found in the original opinion, *State v. McDougald*, 181 N.C. App. 41, 638 S.E.2d 546 (2007). For the convenience of the reader, a summary of the facts is set forth below.

Dwight McDougald ("defendant") and Kathryn Powell ("Powell") were arrested as the result of an undercover drug sale coordinated by Officer Aaron Griffiths ("Officer Griffiths") of the Greensboro Police Department. The jury found defendant guilty of conspiracy to traffick by possessing 100 or more but less than 500 dosage units of methylenedioxyamphetamine ("MDA") but was unable to reach a unanimous verdict on two remaining charges. Defendant subsequently entered guilty pleas to trafficking by possessing 100 or more but less than 500 dosage units of MDA and to sale of Schedule I substance, MDA. He was sentenced to a term of thirty-five to forty-two months imprison-

ment for the offenses of trafficking by possessing and conspiracy to traffick. For the offense of sale of a Schedule I substance, MDA, defendant received a suspended sentence of thirty-six months of supervised probation, which was ordered to begin at the expiration of his prison term.

Defendant appealed the denial of his motion to suppress evidence seized from his apartment. Although he refused to consent to the search, his wife agreed to allow the search to proceed. Defendant argued that proceeding with the search based upon only his wife's consent was a violation of *Georgia v. Randolph*, 547 U.S. 103, 164 L. Ed. 2d 208 (2006). In *Randolph*, the majority held that "a warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident." *Id.* at 120, 164 L. Ed. 2d at 226. This is the precise issue defendant presents for our review.

In our prior opinion, as to the conspiracy charge, we dismissed defendant's argument based upon violations of our Appellate Rules. Judge Elmore dissented, providing the basis for review by the North Carolina Supreme Court. The charges to which defendant pled guilty are not currently before this Court. The State essentially has conceded error pursuant to *Randolph* and we now review our decision to determine if any error was harmless beyond a reasonable doubt. We hold that it was not.

"Even if [a] party can show that the trial court erred in [an evidentiary] ruling, relief ordinarily will not be granted absent a showing of prejudice." *State v. Herring*, 322 N.C. 733, 749, 370 S.E.2d 363, 373 (1988) (citing N.C. Gen. Stat. § 15A-1443(a) (1983)). However, pursuant to North Carolina General Statutes, section 15A-1443(b), "[a] violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless." N.C. Gen. Stat. § 15A-1443(b) (2005). A constitutional error may be rendered harmless by presenting overwhelming evidence of defendant's guilt notwithstanding the challenged evidence. *State v. Autry*, 321 N.C. 392, 403, 364 S.E.2d 341, 348 (1988).

After carefully reviewing the trial testimony in this case, we agree with Judge Elmore's dissent to the Court's prior opinion. Although there was overwhelming evidence of Powell's criminal activity, aside

from the MDA and ecstasy found in defendant's apartment as a result of the illegal search, the evidence connecting defendant to the crime for which he was convicted was far from overwhelming, and as such failed to provide the threshold of evidence necessary to render the error harmless beyond a reasonable doubt.

At trial, Detective Duane James ("Detective James") testified that his role in the investigation was to act as the "flash person"—the undercover officer in charge of securing large sums of money and showing it to the supplier if required. Detective James observed Powell go to the car of Earl Jones ("Jones"), a confidential informant. Powell and Jones then stood outside of the car talking. Detective James observed defendant crossing the apartment complex towards Powell and continue around the building. He observed Powell leave and return a few minutes later, getting into Jones' car. Jones then got out of his car and pointed towards Detective James. Both Powell and Jones crossed to Detective James' car, and he rolled down his window to talk to them. Powell got into Detective James' car and informed him that the deal had changed from 1000 pills to 385. Detective James told Powell that she could count the money and go talk to whomever she needed; he and Powell counted out $3,500.00.

After counting the money, Powell left Detective James' car and she and Jones walked away. Powell went towards the apartments; Jones came back to Detective James. A few minutes later, Detective James observed Powell returning to his car. She got into his car, pulled out a bag and said there were 385 pills. After Detective James gave Powell the money, she got out of the car, and walked back towards the apartment. She then was arrested. Powell acted as an intermediary for the transaction.

Detective Clarence Wally Schoolfield ("Detective Schoolfield") testified that he observed Powell—whom he described as the contact—come down to the parking lot and otherwise corroborated Detective James' testimony. Upon searching defendant—who was detained in Powell's apartment—Detective Schoolfield found $398 in his front right pocket and defendant's wallet in the left rear pocket. Detective Schoolfield searched Powell's apartment and seized marijuana and drug paraphernalia. He also seized two guns, one of which was stolen.

Powell testified as part of a plea deal. She stated that she used to sell marijuana before she moved to the apartment complex where she was arrested and that Jones was her supplier. Jones called her and

asked her if she could get pills. She answered that she could. Because she had talked to defendant a few times about his selling pills, she contacted him. Defendant told her to let him know when she needed them. Powell testified that defendant changed the number of pills from the 500 that Jones had requested to 385.[1] Defendant told her that he would sell the pills to her for $8.50 each and that she could sell them for $9.00 each; she would make $180, which defendant paid before the sale.

Powell testified that defendant informed her that he would walk over to her apartment when the buyer arrived. She testified that after Jones and defendant had arrived at her apartment, she saw defendant laying pills out on her counter. Powell testified that she was fairly certain that she had told Jones where she was getting the pills. She also informed the police that she obtained the pills from defendant.

Officer Griffiths was the lead investigator in the case and testified that he had been investigating defendant since 2002, and had conducted surveillance of defendant's apartment for several months prior to the 7 July 2004 arrest. Officer Griffiths observed Powell come down and meet with Jones. He also observed defendant come down and apparently say something to Powell or Jones as he passed by them. He did not observe anything "on" defendant as he passed. Griffiths observed Powell bring down a bag under her clothes, go to James' car, put something down the front of her shorts, and try to run back to her apartment.

Officer Griffiths was monitoring Jones' body wire transmission and overheard Powell repeatedly request that the deal "go down" upstairs and state that "he" would give Jones the drugs. Over the wire, Officer Griffiths heard Powell refer to some other male as being part of the deal—for example: "he send me," "he's in my house," "he can count 'em," and "I don't think he wants to do it out here. He lives here." When defendant walked by, Powell said, "[T]here he is right there. He's got his son."

Upon her arrest, Powell said to Officer Griffiths that she was "just making money delivering something." When asked what, she replied, "You know. Pills. 'X.' " She informed the officer that defendant was in her apartment. After her arrest, Officer Griffiths took a statement from Powell, which read: "Somebody wanted 'X.' I knew where to get it from. Quick flip. Man gives me one price. I make two hundred to

1. It is unclear why police officers were expecting a sale of 1000 pills while Powell was expecting a sale of only 500 pills.

walk from one destination to another." Officer Griffiths then asked her direct questions—what she was doing; how much she was selling; and for whom she was selling it. He was more interested in defendant as the main target; he considered Powell as just a middle person, a runner.

Powell informed Officer Griffiths that she was selling 300 to 400 pills for $3,000.00 for which she was to make $200.00. She was delivering them for 'D' who lived in her building. By 'D,' she meant defendant. Powell also informed Officer Griffiths that she thought it was 380 pills of Ecstasy. She counted the money and went back upstairs. She got the pills from 'D' and took them to a black male (Detective James). She said she was just trying to make $200 and that 'D' brought the pills over. As Officer Griffiths was filling out police paperwork at the Guilford County Jail, defendant approached him and said, "She was just going to make a little money for this. She don't know what she's doing or what's going on."

As we have determined that the above-referenced evidence against defendant was not overwhelming absent the MDA and ecstasy found in defendant's apartment as a result of the illegal search, this constitutional error was not harmless beyond a reasonable doubt. Therefore, defendant is entitled to a new trial.

New trial.

Chief Judge MARTIN and Judge ELMORE concur.

IN THE MATTER OF: M.H.B., A MINOR CHILD

No. COA08-337

(Filed 19 August 2008)

1. Child Abuse and Neglect— concerns about parent's competency— guardian ad litem for parent not considered— abuse of discretion

The trial court abused its discretion in a child abuse and neglect proceeding by not holding a hearing or making a determination as to whether the biological father (respondent) was incompetent or had diminished capacity and could not adequately protect his own interest. The court's orders in the case

demonstrate concerns about respondent's competency and capacity that were serious enough to order a psychological evaluation and a suspension of visitation rights, but the record does not show that the court considered appointment of a guardian ad litem.

2. Child Abuse and Neglect— visitation with child—authority delegated to DSS—improper

The trial court erred by delegating its judicial power in a child abuse and neglect proceeding by giving DSS sole discretion over respondent's visitation with the child.

Appeal by Respondent from adjudication order entered 22 October 2007 by Judge Bradley B. Letts and from disposition orders entered 18 and 28 December 2007 by Judge Danny E. Davis in District Court, Swain County. Heard in the Court of Appeals 23 July 2008.

Chester M. Jones for Petitioner-Appellee Swain County Department of Social Services.

The Turrentine Group, PLLC, by Karlene Scott-Turrentine, for Respondent-Appellant.

Pamela Newell Williams for Respondent-Appellee Guardian ad Litem.

McGEE, Judge.

The biological father of M.H.B. (Respondent) appeals from adjudication and disposition orders finding M.H.B. to be abused and neglected. For the reasons set forth below, we reverse and remand.

The Swain County Department of Social Services (DSS) received a report from Memorial Mission Hospital of possible child abuse regarding M.H.B. on 25 June 2007. In response to the report, DSS filed a petition on 27 June 2007 alleging that M.H.B. was abused and neglected. DSS alleged M.H.B. had suffered multiple broken ribs, hemorrhaging of the eyes, internal bleeding, and bruises on her chest that were the result of the intentional acts and/or improper care of both Respondent and M.H.B.'s biological mother, who is not a party to this appeal. The trial court entered an order for nonsecure custody on 27 June 2007, placing custody of M.H.B. with DSS.

The trial court held a hearing on 24 September 2007 and entered an order adjudicating M.H.B. to be an abused and neglected juvenile

on 22 October 2007. In its adjudication order, the trial court ordered, in part, that "[Respondent] . . . shall submit to a psychological evaluation and results of the same shall be made available unto [DSS] and the Guardian ad litem for [M.H.B.]" The trial court also ordered that "the Balsam Center shall allow [DSS] and the Guardian ad litem and other parties hereto access to and copies of any and all mental health records of the Balsam Center concerning [Respondent]." The trial court held a disposition hearing on 22 October 2007 and entered a disposition order on 18 December 2007, continuing custody of M.H.B. with DSS, but authorizing a trial home placement of M.H.B. with her biological mother in the residence of the maternal grandparents. The trial court entered a revised disposition order on 28 December 2007. As to visitation, both the 18 and 28 December 2007 disposition orders provided as follows:

> That visitation with [M.H.B.] by [Respondent] . . . shall be at time and places set by [DSS] within its discretion. However, the Court suspends visitation between [Respondent] and [M.H.B.] at this time pending receipt and review of the reports from the Balsam Center by [DSS]. In addition, [Respondent] shall undergo a drug screen before he has any visitation. Further the Court leaves in the discretion of [DSS] to start visitation between [M.H.B.] and [Respondent] after [DSS] receives and reviews such records concerning [Respondent] from the Balsam Center and after [Respondent] undergoes a drug screen. Any [and] all visitation between [Respondent] and [M.H.B.] shall be supervised.

Respondent father appeals.

---

[1] Respondent argues the trial court erred by failing to appoint a guardian ad litem to represent him.[1] During proceedings held on petitions for abuse, neglect, or dependency, the Juvenile Code presently provides:

> On motion of any party or on the court's own motion, the court may appoint a guardian ad litem for a parent in accordance with [N.C. Gen. Stat. §] 1A-1, Rule 17, if the court determines that there is a reasonable basis to believe that the parent is incompe-

1. In his brief, Respondent refers to N.C. Gen. Stat. § 7B-1101.1(c) (2007) as the statute governing when an appointment of a guardian ad litem for a parent is required. However, N.C. Gen. Stat. § 7B-1101.1 (2007) provides for a parent's right to counsel or a guardian ad litem in a termination of parental rights proceeding. The governing statute in an adjudication of abuse, neglect, or dependency proceeding is N.C. Gen. Stat. § 7B-602 (2007).

> tent or has diminished capacity and cannot adequately act in his or her own interest.

N.C. Gen. Stat. § 7B-602(c) (2007); *see also* N.C. Gen. Stat. § 1A-1, Rule 17 (2007).

Our research has revealed no published case interpreting N.C.G.S. § 7B-602(c), which was added to N.C.G.S. § 7B-602 in 2005, and which applies to petitions filed on or after 1 October 2005. Prior to enactment of N.C.G.S. § 7B-602(c), N.C. Gen. Stat. § 7B-602(b) (2003) provided that a trial court was required to appoint a guardian ad litem for a parent who was a minor and

> [w]here it is alleged that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101 in that the parent is incapable as the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or any other similar cause or condition of providing for the proper care and supervision of the juvenile[.]

N.C. Gen. Stat. § 7B-602(b) (2003). Under the new provision, which applies in the present case, a trial court is required to appoint a guardian ad litem for a parent only when the parent is a minor. N.C. Gen. Stat. § 7B-602(b) (2007). However, in addition, the new provision permits any party to file a motion requesting the trial court to appoint a guardian ad litem for a parent in any neglect, abuse, or dependency proceeding where "there is a reasonable basis to believe that the parent is incompetent or has diminished capacity and cannot adequately act in his or her own interest." N.C.G.S. § 7B-602(c). N.C.G.S. § 7B-602(c) also allows the trial court to appoint a guardian ad litem on its own motion pursuant to these same criteria. Because N.C.G.S. § 7B-602(c) employs the term "may," a trial court's action pursuant to this statute is discretionary, and our review is limited to a determination of whether the trial court abused its discretion. *See Loren v. Jackson*, 57 N.C. App. 216, 219, 291 S.E.2d 310, 312 (1982). A trial court abuses its discretion when its decision is "manifestly unsupported by reason." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). However, "[a] court's complete failure to exercise discretion amounts to reversible error." *State v. McVay*, 174 N.C. App. 335, 340, 620 S.E.2d 883, 886 (2005); *see also State v. Bartlett*, 153 N.C. App. 680, 685, 571 S.E.2d 28, 31 (2002) (recognizing that "[w]here the trial court fails to exercise its discretion, . . . such failure constitutes reversible error").

Our Court has also held that a trial court "has a duty to inquire into the competency of a litigant in a civil proceeding where 'circumstances are brought to [the trial court's] attention, which raise a substantial question as to whether the litigant is *non compos mentis*.' " *In re S.N.H.*, 177 N.C. App. 82, 87-88, 627 S.E.2d 510, 514 (2006) (quoting *In re J.A.A.*, 175 N.C. App. 66, 72, 623 S.E.2d 45, 49 (2005)). " 'Whether the circumstances . . . are sufficient to raise a substantial question as to the party's competency is a matter to be initially determined in the sound discretion of the trial judge.' " *In re J.A.A.*, 175 N.C. App. at 72, 623 S.E.2d at 49 (quoting *Rutledge v. Rutledge*, 10 N.C. App. 427, 432, 179 S.E.2d 163, 166 (1971)).

Pursuant to N.C. Gen. Stat. § 35A-1101(7) (2007), an "Incompetent adult" is defined as

> an adult or emancipated minor who lacks sufficient capacity to manage the adult's own affairs or to make or communicate important decisions concerning the adult's person, family, or property whether the lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition.

The phrase "diminished capacity," which appears in N.C.G.S. § 7B-602(c), is used primarily in the criminal law context and is defined as "[a]n impaired mental condition—short of insanity—that is caused by intoxication, trauma, or disease and that prevents a person from having the mental state necessary to be held responsible for a crime." Black's Law Dictionary 220 (8th ed. 2004). However, our Court has also defined "diminished capacity" in the juvenile context as a "lack of 'ability to perform mentally.' " *In re Reinhardt*, 121 N.C. App. 201, 204, 464 S.E.2d 698, 701 (1995) (quoting *Taber's Cyclopedic Medical Dictionary* 278 (16th ed. 1989)), *overruled on other grounds by In re Brake*, 347 N.C. 339, 493 S.E.2d 418 (1997).

In the case before us, the trial court made the following findings of fact related to Respondent's mental state both prior to the hearing and at the hearing:

> 38. . . . [Respondent] states that he is suffering posttraumatic stress disorder, that he [h]as a diagnosis of being manic depressive and bipolar. He states that he was prescribed medication including lithium. He stated that he did not like the side effects of the prescribed medication and discontinued taking the same. He stated that he now self medicates by consuming marijuana and that he uses approximately 25 dollars of marijuana per week.

> 39. That since the filing of the petition, [Respondent] has received mental health treatment and recommenced taking his prescription medications and is taking them currently.
>
> 40. That while [Respondent] was testifying in this case, the Court noted that he was weeping, crying, confounded, agitated and stated that he wished someone would take his life right then.
>
> 41. That after the Petition was filed in this case, [Respondent] did threaten suicide.
>
> 42. That [Respondent] is mentally and emotionally unstable.
>
> 43. That while testifying, [Respondent] even stated that he did not know why he was present at the adjudicatory hearing in this case.

Based upon these findings of fact, Respondent argues the trial court abused its discretion by failing to appoint a guardian ad litem for him. In response, DSS contends as follows:

> It is submitted that if one considered only the foregoing out of proper context and without considering the totality of the testimony, facts and circumstances which were in fact before the trial court, then one might possibly be concerned that there was a reasonable basis that [Respondent] may have had some sort of diminished capacity at the time of the adjudicatory hearing *and* that [Respondent] was not able to act in his own interest. However, when the rest of the story is presented and considered and these findings of fact are considered in proper context, then the argument that [Respondent] had diminished capacity to such a point that he was entitled to have the [trial] [c]ourt *sua sponte* appoint him a GAL simply fails.

Specifically, DSS contends that the trial court's findings that Respondent was "weeping, crying, confounded, [and] agitated" while testifying and that Respondent was "mentally and emotionally unstable" relate solely to Respondent's mental state while he was undergoing cross-examination. DSS contends that Respondent merely became frustrated by cross-examination questions that related to Respondent's drug use and criminal history.

However, despite DSS's contentions, the transcript does not reflect that Respondent was "weeping, crying, confounded, [and] agitated" solely during cross-examination. At the close of the adjudication hearing, the trial court stated that "throughout his testimony

[Respondent] ran the gamut of emotions from weepy to crying to then becoming agitated and angry, and then at some point seeming confused." We cannot speculate that the trial court observed this behavior solely while Respondent was undergoing cross-examination. Moreover, the trial court did not attempt to limit its finding that Respondent is "mentally and emotionally unstable." Therefore, we are unable to say that these findings related solely to Respondent's alleged frustration during cross-examination.

The trial court's findings of fact 38 and 39 also demonstrate that at the time of the hearing Respondent was receiving mental health treatment and was taking medications. Finding of fact 41 further demonstrates that Respondent threatened to commit suicide after the filing of the petition. All of these findings raise serious questions as to Respondent's competency, capacity, and ability to adequately act in his own interest.

The trial court also made a finding of fact that "while testifying, [Respondent] even stated that he did not know why he was present at the adjudicatory hearing in this case." DSS contends that "[t]he context clearly shows that [Respondent] was not without an understanding as to why he was on the stand testifying." It is correct that when Respondent indicated he was not sure why he was at the hearing, the trial court interrupted the cross-examination of Respondent and conducted the following inquiry:

> [RESPONDENT]: I don't see how this is relevant either. Can somebody please tell me why I'm on the stand? I mean, you know, I—I'm—I'm being honest with you, and I—I'm trying to answer your questions, ma'am.
>
> THE COURT: [Respondent], you don't understand why you're testifying?
>
> [RESPONDENT]: Yeah, I—I—I mean, I just —
>
> THE COURT: Do you understand what this trial —
>
> [RESPONDENT]: Yes, sir, I —
>
> THE COURT: —is about?
>
> [RESPONDENT]: Yes, sir I do, yeah, yes, sir.
>
> THE COURT: Do you want me to explain why you're on the stand?

[RESPONDENT]: Well, no, sir. No. I'm just saying I—I feel like the questions she's asking me [are] irrelevant to what—

THE COURT: You were talking about the use of marijuana?

[RESPONDENT]: Yes, sir.

THE COURT: Oh, okay.

[RESPONDENT]: That's what I was saying, sir.

THE COURT: Well, go ahead. I just want to make sure you understood what we were doing. Let the record reflect he does understand we're in court in a trial, and this does involve his minor child. Next question?

As to this inquiry, the trial court stated the following at the close of the hearing: "[Respondent] does appear to be cognizant and realize what this case is about and able to assist [his attorney] in his presentation of evidence related to this petition." However, while the trial court inquired as to whether Respondent knew why he was testifying, the trial court did not conduct a hearing as to Respondent's competency, capacity, or ability to adequately act in his own interest.

We hold that based upon all of the evidence before the trial court, as reflected in the trial court's findings, there was "a reasonable basis to believe that [Respondent] [was] incompetent or ha[d] diminished capacity and [could not] adequately act in his . . . own interest." *See* N.C.G.S. § 7B-602(c). We also hold that the evidence " 'rais[ed] a substantial question as to whether [Respondent] [was] *non compos mentis*.' " *In re S.N.H.*, 177 N.C. App. at 87-88, 627 S.E.2d at 514 (quoting *In re J.A.A.*, 175 N.C. App. at 72, 623 S.E.2d at 49). However, the trial court failed to hold a hearing regarding Respondent's competency, capacity, or ability to adequately act in his own interest. As a result, the trial court also failed to make a determination as to these issues. We must therefore determine whether this failure amounted to an abuse of discretion.

We first recognize that although the trial court made numerous findings of fact that raised doubts as to Respondent's competency, capacity, and ability to adequately act in his own interest, the trial court did not make any findings resolving those doubts in favor of a finding that Respondent was competent and had the capacity and ability to adequately act in his own interest. In fact, the trial court could not have done so because it did not hold a hearing regarding these issues.

Furthermore, in its adjudication order, the trial court ordered that "[Respondent] . . . shall submit to a psychological evaluation and results of the same shall be made available unto [DSS] and the Guardian ad litem for [M.H.B.]" The trial court also ordered that "the Balsam Center shall allow [DSS] and the Guardian ad litem and other parties hereto access to and copies of any and all mental health records of the Balsam Center concerning [Respondent.]" Moreover, in its disposition orders, the trial court "suspend[ed] visitation between [Respondent] and [M.H.B.] at this time pending receipt and review of the reports from the Balsam Center by [DSS]." The trial court gave DSS "the discretion . . . to start visitation between [M.H.B.] and [Respondent]," but only after DSS received and reviewed psychological records concerning Respondent from the Balsam Center. These orders demonstrate that the trial court had concerns regarding Respondent's competency and capacity that were serious enough to cause the trial court to order Respondent to undergo a psychological evaluation. The trial court even suspended Respondent's visitation rights pending a psychological evaluation. However, despite these concerns, the record does not show that the trial court considered appointment of a guardian ad litem for Respondent during the adjudication hearing. Taking into consideration all of the trial court's concerns related to Respondent's competency, capacity, and ability to adequately act in his own interest, as reflected in its findings of fact, and the trial court's subsequent order that Respondent undergo a psychological evaluation, the trial court abused its discretion by failing to hold a hearing or make a determination as to whether Respondent was incompetent or had diminished capacity and could not adequately act in his own interest. Although it is unclear whether the trial court would have appointed a guardian ad litem for Respondent had the trial court held a hearing and made a determination as to these issues, the trial court's complete failure to exercise its discretion to hold such a hearing and make such determinations under these circumstances amounted to an abuse of discretion. *See McVay*, 174 N.C. App. at 340, 620 S.E.2d at 886; *Bartlett*, 153 N.C. App. at 685, 571 S.E.2d at 31. We therefore reverse the adjudication and disposition orders and remand this matter for further proceedings consistent with this opinion.

[2] Respondent also argues the trial court erred by giving DSS sole discretion as to whether Respondent should be allowed visitation with M.H.B. Intertwined with this argument is Respondent's contention that the trial court erred by permitting DSS to base visitation with M.H.B. on DSS's review of pending psychological evaluations of

Respondent. "This Court reviews the trial court's dispositional orders of visitation for an abuse of discretion." *In re C.M.*, 183 N.C. App. 207, 215, 644 S.E.2d 588, 595 (2007).

> Pursuant to N.C. Gen. Stat. § 7B-905(c) (2007),
>
> [a]ny dispositional order under which a juvenile is removed from the custody of a parent, guardian, custodian, or caretaker, or under which the juvenile's placement is continued outside the home shall provide for appropriate visitation as may be in the best interests of the juvenile and consistent with the juvenile's health and safety.

A trial court exercises a judicial function when it awards custody of a child and when it awards visitation rights. *In re Custody of Stancil*, 10 N.C. App. 545, 552, 179 S.E.2d 844, 849 (1971). These judicial functions may not be delegated to the custodian of a child. *Id.*

> If the court finds that the parent has by conduct forfeited the right [of visitation] or if the court finds that the exercise of the right [of visitation] would be detrimental to the best interest and welfare of the child, the court may, in its discretion, deny a parent the right of visitation with, or access to, [the] child; but the court may not delegate this authority to the custodian.

Id. If the trial court does not make such findings, "the court should safeguard the parent's visitation rights by a provision in the order defining and establishing the time, place and conditions under which such visitation rights may be exercised." *Id.*; *see also In re R.A.H.*, 182 N.C. App. 52, 61, 641 S.E.2d 404, 409-10 (2007); *In re C.P.*, 181 N.C. App. 698, 705-06, 641 S.E.2d 13, 18 (2007); *In re E.C.*, 174 N.C. App. 517, 521-23, 621 S.E.2d 647, 651-52 (2005).

In the present case, the trial court's disposition orders provided as follows: "That visitation with [M.H.B.] by [Respondent] . . . shall be at time and places set by [DSS] within its discretion." The trial court also suspended Respondent's visitation with M.H.B. pending review by DSS of psychological evaluations and a drug screen. By these orders, the trial court improperly gave DSS complete discretion to determine when, or if, Respondent could visit with M.H.B. Delegation of this judicial power was in error. Therefore, this case must also be remanded for clarification of Respondent's visitation rights. In light of our holding that the trial court's adjudication and disposition orders must be reversed and the case remanded, it is not necessary to address Respondent's remaining assignments of error.

Reversed and remanded.

Judges HUNTER and STROUD concur.

STATE OF NORTH CAROLINA v. CHRISTOPHER MELVIN HUNT

No. COA08-14

(Filed 19 August 2008)

Homicide— voluntary manslaughter—instruction—misstatement on burden of proof—plain error analysis

The trial court committed plain error in a first-degree murder prosecution in which defendant was found guilty of second-degree murder by improperly instructing the jury on the charge of voluntary manslaughter, and defendant is entitled to a new trial, because: (1) the instruction contained a misstatement of law as to the burden of proof; (2) the trial court compounded the problem by providing the jury with a written document that contained the same misstatement as to the burden of proof; and (3) the Court of Appeals was unable to conclude that the instructional error did not have a probable impact on the jury's finding of guilt.

Appeal by defendant from judgment entered 27 July 2007 by Judge Thomas H. Locke in Robeson County Superior Court. Heard in the Court of Appeals 21 May 2008.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Robert M. Curran, for the State.

Haral E. Carlin for defendant-appellant.

HUNTER, Judge.

Christopher Melvin Hunt ("defendant") appeals from a judgment entered on 27 July 2007 pursuant to a jury verdict finding him guilty of second degree murder. Defendant was sentenced to a minimum term of 180 months and a maximum term of 225 months imprisonment. After careful review, we grant defendant a new trial.

I.

The State presented evidence tending to show that on 13 January 2006, defendant shot and killed Jamal Roberts ("Roberts") in the

parking lot of Trader's Station in Robeson County. Defendant was at Trader's Station with his girlfriend, Candace Hunt; his sister, Kayla Locklear; his brother, Corey Locklear; his friend, Brad Edwards; and his cousins, Brandon Chavis and Christina Walters. An hour after defendant and his group arrived, Roberts arrived with a group of friends including Calvin Sinclair ("Sinclair"), Terrence Brown, and Dexter Stephens ("Stephens"). Brandon Chavis testified that he heard Sinclair say something provocative and gesture. Defendant also testified that Roberts, whom he had never met, indicated for him to go outside.

After playing pool for a while, Roberts and his entire group left to go to their car which was parked several rows behind defendant's van. About five minutes later, defendant and his group left Trader's Station. Roberts's group was still in their car when defendant left Trader's Station. Witnesses from Roberts's group stated that defendant walked past his van and toward their car, "talking trash" and cursing. Roberts and Stephens got out of their car and walked toward defendant, exchanging words and "talking junk." Defendant pulled a pistol from his pocket when Roberts and Stephens were about eight to ten feet from him. Defendant pointed the pistol at Stephens and pulled the trigger but the gun did not fire. Defendant then pointed the gun at Roberts and fired, hitting Roberts. Roberts and his friends were able to run back to their car and drive Roberts to the hospital, while defendant kept firing shots at them. Roberts died that night in the hospital.

Sheriff's investigators recovered three live 0.380 caliber rounds and four 0.380 caliber shell casings from the scene. Pursuant to a conversation with defendant, officers were led to defendant's brother's residence in Lumberton. Defendant's brother then led the officers to a wooded lot where the pistol was found wrapped in a plastic bag and hidden beneath some leaves. Ballistic tests showed that the pistol recovered had fired the bullet found in Roberts's body and matched the spent shell casings found at the scene. The three live rounds also matched the extractor and ejector markings found on the gun officers recovered in the woods.

Defendant testified that as Roberts and Stephens were yelling and swearing at him, Roberts had his hand in his back pocket while rushing toward him. Defendant thought Roberts was reaching for a gun in his back pocket and was fearful for himself and others with him. Defendant also testified to firing one warning shot into the ground, and another two or three into the air as a warning to Roberts

and Stevens. Defendant stated that he did not intend to shoot anyone and that he did not know Roberts had been hit. Although defendant testified he thought Roberts had a gun, no one, including defendant, actually saw Roberts with a gun.

Defendant presents the following issues for this Court's review: (1) whether the trial court committed plain error by instructing the jury as to the burden of proof on the charge of voluntary manslaughter; (2) whether the trial court committed reversible error by denying defendant's request for a jury instruction on defense of others; and (3) whether the trial court committed reversible error during the sentencing portion of defendant's trial by failing to consider mitigating factors.

II.

Defendant argues that the trial court committed plain error by improperly instructing the jury on the charge of voluntary manslaughter. We agree.

We review this issue for plain error because defendant failed to object to the instruction at trial. *See 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)). "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. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 378-79 (1983) (citing *United States v. Jackson*, 569 F. 2d 1003 (7th Cir.), *cert. denied*, 437 U.S. 907, 57 L. Ed. 2d 1137 (1978)).

The trial court instructed the jury on first degree murder, second degree murder, voluntary manslaughter, and involuntary manslaughter. The instructions on both counts of murder and on involuntary manslaughter were correct. The State concedes, however, that the instruction on voluntary manslaughter contained a misstatement of law as to the burden of proof. The State contends that the misstatement did not amount to plain error but was a mere *lapsus linguae* or slip of the tongue.

As to the voluntary manslaughter charge, the trial court instructed the jury that:

> Now, the burden is on the State to prove beyond a reasonable doubt that the defendant did not act in the heat of passion upon adequate provocation, but rather that he acted with malice. *If the defendant fails to meet this burden*, the defendant can be guilty of no more than voluntary manslaughter.

(Emphasis added.)

Shortly after deliberation began, the jury returned to the court and requested "a list of requirements for [second] [d]egree [m]urder and [two] [m]anslaughters." The trial judge asked the court reporter to type up the original oral instructions as to those charges and give each juror a copy of the instructions. The instructions given to the jury included the misstatement on the instruction of voluntary manslaughter. The jury ultimately convicted defendant of second degree murder.

Although decided before the adoption of the plain error standard, our Supreme Court in *State v. Harris*, 289 N.C. 275, 280 221 S.E.2d 343, 347 (1976), held that " 'where the court charges correctly at one point and incorrectly at another, a new trial is necessary because the jury may have acted upon the incorrect part[,]' " (quoting *State v. Parrish*, 275 N.C. 69, 76, 165 S.E.2d 230, 235 (1969)). In the instant case, the trial court first charged the jury correctly as to the burden of proof on voluntary manslaughter and then incorrectly shifted the burden to defendant in the next sentence. Although the State argues that the error should be non-prejudicial because the trial court merely mis-spoke, the trial court further compounded the problem by providing the jury with a written document that contained the same misstatement as to the burden of proof. This is not a case with a singular misstatement where "the trial court repeatedly instructed the jury that the State had the burden of proving [that] defendant was guilty beyond a reasonable doubt." *State v. Baker*, 338 N.C. 526, 565, 451 S.E.2d 574, 597 (1994). Nor is this a case where the trial court made a misstatement of law which was preceded by several correct instructions. *See, e.g.*, *State v. Hazelwood*, 187 N.C. App. 94, 101-02, 652 S.E.2d 63, 68 (2007) (singular misstatements of law not prejudicial when made before several correct statements of law). Instead, the trial court made a misstatement as to the burden of proof for the voluntary manslaughter charge and then provided that same misstatement to the jury in writing, along with the correct second degree murder and involuntary manslaughter charges. We therefore are unable to conclude that the instructional error did not have a probable impact on the jury's finding of guilt. Because defend-

ant is entitled to a new trial, we need not address his remaining assignments of error.

New trial.

Judges TYSON and JACKSON concur.

IN THE MATTER OF: K.J.L.

No. COA08-284

(Filed 19 August 2008)

Termination of Parental Rights— jurisdiction—summons not signed, dated, or stamped

The trial court did not have jurisdiction to terminate parental rights where it lacked jurisdiction over the underlying juvenile file. The summonses were not signed or dated by the clerk of court, and did not contain an official stamp indicating their status as having been filed.

Appeal by respondent from an order entered 15 January 2008 by Judge Mary F. Covington in Davidson County District Court. Heard in the Court of Appeals 23 July 2008.

Charles E. Frye, III, for petitioner-appellee Davidson County Department of Social Services; Laura B. Beck, for appellee Guardian ad Litem.

Robert W. Ewing, for respondent-appellant.

HUNTER, Judge.

K.J.L., the minor child, was born on 18 July 2005. On 28 March 2006, the Davidson County Department of Social Services ("DSS") filed a petition alleging that K.J.L. was a neglected and dependent juvenile. On 8 September 2006, the district court adjudicated K.J.L. a neglected juvenile based on a stipulation between the parties. On 12 April 2007, DSS filed a petition to terminate respondent's parental rights. On 15 January 2008, the trial court terminated respondent's parental rights. Respondent appeals.

The threshold issue for this Court to consider on appeal is whether the trial court acquired jurisdiction of the subject matter of this juvenile action and the respondent without the proper issuance of summons. We hold that it did not.

A juvenile action, including a proceeding in which a juvenile is alleged to be neglected, is commenced by the filing of a petition. N.C. Gen. Stat. § 7B-405 (2007). Service of process in a juvenile proceeding involving abuse, neglect, and dependency is governed by N.C. Gen. Stat. § 7B-406(a), which provides 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 . . . requiring [him] to appear for a hearing at the time and place stated in the summons." N.C. Gen. Stat. § 7B-406(a) (2007). The issuance and service of process is the means by which the court obtains jurisdiction. *Latham v. Cherry*, 111 N.C. App. 871, 873, 433 S.E.2d 478, 481 (1993), *cert. denied*, 335 N.C. 556, 441 S.E.2d 116 (1994); *Childress v. Forsyth County Hospital Auth.*, 70 N.C. App. 281, 285, 319 S.E.2d 329, 332 (1984), *disc. review denied*, 312 N.C. 796, 325 S.E.2d 484 (1985).

Respondent argues that the trial court did not acquire jurisdiction over the underlying juvenile file, which gave custody to the petitioner and adjudicated the minor child as neglected, because the civil summons was not issued by the clerk of court. In the instant case, the summonses included in the record were neither signed nor dated by the clerk of court. See N.C. Gen. Stat. § 1A-1, Rule 4(a) (2007) ("[a] summons is issued when, after being filled out and dated, it is signed by the officer having authority to do so"); *Childress*, 70 N.C. App. at 285, 319 S.E.2d at 332 ("[t]he summons constitutes the means of obtaining jurisdiction over the defendant. In order to be valid, the summons must run in the name of the State and *must* . . . bear the signature of the clerk of court or his deputy. G.S. 1A-1, Rule 4(b). The summons . . . constitutes the exercise of the power of the State to bring the defendant before the court. As such, defects in the summons receive careful scrutiny and can prove fatal to the action") (emphasis added; internal citation omitted). We further note that the summonses do not contain an official stamp indicating their status as having been filed. Thus, it appears that no valid summonses were issued.

"Where no summons is issued the court acquires jurisdiction over neither the persons nor the subject matter of the action." *In re Mitchell*, 126 N.C. App. 432, 433, 485 S.E.2d 623, 624 (1997) (citing

Swenson v. Assurance Co., 33 N.C. App. 458, 235 S.E.2d 793 (1977)). Therefore, because no valid summonses issued, the trial court did not have jurisdiction over the underlying juvenile file, and it lacked jurisdiction to terminate respondent's parental rights. Accordingly, we vacate the order terminating respondent's parental rights.

Vacated.

Judges McGEE and STROUD concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 19 August 2008)

BALLEW v. BALLEW No. 06-548	Buncombe (05CVD2796)	Affirmed
CAGLE v. P.H. GLATFELTER/ ECUSTA DIV. No. 08-26	Ind. Comm. (I.C. No. 121196)	Affirmed
CARROLL v. RANDOLPH CTY. No. 07-1446	Randolph (06CVS2147)	Reversed and remanded
DAVIS v. SUGARMAN No. 07-505	Iredell (06CVS195)	Affirmed
DEASON v. OWENS-ILLINOIS, INC. No. 07-1159	Ind. Comm. (I.C. No. 192506)	Affirmed
ELROD v. ELROD No. 08-115	Buncombe (07CVD4036)	Affirmed
IN RE A.M. No. 08-92	Guilford (07JB288)	No error
IN RE D.R.B. No. 08-304	Iredell (05JA143)	Vacated
IN RE J.L.A. No. 08-220	Yadkin (06J71)	Affirmed
IN RE S.V., S.V., Z.P. No. 08-388	Orange (08J4-6)	Vacated
IN RE T.S., J.M., Z.S., T.S., S.S., T.M., D.M., R.M. No. 08-436	Harnett (07J13-19) (07J139)	Affirmed
KENION v. MAPLE VIEW FARM, INC. No. 07-1478	Ind. Comm. (I.C. No. 604349)	Affirmed
MILLER v. MILLER No. 07-1032	Harnett (03CVD1751)	Affirmed in part; vacated and re- manded in part
STATE v. ARAZIE No. 08-166	Stanly (06CRS53456)	Affirmed
STATE v. BROWN No. 08-16	Mecklenburg (06CRS224125) (07CRS10510)	No error
STATE v. DUANE No. 08-141	Burke (06CRS5484)	No error

STATE v. FLEMING No. 07-1299	Wayne (05CRS56762-63) (05CRS9730)	No error in part; reversed in part
STATE v. McDOUGAL No. 08-9	Cabarrus (03CRS15545) (03CRS15553) (03CRS15555)	No error
STATE v. OLIVER No. 07-972	Mecklenburg (06CRS223144-46)	No error
STATE v. PIGFORD No. 08-109	Lenoir (05CRS816) (06CRS50869)	No error in part; remanded for re- sentencing in part
STATE v. SHOLAR No. 08-89	Duplin (06CRS50860) (06CRS51175)	No error
STATE v. SQUIRES No. 08-50	Beaufort (05CRS52597)	No error
STATE v. WALKER No. 08-36	Rockingham (06CRS3785)	No error
WHITE FOX CONSTR. CO. v. MOUNTAIN GROVE BAPTIST CHURCH, INC. No. 07-963	Caldwell (04CVS67)	Reversed and remanded

STATE OF NORTH CAROLINA v. FRANKIE DELANO WASHINGTON

No. COA07-1517

(Filed 2 September 2008)

Constitutional Law— speedy trial—delay of nearly five years—*Barker* factors

Defendant was denied his constitutional right to a speedy trial by a delay of four years and nine months given defendant's repeated efforts to expedite his trial, the length of the delay, the overwhelming evidence that the delay could have been avoided if the State had exercised even the slightest care during the course of the prosecution, and the fact that the delay actually prejudiced defendant at trial. None of the factors from *Barker v. Wingo*, 407 U.S. 514, weigh in favor of the State.

Appeal by defendant from judgments entered 26 February 2007 by Judge Henry W. Hight in Durham County Superior Court. Heard in the Court of Appeals 1 May 2008.

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

Parish, Cooke & Condlin, by James R. Parish, for defendant appellant.

McCULLOUGH, Judge.

Frankie Delano Washington ("defendant") appeals his convictions of first-degree burglary, two counts of second-degree kidnapping, robbery with a dangerous weapon, attempted robbery with a dangerous weapon, assault and battery, and attempted first-degree sex offense. We vacate and dismiss.

The relevant facts and procedural history are as follows: At around 2:45 a.m. on 30 May 2002, sixteen-year-old Mary Katherine Breeze ("Katherine") returned home from a party. Katherine entered her home located at 911 North Gregson Street in the Trinity Park neighborhood of Durham through a sliding door on the side of the house. She testified at trial that although the neighborhood was a "little bit of a rough neighborhood," she did not want to wake her parents. Accordingly, she did not lock the door as she came in. Mary Breeze ("Mrs. Breeze"), Bill Breeze ("Mr. Breeze") and their twelve-year-old son, Will, were the only ones home at the time.

At around 3:00 a.m., an intruder entered the Breezes' home through the unlocked sliding glass door. The intruder was a "light complected" African-American male, wearing blue jeans, tan boots, and a dark-colored T-shirt with some sort of white writing on the front and back. The intruder wore a blue bandana over his nose and mouth and had a dark covering on his head, leaving only a "small slice of the front of his head" exposed. He was not wearing any gloves.

The Breezes were awakened by the barks of their family dog. Without putting on his glasses, Mr. Breeze went downstairs to check on the dog. When he reached the bottom landing of the stairs, the intruder pointed a sawed-off shotgun toward Mr. Breeze's face and ordered him to give him his money.

Mrs. Breeze heard scuffling, came out of her bedroom, and peered down the spiral staircase. Although she was not wearing her glasses, Mrs. Breeze could see the intruder standing on the landing in front of the staircase, holding a gun to Mr. Breeze's head. Mrs. Breeze screamed, and Will came out of his bedroom into the upstairs hallway. Katherine stayed in her bedroom and dialed 911.

The intruder headed up the stairs, and Mr. Breeze fled the house, seeking help. The intruder pushed Will ahead of Mrs. Breeze and held the gun to the back of Mrs. Breeze's head, threatening that she "was going to give him everything he wanted or he was going to kill [her]." He forced Mrs. Breeze and Will into the living room and pushed Will onto the couch.

While holding a gun to the back of Mrs. Breeze's head, the intruder directed Mrs. Breeze into the den and shut the door. While standing behind Mrs. Breeze, the intruder proceeded to stick his hand into Mrs. Breeze's underpants, reaching her "crotch" area. Mrs. Breeze had just undergone major abdominal surgery and had several drain lines coming from her body. She explained to the intruder, "if you're not careful, you're going to kill me." The intruder removed his hand from her underpants.

Placing the gun to the back of Mrs. Breeze's head, the intruder took her by the arm and told her that he wanted all of her money. She gave the intruder her purse, which contained approximately $150 cash, a palm pilot ("PDA"), and PDA accessories. The intruder then fled through the side door. In total, the intruder was in the Breezes' home for ten to fifteen minutes. At trial, Mrs. Breeze testified that for most of that time, her back was turned towards the intruder.

Mr. Breeze had been unsuccessfully banging on his neighbors' doors when the intruder found him on Markham Street and ordered him to return to his house. Mr. Breeze refused, and the intruder struck him in the face. The intruder then fled down Markham Street towards Duke University. Mr. Breeze followed the intruder and saw him turn onto Watts Street.

Durham police arrived at the Breezes' home shortly thereafter. The Breezes gave law enforcement descriptions of the intruder's clothing and told officers that the intruder appeared to be taller than five foot seven inches and under the age of thirty, with a receding hairline. Although most of the intruder's face was covered by the bandana, Mr. Breeze noted the distinctively young, smooth skin around the intruder's eyes.

Law enforcement used a K-9 unit to track a human scent from the street where Mr. Breeze was assaulted, while Officer William Bell patrolled the area by car.

The K-9 unit had tracked the human scent from Markham Street several blocks, through an alleyway, and through some backyards to Lancaster Street when, sometime between 3:30 a.m. and 4:00 a.m., the unit heard a call out that defendant had been detained. Upon hearing the call, the K-9 unit stopped tracking the scent.

Officer Bell testified at trial that he was patrolling the neighborhood, looking for a black male wearing a blue T-shirt with writing on the front and jeans. He observed defendant, who was forty-one years old and 5 feet 6 inches in height, walking south on the 1200 block of Berkeley Street. Defendant was wearing a blue T-shirt with an emblem on the front of the shirt and white lettering, blue jeans, and "work-type" boots. Defendant was sweating and appeared nervous. His T-shirt was dirty with grass stains, and he had some mud on his jeans.

Officer Bell asked defendant to empty his pockets, and he recovered from defendant a long-handled pair of pliers and a short piece of a clothes hanger. Officer Anthony Smith testified that to his knowledge, defendant did not have any cash on him.

Defendant told Officer Bell that he had been walking from his girlfriend's house on Hillcrest Avenue, which was off of Guess Road. He stated that he was an auto mechanic and that he used the hanger and pliers for his work on cars; however, defendant later told police that he had been smoking crack cocaine in a nearby house on

Claredon Street. At trial, Lieutenant John Peter testified on cross-examination that small pieces of hanger, like the one recovered from defendant, are commonly used as "push rods." A push rod is a small piece of metal that is used to push out debris from a crack pipe.

Sometime between 4:00 a.m. and 5:00 a.m., law enforcement returned to the Breezes' home and told the Breezes that they had apprehended a suspect fitting the description of the intruder. Police drove Mr. and Mrs. Breeze to defendant, who was standing in custody outside of a police car, about half a mile from the Breezes' home. Defendant was not wearing a bandana or head covering, but he was wearing a navy blue T-shirt with white insignia on the chest, baggy blue jeans, and tan boots.

At trial, Mrs. Breeze testified that in the dark, from about 20 feet from defendant, she identified defendant as the intruder who broke into her home earlier that morning. She stated that she could not determine defendant's age from that distance. Defendant was arrested. Police did not conduct any subsequent pretrial identification procedures.

Later that day, based on a tip from a neighborhood child, Durham Police recovered Mrs. Breeze's black purse, PDA and attachments, a Mossburg sawed-off shotgun, a bandana, and fecal matter in or around a creek in Walltown Park in Durham. Officers recovered a black toboggan in an alleyway on Buchanan Boulevard, between Green Street and Berkeley Street. An unusual cigarette butt was also collected from the Breezes' residence, but it was later determined to be unrelated to the case.

Defendant was held in the Durham County Jail for 366 days, pending State Bureau of Investigation ("SBI") analysis of the above items of physical evidence for trial. After several motions by defendant and incremental reductions by the trial court, on 7 May 2003, the trial court reduced defendant's secured bond to the amount of $37,500.00. Defendant was thereafter released from jail on bond.

From May of 2002 to October of 2004, defendant moved the court twice to compel SBI analysis of the State's evidence. On 18 March 2004, the trial court granted defendant's motion, and ordered the SBI to conduct all of the requested tests. The SBI, however, was never notified of that order.

On 24 June 2005, defendant moved the court to dismiss all charges with prejudice for the State's violation of his right to a speedy

trial. The trial court denied that motion. The SBI finally completed all requested analysis of the evidence on 30 January 2006.

Approximately four years and nine months after defendant's 30 May 2002 arrest, defendant was tried before a jury at the 19 February 2007, 20 February 2007, and 21 February 2007 Criminal Sessions of Durham County Superior Court.

At trial, the State presented the identification testimony of Mr. Breeze, Mrs. Breeze, and Will Breeze as well as the testimony of law enforcement officers as to the location and circumstances of defendant's 30 May 2002 arrest.

SBI lab reports and the expert testimony of SBI lab agents were also admitted as evidence at trial. After analyzing all of the items of evidence collected by police, the SBI determined that only the purse and toboggan contained identifiable physical evidence. SBI examination of this evidence revealed the following: (1) three identifiable fingerprints were found inside of Mrs. Breeze's purse, but none of those prints were a match to defendant; (2) the black toboggan contained the DNA profiles of more than one donor, but none of those profiles were a match to defendant.

Defendant was found guilty of first-degree burglary, two counts of second-degree kidnapping, robbery with a dangerous weapon, attempted robbery with a dangerous weapon, assault and battery, and attempted first-degree sex offense. He was sentenced to consecutive terms of imprisonment of 46 to 56 months, 46 to 56 months, 117 to 150 months, 117 to 150 months, 20 days, and 251 to 311 months, respectively. Defendant was given credit for the 366 days spent in confinement prior to his trial.

On appeal, defendant contends that (1) he was denied his constitutional right to a speedy trial; and (2) the trial court erred by denying his motions to dismiss various charges for insufficiency of the evidence.

I. Right to a Speedy Trial

Defendant first contends that the four-year and nine-month delay between his May 2002 arrest and his February 2007 trial amounted to a violation of his constitutional right to a speedy trial. Accordingly, defendant contends that his convictions must be vacated and the charges against him must be dismissed with prejudice. We conclude that the circumstances of this case are unprecedented. After

a difficult and sensitive balancing of the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530, 33 L. Ed. 2d 101, 117 (1972), we agree with defendant.

The Sixth Amendment to the United States Constitution and the fundamental law of this State provide every individual formally accused of a crime the right to a speedy trial. *See, e.g.*, *State v. Lyszaj*, 314 N.C. 256, 261, 333 S.E.2d 288, 292 (1985). The Sixth Amendment states, in pertinent part, "in all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial." U.S. Const. amend. VI. This provision is made applicable to the states by the Fourteenth Amendment. *See Klopfer v. North Carolina*, 386 U.S. 213, 222, 18 L. Ed. 2d 1, 8 (1967). Likewise, Article I, Section 18 of the North Carolina Constitution provides that "[a]ll courts shall be open[] [to] every person . . . without favor, denial, or delay." N.C. Const. art. 1, § 18. When reviewing speedy trial claims, we employ the same analysis under both the Sixth Amendment and Article I. *See State v. Flowers*, 347 N.C. 1, 27, 489 S.E.2d 391, 406 (1997).

In *Barker*, the United States Supreme Court set forth a balancing test involving four interrelated factors for courts to use in determining whether a defendant's constitutional right to a speedy trial has been violated. *Barker*, 407 U.S. at 530, 33 L. Ed. 2d at 116-17. These factors include: (1) the length of the delay; (2) the reason for the delay; (3) defendant's assertion of his right to a speedy trial; and (4) prejudice to defendant resulting from the delay. *Id.* North Carolina courts have adopted these standards in analyzing alleged speedy trial violations. *See State v. Bare*, 77 N.C. App. 516, 519, 335 S.E.2d 748, 750 (1985), *disc. review denied*, 315 N.C. 392, 338 S.E.2d 881 (1986).

Our Supreme Court has emphasized that none of the four factors identified above is determinative; rather they are to be considered together, and each claim is to be decided on a case-by-case basis, after a careful balancing of the facts:

> "We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. But, because we are dealing with a fundamental right of the accused, this process must be carried out with full recogni-

tion that the accused's interest in a speedy trial is specifically affirmed in the Constitution."

State v. Spivey, 357 N.C. 114, 118, 579 S.E.2d 251, 255 (2003) (quoting *Barker*, 407 U.S. at 533, 33 L. Ed. 2d at 118-19).

With these principles in mind, we now balance the four factors given the evidence contained in the record.

(1) Length of the Delay

First, the length of the delay is not *per se* determinative of whether a defendant has been deprived of his right to a speedy trial. *See State v. Webster*, 337 N.C. 674, 678, 447 S.E.2d 349, 351 (1994). The United States Supreme Court has noted that "lower courts have generally found post-accusation delay 'presumptively prejudicial' at least as it approaches one year." *Doggett v. United States*, 505 U.S. 647, 652 n.1, 120 L. Ed. 2d 520, 528 n.1 (1992). However, " 'presumptive prejudice' does not necessarily indicate a statistical probability of prejudice; it simply marks the point at which courts deem the delay unreasonable enough to trigger the *Barker* enquiry [sic]." *Id.* Here, the length of the delay was approximately four years and nine months. The State concedes that this is enough to trigger examination of the other factors.

(2) Reason for the Delay

With respect to the reasons for the delay, a defendant bears the burden of presenting *prima facie* evidence that the delay was caused by the neglect or willfulness of the prosecution. *Spivey*, 357 N.C. at 119, 579 S.E.2d at 255. "Only after the defendant has carried his burden of proof by offering *prima facie* evidence showing that the delay was caused by the neglect or willfulness of the prosecution must the State offer evidence fully explaining the reasons for the delay and sufficient to rebut the *prima facie* evidence." *Id.*

We have held that " '[t]he constitutional guarantee does not outlaw good-faith delays which are reasonably necessary for the State to prepare and present its case. . . . The proscription is against purposeful or oppressive delays and **those which the prosecution could have avoided by reasonable effort.**' " *State v. Hammonds*, 141 N.C. App. 152, 160, 541 S.E.2d 166, 173 (2000) (citation omitted) (emphasis added), *cert. denied*, 536 U.S. 907, 153 L. Ed. 2d 184 (2002).

Likewise, in *Spivey*, the defendant asserted that a four-and one-half-year pretrial delay was caused by the State's "laggard perform-

ance," but the record revealed that the delay was actually the result of a "neutral factor"—docket congestion in Robeson County. *Spivey*, 357 N.C. at 117, 579 S.E.2d at 256. The Court concluded that the defendant had failed to carry his burden of proof in establishing State neglect. In holding that the defendant had not been deprived of his right to a speedy trial, our Supreme Court reasoned:

> Defendant has failed to present **any** evidence that the delay was caused by the State's neglect or willfulness, and **we see no indication that court resources were either negligently or purposefully underutilized.** Indeed, **defendant relies solely on the length of delay** and ignores the balancing of other factors.

Spivey, 357 N.C. at 121, 579 S.E.2d at 256 (emphasis added). *See also Hammonds*, 141 N.C. App. at 160-61, 541 S.E.2d at 173-74 (holding that where a four-and-one-half-year-pretrial delay was caused by docket congestion in Robeson County and other "neutral factors," defendant failed to carry his burden of proof in showing State neglect or willfulness).

The case *sub judice*, however, is distinguishable from both *Spivey* and *Hammonds*, as the record contains overwhelming evidence that the actual reason for the delay in this case was not a neutral factor, but rather, was repeated neglect and underutilization of court resources on the part of the Durham County District Attorney's Office. The State has failed to rebut this showing, and we must weigh this factor in favor of defendant.

Failure to submit evidence to SBI for analysis

First, the record shows that much of the delay was caused by the State's failure to submit its physical evidence to the SBI lab to be examined.

Defendant was arrested on 30 May 2002, indicted on 19 August 2002, and was held in the Durham County Jail for 366 days, pending SBI analysis of the physical evidence. The record shows that from 26 August 2002 to 7 May 2003, defendant moved the court four times to reduce defendant's bond, which was originally set at $1 million. With each motion, the trial court incrementally reduced defendant's bond and directed the State to proceed with the testing as expeditiously as possible.

By 20 July 2006, the case had appeared on at least three trial calenders, but was continued at the request of the State because the SBI

had not performed the necessary tests on the evidence. Thus, it is clear that at least 49 months of the delay, from 30 May 2002 to 20 July 2006, is attributable to the State's continuances, pending SBI testing of the evidence.[1]

According to SBI lab reports, however, the black purse, containing three exclusionary fingerprints, and the black toboggan, containing exclusionary DNA evidence, were not submitted to the SBI lab for analysis until 4 August 2005, which was more than three years after these items were collected.

Moreover, Natassha Robinson, the forensic scientist who conducted the latent print examination and comparison on the shotgun, PDA, and purse, testified at trial that while the State submitted the PDA and shotgun for testing in June and July of 2002, respectively, the State did not submit any fingerprint impressions from defendant for comparison. Lab reports show that defendant's fingerprint impressions were obtained from the SBI's internal system on 31 August 2005.

With the exception of the fecal matter, which could not be tested, the lab reports show that all of the items that were submitted to the lab in June or July of 2002 had been analyzed by 20 October 2003. Most of these items were fully analyzed within six months of their submission. Thus, the primary reason that the SBI did not complete its analysis of the State's evidence until January of 2006 was not a neutral factor, but rather, was a factor wholly within the prosecution's control: the prosecution's failure to submit the evidence to the lab prior to August of 2005.

Failure to make appropriate requests

Next, the record reveals that during the prosecution, the State was given notice of evidence tending to establish the guilt of another person already in custody, yet the State failed to request that the SBI make appropriate comparisons of the evidence to this person.

On 23 October 2003, defendant moved to compel SBI analysis of the State's physical evidence on the grounds that another person, Lawrence Hawes, had been arrested as a suspect in a string of home invasions in or near the Trinity Park neighborhood of Durham, including six home invasions that occurred *after* defendant's 30 May 2002 arrest:

1. On 20 July 2006, defendant continued trial to 18 September 2006, a two-month delay, which we attribute to defendant and do not weigh against the State.

8. Based on information and belief, the Durham Police Department formed a Sexual Assault Task Force to deal with a series of sexual assaults and burglaries occurring over the last year and a half;

9. [T]hese attacks were occurring in the neighborhoods commonly referred to as **Trinity Park**, Watts-Hillandale, Walltown and Duke University's East Campus;

10 On or about September 13, 2002 **Lawrence Hawes** was arrested by the Durham Sexual Assault Task Force and charged with burglary and sexual assault offenses;

11. . . . **Lawrence Hawes** was a suspect, according to the Durham Sexual Assault Task Force, in the following burglary and/or sexual assaults:

a. January 10, 2002, 400 block of **Gregson St.**

b. February 20, 2002, 600 block of Buchanan St.

c. March 7, 2002, Englewood Ave.

d. April 1, 2002, Priscillas on Guess Rd.

e. July 1, 2002, 800 block of Wilkerson Ave.

f. August 17, 2002, 1400 block of Carolina Ave.

g. September 5, 2002, 800 block of Wilkerson Ave.

h. August 7, 2002, 1100 block of Iredell St.

i. . . . August 17, 2002, Knox St.

j. . . . August 23, 2002, 1400 block of Carolina Ave.

* * * *

14. Based on information and belief, **Lawrence Hawes would follow females to a residence late at night** or in the early morning hours, pull a weapon and sexually assault the female;

* * * *

18. [T]he State Bureau of Investigation has not compared the fingerprints or DNA samples of the defendant to any of the evidence recovered by the Durham Police . . .;

19. Nor has the State Bureau of Investigation compared the known fingerprints and DNA samples of Lawrence Hawes to the

evidence recovered by the Durham Police as related to the burglary and assault at 911 N. Gregson St[.]

Because it is referenced in the record of appeal and is material to the issue of state neglect, we take judicial notice that Lawrence Hawes was convicted on 4 June 2003 for acts committed during a home invasion in the Trinity Park neighborhood of Durham on 7 March 2002. *State v. Hawes*, No. COA03-1417, 2004 N.C. App. LEXIS 1286, at 1, 2 (N.C. Ct. App. July 20, 2004), *cert. denied*, 360 N.C. 71, 623 S.E.2d 777 (2005); *see* 1-2 *Brandis and Broun on North Carolina Evidence* § 26 (2004) ("An appellate court may notice its own records."); *see*, *e.g.*, *West v. Reddick*, *Inc.*, 302 N.C. 201, 203, 274 S.E.2d 221, 223 (1981) (taking judicial notice of the facts of a North Carolina Court of Appeals decision and concluding that an opinion of the North Carolina Court of Appeals is a "readily accessible source of indisputable accuracy"); *In re Trucking Co.*, 285 N.C. 552, 557, 206 S.E.2d 172, 176 (1974) ("The Supreme Court will take judicial notice of its own records.").

In *Hawes*, the State's evidence tended to show that on 7 March 2002, Lawrence Hawes, a black male, wore a maroon bandana over his nose and mouth and pointed a sawed-off shotgun at the victim before raping and robbing her. *Hawes*, slip op. at 1, 2. Lawrence Hawes' DNA profile was a match to the DNA recovered from the victim's pajama bottoms. *Id.* Hawes' shoe print matched a print recovered from the scene of another nearby home invasion and sexual assault that occurred on 5 September 2002. *Id.* Upon arresting Hawes, police recovered a semi-automatic handgun, four types of hats, four shirts, a bandana, and a toolbox from Hawes' car. *Id.*, slip op. 4. Lawrence Hawes was sentenced to three consecutive terms of 384 to 470 months' imprisonment, and we found no error by the trial court. *Id.*, slip op. 1.

The record shows that despite defendant's 2002 request, the State never submitted a request to the SBI lab that any of the physical evidence in this case be compared to the known fingerprints or DNA profile of Lawrence Hawes, and the trial court denied defendant's motion to compel such testing.[2] Forensic Scientist Natassha Robinson testified that it is SBI policy that where a suspect has been

2. Although the trial court later granted defendant's 2004 motion to compel testing, the 2004 motion makes no reference to Lawrence Hawes. We have no explanation as to why defense counsel did not renew his 2002 request to have the physical evidence compared to the DNA profile and fingerprint impressions obtained from Hawes nor why he failed to introduce this evidence at trial.

identified, latent fingerprint impressions will not be compared to those contained in the AFIS system unless the State specifically makes such a request. Because the State did not make a request for such a comparison, the fingerprints obtained from the purse, which did not match defendant, were not run through the system for comparison. Likewise, the State did not request that the mixture of DNA profiles obtained from the toboggan, none of which matched defendant, be queried against the convicted offender indexes of the NCSBI State Database. We conclude that the State's failure to request that such comparisons be made is evidence of the State's repeated neglect of this case over the course of the prosecution.

Underutilization of court resources

Finally, the record shows that for nearly two years the Durham County District Attorney's Office failed to notify the SBI that it had been court ordered on 18 March 2004 to analyze the evidence; as such, the SBI lab did not comply with the order and did not conduct all of the tests mandated by Judge Stephens. As previously discussed, we note that even if the State had provided the SBI with a copy of Judge Stephens' Order in 2004, the SBI could not have tested the purse or toboggan at that time because the State did not submit those items to the lab for examination until August of 2005.

The 18 March 2004 order mandated that the SBI conduct eight types of tests on the evidence and that if any of those tests could not be performed, that the agency provide Assistant District Attorney Tracy Cline with a written statement explaining the reason that any such test could not be performed. At trial, Special Agent Jennifer Elwell of the SBI testified to the following:

> Q. Is there in [the SBI files on the case] a Court Order signed on the 18th day of March, 2004, ordering the SBI to perform certain tests?
>
> A. **No, sir, there is no Court Order in either file.**
>
> Q. So [to] your personal knowledge, no one from the Durham Police Department contacted you and let you know sometime after the 18th day of March, 2004 that the SBI was under Court Order to perform certain tests?
>
> A. I'm going to refer right now to my phone logs, not my phone logs, but the phone logs that were generated in this case, and see if there is any kind of telephone conversation. **It is our**

standard operating procedure that if a conversation had occurred we would have written it down in the phone log.

* * * *

A. No, sir, there is no indication of a phone conversation regarding a Court Order.

Q. From the Durham Police?

A. No.

Q. Or the Durham County District Attorney's Office?

A. That would be correct.

(Emphasis added.)

In total, four different SBI agents—Jennifer Elwell, Michael Joseph Budzynski, Natassha Robinson, and James Gregory—testified that they were not provided with notice of the 2004 court order. Detective Smith of the Durham Police Department also testified that he never received a copy of the order compelling testing, and he had no notice of it.

Moreover, despite the 2004 order that the SBI conduct STR/DNA analysis of the bandana and make appropriate comparisons to defendant, the lab report shows that the State never requested such a test. Accordingly, the SBI only conducted a hair analysis of the bandana and never examined the bandana for the presence of DNA. Thus, even with more than four-and-one-half years of time to prepare its case, the State failed to completely analyze the evidence as ordered.

In sum, the State's three-year delay in submitting the evidence to the SBI lab, its failure to request that such evidence be compared to the AFIS Database and convicted offender indexes of the NCSBI State Database, and its failure to notify the SBI that it had been court ordered to conduct tests necessary for its prosecution is *prima facie* evidence of State neglect and underutilization of court resources during the course of this prosecution. Defendant has carried his burden of proof.

In response, the State argues that the length of time that it took the SBI to test the items of evidence was outside of the prosecution's control. Likewise, at trial, Assistant District Attorney Cline testified that it can take "years" for the SBI to fully test an item. This assertion, however, is simply unsupported by the evidence of record. According

to SBI lab reports, all of the items were tested within one year and four months of their submission and most were tested within six months of their submission.

In addition, the State contends that much of the delay was caused by the fact that the fecal matter could not be tested; however, the State has not submitted any evidence to support this contention. To the contrary, SBI Agent Michael Joseph Budzynski testified at trial that because the SBI lab does not conduct DNA analysis on fecal matter submitted in a plastic bag, upon receiving a fecal sample in that form, the SBI lab would have immediately advised the State that such evidence would not be analyzed.

In sum, there is no evidence in the record tending to show that the delay was caused by a factor outside of the prosecution's control, such as a short staff or backlog of evidence to be tested at the SBI lab. This distinguishes the instant facts from the facts of *Spivey* and *Hammonds*. Because the State has failed to rebut defendant's *prima facie* showing that the majority of the delay was caused by the State's neglect and underutilization of court resources throughout the course of this prosecution, we must weigh this factor in favor of defendant.

(3) Defendant's Assertion of His Right to a Speedy Trial

We turn to the third factor. The United States Supreme Court has stated:

> Whether and how a defendant asserts his right is closely related to the other factors . . . . The strength of his efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences. The more serious the deprivation, the more likely a defendant is to complain.

Barker, 407 U.S. at 531, 33 L. Ed. 2d at 117.

Here, defendant formally asserted his right on 24 June 2005, when he moved to dismiss the case on the grounds that the State had deprived him of his right to a speedy trial. While this was roughly two years and ten months after his August 2002 indictment, it was also approximately one year and eight months before his trial began.

In addition, although not a formal assertion of defendant's right, in order to reduce the delay, defendant moved the court twice to com-

pel testing by the SBI. Defendant made his first motion on 23 October 2002, just roughly two months after his indictment; he moved the trial court again on 18 March 2004, stating:

> [T]he Defendant believes the tests [sic] results will prove he had no contact with any of the collected items, has never been inside the residence at 911 N. Gregson St., did not assault any of the victims and is completely innocent of these charges.
>
> Wherefore the Defendant requests that the Court enter an Order compelling the SBI to proceed with the examinations requested in paragraph seven (7) above **as soon as practicable.**

(Emphasis added.)

Finally, defendant complained about the delay at trial by cross-examining all of the State's witnesses from the SBI about the reason for the delay and by calling Assistant District Attorney Cline to the stand to testify to the same effect.

Thus, while defendant's formal assertion of his right was not immediate, he did assert this right almost two years prior to the start of his trial. Further, defendant began informally asserting his right as early as October of 2002, when he began moving the court to expedite SBI testing. Defendant continued to complain about the delay throughout his prosecution. Accordingly, when considered together, these actions weigh in favor of defendant.

(4) Prejudice to Defendant

Finally, we consider whether defendant has suffered prejudice as a result of the delay of his trial. "Courts will not presume that a delay in prosecution has prejudiced the accused. The defendant has the burden of proving the fourth factor." *State v. Hughes*, 54 N.C. App. 117, 120, 282 S.E.2d 504, 506 (1981). Nevertheless, the need to demonstrate prejudice diminishes as the egregiousness of the delay increases. *Doggett*, 505 U.S. at 668, 120 L. Ed. 2d at 532.

As to this factor, the United States Supreme Court has recognized three objectives of the right to a speedy trial: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *Barker*, 407 U.S. at 532, 33 L. Ed. 2d at 118 (citation omitted). Of these forms of prejudice, the most serious is the last, as "the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Id.*

Here, there is evidence that the near five-year pretrial delay resulted in actual particularized prejudice to defendant, which we must weigh heavily in defendant's favor.

Pretrial incarceration

First, defendant was incarcerated for more than 366 days prior to his trial. While evidence of a lengthy pretrial incarceration, standing alone, may be insufficient to establish that a defendant's right to a speedy trial has been violated; *see Spivey*, 357 N.C. 114, 579 S.E.2d 251; and *Hammonds*, 141 N.C. App. 152, 541 S.E.2d 166, our Supreme Court has nonetheless stated that evidence of an oppressive pretrial incarceration is an important consideration in our analysis. *Webster*, 337 N.C. at 681, 447 S.E.2d at 352. "[T]ime spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness." *Barker*, 407 U.S. at 532, 33 L. Ed. 2d at 118. Here, there is evidence that the pretrial incarceration not only disrupted defendant's work as an auto mechanic, but also disrupted his family life. At 3:00 p.m. on the afternoon following defendant's arrest, police found defendant's ten-year-old son home alone in defendant's apartment. The record does not reveal who took custody of his son during defendant's incarceration; however, defendant's sudden separation from his child, which lasted for more than a year, is a form of prejudice that we must consider.

Impairment to the defense

As a preliminary matter, we note that evidence tending to establish that another person committed the crime for which a defendant is charged is relevant and admissible as long as it does more than create an inference or conjecture in this regard. *State v. Israel*, 353 N.C. 211, 219, 539 S.E.2d 633, 638 (2000). It must tend to both implicate another and be inconsistent with the guilt of the defendant. *Id.* Thus, the evidence referenced in defense counsel's 2002 motion, that another person, Lawrence Hawes, had been convicted of invading another home in the same Trinity Park neighborhood, while carrying the same type of weapon and wearing the same type of disguise, just two months prior to the date of the offenses for which defendant was charged would have been relevant and admissible evidence at trial. Because we see no tactical advantage in excluding this evidence from the jury's consideration, we find that defense counsel's failure to introduce this evidence was likely inadvertent. We recognize, as a practical matter, that over the years that passed between defense counsel's 2002 motion to compel testing and defendant's 2007 trial,

defense counsel may have simply forgotten about or overlooked this evidence; however, without an explanation in the record, we will not attribute this omission to the delay. Thus, while the fact that this evidence was not introduced at trial was clearly prejudicial to defendant, we do not weigh this prejudice against the State under our *Barker* analysis.

What we do weigh against the State, however, is the clear impairment to the defense caused by the inability of many of the witnesses to recall details pertinent to the defense. *See Barker*, 407 U.S. at 532, 33 L. Ed. 2d at 118 ("There is also prejudice if defense witnesses are unable to recall accurately events of the distant past."). Here, the trial transcript reveals that the witnesses' inability to accurately recall the events of 30 May 2002 repeatedly interfered with defendant's ability to establish circumstantial evidence that was relevant to the defense and also impeded defendant's ability to challenge the reliability of the State's identification evidence on cross-examination. Given that all of the evidence tending to establish defendant's guilt in this case was testimonial in nature, the impairment to the defense here was more pronounced than it might have been otherwise.

First, in establishing defendant's guilt, the State relied heavily on the testimony of Durham Police officers concerning the circumstances of defendant's arrest. Since it had been nearly five years since defendant's arrest, however, officers could recall very little beyond what was recorded in their notes. There were several instances at trial where the defense inquired about facts that were not contained in police reports, but were relevant to the defense, and the officers stated that they did not recall.

For instance, the defense's ability to highlight any discrepancies between defendant's physical characteristics and the description of the intruder that was given to law enforcement was repeatedly impeded by the inability of the officers to recall details of the description that had not been recorded in their notes. This is just one example:

> Q. You indicated that Officer Caldwell gave out a description of this person who had been in the house with the shotgun?
>
> A. Uh-huh.
>
> Q. What was that description?
>
> A. The description was a black male with a shotgun. I think he said blue T-shirt and jeans.

Q. Did the person that gave out the initial description say anything about his height?

A. **I don't recall.**

Q. Did they say anything about the person's weight?

A. **I don't recall that either.**

(Emphasis added.)

Likewise, another fact relevant to the defense was that approximately $150 was missing from Mrs. Breeze's purse, yet police reports did not show that defendant had any money in his pockets at the time of his arrest. While the omission in the reports tended to imply that defendant was not carrying the cash, this fact was not affirmatively documented and not one officer was able to testify with certainty as to this fact. For example, relying on memory alone, Detective Anthony Smith suggested, but could not say definitively that defendant did not have any cash on him at the time of his arrest:

Q. Was [sic] there [] property forms filled out for Frankie Washington?

A. There was [sic] some.

Q. How many?

A. I don't know the exact amount. There are other means of identifying where property is also.

Q. All right. Can you tell this jury, if a property report was done on any money that was taken from Frankie Washington the night he was arrested or early morning hours he was arrested?

A. No. No.

Q. Do you remember of your own personal knowledge whether he had any money on him at all?

A. **I do not recall him having any money on him.**

(Emphasis added.)

Next, the crux of the State's evidence establishing defendant's guilt was eyewitness testimony, including Mr. and Mrs. Breeze's pretrial show-up identification of defendant as the perpetrator of the crime and three in-court identifications to the same effect. The victims' blurred recollections as to the details of 30 May 2002

repeatedly interfered with defendant's ability to challenge the reliability of those identifications.

For example, defendant's opportunity to challenge the reliability of Mr. Breeze's pretrial identification of defendant as the perpetrator of these crimes was severely hindered by Mr. Breeze's inability to recall the details of the 30 May 2002 identification procedure:

> Q. So when they told you they had a suspect, you knew that before you even left the house, is that right?
>
> A. I knew that they were going to drive me somewhere to show me someone, yes.
>
> Q. And when they drove you to where this person was, you were in the back of a police car, is that right?
>
> A. Yes, that's correct. **I think that's right**, yeah. I was in a police car.
>
> Q. Think about it for a minute. Were you in the back of the police car?
>
> A. Yes.
>
> * * * *
>
> Q. How many people were sitting on the front seat in front of you?
>
> A. Well, there was the driver, and I believe **there might have been somebody else,** but I'm not a hundred percent sure I wasn't there and the other guy in the backseat, but **I think I was sitting beside my wife.**
>
> Q. And you're looking out through the front window of the police car, is that right?
>
> A. **I think it was the side, I'm not sure. I looked out the window.**
>
> Q. **How far was the police car away from this person you were looking at?**
>
> A. **Close enough** that I could see him real well. . . .
>
> Q. How far away were you, Attorney Breeze?
>
> A. **I don't know.** I mean it was not too far.
>
> * * * *

Q. So you're saying maybe back to that first row is how far away you were?

A. **Well, you know, I don't know.** I mean it wasn't all that far because I could see him.

(Emphasis added.)

It seems from the outcome of the case that the jury did not weigh Mr. Breeze's faded memory heavily against him; however, Mr. Breeze's inability to recall the conditions under which he identified defendant as the perpetrator of the offenses at issue, including the distance from defendant at which he made such identification, made it substantially more difficult for defendant to challenge Mr. Breeze's opportunity to accurately see defendant's facial features and to contest the reliability of that identification. This was prejudicial to defendant.

Finally, we turn to the fact that the victims in this case were permitted to participate in several in-court identifications nearly five years after the date of the crime.[3] Without addressing whether it was proper to admit such identification evidence, we note that the "reliability of identification evidence is the linchpin in determining its admissibility." 29 Am. Jur. 2d Evidence, § 637 (2008). For both in-court and out-of-court identifications, there are five factors to consider in determining whether an identification procedure is so inherently unreliable that the evidence must be excluded from trial: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty

3. While we are troubled by the the Durham Police Department's use of a highly suggestive show-up procedure to identify defendant as the perpetrator of this crime, defendant did not move to suppress this pretrial identification evidence at trial nor does he argue on appeal that admission of this evidence amounted to plain error; accordingly, the question of whether the trial court's admission of that evidence constitutes reversible error is not before us for review. N.C. R. App. P. 10(b)(1) (2008). Likewise, while defendant did object to the victims' in-court identifications of defendant pursuant to Rule 403 of the N.C. Rules of Evidence, defendant has abandoned this assignment of error on appeal. N.C. R. App. P. 28(b)(6) Art. II. Thus, for purposes of our *Barker* analysis, we assume *arguendo*, that the trial court's admission of the pretrial identification evidence and in-court identification evidence does not constitute reversible error. *But cf. State v. Pinchback*, 140 N.C. App. 512, 518, 537 S.E.2d 222, 225 (2000) (reversing on the grounds that pretrial identification evidence should have been excluded where the identification procedure was a suggestive show up; the witness was only in the presence of an unmasked perpetrator for a period of thirty minutes, most of which time the witness's back was turned towards the perpetrator; and the witness only accurately described the perpetrator's clothing).

demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. *Id.*; *see also Pinchback*, 140 N.C. App. at 518, 537 S.E.2d at 225. Thus, we have recognized that the longer the length of time between the crime and the in-court confrontation, the greater the likelihood of misidentification, and likewise, the greater the prejudice to defendant from admission of such identification evidence.[4]

In May of 2002, Mrs. Breeze could only identify the color of the intruder's shirt and that it had some sort of white insignia on the front and back of it. At trial in 2007, she was asked whether a photo of defendant's blue shirt depicted the same exact blue shirt that she had seen nearly five years earlier. Similarly, Will Breeze and Mr. Breeze, who testified that they had only seen a slice of the intruder's face for less than ten to fifteen minutes in May of 2002 and who had never seen the intruder before that time, were asked to identify whether defendant was the same person they had seen nearly five years before. These in-court identifications were substantially more likely to result in a misidentification of defendant as the perpetrator of the crimes charged than if they had been conducted sooner in the process.

In sum, it is clear from the record that the near five-year pretrial delay resulted in actual particularized prejudice to defendant, including an oppressive 366-day pretrial incarceration, the loss of circumstantial evidence surrounding defendant's arrest, impairment to the defense's ability to challenge pretrial identification evidence, and a substantially greater likelihood that the in-court identifications would result in misidentification of defendant as the perpetrator of the offenses. Accordingly, we must weigh this prejudice heavily in defendant's favor.

Given the length of the delay, defendant's repeated efforts to expedite his trial, the overwhelming evidence that the delay could have been avoided if the State had exercised even the slightest care during the course of this prosecution, and the fact that this delay actually prejudiced defendant at trial, there is not one *Barker* factor that weighs in favor of the State. Therefore, after applying the *Barker*

4. For future reference, we note that in an effort "to help solve crime, convict the guilty, and exonerate the innocent in criminal proceedings by improving procedures for eyewitness identification of suspects," the General Assembly has enacted the Eyewitness Identification Reform Act. N.C. Gen. Stat. § 15A-284.51(2007). Because this legislation became effective on 1 March 2008, it is not applicable to the case *sub judice*.

balancing test to the exceptional and unprecedented facts of this case, we have no choice but to conclude that defendant has been deprived of a right specifically affirmed in both our state and federal constitutions. As such, we must vacate defendant's convictions and dismiss all charges with prejudice.

Because we dismiss all charges with prejudice on speedy trial grounds, we need not address defendant's remaining assignments of error.

Vacated and dismissed.

Judges TYSON and STROUD concur.

NANCY E. ODELL, INDIVIDUALLY AND ON BEHALF OF THOSE SIMILARLY SITUATED, PLAINTIFF-APPELLANT v. LEGAL BUCKS, LLC, A NORTH CAROLINA LIMITED LIABILITY COMPANY, JAMES KEITH TART AND LYNN DAVIES TART, DEFENDANTS-APPELLEES

No. COA07-1094

(Filed 2 September 2008)

1. Appeal and Error— appellate rules violations—sanctions—failure to show substantial or gross noncompliance

The Court of Appeals denied defendants' motion for sanctions under N.C. R. App. P. 34(b) based on plaintiff's failure to comply with the Rules of Appellate Procedure, including stylistic requirements provided in N.C. R. App. P. 26(g)(1), N.C. R. App. P. 28(b), and in the appendices to the appellate rules, because the errors did not constitute substantial or gross noncompliance with the appellate rules.

2. Gambling— litigation funding agreement—not illegal gaming contract

A litigation funding agreement under which defendant creditor advanced money to plaintiff borrower that was to be repaid out of plaintiff's expected recovery in a pending personal injury claim was not a "bet" or a "wager" that rendered it an illegal gaming contract under N.C.G.S. § 16-1, even though defendant's return on its advance depended on the contingent event of the amount of plaintiff's recovery on her personal injury claim, because: (1) a "bet" requires the parties to the bet to take oppo-

site sides of an uncertain event, whereas both parties in the instant case desired the same outcome of the uncertain event; and (2) a "wager" requires that neither party to the wager have any interest in the contingent event at issue, and plaintiff did have such an interest based on the determination of her legal rights.

3. Champerty and Maintenance— litigation funding agreement—repayment from personel injury claim proceeds

A litigation funding agreement under which defendant creditor advanced money to plaintiff borrower that was to be repaid out of plaintiff's expected recovery in a pending personal injury claim was not void as constituting champerty and maintenance where: (1) the agreement gives defendants an interest in the proceeds of plaintiff's personal injury claim rather than an interest in the claim itself; (2) plaintiff has not pointed to any evidence that defendants interfered in plaintiff's personal injury claim for the purpose of stirring up strife and continuing litigation, and the agreement specifically states that defendants have no control, input, influence, right or involvement of any kind regarding any claim, right, or interest of plaintiff in the litigation; (3) plaintiff has never alleged that defendants directly attempted to influence her decisions with respect to her personal injury claim, and while the existence of defendants' lien on the proceeds of plaintiff's recovery may have influenced some of plaintiff's decisions regarding her personal injury claim, plaintiff has not demonstrated that defendants attempted to control the resolution of her claim for the purpose of stirring up strife and continuing litigation; and (4) although plaintiff notes that courts in other jurisdictions have held similar litigation financing agreements to be champertous and void, those cases do not purport to require as a prerequisite for champerty and maintenance that a litigation lender act with a purpose of stirring up strife and continuing litigation, and thus, North Carolina law appears to require a higher level of intermeddling for a lender's actions to be considered champertous.

4. Interest— usury—litigation funding agreement—payment from personal injury recovery

A litigation funding agreement which assigned the expected proceeds from plaintiff borrower's personal injury claim to defendant creditor as the method of repayment of funds advanced to plaintiff was usurious because: (1) the agreement constituted an "advance" within the scope of the usury statute,

N.C.G.S. § 24-1.1, when defendant investigated the merits of the plaintiff's personal injury claim, determined that the claim was meritorious and would likely yield a recovery sufficient to pay the funds advanced to plaintiff plus interest; and thus made the advance "in expectation of reimbursement"; (2) the parties to the agreement had an understanding that the principal of the advance "shall be or may be returned" even if repayment was not absolute but was contingent on plaintiff's recovery in the litigation and, depending on the amount recovered, could be as little as zero; (3) it was undisputed that the rate of interest provided for in the agreement substantially exceeded that permitted by the usury statute; and (4) defendant acted with a corrupt intent to received more in interest than the legal rate permitted for the use of the money advanced when plaintiff simply had to show that defendant intentionally charged more for money lent than the law allowed.

5. Creditors and Debtors; Consumer Protection— litigation funding agreement—violation of Consumer Finance Act

A litigation funding agreement violated provisions of the Consumer Finance Act set forth in N.C.G.S. § 53-166(a) where defendant creditor had not obtained the license required by that statute and contracted with plaintiff for a payment of interest that exceeded the maximum permitted by Ch. 24 of the General Statutes.

6. Unfair Trade Practices— litigation funding agreement—usury—failure to disclose Consumer Finance Act violation—public policy

Defendant creditor committed an unfair and deceptive trade practice as a matter of law in entering a litigation funding agreement with plaintiff where, in addition to showing that the agreement was usurious in violation of N.C.G.S. § 24-1.1, plaintiff showed that defendant's conduct had the capacity to deceived when defendant failed to disclose to plaintiff that she was executing a contract that violated the Consumer Finance Act, and that defendant's contract with plaintiff violated the paramount public policy of North Carolina to protect resident borrowers through application of the North Carolina interest laws.

Appeal by Plaintiff from order dated 25 May 2006 and from order and judgment entered 28 December 2006 by Judge Peter M. McHugh, and from final order and judgment entered 30 April 2007 by Judge

Anderson D. Cromer in Superior Court, Rockingham County. Heard in the Court of Appeals 19 February 2008.

Baron & Berry, L.L.P., by Frederick L. Berry; Robertson Medlin & Blocker, PLLC, by John F. Bloss, for Plaintiff-Appellant.

Womble Carlyle Sandridge & Rice, PLLC, by Hada de Varona Haulsee, for Defendants-Appellees.

McGEE, Judge.

The record in this case shows that Nancy E. Odell (Plaintiff) was involved in a motor-vehicle collision in June 2001. Plaintiff retained counsel and pursued a personal injury claim against the driver of the second motor vehicle. Although Plaintiff expected to recover at least thirty thousand dollars from her personal injury claim, Plaintiff was having financial difficulties and approached Legal Bucks, LLC (Defendant Legal Bucks) to obtain an advance.

Defendant Legal Bucks is a Limited Liability Company. James Keith Tart (Defendant James Tart) and Lynn Davies Tart (Defendant Lynn Tart) are member-managers of Defendant Legal Bucks (collectively, Defendants). Defendant Legal Bucks is in the business of "litigation funding." Specifically, Defendant Legal Bucks advances money to borrowers who are expecting to recover in pending tort claims, but who need money for personal expenses before their claims go to trial or settle. When a potential borrower approaches Defendant Legal Bucks to obtain an advance, Defendants James Tart and Lynn Tart investigate the borrower's legal claim to determine the merit of the borrower's claim, how much the borrower is likely to recover, and, if an advance is made, the appropriate amount of the advance. The borrower then repays Defendant Legal Bucks, with interest, out of the proceeds of his or her recovery.

After investigating Plaintiff's personal injury claim, Defendant James Tart agreed to advance Plaintiff three thousand dollars. The parties executed a "Transfer and Conveyance of Proceeds and Security Agreement" (the Agreement) on 28 March 2003. The Agreement provided, in pertinent part:

> [F]or and in consideration of the sum of Three Thousand and No/100 Dollars ($3,000.00) (the "Advance") . . . Legal Bucks and Plaintiff do hereby agree as follows:
>
> . . . .

2. Plaintiff unconditionally and irrevocably transfers and conveys to Legal Bucks all of Plaintiff's control, right, title and interest in the first monies paid to Plaintiff from the Proceeds [of Plaintiff's personal injury claim] as follows:

(A) If Legal Bucks is paid *prior to* July 1, 2003: $4,200 (the amount of the Advance ($750) plus 40% of the Advance ($300));[1] and

(B) If Legal Bucks is paid *on or after* July 1, 2003: The amount from Subparagraph A ($4,200) plus $234 (7.8% of the Advance) for each month thereafter and until Legal Bucks is paid (the "monthly assignment"). The monthly assignment will occur the first day of each month, beginning July 1, 2003. Under no circumstances, however, shall the amount owed under this Subparagraph exceed three hundred twenty-five percent (325%) of the Advance ($9,750).

3. Plaintiff hereby grants to Legal Bucks a security interest in the Proceeds of the Litigation . . . in order to secure the conveyance, subject to the terms and conditions of this Agreement[.]

4. This Agreement is expressly intended to transfer, convey and relinquish control over only a specified portion of the Proceeds which may flow from and are received as a result of the Litigation, to wit: the Security Interest. This Agreement is not an assignment, nor a purchase of any right, chose in action, cause of action, or claim which Plaintiff may have or possess as against any responsible party, respondent or defendant referred to herein. No control, input, influence, right or involvement of any kind as concerns any claim, right, or interest of Plaintiff in the Litigation is contemplated by any party to this Agreement.

5. Except as expressly provided for herein, this Agreement is contingent, speculative and without recourse on the part of Legal Bucks.

6. If there is no recovery of Proceeds by Plaintiff, then Legal Bucks shall receive NOTHING. If the Proceeds do not allow for payment of the Security Interest in full, Plaintiff shall . . . satisfy

1. The dollar figures listed in subparagraph (2)(A) of the Agreement appear to be incorrect. The $4,200.00 figure represents the advance of $3,000.00, plus forty percent of the advance, or $1,200.00.

> the Security Interest to the maximum extent possible from the Proceeds and owe nothing further . . . .
>
> . . . .
>
> 13. In the event that Plaintiff terminates or otherwise breaches the covenants, conditions or terms of this Agreement, Plaintiff shall pay liquidated damages to Legal Bucks in the amount of three times (3x) the Security Interest[.]

Plaintiff's personal injury claim settled for $18,000.00 in May 2005. Pursuant to subparagraph (2)(B) of the Agreement, Plaintiff owed Defendant Legal Bucks $9,582.00 at the time her claim settled. Plaintiff's debt reached the contractual cap of $9,750.00 on 1 June 2005.

Rather than repay Defendant Legal Bucks out of the proceeds of her settlement, Plaintiff filed a complaint on 15 June 2005 against Defendants alleging, *inter alia*, that the Agreement: was usurious; constituted champerty and maintenance; constituted unlawful gaming; violated the Consumer Finance Act; and was an unfair and deceptive trade practice. Plaintiff's complaint also included class allegations. The Chief Justice of the North Carolina Supreme Court issued an order on 17 August 2005 designating Plaintiff's case as exceptional and assigning Judge Peter M. McHugh to preside over the case.

Defendants filed an amended answer on 31 August 2005 denying the allegations in Plaintiff's complaint. Defendants also filed a counterclaim for breach of contract and sought $29,250.00 in liquidated damages pursuant to paragraph thirteen of the Agreement.

Plaintiff filed a motion on 27 October 2005 for partial judgment on the pleadings pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(c). Defendants also moved to dismiss Plaintiff's action pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). The trial court held a hearing on the parties' motions on 22 November 2005. The trial court issued an order on 25 May 2006 granting Defendant's motion with respect to Plaintiff's unlawful gaming claim and two other claims not pertinent to this appeal. The trial court denied Defendants' motion as to Plaintiff's remaining claims, and denied Plaintiff's motion in its entirety.[2]

---

2. The record indicates that the trial court issued its ruling in a 25 May 2006 email message to counsel for Plaintiff and Defendants. The trial court directed counsel for Defendants to prepare an appropriate order. Counsel for Defendants apparently prepared the order, but the order was never entered by the trial court. The parties, how-

Plaintiff and Defendants filed cross-motions for summary judgment on 16 and 17 May 2006 as to Plaintiff's remaining claims for usury, violation of the Consumer Finance Act, champerty and maintenance, and unfair and deceptive trade practices. Plaintiff also filed a motion for class certification. The trial court issued an order and judgment on 28 December 2006 denying Plaintiff's motion for summary judgment in its entirety and granting Defendants' motion for summary judgment in its entirety. The trial court also stated that "[b]ecause this ruling resolves all claims raised by [Plaintiff] in favor of [Defendants] and against [Plaintiff], the Court has not addressed [Plaintiff's] Motion for Class Certification."

Defendants filed a motion for summary judgment on their counterclaim for breach of contract and liquidated damages on 6 March 2007. Plaintiff filed a motion for partial summary judgment on Defendants' counterclaim on 9 March 2007. The trial court issued a final order and judgment on 30 April 2007 granting Defendants' motion for summary judgment on their counterclaim and denying Plaintiff's motion for partial summary judgment. The trial court awarded Defendants $29,250.00 plus post-judgment interest. Plaintiff appeals.

I.

[1] Before we reach the merits of Plaintiff's appeal, we address Defendants' motion for sanctions for Plaintiff's failure to comply with the Rules of Appellate Procedure. Defendants argue that Plaintiff's brief violates a number of the stylistic requirements set out in N.C.R. App. P. 26(g)(1), N.C.R. App. P. 28(b), and in the appendices to the appellate rules. Defendants contend that these violations warrant severe sanctions, including dismissal of Plaintiff's appeal.

We have reviewed Plaintiff's brief and find that it does not contain errors that constitute substantial or gross noncompliance with the appellate rules. *See Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 201, 657 S.E.2d 361, 367 (2008). We therefore do not impose any of the sanctions set out in N.C.R. App. P. 34(b). *Id.* We now turn to the merits of Plaintiff's appeal.

---

ever, have stipulated that the trial court's 25 May 2006 email accurately reflects its rulings on the parties' motions. Further, the trial court's 28 December 2006 order contains an acknowledgment that the trial court previously entered an order dismissing Plaintiff's claim for unlawful gaming.

II.

[2] Plaintiff first argues that the trial court erred by denying Plaintiff's Rule 12(c) motion for judgment on the pleadings, and by granting Defendants' Rule 12(b)(6) motion to dismiss, with regard to Plaintiff's claim that the Agreement is void as an illegal gaming contract. "This court reviews *de novo* rulings on motions made pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) and (c)." *Toomer v. Branch Banking & Tr. Co.*, 171 N.C. App. 58, 66, 614 S.E.2d 328, 335, *disc. review denied*, 360 N.C. 78, 623 S.E.2d 263 (2005).

N.C. Gen. Stat. § 16-1, in defining illegal gaming contracts, provides:

> All wagers, bets or stakes made to depend upon any race, or upon any gaming by lot or chance, or upon any lot, chance, casualty or unknown or contingent event whatever, shall be unlawful; and all contracts, judgments, conveyances and assurances for and on account of any money or property, or thing in action, so wagered, bet or staked, or to repay, or to secure any money, or property, or thing in action, lent or advanced for the purpose of such wagering, betting, or staking as aforesaid, shall be void.

N.C. Gen. Stat. § 16-1 (2007). Plaintiff argues that the Agreement is void under N.C.G.S. § 16-1 because Defendants' return on its advance depended on a contingent event; namely, the amount of Plaintiff's recovery on her personal injury claim. Defendants respond that although their return depended on a contingent event, the Agreement does not come within the prohibition in N.C.G.S. § 16-1 because it is not a wager or bet.

Our Courts have not previously defined what constitutes a "wager" or "bet" for the purposes of N.C.G.S. § 16-1. Other sources have defined these terms as follows:

> The term "bet" is defined as . . . an agreement to pay something of value upon the happening or nonhappening of a specified contingent event. Someone must take the other side of an uncertain event to give meaning to a "bet."
>
> "Wagers," on the other hand, have been defined as contracts in which the parties in effect stipulate that they will gain or lose upon the happening of an uncertain event, in which they have no interest except that arising from the possibility of such gain or loss.

38 Am. Jur. 2d *Gambling* § 3 (1999) (footnotes omitted). We hold that the Agreement does not fall within either of these definitions.

A "bet," as defined above, requires that the parties to the bet take opposite sides of an uncertain event. It follows that for an agreement to constitute a "bet," there must be both a winning party and a losing party. In the Agreement at issue in the current case, however, both Plaintiff and Defendants desired the same outcome of the uncertain event: that Plaintiff recover a large sum of money in her personal injury claim. All parties to the Agreement stood to gain if Plaintiff recovered an amount equal to or greater than the sum of the principal of the advance plus the accrued interest. Likewise, all parties to the Agreement stood to lose if Plaintiff recovered less than the amount she owed to Defendants. Such an agreement does not constitute a "bet" under N.C.G.S. § 16-1, notwithstanding that the parties' respective positions under the Agreement were dependent upon a contingent event.

A "wager," as defined above, requires that neither party to the wager have any interest in the contingent event at issue. It is true that Defendants had no independent interest in the outcome of Plaintiff's personal injury claim. However, it is equally clear that Plaintiff did have an independent interest in the outcome of her personal injury claim. The outcome of Plaintiff's personal injury claim would not only define Plaintiff's legal rights and obligations under the Agreement with Defendants, but would also define her legal rights with respect to the other parties to the automobile accident giving rise to her claim. Therefore, the Agreement does not constitute a "wager" under N.C.G.S. § 16-1, notwithstanding that the parties' respective positions under the Agreement were dependent upon a contingent event.

We hold that the trial court did not err by denying Plaintiff's Rule 12(c) motion for judgment on the pleadings, or by granting Defendants' Rule 12(b)(6) motion to dismiss, with regard to Plaintiff's claim that the Agreement is void as an illegal gaming contract under N.C.G.S. § 16-1. Plaintiff's assignment of error is overruled.

III.

[3] Plaintiff next argues that the trial court erred in its 28 December 2006 order by granting summary judgment for Defendants on Plaintiff's claim that the Agreement constitutes champerty and maintenance. 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). 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).

Our Court has defined champerty and maintenance as follows:

> "Maintenance" [is] "an officious intermeddling in a suit, which in no way belongs to one, by maintaining or assisting either party with money or otherwise to prosecute or defend it." "Champerty" is a form of maintenance whereby a stranger makes a "bargain with a plaintiff or defendant to divide the land or other matter sued for between them if they prevail at law, whereupon the champertor is to carry on the party's suit at his own expense." . . . [A]n agreement will not be held to be within the condemnation of the principles "unless the interference is clearly officious and for the purpose of stirring up 'strife and continuing litigation.' "

Wright v. Commercial Union Ins. Co., 63 N.C. App. 465, 469, 305 S.E.2d 190, 192, *disc. review denied*, 309 N.C. 634, 308 S.E.2d 719 (1983) (quoting *Smith v. Hartsell*, 150 N.C. 71, 76, 63 S.E. 172, 174 (1908) (citation omitted)). These doctrines are "intended to prevent the interference of strangers having no pretense of right to the subject of the suit, and standing in no relation of duty to the suitor." *Hartsell*, 150 N.C. at 78-79, 63 S.E. at 175 (citation omitted). The doctrines are further "intended to prevent traffic in doubtful claims, and to operate upon buyers of pretended rights, who [have] no relation to the suitor or the subject, otherwise than as purchasers of the profits of litigation." *Id.* at 79, 63 S.E. at 175 (citation omitted). Plaintiff argues that the Agreement was champertous in that Defendants have no relation to the subject matter of Plaintiff's personal injury claim or the parties thereto, other than the fact that Defendants have given Plaintiff an advance in exchange for an interest in the profits of Plaintiff's claim.

Defendants first respond that the Agreement is not champertous because it merely gives Defendants an interest in the proceeds of Plaintiff's personal injury claim, rather than an interest in the claim itself. Our Supreme Court has stated:

> There is a distinction between the assignment of a claim for personal injury and the assignment of the proceeds of such a claim.

> The assignment of a claim gives the assignee control of the claim and promotes champerty. Such a contract is against public policy and void. The assignment of the proceeds of a claim does not give the assignee control of the case and there is no reason it should not be valid.

Charlotte-Mecklenburg Hospital Auth. v. First of Ga. Ins. Co., 340 N.C. 88, 91, 455 S.E.2d 655, 657 (internal citation omitted), *reh'g denied*, 340 N.C. 364, 458 S.E.2d 186 (1995). The Agreement in this case specifically states that Plaintiff "transfer[ed] and convey[ed] to [Defendant Legal Bucks] all of Plaintiff's control, right, title and interest in *the first monies paid to Plaintiff from the Proceeds*" of Plaintiff's personal injury claim (emphasis added). The Agreement further provides that it "is not an assignment, nor a purchase of any right, chose in action, cause of action, or claim which Plaintiff may have or possess as against any responsible party[.]" Because the Agreement merely assigns the proceeds of Plaintiff's personal injury claim to Defendants, such assignment does not render the Agreement champertous under *Charlotte-Mecklenburg*.

While the Assignment is not champertous under the rule stated in *Charlotte-Mecklenburg*, this does not end our inquiry. *Charlotte-Mecklenburg* held that an assignment of litigation proceeds is not *per se* champertous because such an assignment alone does not give the assignee any control over the underlying litigation. However, an assignment of proceeds may still be champertous if some other aspect of the contract gives the assignee such control.

Plaintiff argues that agreements such as the one in this case give litigation lenders a champertous level of control over borrowers' lawsuits because they have a deleterious effect on borrowers' abilities to settle their underlying claims. According to Plaintiff, a rational borrower is likely to reject any settlement offer that is less than the amount of the advance and accrued interest she owes to the lender, even if the settlement offer is perfectly reasonable. This is because the borrower will be required to pay her entire recovery to the lender, and will in effect receive nothing from the settlement. Instead, Plaintiff argues, the borrower will bring her claim to trial, because she at least has a chance of securing a larger recovery if she wins at trial. If the borrower loses at trial or only secures a small recovery, she is no worse off than she would have been had she accepted the settlement offer.

Plaintiff argues that such concerns are not merely hypothetical. Plaintiff points out that Defendant James Tart testified in his deposition that Defendant Legal Bucks has agreed to reduce the amount of its lien in a number of cases in order to facilitate a settlement, because the parties to the underlying claim were otherwise unable to reach a settlement due in part to Defendant Legal Bucks' lien on the proceeds of the claim.

We share Plaintiff's concerns regarding the potential negative effects of litigation funding on a borrower's ability or willingness to settle her underlying claim, especially given our State's strong public policy in favor of encouraging settlements. *See*, *e.g.*, *Menard v. Johnson*, 105 N.C. App. 70, 73, 411 S.E.2d 825, 827 (1992) (noting that "it is well settled that North Carolina public policy encourages prompt settlement of disputed claims"). Nonetheless, we hold that the Agreement in this case is not champertous under controlling North Carolina law.

As noted above, our Courts have held for at least a century that an outsider's involvement in a lawsuit does not constitute champerty or maintenance merely because the outsider provides financial assistance to a litigant and shares in the recovery. Rather, "a contract or agreement will not be held within the condemnation of the principle[s] . . . unless the interference is clearly officious and for the purpose of stirring up 'strife and continuing litigation.' " *Hartsell*, 150 N.C. at 76, 63 S.E. at 174 (citation omitted); *see*, *e.g.*, *Oliver v. Bynum*, 163 N.C. App. 166, 170-71, 592 S.E.2d 707, 711 (2004) (finding no abuse of discretion in the trial court's decision to disqualify the plaintiff's counsel, where the evidence demonstrated that counsel engaged in champerty and maintenance by facilitating and helping to secure funding for the plaintiff's lawsuit against the defendant because counsel desired to ruin the defendant's career).

In this case, Plaintiff has not pointed to any evidence that Defendants interfered in Plaintiff's personal injury claim "for the purpose of stirring up 'strife and continuing litigation.' " *Hartsell*, 150 N.C. at 76, 63 S.E. at 174 (citation omitted). The Agreement between the parties specifically states that Defendants have "[n]o control, input, influence, right or involvement of any kind" regarding "any claim, right, or interest of Plaintiff in the [l]itigation[.]" Further, Plaintiff has never alleged that Defendants directly attempted to influence her decisions with respect to her personal injury claim. In fact, Plaintiff's deposition testimony demonstrates just the opposite:

> [DEFENSE COUNSEL]: . . . [W]hat did [Defendant James Tart] say when you told him that you were thinking about getting another lawyer?
>
> [PLAINTIFF]: If I'm not mistaken, he just said [to] keep in touch with him. I might be wrong.
>
> [DEFENSE COUNSEL]: Did you ever talk to [Defendant James Tart] about the settlement offers that [the defendant in the underlying lawsuit] made[?]
>
> [PLAINTIFF]: Not that I know of, not to my knowledge.
>
> [DEFENSE COUNSEL]: Did anything that [Defendant James Tart] said to you influence your decisions with respect to those [settlement] offers that were made by [the defendant in the underlying lawsuit]?
>
> [PLAINTIFF]: Not that I—no.

While the existence of Defendants' lien on the proceeds of Plaintiff's recovery may have influenced some of Plaintiff's decisions regarding her personal injury claim, Plaintiff simply has not demonstrated that Defendants attempted to control the resolution of her claim for the purpose of stirring up strife and continuing litigation.

Plaintiff correctly notes that courts in other jurisdictions have held similar litigation financing agreements to be champertous and void. *See Rancman v. Interim Settlement Funding Corp.*, 789 N.E.2d 217, 221 (Ohio 2003) (holding that "a contract making the repayment of funds advanced to a party to a pending case contingent upon the outcome of that case is void as champerty and maintenance. Such an advance constitutes champerty and maintenance because it gives a nonparty an impermissible interest in a suit, impedes the settlement of the underlying case, and promotes speculation in lawsuits."); *Johnson v. Wright*, 682 N.W.2d 671, 678 (Minn. App. 2004) (holding a litigation funding contract champertous because the lending company "effectively intermeddled and speculated in [the] appellant's litigation and its outcome. We conclude that because recovery is tied to the outcome of the litigation, the . . . agreement is champertous.")

The cases cited by Plaintiff, however, do not purport to require as a prerequisite for champerty and maintenance that a litigation lender act with a purpose of stirring up strife and continuing litigation. North Carolina law thus appears to require a higher level of intermeddling for a lender's actions to be considered champertous.

The evidence in this case does not demonstrate that Defendants interfered in Plaintiff's personal injury claim to the extent required to support a claim of champerty and maintenance. We therefore hold that the trial court did not err by granting summary judgment for Defendants on Plaintiff's claim that the Agreement constituted champerty and maintenance. Plaintiff's assignment of error is overruled.

IV.

[4] Plaintiff next argues that the trial court erred in its 28 December 2006 order by granting summary judgment for Defendants on Plaintiff's claim for usury. Our Supreme Court has stated that for a plaintiff to succeed on a claim of usury, the plaintiff must demonstrate:

> [(1)] a loan or forbearance of the collection of money, [(2)] an understanding that the money owed will be paid, [(3)] payment or an agreement to pay interest at a rate greater than allowed by law, and [(4)] the lender's corrupt intent to receive more in interest than the legal rate permits for use of the money loaned.

Swindell v. Federal National Mortgage Assn., 330 N.C. 153, 159, 409 S.E.2d 892, 895 (1991). N.C. Gen. Stat. § 24-1.1 (2007), entitled "Contract rates and fees," expands the types of transactions subject to usury restrictions and specifies the maximum interest rate allowed by law. This statute provides in part:

> (a) Except as otherwise provided in this Chapter or other applicable law, the parties to a loan, purchase money loan, advance, commitment for a loan or forbearance other than a credit card, open-end, or similar loan may contract in writing for the payment of interest not in excess of:
>
> > (1) Where the principal amount is twenty-five thousand dollars ($25,000) or less, the rate set under subsection (c) of this section[.]
>
> . . . .
>
> (c) On the fifteenth day of each month, the Commissioner of Banks shall announce and publish the maximum rate of interest permitted by subdivision (1) of subsection (a) of this section on that date. Such rate shall be . . . [no greater than] sixteen percent (16%)[.]

N.C. Gen. Stat. § 24-1.1(a)-(c) (2007). It is undisputed in this case that the rate of interest provided for in the Agreement substantially exceeds that permitted by N.C.G.S. § 24-1.1.

Plaintiff argues that the Agreement constitutes an "advance" that comes within the scope of N.C.G.S. § 24-1.1. According to Plaintiff, the inclusion of "advance" transactions within N.C.G.S. § 24-1.1 means that the usury prohibition applies despite the fact that Plaintiff's obligation to repay the money owed under the Agreement was contingent upon Plaintiff's recovery in her personal injury claim. Defendants disagree. According to Defendants, it does not matter whether the Agreement is styled as a "loan" or an "advance," because the second element of a usury claim makes clear that to run afoul of usury prohibitions, the borrower must be under an absolute obligation to repay the money lent or advanced.

We first consider whether element one of Plaintiff's usury claim is met in this case. While *Swindell* asks only whether there has been a "loan or forbearance," *Swindell*, 330 N.C. at 159, 409 S.E.2d at 895, it is clear that N.C.G.S. § 24-1.1 expands the types of transactions subject to its usury prohibition to include advances and other types of transactions. We must therefore determine whether the type of transaction at issue falls within the scope of N.C.G.S. § 24-1.1.

Our Courts have consistently recognized that a "loan" is a type of transaction in which the borrower has an unconditional obligation to repay the principal. *See, e.g.*, *Auto Supply v. Vick*, 303 N.C. 30, 39, 277 S.E.2d 360, 367, *reaff'd on reh'g*, 304 N.C. 191, 283 S.E.2d 101 (1981) (defining a "loan" as "a delivery or transfer of a sum of money to another under a contract to return at some future time *an equivalent amount* with or without an additional sum being agreed upon for its use" (emphasis added)); *Kessing v. Mortgage Corp.*, 278 N.C. 523, 529, 180 S.E.2d 823, 827 (1971) (defining a "loan" as " 'a contract by which one delivers a sum of money to another and the latter agrees to return at a future time *a sum equivalent to that which he borrows*' " (emphasis added) (citation omitted)); *State ex rel. Cooper v. NCCS Loans, Inc.*, 174 N.C. App. 630, 634, 624 S.E.2d 371, 374 (2005) (defining a "loan" as " 'an agreement, express or implied, *to repay the sum lent*, with or without interest' " (emphasis added) (quoting *Kessing*, 278 N.C. at 529, 180 S.E.2d at 827 (citation omitted))).

These cases make clear that one primary characteristic of a "loan" is repayment of the principal, or its equivalent. Therefore, a transaction in which the borrower's repayment of the principal is

subject to a contingency is not considered a "loan," because the terms of the transaction do not necessarily require that the borrower "repay the sum lent," *id.* at 634, 624 S.E.2d at 374, or return "a sum equivalent to that which he borrow[ed]." *Kessing*, 278 N.C. at 529, 180 S.E.2d at 827.

While definitions of "advance" are not as common, those that are available demonstrate that an "advance," while similar to a loan, does not require unconditional repayment of the principal. Black's Law Dictionary, for example has defined "advance" as "money advanced to be repaid conditionally[.]" Black's Law Dictionary 52 (6th ed. 1990). Our Court has also defined "advance" as " '[to] furnish[] money or goods for others in expectation of reimbursement.' " *Louchheim, Eng & People v. Carson*, 35 N.C. App. 299, 304, 241 S.E.2d 401, 404 (1978) (citation omitted). While parties to an advance transaction may have an "expectation of reimbursement," this expectation does not necessarily suggest an absolute right to repayment. In the current case, for example, before Defendants decided to advance money to Plaintiff, they investigated the merits of Plaintiff's personal injury claim and determined that Plaintiff's claim was likely meritorious and would likely yield a recovery sufficient to allow Plaintiff to repay the amount advanced. Therefore, while Plaintiff's obligation to repay the principal was conditional on her recovery, Defendants certainly made the advance "in expectation of reimbursement."

In the current case, Defendants delivered three thousand dollars to Plaintiff. While the parties expected that Plaintiff would repay the entire principal and accrued interest, Plaintiff's repayment obligations were ultimately subject to a contingency; namely, whether Plaintiff's recovery on her personal injury claim was sufficient to satisfy all or part of her debt to Defendants. On these facts, we find that Defendants' contract with Plaintiff was an "advance" within the meaning of N.C.G.S. § 24-1.1. We therefore hold that the first element of Plaintiff's usury claim is met in this case.

The second element of a usury claim requires that the parties to the qualifying transaction had "an understanding that the money owed [would] be paid." *Swindell*, 330 N.C. at 159, 409 S.E.2d at 895. Plaintiff argues that the parties had such an understanding, even if Plaintiff's obligation to repay the principal was conditional.

Defendants contend that this element demonstrates that a transaction can only be considered usurious if the borrower has an unconditional obligation of repayment. Defendants correctly note that a

number of early cases from our Courts suggest that an action for usury only lies when the borrower's obligation to repay the principal is not subject to any contingency. In *Carter v. Brand*, 1 N.C. 255 (1800), for example, our Supreme Court held that the contract at issue was usurious because "[n]o part of the principal is put in hazard, but the whole is actually secured by [a lien]; nor is the agreement to pay the [interest] subject to any contingency, but is found to have been positive and absolute." *Id.* at 257. So, too, in *Riley v. Sears*, 154 N.C. 509, 70 S.E. 997 (1911), our Supreme Court cited with approval the following explanation from the New York Court of Chancery:

> "Whenever, by the agreement of the parties, a premium or profit beyond the legal rate of interest for a loan or advance of money is, either directly or indirectly, secured to the lender, it is a violation of the [usury] statute, unless the loan or advance is attended with some contingent circumstances by which the principal is put in evident hazard. A contingency merely nominal, with little or no hazard to the principal of the money loaned or advanced, can not alter the legal effect of the transaction."

Id. at 518, 70 S.E. at 1000-01 (quoting *Colton v. Dunham*, 2 Paige Ch. 267 (N.Y. Ch. 1830)).

We note, however, that other decisions from our Supreme Court during the same time period suggested that the second element of a usury claim did not require an absolute obligation of repayment. In *MacRackan v. Bank*, 164 N.C. 24, 80 S.E. 184 (1913), for example, our Supreme Court stated the elements of a usury claim as:

> 1. A loan or forbearance of money, either express or implied.
>
> 2. An understanding between the parties that the principal *shall be or may be* returned.
>
> 3. That for such loan or forbearance a greater profit than is authorized by law shall be paid or agreed to be paid.
>
> 4. That the contract is entered into with an intention to violate the law.

Id. at 34, 80 S.E. at 188 (emphasis added); *see also Nat'l Bank v. Wysong & Miles Co.*, 177 N.C. 380, 386, 99 S.E. 199, 202, *cert. denied*, 250 U.S. 665, 63 L.E. 1197 (1919) (stating that the second element of a usury claim requires "an understanding that the principal shall be *or may be* returned" (emphasis added)).

We further note that our State's usury statute has expressly included both "loan" and "advance" transactions within its scope since the General Assembly enacted a prior version of N.C.G.S. § 24-1.1 in 1969. *See* 1969 N.C. Sess. Laws ch. 1303, § 1. We may therefore presume that the General Assembly intended for the usury prohibition in § 24-1.1 to apply to at least two distinct types of transactions. *See*, *e.g.*, *Transportation Service v. County of Robeson*, 283 N.C. 494, 500, 196 S.E.2d 770, 774 (1973) (noting that "[i]n the absence of contrary indication, it is presumed that no word of any statute is a mere redundant expression. Each word is to be construed upon the supposition that the Legislature intended thereby to add something to the meaning of the statute."). Defendants' argument that a contract may only be usurious if the borrower has an absolute obligation of repayment is inconsistent with the General Assembly's inclusion of both "loan" and "advance" transactions within the scope of N.C.G.S. § 24-1.1.

In the current case, the parties agreed that Plaintiff's repayment obligation would depend on the circumstances of her recovery on her personal injury claim. If Plaintiff recovered an amount equal to or greater than the sum of the principal of the advance and the accrued interest, Plaintiff would pay the entire principal and accrued interest out of the proceeds of her recovery. If Plaintiff recovered some amount greater than zero, but less than the sum of the principal of the advance and the accrued interest, Plaintiff would pay her entire recovery to Defendants in complete satisfaction of her debt. Finally, if Plaintiff recovered nothing, Plaintiff would have no obligation to repay the principal of the advance or any accrued interest.

The terms of the Agreement demonstrate that the parties had an understanding that the principal of the advance "shall be or may be returned." *MacRackan*, 164 N.C. at 34, 80 S.E. at 188. These terms also satisfy the contemporary requirement set out in *Swindell* that the parties had "an understanding that the money owed [would] be paid." *Swindell*, 330 N.C. at 159, 409 S.E.2d at 895. There is nothing in the Agreement suggesting that Plaintiff would be excused from paying the amount she owed, whether that amount was the full sum of the principal of the advance plus accrued interest, or some lesser amount. Rather, the parties simply agreed that under certain circumstances, the "money owed" under the Agreement would be as little as zero dollars. We therefore hold that the second element of a usury claim was met in this case.

We note that Defendants have also argued that *Vick* stands for the proposition that the usury prohibition in N.C.G.S. § 24-1.1 does not apply unless the borrower's repayment obligations are absolute. Defendants' reliance on *Vick* is misplaced. In *Vick*, our Supreme Court considered a business arrangement in which a franchisor extended credit to a franchisee. The franchisee could satisfy its debt either by paying the amount due in cash, or by transferring to the franchisor chattel paper that was generated by the franchisee's sales. *Vick*, 303 N.C. at 33-34, 277 S.E.2d at 363-64. However, the franchisee remained responsible for collecting the payments due on the chattel paper and was liable to the franchisor for the balance of any delinquent accounts each month. Further, the franchisee was required to repurchase from the franchisor any chattel paper representing an account more than ninety days past due. *Id.* at 35, 277 S.E.2d at 364. The franchisor sued the franchisee for default on its obligations, and the franchisee answered that the transactions at issue were usurious. *Id.* at 35, 277 S.E.2d at 364-65.

On appeal, the question before our Supreme Court was whether the type of transaction at issue was a "forbearance" within the meaning of N.C.G.S. § 24-1.1. *Id.* at 39, 277 S.E.2d at 367. The Court held that because the franchisee's liability for the underlying debt represented by the chattel paper remained absolute until the account was fully paid off, the franchisor's acceptance of chattel paper in the interim constituted "a forbearance of a debt due and payable." *Id.* at 41, 277 S.E.2d at 368.

We find *Vick* clearly distinguishable from the current case. The issue in *Vick* was not whether the transaction in question constituted an advance, but whether it constituted a forbearance. Further, the franchisee's absolute liability for the underlying debt in *Vick* was not the component of the transaction that brought the transaction within the scope of N.C.G.S. § 24-1.1. Rather, it was the franchisor's acceptance of chattel paper in forbearance of that debt that subjected the transaction to the usury prohibition. Contrary to Defendants' contention, *Vick* did not purport, and cannot be read, to stand for a broad proposition that N.C.G.S. § 24-1.1 only applies where the borrower is under an absolute repayment obligation. Further, Defendants' interpretation of *Vick* contradicts the express inclusion of "advance" transactions within the scope of N.C.G.S. § 24-1.1, as discussed above.

We now turn to the third element of Plaintiff's usury claim. As noted above, Defendants do not dispute that the rate of interest pro-

vided for in the Agreement substantially exceeds that permitted by N.C.G.S. § 24-1.1. We therefore hold that the third element of Plaintiff's usury claim was met in this case.

Finally, we must determine whether Defendants acted with a "corrupt intent to receive more in interest than the legal rate permits for use of the money loaned." *Swindell*, 330 N.C. at 159, 409 S.E.2d at 895. To satisfy this element, Plaintiff is not required to show that Defendant "had the specific 'corrupt intent' to enter into a usurious loan agreement." *NCCS Loans*, 174 N.C. App. at 639, 624 S.E.2d at 377. Rather, Plaintiff simply must show that Defendant "intentional[ly] charg[ed] . . . more for money lent than the law allows." *Id. See also Wysong & Miles*, 177 N.C. at 386, 99 S.E. at 202-03 (stating that "[t]he fourth element [of a usury claim] may be implied if all the others are expressed upon the face of the contract"). As discussed above, we have found that Defendants intentionally entered into a contract to receive a greater amount of interest than that allowed by N.C.G.S. § 24-1.1. We therefore hold that Plaintiff has satisfied all four elements of a usury claim. We further hold that the trial court erred by granting summary judgment for Defendants on Plaintiff's usury claim.

V.

[5] Plaintiff next argues that the trial court erred in its 28 December 2006 order by granting summary judgment for Defendants on Plaintiff's claim that Defendants violated the Consumer Finance Act.

The Consumer Finance Act provides in part:

> No person shall engage in the business of lending in amounts of ten thousand dollars ($10,000) or less and contract for, exact, or receive, directly or indirectly, on or in connection with any such loan, any charges whether for interest, compensation, consideration, or expense, or any other purpose whatsoever, which in the aggregate are greater than permitted by Chapter 24 of the General Statutes . . . without first having obtained a license from the Commissioner [of Banks].

N.C. Gen. Stat. § 53-166(a) (2007). Our Court has previously noted that "for an unlicensed lender to charge a rate of interest on a small loan greater than the rates permitted is a violation both of the Consumer Finance Act, and of Chapter 24's prohibitions on usury." *NCCS Loans*, 174 N.C. App. at 634, 624 S.E.2d at 374.

It is undisputed in this case that Defendants have not obtained the license required by N.C.G.S. § 53-166(a). Further, as we concluded in Part IV above, Defendants contracted with Plaintiff for a payment of interest that exceeded the maximum amount permitted by Chapter 24 of the General Statutes. We therefore find that Defendants violated the Consumer Finance Act, and we hold that the trial court erred by granting summary judgment for Defendants on Plaintiff's claim for violation of the Consumer Finance Act.

VI.

[6] Plaintiff next argues that the trial court erred in its 28 December 2006 order by granting summary judgment for Defendants on Plaintiff's claim that Defendants committed unfair and deceptive trade practices.

To establish a claim for unfair and deceptive trade practices under N.C. Gen. Stat. § 75-1.1, a plaintiff must show that: "(1) [the] defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff." *Dalton v. Camp*, 353 N.C. 647, 656, 548 S.E.2d 704, 711 (2001).

Plaintiff first argues that she may succeed on a claim for unfair and deceptive trade practices merely by establishing a violation of N.C. Gen. Stat. § 24-1.1. We disagree. The General Assembly has specifically provided that certain violations of Chapter 24 are both usurious and unfair and deceptive acts. *See* N.C. Gen. Stat. § 24-1.1E(d) (2007) (providing that "the making of a high-cost home loan which violates . . . this section is hereby declared usurious in violation of the provisions of this Chapter and unlawful as an unfair or deceptive act or practice in or affecting commerce in violation of the provisions of G.S. 75-1.1"). The fact that the General Assembly has not included a similar provision in N.C.G.S. § 24-1.1 leads us to conclude that the General Assembly did not intend for violations of N.C.G.S. § 24-1.1 to be *per se* violations of N.C.G.S. § 75-1.1.

Plaintiff may still succeed on her claim, however, if she demonstrates that Defendants committed unfair and deceptive acts in addition to violating N.C.G.S. § 24-1.1. Plaintiff argues that Defendants committed such acts by failing to inform her that she was entering into an unlawful contract, and by violating established public policies supporting N.C.G.S. § 24-1.1. Defendants respond that even if their contract with Plaintiff was usurious, they did not engage in any

deceptive conduct because they accurately disclosed the terms of the transaction to Plaintiff before she signed the agreement.

In *NCCS Loans*, the defendants engaged in "payday lending" practices in which the defendants made immediate cash advances to customers who signed contracts for Internet service. *NCCS Loans*, 174 N.C. App. at 635-36, 624 S.E.2d at 375. The defendants then charged high interest rates on the underlying cash advance. *Id.* at 635-37, 624 S.E.2d at 375-76. Our Court held that the defendants' payday lending practices were usurious and also violated the Consumer Finance Act. *Id.* at 640, 624 S.E.2d at 378. The Attorney General further argued that the defendants' practices were unfair and deceptive, and our Court agreed:

> [The] [d]efendants herein assert that, if one assumes that their customers knew they were executing contracts for a loan . . . , then [the] defendants' conduct was not "deceptive." However, "[p]roof of actual deception is not necessary; it is enough that the statements had the capacity to deceive." We observe that [the] defendants did not inform consumers that they were executing documents in violation of North Carolina's Consumer Finance Act. On all the facts of this case, we conclude that [the] defendants' contracts "had the capacity to deceive."
>
> Moreover, "violations of statutes designed to protect the consuming public and violations of established public policy may constitute unfair and deceptive trade practices." In this regard, we note that it is a "paramount public policy of North Carolina to protect North Carolina resident borrowers through the application of North Carolina interest laws." N.C. Gen. Stat. § 24-2.1 (2003). [The] [d]efendants' practice of offering usurious loans was a clear violation of this policy.

Id. at 640-41, 624 S.E.2d at 378 (quoting *Pinehurst, Inc. v. O'Leary Bros. Realty*, 79 N.C. App. 51, 59, 338 S.E.2d 918, 923, *disc. review denied*, 316 N.C. 378, 342 S.E.2d 896 (1986); *Stanley v. Moore*, 339 N.C. 717, 723, 454 S.E.2d 225, 228 (1995)). Our Court therefore concluded that the trial court did not err by ruling that the defendants committed unfair and deceptive trade practices as a matter of law, in violation of N.C.G.S. § 75-1.1. *Id.* at 641, 624 S.E.2d at 378.

Similar circumstances exist in the current case. Although Defendants disclosed the terms of the advance to Plaintiff, Defendants did not inform Plaintiff that she was executing a contract that vio-

lated the Consumer Finance Act. Therefore, Defendants' conduct "had the capacity to deceive," as Defendants did not disclose the actual nature of the transaction to Plaintiff. Further, Defendants' contract with Plaintiff for an illegal advance violated "the paramount public policy of North Carolina to protect North Carolina resident borrowers through the application of North Carolina interest laws." N.C. Gen. Stat. § 24-2.1(g) (2007). On these facts, we hold that Defendants committed unfair and deceptive trade practices as a matter of law. The trial court therefore erred by granting summary judgment in favor of Defendants on Plaintiff's claim for unfair and deceptive trade practices.

In sum, we affirm the trial court's 25 May 2006 order dismissing Plaintiff's claim for illegal gaming. We affirm the portion of the trial court's 28 December 2006 order granting summary judgment for Defendants on Plaintiff's claim of champerty and maintenance. We reverse the portion of the trial court's 28 December 2006 order granting summary judgment in favor of Defendants on Plaintiff's claims for usury, violation of the Consumer Finance Act, and unfair and deceptive trade practices. Because we find the Agreement to be invalid and unenforceable, we likewise reverse the trial court's 30 April 2007 order granting summary judgment in favor of Defendants on Defendants' counterclaim for breach of contract and liquidated damages. We remand to the trial court for further proceedings as may be necessary, including entry of judgment for Plaintiff and consideration of Plaintiff's outstanding motion for class certification.

VII.

Finally, Plaintiff argues that even should our Court find the Agreement to be valid and enforceable, the trial court erred by granting summary judgment in favor of Defendants on their counterclaim for $29,250.00 in liquidated damages. Specifically, Plaintiff argues that the liquidated damages clause in the Agreement is unenforceable as a matter of law because it did not provide a reasonable estimate of Defendants' damages in the event that Plaintiff breached the Agreement. Because we find the Agreement to be invalid and unenforceable, it is unnecessary for us to address Plaintiff's argument.

Affirmed in part; reversed and remanded in part.

Judges WYNN and CALABRIA concur.

IN RE ESTATE OF POPE

[192 N.C. App. 321 (2008)]

IN THE MATTER OF THE ESTATE OF JOHN W. POPE, JR., DECEASED

JANE FORBES POPE, PETITIONER v. THOMAS J. ROLLINS, EXECUTOR OF THE ESTATE OF JOHN W. POPE, JR., AMANDA JOYCE POPE AND JAMES ARTHUR POPE, IN THEIR CAPACITIES AS CO-TRUSTEES OF THE POPE FAMILY TRUST FOR THE BENEFIT OF JOHN W. POPE, JR., AND THE JOHN WILLIAM POPE FOUNDATION, RESPONDENTS

No. COA06-1644

(Filed 2 September 2008)

1. Trusts— elective share—specific procedure for clerk

Although petitioner contends the trial court erred in an elective share proceeding by concluding that her claim to an elective share of assets in the Pope Family Trust was an estate proceeding instead of a special proceeding, the label was unimportant in this case given the fact that: (1) the General Assembly chose to set out a specific procedure for the clerk and the standard of review for the superior court judgment in N.C.G.S. § 30-3.4; and (2) petitioner failed to demonstrate that the proceedings before the clerk violated N.C.G.S. § 30-3.4 or that the superior court applied an improper standard of review.

2. Constitutional Law— due process—opportunity to be heard

The trial court did not violate petitioner's right to due process by failing to conduct a hearing on her appeal regarding her claim for an elective share of trust assets because: (1) petitioner failed to properly preserve this issue by failing to cite authority as required by N.C. R. App. P. 28(b)(6); (2) petitioner failed to demonstrate that she was denied an opportunity to be heard; and (3) although petitioner was not given an opportunity to present oral argument, there was voluminous briefing before the superior court along with the extensive materials already in the record, thus giving petitioner ample opportunity to be heard.

3. Trusts— elective share—taxable estate—gross estate—total net assets

The trial court did not err by granting respondents' motion for summary judgment and by denying petitioner's claim for an elective share of trust assets under N.C.G.S. § 30-3.1 et seq. because the plain language of N.C.G.S. § 30-3.2(4) establishes that the assets in testator's trust were not part of his total net assets, which includes all property to which decedent had legal

and equitable title immediately prior to death, when: (1) testator ceased to have legal title when he created the trust since it was held instead collectively by the trustees; (2) petitioner cites no legal authority for the proposition that "taxable estate" is synonymous with "gross estate," and N.C.G.S. § 30-3.2(4)(e) refers to the taxable estate as decedent's gross estate less any deductions; (3) the taxable estate is zero since the assets of the trust were all transferred to a foundation, a corporation organized for a charitable purpose, and as a result, no value is left in the trust for purposes of calculating testator's total net assets; and (4) decedent did not make a gift to the foundation within six months of his death since no delivery, actual or constructive, of the trust assets occurred until after testator's death.

Appeal by petitioner and respondents from orders entered 1 September 2006 by Judge Howard E. Manning, Jr. in Wake County Superior Court. Heard in the Court of Appeals 20 September 2007.

Ward and Smith, P.A., by Alexander C. Dale, George K. Freeman, Jr., and Stuart B. Dorsett, for petitioner.

Womble, Carlyle, Sandridge & Rice, PLLC, by Johnny M. Loper, Jean T. Adams, Elizabeth Arias, and Sarah L. Buthe, for respondents.

GEER, Judge.

Petitioner Jane Forbes Pope appeals from the order granting respondents' motion for summary judgment and denying her claim for an elective share under N.C. Gen. Stat. § 30-3.1 *et seq.* (2007) (the "Elective Share Act"). We hold that Ms. Pope has failed to demonstrate that the clerk of superior court and, on appeal, the superior court deviated from the procedural requirements of the Elective Share Act. Further, we have concluded based on the undisputed facts that the trust assets at issue are not included in the "Total Net Assets," as defined by N.C. Gen. Stat. § 30-3.2(4) (2007), of Ms. Pope's husband's estate. Accordingly, we affirm the decision below, although on different grounds.

Facts

On 23 December 1986, John W. Pope, Jr. ("Mr. Pope"), together with his sister and brother, Amanda Joyce Pope and James Arthur Pope, entered into the Pope Family Trust Agreement ("the Trust

Agreement"). Pursuant to the Trust Agreement, the siblings, as grantors, each transferred into the trust specified shares of preferred and common stock of Variety Wholesalers, Inc., a closely-held family business. The Trust Agreement named the siblings as the three trustees of the trust and expressed the purpose of the trust as being to receive, manage, and distribute any property that the siblings conveyed to the trustees during their lifetimes or upon their deaths or any other property distributed to the trustees. The trustees were granted the authority to act only upon the unanimous consent of all of the trustees.

The Trust Agreement required the trustees to divide the property held by the trust into equal shares, with each share to be held in a separate trust for Mr. Pope, Amanda Joyce Pope, and James Arthur Pope. The trustees were required to "pay over" to each of the siblings all of the income from his or her separate trust, or to use that income for that sibling's benefit, in at least annual installments. In addition, the Trust Agreement authorized the trustees "at any time and from time to time to distribute such part or all of the principal of the trust of any such Grantor in such amounts as they may deem best in their discretion to provide for the support and maintenance of such Grantor and to provide for the payment of such income tax liabilities as such Grantor shall incur as a result of such Grantor's beneficial interest in such trust, as such tax liability may be determined by the Trustees in their discretion from time to time." The Trust Agreement further authorized the trustees "in their discretion" to distribute trust principal to enable a grantor to purchase a home; to enter into a trade, profession, or business; or for other similar purposes.

The Trust Agreement stated that the trust "is irrevocable, and that this Trust may not be altered, amended or modified." According to the Trust Agreement, the trust could be terminated only "[a]t such time as: (1) no then-living Grantor is less than fifty (50) years of age; (2) each of John W. Pope, Sr. and Joyce W. Pope [the siblings' parents] are deceased; and (3) the Trustees then serving shall sign their unanimous written consent to the termination of each of the trusts existing hereunder for each of the then living Grantors . . . ." Upon the occurrence of those circumstances, the trustees were required to distribute the property held in each of the siblings' trusts to "the beneficiaries then entitled to the income therefrom."

Upon the death of one of the siblings, the trustees were required to divide the property in the trust for that sibling into as many equal shares as would allow the trustees to set apart one share for each of

the sibling's living children and each deceased child with descendants surviving at the time of the division. The Trust Agreement further provided: "Should any Grantor die without lineal descendants, then the property in the trust of such Grantor shall be distributed by the Trustees to the John W. Pope Foundation; provided that each such Grantor shall have the power to direct and appoint the property in the trust of such Grantor to the shares set apart for the other Grantors . . . or their descendants . . . to be held and distributed in all respects as if such property had originally been a part of such shares so set apart." The Trust Agreement specified the manner by which the grantor could exercise this power. The Trust Agreement then provided that "[s]hould any Grantor die without lineal descendants and without effectively exercising this power, then the property in the trust of such Grantor shall be distributed to the John W. Pope Foundation."

Mr. Pope married Jane Forbes Pope ("Ms. Pope") on 19 October 2000. Mr. Pope executed a will on 17 January 2002, naming Ms. Pope as his sole beneficiary. On 19 March 2004, Mr. Pope died testate survived by his wife and siblings. Mr. Pope had no children and had not exercised his power to have his trust's assets distributed to his siblings' trusts. On 5 May 2004, the surviving trustees of the Pope Family Trust transferred the principal of Mr. Pope's trust to the John W. Pope Foundation ("the Foundation"), relying upon the terms of the Trust Agreement. The Foundation is a tax-exempt charitable organization.

A week later, Ms. Pope filed a petition for elective share pursuant to N.C. Gen. Stat. § 30-3.1 (2007). On the same date, she also filed a motion for a standstill order pursuant to N.C. Gen. Stat. § 30-3.5(b) (2007), alleging that she is entitled as her elective share to a portion of the assets of Mr. Pope's trust and that James Arthur Pope and Amanda Joyce Pope, as trustees, had acted improperly in transferring the trust's assets to the Foundation. Ms. Pope sought an order: (1) staying any disposal of the property in the Pope Family Trust pending final determination of Ms. Pope's elective share; (2) staying any further action by the trustees of the Pope Family Trust until a trustee had been appointed as the third trustee of the Pope Family Trust in place of Mr. Pope; and (3) compelling the Foundation to reconvey any property transferred from the Pope Family Trust after Mr. Pope's death back into the name in which the assets were held prior to the transfer.

On 12 May 2004, an assistant clerk of superior court granted Ms. Pope's motion and entered a standstill order. In an order entered 19

July 2004, the clerk of superior court granted the Pope Family Trust's and the Foundation's motion for reconsideration and entered a revised standstill order, requiring only that the Foundation retain one-half of the assets received from Mr. Pope's trust or one-half of the proceeds of any sale of the Variety Wholesalers, Inc. stock transferred as part of those assets.

Upon the filing of Ms. Pope's elective share petition, the clerk designated the elective share claim as an estate matter. On 17 May 2005, Ms. Pope filed a petition to have her elective share claim re-designated as a special proceeding, representing that respondents (Amanda Joyce Pope and James Arthur Pope, as co-trustees of the Pope Family Trust, and the Foundation) had no objection to the petition. On 20 May 2005, the clerk entered an order granting the petition and ordering that the petition for elective share together with all subsequent pleadings be transferred to the special proceedings division of the Wake County Superior Court. In a letter to the clerk dated 20 May 2005, however, counsel for respondents indicated that he had done additional research and now believed that the matter was properly an estate proceeding.

On 6 September 2005, respondents filed a motion to dismiss the petition for elective share or, alternatively, for summary judgment, attaching various affidavits and other materials. On 12 September 2005, Ms. Pope also filed a motion for summary judgment. Although Ms. Pope did not attach any additional materials, she made "[r]eference . . . to the pleadings, all of the discovery conducted in this matter, and to the Court's file."

On 24 March 2006, the clerk entered an order rescinding her 19 May 2005 order re-designating the case as a special proceeding, directing the special proceeding file closed, and directing that all filings in the special proceeding be transferred back to the estate file. On the same date, the clerk also entered an order on the parties' motions for summary judgment. The clerk determined that (1) the assets of Mr. Pope's trust were not part of his "Total Net Assets" as defined by N.C. Gen. Stat. § 30-3.2(4); (2) to the extent those assets should be included in Total Net Assets, the assets should be valued as of the date they were transferred to the trust; and (3) neither the Foundation nor the Pope Family Trust was subject to contribution to satisfy Ms. Pope's elective share. The clerk concluded that on those issues "there is no material fact at issue and . . . Respondents are entitled to judgment as a matter of law." She nonetheless included findings of fact because "it can be helpful for a lower court to set out the

undisputed facts and legal principles upon which the judgment is based where an appeal is anticipated."

Ms. Pope appealed to superior court on 27 March 2006. In a Joint Scheduling Order filed 11 May 2006, the court stated that "the parties believe, and the Court agrees, that the matters at issue there [sic] are primarily, if not entirely, issues of law, and the parties do not desire to offer any additional facts into evidence, to the extent such might be permitted." The court indicated that "[a]ccordingly, this Court will conduct its review on appeal upon the evidence of record before the clerk in 04 E 777 without receiving any additional evidence." On 9 June 2005, Ms. Pope filed a motion to amend the scheduling order, noting that the clerk had refused to receive affidavits from attorneys regarding the meaning of "taxable estate," as used in N.C. Gen. Stat. § 30-3.2(4)(e), and requesting that she be allowed to present to the court additional evidence in the form of those affidavits.

On 1 September 2006, the superior court entered its memorandum of decision and order on Ms. Pope's appeal from the clerk's order rescinding its 19 May 2005 order re-designating the elective share matter as a special proceeding. In affirming the clerk's order, the superior court concluded that the clerk had properly determined that an elective share proceeding is an estate matter within the original jurisdiction of the clerk of superior court and that appeals from orders in an elective share proceeding are governed by N.C. Gen. Stat. § 1-303.3 (2007) and N.C. Gen. Stat. § 30-3.4(g) (2007).

Also on 1 September 2006, the superior court entered a memorandum of decision and order on the appeal from the clerk's order on the parties' motions for summary judgment. As a preliminary matter, the superior court noted that following the entry of the Joint Scheduling Order, Ms. Pope's counsel "filed affidavits of lawyers familiar with the drafting of the Elective Share Act, G.S. 30-1 et seq. in support of their position that the Clerk's Order was legally erroneous in terms of what the Elective Share Act provides." The court explained that it had scheduled a hearing on 14 July 2006 to hear respondents' motion to strike the affidavits and had ordered that the affidavits be sealed until such time that the court (1) determined whether or not it would accept additional evidence and (2) instructed respondents that they could file counter-affidavits.

In addressing the merits of the appeal, the superior court first concluded that the Trust Agreement "is a valid, enforceable binding contract that vests specific rights in each beneficiary in consideration

for their giving up valuable rights of ownership in their individual shares of Variety Wholesalers." The superior court then addressed the following question: "Is the Elective Share Act retroactive as applied to vested contractual rights such as those in the Pope Family Trust Agreement?" The court answered this question by concluding that the legislature "could not have intended to allow the Elective Share Act to have retroactively affected other vested contractual rights made prior to the effective date of the Act such as those vested rights in the parties to the Pope Family Trust Agreement." The court observed that its "interpretation is in accord with North Carolina law and the strong presumption that statutes are presumed to act prospectively, especially here where to apply the Act retroactively would involve an unconstitutional impairment of vested contract rights between the parties to the Pope Family Trust Agreement."

The court, therefore, concluded "that the Elective Share Act is to be applied only prospectively and may not reach back in time to retroactively undo and vacate vested contractual rights regarding property and assets, including the rights vested in the parties to the Pope Family Trust Agreement." Because of its disposition of the appeal, the court made "no ruling, or determination, as to the validity or invalidity of the findings and conclusions of law made by the Clerk[,]" including the objections and motions to strike the affidavits relating to the interpretation of the Elective Share Act. Ms. Pope gave timely notice of appeal to this Court on 20 September 2006.

Discussion

This appeal represents the first time this Court has addressed the State's Elective Share Act, which became effective 1 January 2001 and applies to estates of decedents dying on or after that date. 2000 N.C. Sess. Laws ch. 178 sec. 9. An elective share is "equal to (i) the applicable share of the Total Net Assets, as defined in G.S. 30-3.2(4), less (ii) the value of Property Passing to Surviving Spouse, as defined in G.S. 30-3.3(a)." N.C. Gen. Stat. § 30-3.1(a).

The surviving spouse must exercise the right to obtain an elective share by filing a petition within six months after the issuance of letters testamentary or letters of administration. N.C. Gen. Stat. § 30-3.4(a) and (b). The clerk must set the matter for hearing no earlier than two months and not later than six months after the filing of the petition. N.C. Gen. Stat. § 30-3.4(c). Following the hearing, the clerk "shall determine whether or not the surviving spouse is entitled to an elective share, and if so, the clerk shall then determine the elec-

tive share and shall order the personal representative to transfer that amount to the surviving spouse." N.C. Gen. Stat. § 30-3.4(f). Ms. Pope raises questions regarding (1) the proper procedure to be followed in deciding elective share claims and (2) whether the assets of Mr. Pope's trust should be included in his Total Net Assets when determining her elective share.

I

[1] Ms. Pope contends that the trial court erred in concluding that her claim was an estate proceeding instead of a special proceeding. Ms. Pope argues that the designation is important because "[t]his designation determines the clerk's duties and the superior court's standard of review on appeal." We need not decide, in this case, what label should be applied because the General Assembly chose to set out a specific procedure for the clerk and the standard of review for the superior court judge in N.C. Gen. Stat. § 30-3.4. Ms. Pope's contentions on appeal are all resolved by the terms of that statutory provision.

N.C. Gen. Stat. § 30-3.4(f) specifies that "[t]he clerk's order shall recite specific findings of fact and conclusions of law in arriving at the decedent's Total Net Assets, Property Passing to Surviving Spouse, and the elective share." N.C. Gen. Stat. § 30-3.4(g) provides that "[a]ny party in interest may appeal from the decision of the clerk to the superior court." Upon an appeal taken from the clerk to the superior court, "the judge may review the findings of fact by the clerk and may find the facts or take other evidence, but the facts found by the judge shall be final and conclusive upon any appeal to the Appellate Division." *Id.*

Ms. Pope does not argue that the clerk failed to comply with the procedures set out in N.C. Gen. Stat. § 30-3.4(f). Instead, Ms. Pope focuses on whether an elective share proceeding is an estate proceeding or a special proceeding. According to Ms. Pope, if it is an estate proceeding, as Ms. Pope contends, then the Rules of Civil Procedure did not apply to the proceeding, and the clerk erred in resolving the dispute pursuant to a motion for summary judgment.

Nothing in N.C. Gen. Stat. § 30-3.4 precludes resolution of the elective share issues on summary judgment if there is no dispute as to the facts. The statute requires only "notice and hearing" without further elaboration. N.C. Gen. Stat. § 30-3.4(f). Summary judgment simply means that a case can be decided based on undisputed

facts without the need for an *evidentiary* hearing. *See* N.C.R. Civ. P. 56(c) ("The judgment 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."). The Elective Share Act anticipates resolution of the elective share issue relatively quickly, *see* N.C. Gen. Stat. § 30-3.4(b) and (c), and, if there are no disputed facts, we can see no justification for requiring an evidentiary hearing when one is not specifically mandated by the statute.

Ms. Pope argues, however, that because the elective share statute requires findings of fact, summary judgment cannot be appropriate as summary judgment orders are not supposed to include findings of fact. While it is true that a trial court may not, on summary judgment, make findings of fact resolving disputed issues of fact, when—as here—the material facts are undisputed, an order may include a recitation of those undisputed facts. *See McArdle Corp. v. Patterson*, 115 N.C. App. 528, 531, 445 S.E.2d 604, 606 (1994) (holding that although the label "findings of fact" implies facts were disputed, findings made by trial judge were *undisputed* and trial court, therefore, committed no error by setting out undisputed facts in judgment), *aff'd per curiam*, 340 N.C. 356, 457 S.E.2d 596 (1995); *Capps v. City of Raleigh*, 35 N.C. App. 290, 292, 241 S.E.2d 527, 529 (1978) ("Granted, in rare situations it can be helpful for the trial court to set out the undisputed facts which form the basis for his judgment. When that appears helpful or necessary, the court should let the judgment show that the facts set out therein are the undisputed facts.").

On appeal, Ms. Pope does not specifically identify any of the clerk's findings of fact as resolving issues of material fact. Indeed, although Ms. Pope asserts that there are factual issues for the trier of fact, she never explains in what way the evidence in the record gives rise to issues of material fact, as opposed to issues requiring the application of law to the facts. Moreover, if summary judgment were inappropriate, the remedy would be to remand for an evidentiary hearing. Yet, Ms. Pope does not specifically argue that she needed an evidentiary hearing. She identifies no issue that required an evidentiary hearing and points to no evidence that she would have presented at such a hearing that was not already before the clerk. On appeal to superior court, the only additional evidence that Ms. Pope sought to present were affidavits—not live testimony—from lawyers regarding the proper interpretation of wording in the statute.

In this case, the parties filed cross-motions for summary judgment, submitting documentary evidence, including affidavits. The clerk conducted a hearing as required by the statute—although it consisted only of oral argument—and then entered an order setting out findings of fact and conclusions of law, also as required by the statute. Ms. Pope has, therefore, failed to establish that the clerk did not comply with the procedural requirements of N.C. Gen. Stat. § 30-3.4.

In any event, the question whether the clerk erred in resolving the case on the parties' cross-motions for summary judgment is not properly before this Court. The record does not contain any indication that Ms. Pope ever objected to the clerk's resolving the case on summary judgment prior to appealing. "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).

Moreover, Ms. Pope also moved for summary judgment. "Our Courts have long held to the principle that a party may not appeal from a judgment entered on its own motion or provisions in a judgment inserted at its own request." *Templeton v. Apex Homes, Inc.*, 164 N.C. App. 373, 377, 595 S.E.2d 769, 771-72 (2004) (internal citation omitted) (plaintiffs were precluded from appealing entry of summary judgment because they invited error when "the parties joined together to encourage the court to enter summary judgment on all issues in order to proceed immediately to the question of remedy"). Any error the clerk may have committed by resolving the matter on summary judgment was thus invited error.

Turning to the appeal before the superior court, Ms. Pope contends the court did not apply the proper standard of review. Specifically, she argues the superior court (1) erred in finding facts not contained in the clerk's order and finding facts contrary to the clerk's order, (2) erred in not applying a de novo standard of review, and (3) erred in ruling on the constitutional application of the statute when the clerk had declined to do so.

We first note that Ms. Pope's contention that the superior court erred in not applying a de novo standard of review is inconsistent with her other two contentions that the trial court erred in finding additional facts and in addressing an issue not first determined by the

clerk. " 'Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the [trial court].' " *N.C. Indus. Capital, LLC v. Clayton*, 185 N.C. App. 356, 370, 649 S.E.2d 14, 24 (2007) (quoting *Peninsula Prop. Owners Ass'n v. Crescent Res., LLC*, 171 N.C. App. 89, 92, 614 S.E.2d 351, 353, *appeal dismissed and disc. review denied*, 360 N.C. 177, 626 S.E.2d 648 (2005)).

Regardless, the standard of review for the superior court is set out in N.C. Gen. Stat. § 30-3.4(g): "Upon an appeal taken from the clerk to the superior court, the judge may review the findings of fact by the clerk *and may find the facts or take other evidence*, but the facts found by the judge shall be final and conclusive upon any appeal to the Appellate Division." (Emphasis added.) Thus, the superior court was entitled, after reviewing the clerk's findings of fact, to "find the facts." *Id.*

In this case, however, both the clerk and the superior court concluded that the material facts were undisputed, and the only issues were ones of law. On appeal, the issues that Ms. Pope claims are disputed are either questions of law or involve application of legal principles to undisputed facts. Thus, because the trial court was addressing only issues of law, it necessarily conducted a de novo review. *See Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004) ("On appeal, an order allowing summary judgment is reviewed *de novo*."). Under a de novo review, the superior court was entitled to base its decision on different grounds than that relied upon by the clerk. *See Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989) ("If the granting of summary judgment can be sustained on any grounds, it should be affirmed on appeal. If 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."). Thus, the superior court did not err in affirming the clerk's decision based on its construction of the effective date of the statute rather than on the statutory analysis applied by the clerk.

In sum, Ms. Pope has failed to demonstrate that the proceedings before the clerk violated N.C. Gen. Stat. § 30-3.4 or that the superior court applied an improper standard of review. While the case may arise in which this Court is required to resolve whether an elective share proceeding is an estate proceeding or a special proceeding, we are not required to do so in this case.

II

[2] Ms. Pope next contends that her right to due process was denied because the trial court did not conduct a hearing on her appeal. She cites no authority in support of this position and, therefore, this issue is not properly presented for review. *See* N.C.R. App. P. 28(b)(6) ("Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.").

Further, Ms. Pope has failed to demonstrate that she was denied an opportunity to be heard. The superior court noted in its memorandum of decision and order:

> Petitioner and Respondents delivered to the Court briefs and memoranda with supporting legal materials weighing in excess of fifty (50) pounds and when stacked was approximately two (2) feet tall.
>
> Petitioner Pope's Brief on the Elective Share Issue is fifty (50) pages. Respondents' Brief on the Elective Share Issue is fifty two [sic] (52) pages and Petitioner Pope's Reply Brief is thirty five [sic] (35) pages.

Ms. Pope did not request an evidentiary hearing. Indeed, the only additional material that she proposed to submit to the superior court were affidavits that the superior court deemed immaterial to its resolution of the appeal.

It appears that Ms. Pope is concerned that she was not given an opportunity to present oral argument. In light of the voluminous briefing before the superior court along with the extensive materials already in the record, we can conceive of no basis upon which one could conclude that Ms. Pope was denied due process. She had ample opportunity to be heard. *Cf.* N.C.R. App. P. 28(j) (limiting main briefs filed in the Court of Appeals to 35 pages and reply briefs to 15 pages if using nonproportional type); N.C.R. App. P. 30(f) (authorizing appellate courts to decide appeal on the record and briefs without oral argument).

III

[3] We now turn to the question of Ms. Pope's entitlement to an elective share. "[D]etermining the value or amount of the elective share requires one to determine the value or amount of three figures, to wit: (1) the 'applicable share' of (2) the 'Total Net Assets' and (3) the

'Property Passing to Surviving Spouse.' " 1 James B. McLaughlin, Jr. & Richard T. Bowser, *Wiggins Wills and Administration of Estates in North Carolina* § 161.1 (4th ed. 2000). The only issue presented by this appeal is whether the assets in Mr. Pope's trust should be included within the "Total Net Assets." The parties agree that if those assets are not included in the Total Net Assets, then Ms. Pope is not entitled to an elective share.

The clerk ruled that the assets should not be included based on the definition of Total Net Assets contained in the statute. The superior court concluded that the assets should not be included because the General Assembly did not intend for the statute to apply retroactively to contractual rights that vested prior to the effective date of the statute. Respondents in turn argue as an alternative ground for upholding the decision below that application of the statute to Mr. Pope's trust would violate the Contracts Clause of the United States Constitution and the equivalent provision under the North Carolina Constitution.

It is well settled that "appellate courts must 'avoid constitutional questions, even if properly presented, where a case may be resolved on other grounds.' " *James v. Bartlett*, 359 N.C. 260, 266, 607 S.E.2d 638, 642 (2005) (quoting *Anderson v. Assimos*, 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002)). *See also Brooks v. Taylor Tobacco Enters., Inc.*, 298 N.C. 759, 761, 260 S.E.2d 419, 421 (1979) ("It is an established principle of appellate review that this court will refrain from deciding constitutional questions when there is an alternative ground available upon which the case may properly be decided."). While the superior court construed the statute as applying prospectively only, in order to avoid the statute's having an unconstitutional effect, we are concerned that this interpretation may prevent the statute from reaching assets that the General Assembly intended to reach and that could be included within Total Net Assets without constitutional implications. Since we have determined that the plain language of the statute establishes that the assets in Mr. Pope's trust were not part of his Total Net Assets, we need not address either the constitutional issue or the superior court's conclusion regarding the effective date of the statute.

For purposes of determining the elective share,

> "Total Net Assets" means, after the payment or provision for payment of the decedent's funeral expenses, year's allowances to persons other than to the surviving spouse, debts, claims other

than an equitable distribution of property awarded to the surviving spouse pursuant to G.S. 50-20 subsequent to the death of the decedent, and administration expenses, the sum of the following [relevant items]:

a. All property to which the decedent had legal and equitable title immediately prior to death;

b. All property received by the decedent's personal representative by reason of the decedent's death, other than wrongful death proceeds;

c. One-half of the value of any property held by the decedent and the surviving spouse as tenants by the entirety, or as joint tenants with rights of survivorship;

d. The entire value of any interest in property held by the decedent and another person, other than the surviving spouse, as joint tenants with right of survivorship, except to the extent that contribution can be proven by clear and convincing evidence;

e. The value of any property which would be included in the taxable estate of the decedent pursuant to sections 2033, 2035, 2036, 2037, 2038, 2039, or 2040 of the [Internal Revenue] Code.

f. Any gifts of property made by the decedent to donees other than the surviving spouse within six months of the decedent's death, excluding:

   1. Any gifts within the annual exclusion provisions of section 2503 of the Code;

   2. Any gifts to which the surviving spouse consented. A signing of a deed, or income or gift tax return reporting such gift shall be considered consent; and

   3. Any gifts made prior to marriage;

g. Any proceeds of any individual retirement account, pension or profit-sharing plan, or any private or governmental retirement plan or annuity of which the decedent controlled the designation of beneficiary, excluding any benefits under the federal social security system;

h. Any other Property Passing to Surviving Spouse under G.S. 30-3.3; and

i. In case of overlapping application of the same property under more than one provision, the property shall be included only once under the provision yielding the greatest value.

N.C. Gen. Stat. § 30-3.2(4). Ms. Pope contends that the assets in Mr. Pope's trust fall within subsections (a), (e), and (f).

A. *Legal and Equitable Title*

Total Net Assets include "[a]ll property to which the decedent had legal and equitable title immediately prior to death." N.C. Gen. Stat. § 30-3.2(4)(a). Respondents contend that Mr. Pope had neither legal nor equitable title. We agree that Mr. Pope did not have legal title within the meaning of the statute and, therefore, need not decide whether Mr. Pope had equitable title.

In arguing that this subsection applies, Ms. Pope points to the fact that Mr. Pope was both the beneficiary of the trust and one of the trustees. There is no dispute that legal title to the trust assets was lodged in the trustees. *See In re Appeal of Appalachian Student Hous. Corp.*, 165 N.C. App. 379, 387, 598 S.E.2d 701, 706 ("In an active trust, legal title vests in the trustee of the property."), *appeal dismissed*, 359 N.C. 68, 604 S.E.2d 307 (2004). Since, however, there were multiple trustees, including Mr. Pope, the question remains whether Mr. Pope could still be said to hold legal title.

Our Supreme Court answered this question in *Blades v. Norfolk S. Ry. Co.*, 224 N.C. 32, 29 S.E.2d 148 (1944). In *Blades*, as in this case, the trustees of the trust were identical to the beneficiaries, causing the appellant to argue that both the equitable interest and the legal estate were held by the same individuals. *Id.* at 37, 29 S.E.2d at 151. In holding otherwise, the Court pointed out that none of the trustees had "a free hand in dealing with his own equitable interest nor with that of any other. It is expressly required that action be unanimous; and the trust deed provides for complete authority to surviving trustees in case the panel is reduced in number by death." *Id.* at 39, 29 S.E.2d at 152. In concluding that under these circumstances, legal title and the equitable interest did not merge in a single person, the Court pointed to "the impossibility of judicially allocating and applying the individual equitable interest to the appropriate legal interest with which it is supposed to merge, where the trustees and the beneficiaries are plural and where the property is committed to the trustees collectively, as a body, to act in common for *cestuis* whose equitable interests are individual." *Id.* at 37-38, 29 S.E.2d at 152.

As support for its conclusion, the Court relied upon the first Restatement of Trusts, quoting its assertion that when multiple trustees exist, " 'each of the beneficiaries has an equitable interest which is separate from the legal interest held by the whole group. As trustees they hold the legal title as *joint tenants*, and ordinarily they hold the beneficial interests as *tenants in common*.' " *Id.* at 40, 29 S.E.2d at 153 (quoting Restatement of Trusts § 99). Restatement (Second) of Trusts states that when the sole beneficiary of a trust is also one of several trustees, "[t]he trustees hold the legal title to the property as joint tenants, and the beneficiary has the entire equitable interest. There is no partial merger of the legal and equitable interests." Restatement (Second) of Trusts § 99 cmt. c (1959). *See also Hanson v. Birmingham*, 92 F. Supp. 33, 42 (N.D. Iowa 1950) ("It is well recognized law that where there is more than one trustee they form but one collective trustee."), *appeal dismissed per curiam*, 190 F.2d 206 (8th Cir. 1951); *Nichols v. Pospiech*, 289 Mich. 324, 334, 286 N.W. 633, 636 (1939) (holding that when administration of trust is vested in co-trustees, they all form only one collective trustee).

In this case, when Mr. Pope created the trust, he ceased to have legal title. Legal title to the trust assets was held instead collectively by the trustees. Thus, even if Mr. Pope held equitable title to the assets, an issue we do not decide, he nonetheless no longer held legal title, and N.C. Gen. Stat. § 30-3.2(4)(a) does not apply.

B. *Taxable Estate*

N.C. Gen. Stat. § 30-3.2(4)(e) provides that Total Net Assets include "[t]he value of any property which would be included in the taxable estate of the decedent pursuant to sections 2033, 2035, 2036, 2037, 2038, 2039, or 2040 of the Code." N.C. Gen. Stat. § 30-3.2(1) defines "Code" to mean "the Internal Revenue Code in effect at the time of the decedent's death." Ms. Pope's argument regarding this subsection hinges entirely on her contention that when the General Assembly said "taxable estate," it actually meant "gross estate." We can find no basis for this interpretation of the statute.

Since this subsection encompasses property included in the taxable estate of the decedent "pursuant to" the Internal Revenue Code, the more reasonable interpretation is that the General Assembly was referring to "the taxable estate" as defined by the Internal Revenue Code. Under the Code, "the taxable estate shall be determined by deducting from the value of the gross estate the deductions provided for in this part [26 U.S.C.S. §§ 2051 *et seq.*]." 26 U.S.C.S. § 2051 (2007).

Given this definition, we cannot reasonably equate "taxable estate" with "gross estate."

Interpreting the reference to "taxable estate" to mean the federal taxable estate is also consistent with the procedure mandated by the General Assembly for elective share proceedings. N.C. Gen. Stat. § 30-3.4(d) requires that "[i]n every case in which a petition to determine an elective share has been filed, and within two months of the filing of the petition, the personal representative shall prepare and submit to the clerk a proposed Form 706, federal estate tax return, for the estate, regardless of whether that form is required to be filed with the Internal Revenue Service." Form 706, a copy of which is included in the record on appeal in this case, requires the estate to report the "[t]otal gross estate," the "[t]otal allowable deductions," and the "[t]axable estate," calculated by subtracting the deductions from the gross estate.

Moreover, the General Assembly has, in other statutes, specifically distinguished between "gross estate" and "taxable estate," with "taxable estate" consistently being identified as the federal taxable estate. *See* N.C. Gen. Stat. §§ 28A-27-1, 28A-27-5(a), 105-32.2(b) (2007). *Black's Law Dictionary* 589 (8th ed. 2004), when defining "taxable estate," references 26 U.S.C.A. § 2051 and states that it is "[a] decedent's gross estate reduced by allowable deductions (such as administration costs and ESOP deductions)." *See State v. Webb*, 358 N.C. 92, 97, 591 S.E.2d 505, 511 (2004) ("Where appropriate, including earlier in this opinion, this Court has consulted *Black's Law Dictionary*."). When, as here, a term "has longstanding legal significance, it is presumed that legislators intended the same significance to attach by use of that term, absent indications to the contrary . . . ." *Sheffield v. Consol. Foods Corp.*, 302 N.C. 403, 427, 276 S.E.2d 422, 437 (1981).

Ms. Pope cites no legal authority for the proposition that "taxable estate" is synonymous with "gross estate." Although she refers to the Delaware statute that she contends was the basis for our Elective Share Act, that statute, Del. Code Ann. tit. 12 § 902(a) (2007), specifically refers to "decedent's gross estate."[1] She also attempts to rely upon affidavits addressing common estate practice and the intent of the legislature. These affidavits were, however, excluded by the clerk

1. "The elective estate means the amount of the decedent's gross estate for federal estate tax purposes, regardless of whether or not a federal estate tax return is filed for the decedent, modified as follows . . . ." Del. Code Ann. tit. 12 § 902(a).

and were not considered by the trial court. Because Ms. Pope has not challenged the clerk's ruling on appeal and has not specifically argued that the trial court erred in not considering those affidavits, those affidavits are not properly before us. We point out, however, that it has long been the law in North Carolina that such evidence is not competent:

> While the cardinal principle of statutory construction is that the words of the statute must be given the meaning which will carry out the intent of the Legislature, that intent must be found from the language of the act, its legislative history and the circumstances surrounding its adoption which throw light upon the evil sought to be remedied. Testimony, even by members of the Legislature which adopted the statute, as to its purpose and the construction intended to be given by the Legislature to its terms, is not competent evidence upon which the court can make its determination as to the meaning of the statutory provision.

State ex rel N.C. Milk Comm'n v. Nat'l Food Stores, Inc., 270 N.C. 323, 332-33, 154 S.E.2d 548, 555 (1967).

To equate "gross estate" and "taxable estate" as urged by Ms. Pope would require us to rewrite the statute. Although Ms. Pope points to a number of problems that may arise from interpreting "taxable estate" to mean the federal taxable estate, those issues are for the General Assembly to resolve. As our Supreme Court has explained: "The duty of a court is to construe a statute as it is written. It is not the duty of a court to determine whether the legislation is wise or unwise, appropriate or inappropriate, or necessary or unnecessary." *Campbell v. First Baptist Church of the City of Durham*, 298 N.C. 476, 482, 259 S.E.2d 558, 563 (1979).

We, therefore, hold that when § 30-3.2(4)(e) refers to "the taxable estate," it means the decedent's gross estate less any deductions. There is no dispute by the parties that the trust assets are part of Mr. Pope's gross estate. Likewise, there is no dispute that the taxable estate, as set out in the Form 706, is zero since the assets of the trust were all transferred to the Foundation, a corporation organized for a charitable purpose. As a result, no value is left in Mr. Pope's trust for purposes of calculating Mr. Pope's Total Net Assets.[2]

---

2. Nothing in this opinion should be viewed as addressing respondents' contention that if N.C. Gen. Stat. § 30-3.2(4)(e) were to apply, it would violate the state and federal constitutions. That question remains open.

C. *Gifts*

Finally, respondent relies upon N.C. Gen. Stat. § 30-3.2(4)(f), which provides that Total Net Assets include "[a]ny gifts of property made by the decedent to donees other than the surviving spouse within six months of the decedent's death." The plain language of this subsection requires that the gift be made by the decedent. North Carolina recognizes two types of gifts: *inter vivos* gifts and gifts *causa mortis*. *Creekmore v. Creekmore*, 126 N.C. App. 252, 256, 485 S.E.2d 68, 71 (1997). Accordingly, we must determine whether the transfer of the trust's assets was an *inter vivos* gift or a gift *causa mortis* by Mr. Pope.[3]

For a valid gift to occur, there must be (1) donative intent and (2) actual or constructive delivery. *Courts v. Annie Penn Mem'l Hosp.*, 111 N.C. App. 134, 138, 431 S.E.2d 864, 866 (1993). " 'In all cases of gifts, whether inter vivos or causa mortis, there must be a delivery to complete the gift. And, in North Carolina, the law of delivery is the same for gifts inter vivos and gifts causa mortis.' " *Huskins v. Huskins*, 134 N.C. App. 101, 104, 517 S.E.2d 146, 148 (1999) (quoting *Atkins v. Parker*, 7 N.C. App. 446, 450, 173 S.E.2d 38, 41 (1970)), *cert. denied*, 351 N.C. 355, 542 S.E.2d 211 (2000). For sufficient delivery to have occurred, the " 'delivery must divest the donor of all right, title, and control over the property given.' " *Id.* (quoting *Courts*, 111 N.C. App. at 138, 431 S.E.2d at 866).

In this case, no delivery, actual or constructive, of the trust assets occurred until after Mr. Pope's death. Accordingly, decedent did not make a gift to the Foundation within six months of his death. *See id.* at 106-07, 517 S.E.2d at 149-50 (holding that decedent's mailing of the combinations to a safe to a third person with a letter stating that the contents of the safe should go to decedent's wife did not constitute adequate delivery prior to the decedent's death); *Creekmore*, 126 N.C. App. at 258, 485 S.E.2d at 72 ("Therefore, because defendant did not cash the check before testatrix's death, the $10,000.00 was never delivered from testatrix to defendant and the attempted gift was incomplete."). We, therefore, conclude that this subsection also does not apply.

---

3. In oral argument, Ms. Pope's counsel suggested it was a testamentary gift. A testamentary gift is "[a] gift made in a will." *Black's Law Dictionary* 710. Since the transfer of assets was the result of the Trust Agreement and not pursuant to any provision of Mr. Pope's will, it cannot be a testamentary gift. We, therefore, need not decide whether this subsection applies to testamentary gifts.

Conclusion

We thus hold that Ms. Pope has not demonstrated that the clerk or the superior court failed to comply with the procedural requirements of N.C. Gen. Stat. § 30-3.4 and that Ms. Pope received ample opportunity to present her contentions both to the clerk and to the superior court. We further hold, based on the undisputed facts, that Ms. Pope has failed to establish that the assets of Mr. Pope's trust should be included in his Total Net Assets.

We note that the parties have raised a number of significant questions regarding the statute, including its constitutionality when applied to contracts entered into prior to the enactment of the statute, its applicability to assets not part of the marital estate, and the impractical consequences of the plain language of the statute. Because of the precise circumstances of this case, we need not resolve those questions and leave them for another day or for resolution by the General Assembly. Accordingly, we affirm the decision of the trial court.

Affirmed.

Judges BRYANT and STEELMAN concur.

TAMMY D. YORKE, EXECUTOR OF THE ESTATE OF WILLIAM R. YORKE, JR., PLAINTIFF-APPELLANT v. NOVANT HEALTH, INC., NOVANT HEALTH TRIAD REGION, L.L.C., FORSYTH MEMORIAL HOSPITAL, INC., ALL D/B/A FORSYTH MEDICAL CENTER, AND TENESA MCCASKILL-GAINEY, DEFENDANTS-APPELLEES

No. COA07-503

(Filed 2 September 2008)

1. Appeal and Error— settlement of record—timeliness

The fact that the trial judge is not available for judicial settlement of the record on appeal does not relieve an appellant from the burden of seeking an extension of time under the appellate rules. Plaintiff's failure to seek an appropriate extension of time resulted in the denial of its motion in the Court of Appeals to deem the record timely filed and amounted to substantial violations of the appellate rules. However, the Court of Appeals in its discretion decided not to impose sanctions.

2. Appeal and Error— appellate jurisdiction—notice of appeal— intermediate order not included—judgment necessarily affected

The Court of Appeals had jurisdiction pursuant to N.C.G.S. § 1-278 to review a directed verdict order that denied plaintiff recovery on a res ipsa loquitur theory even though plaintiff's notice of appeal did not include that order. The order wholly denied plaintiff one of his theories of recovery, involved the merits, and necessarily affected the judgment.

3. Appeal and Error— appellate jurisdiction—discovery protection order—interlocutory—judgment not necessarily affected.

The Court of Appeals lacked jurisdiction under N.C. R. App. P. 3(d) or N.C.G.S. § 1-278 to consider an order protecting a hospital's risk management file from discovery where the order was a nonappealable interlocutory order and did not necessarily affect the judgment.

4. Appeal and Error— assignments of error—substantial compliance

Plaintiff's assignments of error were in substantial compliance with the rules of appellate procedure, even assuming they were less specific than required by Rule 10, and were not dismissed.

5. Negligence— res ipsa loquitur—direct proof offered—directed verdict

The trial court did not err by granting defendants a directed verdict on plaintiff's res ipsa loquitur theory of negligence, and by not instructing on that theory, where plaintiff offered direct proof of the cause of his injury.

6. Evidence— medical malpractice—failure to prepare internal report—irrelevancy

In a medical malpractice case, defendants' failure to prepare an incident or Quality Assessment Report (QAR) was irrelevant to the issue of whether they breached the standard of care owed to the patient, and the trial court did not err by excluding evidence of that failure.

7. Medical Malpractice— automatic blood pressure cuff— identified at trial—not an instant of surprise—new trial denied

The trial court did not abuse its discretion in a medical malpractice case by denying a new trial based on alleged surprise when the type of automatic blood pressure cuff used on plaintiff was identified at trial. The record reveals that defense counsel had previously identified the machine at issue and made it available for inspection. Furthermore, plaintiff requested and received a spoliation instruction.

Appeal by Plaintiff from judgment entered 19 October 2005 and from order entered 30 December 2005 by Judge L. Todd Burke in Superior Court, Forsyth County. Heard in the Court of Appeals 10 December 2007.

Kennedy, Kennedy, Kennedy & Kennedy, L.L.P., by Harold L. Kennedy, III and Harvey L. Kennedy, for Plaintiff-Appellant.

Bennett & Guthrie, P.L.L.C., by Richard V. Bennett and Joshua H. Bennett, for Defendants-Appellees.

McGEE, Judge.

The record in this case shows that William R. Yorke, Jr. (Mr. Yorke) filed an amended complaint dated 28 January 2005 against Novant Health, Inc.; Novant Health Triad Region, L.L.C.; Forsyth Memorial Hospital, Inc., all d/b/a Forsyth Medical Center (together, Defendant Hospital); and Tenesa McCaskill-Gainey (Defendant McCaskill-Gainey) (collectively, Defendants).[1] Mr. Yorke alleged that he was injured by the negligence of Defendant McCaskill-Gainey while he was a patient at Defendant Hospital. Specifically, Mr. Yorke alleged that Defendant McCaskill-Gainey was negligent in that, *inter alia*, she: placed a blood pressure cuff too tightly on Mr. Yorke's arm; further tightened the cuff after Mr. Yorke complained about pain in his arm; failed to check the blood pressure machine to ensure that it was functioning properly; and failed to address the injury that allegedly resulted from the cuff on Mr. Yorke's arm. Plaintiff also pleaded the doctrine of *res ipsa loquitur* against all Defendants.

1. Mr. Yorke's original complaint incorrectly listed "Tanisha Gant" as the individual defendant. Mr. Yorke subsequently filed a motion dated 29 October 2004 to amend his complaint to change the name of the individual defendant to "Tenesa McCaskill-Gainey." The trial court granted Mr. Yorke's motion in an order dated 15 November 2004.

During pre-trial discovery, Mr. Yorke requested that Defendant Hospital produce "[t]he complete file of the Risk Management Department at Forsyth Medical Center concerning the hospitalization of [Mr. Yorke]" (the risk management file). Defendant Hospital refused to produce the risk management file, and filed a motion for a protective order on 7 October 2004 claiming that the risk management file was the product of a medical review committee and therefore was protected from discovery pursuant to N.C. Gen. Stat. § 131E-95(b). Defendant Hospital also claimed that the risk management file contained trial preparation materials that were protected from discovery pursuant to N.C. Gen. Stat. § 1A-1, Rule 26(b)(3). Mr. Yorke filed a motion dated 29 October 2004 to compel production of the risk management file. The trial court entered an order on 20 December 2004 in which the trial court, *inter alia*, granted Defendant Hospital's motion for a protective order.

At trial, Mr. Yorke testified that he suffered a heart attack on 16 December 2001 and was admitted to Defendant Hospital. An unidentified nurse took Mr. Yorke's vital signs and put a blood pressure cuff on Mr. Yorke's left arm. Defendant McCaskill-Gainey entered Mr. Yorke's room later that evening, and Mr. Yorke asked her to loosen the blood pressure cuff because it was hurting his arm. Defendant McCaskill-Gainey explained to Mr. Yorke that she could not loosen the cuff because the cuff would not function properly if she loosened it.

Mr. Yorke called Defendant McCaskill-Gainey into his room later during the evening of 16 December 2001 and repeated his request for her to loosen the blood pressure cuff because it was causing him substantial pain. Defendant McCaskill-Gainey again explained that she could not loosen the cuff. Mr. Yorke testified that later that evening he again called Defendant McCaskill-Gainey into his room because "[t]he blood pressure cuff was killing my arm. It was hurting plumb into my fingers." According to Mr. Yorke, Defendant McCaskill-Gainey then "took [the cuff] off and put it back on even tighter than what it was before." Mr. Yorke testified that this caused him intense pain.

Mr. Yorke testified that he continued to suffer from pain in his arm from 17 December through 20 December 2001. On the morning of 20 December 2001, a doctor came to check on Mr. Yorke and immediately removed Mr. Yorke's blood pressure cuff. Mr. Yorke testified that he suffered muscle and nerve damage to his left arm as a result of wearing the blood pressure cuff, and that he had suffered pain in his

left arm on a daily basis since leaving the hospital. Mr. Yorke also stated that he had suffered a significant loss of strength and feeling in his left arm since leaving the hospital.

Following Mr. Yorke's evidence, Defendants moved for a directed verdict on Mr. Yorke's *res ipsa loquitur* theory of recovery. Defendants argued that *res ipsa loquitur* "is only available as a means to find liability when no proof of the cause of injury is available," and that Mr. Yorke had introduced evidence that the cause of his injury was Defendant McCaskill-Gainey's having applied the blood pressure cuff too tightly on his arm. The trial court granted Defendants' directed verdict motion as to Mr. Yorke's *res ipsa loquitur* theory of recovery.

Defendants' evidence at trial tended to show that portions of Mr. Yorke's testimony were fabricated, that Defendants were not responsible for Mr. Yorke's alleged injury, and that Mr. Yorke exaggerated the nature of his alleged injury. For example, one of Defendants' expert witnesses, Dr. Joseph T. Alexander, testified that the bruising on Mr. Yorke's arm likely resulted not from the blood pressure cuff, but rather from blood thinners and intravenous catheters that were placed in Mr. Yorke's arm. Defendants also challenged the extent of Mr. Yorke's injuries by showing a videotape of Mr. Yorke using his left arm to turn pages during his deposition. Defendants further challenged Mr. Yorke's testimony by demonstrating through cross-examination that Mr. Yorke's version of the events that allegedly led to his injury had changed over time. Specifically, Defendants demonstrated that Mr. Yorke had previously alleged that he was injured on a day that Defendant McCaskill-Gainey was not working at Defendant Hospital.

During the charge conference, Mr. Yorke requested a jury instruction on *res ipsa loquitur*. The trial court denied Mr. Yorke's request and instructed the jury on standard negligence principles. The jury returned a verdict on 14 October 2005 finding that Mr. Yorke was not injured by Defendants' negligence. In accordance with the verdict, the trial court entered a judgment on 19 October 2005 ordering that Mr. Yorke was not entitled to recover from Defendants. Mr. Yorke filed a motion for a new trial on 27 October 2005, and the trial court denied Mr. Yorke's motion on 30 December 2005.

Mr. Yorke gave notice of appeal on 4 May 2006 from the trial court's judgment and from the order denying his motion for a new trial. Mr. Yorke died on 2 October 2006 and counsel filed a motion to

substitute the executor of Mr. Yorke's estate, Tammy D. Yorke (Plaintiff), as plaintiff in this case. The trial court granted the motion on 24 April 2007.

I.

Before we address the merits of Plaintiff's appeal, we consider a number of motions currently before our Court.

Defendants have filed a motion to dismiss Plaintiff's appeal. Defendants argue that Plaintiff's appeal should be dismissed in whole, or in part, due to various violations of the Rules of Appellate Procedure. We consider each of Defendants' arguments in turn.

A.

[1] Defendants first argue that Plaintiff's appeal should be dismissed in its entirety because Plaintiff did not settle the record on appeal in a timely manner, in violation of N.C.R. App. P. 11(c). Rule 11(c) provides that if a party requests judicial settlement of the record on appeal, a hearing to settle the record "shall be held not later than 15 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 20 days after service of the request for hearing upon the judge." N.C.R. App. P. 11(c). Rule 11 also provides, however, that the deadline for judicial settlement of the record on appeal may be extended in accordance with Rule 27(c). N.C.R. App. P. 11(f). Under Rule 27(c), if an appellant requires an extension of time to procure judicial settlement of the record, the appellant must file a motion with this Court seeking an extension. N.C.R. App. P. 27(c)(2).

The record in this case reveals that Plaintiff filed a request dated 18 December 2006 with the trial court for judicial settlement of the record on appeal. The trial court held a hearing and settled the record on appeal on 24 April 2007, more than three months past the deadline set by Rule 11(c). Plaintiff never filed a motion with this Court seeking an extension of time to procure judicial settlement of the record on appeal. Rather, Plaintiff filed with this Court a "motion *nunc pro tunc* for an extension of time to deem the record on appeal timely filed" on 10 December 2007, the day this case was heard by our Court.

Defendants argue that Plaintiff's failure to seek an extension of time from this Court for judicial settlement of the record subjects Plaintiff's appeal to dismissal. Plaintiff responds that her appeal is

not subject to dismissal because she did not violate Rule 11(c). Plaintiff argues that the trial court judge who presided over Plaintiff's trial rotated to another county between December 2006 and April 2007, and therefore would have been unable to settle the record on appeal before April 2007 even had Plaintiff sought to calendar a hearing during the time period required by Rule 11(c).

Our Court has stated that "[t]he appellate rules that regulate the timing of the settlement and filing of the record on appeal are not arbitrary formalities, but ' "are designed to keep the process of perfecting an appeal flowing in an orderly manner." ' " *Cadle Co. v. Buyna*, 185 N.C. App. 148, 150, 647 S.E.2d 461, 463 (2007) (quoting *Kellihan v. Thigpen*, 140 N.C. App. 762, 763, 538 S.E.2d 232, 234 (2000) (quoting *Craver v. Craver*, 298 N.C. 231, 236, 258 S.E.2d 357, 361 (1979))). Further, it has long been established that "it is the appellant who 'bears the burden of seeing that the record on appeal is properly settled and filed with this Court.' " *Groves v. Community Hous. Corp.*, 144 N.C. App. 79, 82, 548 S.E.2d 535, 537 (2001) (quoting *McLeod v. Faust*, 92 N.C. App. 370, 371, 374 S.E.2d 417, 418 (1988)). Therefore, Plaintiff was required to seek an extension of time with this Court under Rule 27(c)(2) in order to obtain judicial settlement of the record on appeal outside of the time limit set by Rule 11(c). The fact that a trial court judge may be unavailable to settle the record within the time set by Rule 11(c) does not relieve an appellant's burden of seeking an extension of time under the appellate rules. We conclude that Plaintiff has violated the appellate rules, and we therefore deny Plaintiff's "motion *nunc pro tunc* for an extension of time to deem the record on appeal timely filed."

We must now determine whether dismissal of Plaintiff's appeal is appropriate. Rule 11(c) is a nonjurisdictional requirement "designed primarily to keep the appellate process 'flowing in an orderly manner.' " *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 198, 657 S.E.2d 361, 365 (2008) (quoting *Craver*, 298 N.C. at 236, 258 S.E.2d at 361). Our Supreme Court has recently stated:

> [W]hen 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.

Id. at 201, 657 S.E.2d at 367.

In this case, the Rules of Appellate Procedure required Plaintiff to obtain judicial settlement of the record on appeal, or an extension of time from this Court, within twenty days of 18 December 2006. The record does not indicate that Plaintiff made any attempt to schedule a settlement hearing or file a motion with this Court within the twenty-day deadline. In fact, the record does not indicate that Plaintiff made any such attempt until more than three months after the deadline set out in Rule 11(c). Under these circumstances, we hold that Plaintiff committed substantial violations of the appellate rules that would support an award of sanctions under N.C.R. App. P. 34(b). After much consideration, we have decided in our discretion not to impose sanctions pursuant to Rule 34(b). Nonetheless, counsel for Plaintiff must be mindful of their responsibilities under the appellate rules when prosecuting future appeals.

B.

[2] Defendants next argue that Plaintiff is not entitled to appellate review of her first assignment of error, in which Plaintiff argues that the trial court erred by granting Defendants' motion for a directed verdict on Mr. Yorke's *res ipsa loquitur* theory of recovery. Defendants also argue that Plaintiff is not entitled to appellate review of her sixth assignment of error, in which Plaintiff argues that the trial court erred by granting Defendants' motion for a protective order regarding the risk management file. Defendants argue that our Court has no jurisdiction to review the trial court's directed verdict and discovery orders because Plaintiff's notice of appeal does not include these orders among those from which Plaintiff appeals. Rather, Plaintiff's notice of appeal only lists the trial court's 19 October 2005 judgment and 30 December 2005 order denying Mr. Yorke's motion for a new trial.

N.C.R. App. P. 3(d) provides that an appellant's notice of appeal "shall designate the judgment or order from which appeal is taken[.]" An appellant's failure to designate a particular judgment or order in the notice of appeal generally divests this Court of jurisdiction to consider that order. *See, e.g.*, *Fenz v. Davis*, 128 N.C. App. 621, 623, 495 S.E.2d 748, 750 (1998) (where the notice of appeal listed the trial court's order denying a new trial, but did not list the actual judgment entered upon the jury verdict, the Court held that it lacked jurisdiction under Rule 3(d) to review any assignment of error related to the trial proceedings and judgment).

Notwithstanding the jurisdictional requirements in Rule 3(d), our Court has recognized that even if an appellant omits a certain order from the notice of appeal, our Court may still obtain jurisdiction to review the order pursuant to N.C. Gen. Stat. § 1-278. *See* N.C. Gen. Stat. § 1-278 (2007) (stating that "[u]pon an appeal from a judgment, the court may review any intermediate order involving the merits and necessarily affecting the judgment"). Review under N.C.G.S. § 1-278 is permissible if three conditions are met: "(1) the appellant must have timely objected to the order; (2) the order must be interlocutory and not immediately appealable; and (3) the order must have involved the merits and necessarily affected the judgment." *Dixon v. Hill*, 174 N.C. App. 252, 257, 620 S.E.2d 715, 718 (2005), *disc. review denied*, 360 N.C. 289, 627 S.E.2d 619, *cert. denied*, 548 U.S. 906, 165 L. Ed. 2d 954 (2006). An order involves the merits and necessarily affects the judgment if it deprives the appellant of one of the appellant's substantive legal claims. *See, e.g.*, *Charles Vernon Floyd, Jr. & Sons, Inc. v. Cape Fear Farm Credit, ACA*, 350 N.C. 47, 49, 51, 510 S.E.2d 156, 158, 159 (1999) (where the trial court ordered the plaintiffs to elect whether to seek recovery for breach-of-contract damages or unfair and deceptive trade practices, our Supreme Court held that the trial court's election-of-remedies order "involved the merits and affected the judgment" because it "deprived [the] plaintiffs of one of their claims"), *overruled in part on other grounds*, *Dep't of Transp. v. Rowe*, 351 N.C. 172, 176, 521 S.E.2d 707, 710 (1999).

We first consider whether our Court has jurisdiction under N.C.G.S. § 1-278 to review the trial court's directed verdict in favor of Defendants on Mr. Yorke's *res ipsa loquitur* theory of recovery. Defendants do not dispute that Mr. Yorke objected to the trial court's directed verdict order at trial, or that the directed verdict order was interlocutory and not immediately appealable. We further conclude that because the directed verdict order wholly denied Mr. Yorke one of his theories of recovery, namely, that Defendants were negligent pursuant to the doctrine of *res ipsa loquitur*, the order "involved the merits and necessarily affected the judgment." *Dixon*, 174 N.C. App. at 257, 620 S.E.2d at 718. Therefore, our Court has jurisdiction to review the trial court's directed verdict order pursuant to N.C.G.S. § 1-278.

[3] We next consider whether our Court has jurisdiction under N.C.G.S. § 1-278 to review the trial court's protective order regarding the risk management file. N.C. Gen. Stat. § 1A-1, Rule 46(b) provides:

> With respect to . . . orders of the court not directed to the admissibility of evidence, formal objections and exceptions are unnecessary. In order to preserve an exception to any such ruling or order . . . , it shall be sufficient if a party, at the time the ruling or order is made or sought, makes known to the court the party's objection to the action of the court or makes known the action that the party desires the court to take and the party's grounds for its position.

N.C. Gen. Stat. § 1A-1, Rule 46(b) (2007). The record in this case reveals that Mr. Yorke vigorously opposed Defendants' motion for a protective order by filing an objection to Defendants' motion, filing a motion to compel discovery of the disputed documents, and presenting his arguments during an 8 November 2004 hearing before the trial court. We therefore conclude that "at the time the ruling or order [was] made or sought," [Mr. Yorke] "ma[de] known to the [trial] court [his] objection to the action of the [trial] court" and "ma[de] known the action that [he] desire[d] the [trial] court to take and [his] grounds for [his] position." N.C.G.S. § 1A-1, Rule 46(b).

Further, the protective order in this case was interlocutory and not immediately appealable. It is correct that a trial court's interlocutory order compelling discovery may be immediately appealable if the party opposing discovery contends that the material is statutorily protected from discovery. *See Sharpe v. Worland*, 351 N.C. 159, 166, 522 S.E.2d 577, 581 (1999) (holding that "when . . . a party asserts a statutory privilege which directly relates to the matter to be disclosed under an interlocutory discovery order, and the assertion of such privilege is not otherwise frivolous or insubstantial, the challenged order affects a substantial right" and is immediately appealable). However, Defendants have cited no authority for their proposition that a trial court's *grant of a protective order* similarly affects a substantial right of the party seeking the disputed documents. Indeed, the type of right at issue in *Sharpe*—the right not to disclose protected materials—is not implicated when a trial court grants a protective order. We therefore conclude that the trial court's protective order in this case was interlocutory and not immediately appealable.

Finally, we must determine whether the protective order "involved the merits and necessarily affected the judgment." *Dixon*, 174 N.C. App. at 257, 620 S.E.2d at 718. We conclude that it did not. As noted above, our Courts have found an interlocutory order to involve the merits and necessarily affect the judgment where the order

deprived an appellant of one of her substantive legal claims. *See, e.g.*, *Floyd*, 350 N.C. at 51, 510 S.E.2d at 159; (finding review available under N.C.G.S. § 1-278 where the trial court's election-of-remedies order forced the plaintiffs to forgo one of their claims); *Gaunt v. Pittaway*, 139 N.C. App. 778, 782-83, 534 S.E.2d 660, 663, *disc. review denied*, 353 N.C. 262, 546 S.E.2d 401 (2000), *cert. denied*, 353 N.C. 371, 547 S.E.2d 810, *cert. denied*, 534 U.S. 950, 151 L. Ed. 2d 261 (2001) (finding review available under N.C.G.S. § 1-278 where the trial court's order dismissed the plaintiffs' claim for unfair and deceptive trade practices); *Brooks v. Wal-Mart Stores, Inc.*, 139 N.C. App. 637, 643, 535 S.E.2d 55, 60 (2000), *disc. review denied*, 353 N.C. 370, 547 S.E.2d 2 (2001) (finding review available under N.C.G.S. § 1-278 where the trial court's order dismissed one defendant's cross-claims against the other defendants).

In this case, however, the trial court's protective order did not deny Mr. Yorke any of his substantive legal claims. While the protective order did deny Mr. Yorke access to certain evidence, it did not resolve any substantive legal issues related to Mr. Yorke's negligence claim, nor did it deny Mr. Yorke his right to pursue his negligence claim, or to prove his negligence claim through introduction of other evidence and examination of witnesses. Therefore, the protective order did not "involve[] the merits and necessarily affect[] the judgment." *Dixon*, 174 N.C. App. at 257, 620 S.E.2d at 718.

In accordance with the above, we conclude that our Court lacks jurisdiction under either N.C.R. App. P. 3(d) or N.C.G.S. § 1-278 to consider Plaintiff's sixth assignment of error. Plaintiff's sixth assignment of error is therefore dismissed.

We note that Defendants have filed a motion asking this Court, in the event that we determine review is warranted, to seal the documents shielded by the protective order. Because this Court lacks jurisdiction to review the trial court's protective order, we dismiss Defendants' motion as moot.

C.

[4] Defendants next argue that each of Plaintiff's remaining assignments of error should be dismissed because they each fail to state a sufficient legal basis for the errors they assert. *See* N.C.R. App. P. 10(c)(1) (stating that "[e]ach assignment of error shall . . . state plainly, concisely and without argumentation the legal basis upon which error is assigned").

We have reviewed Plaintiff's assignments of error and find them to be in substantial compliance with the rules of appellate procedure. Each of Plaintiff's assignments of error "directs the attention of the appellate court to the particular error about which the question is made[.]" N.C.R. App. P. 10(c)(1). Even assuming *arguendo* that Plaintiff's assignments of error are less specific than required by Rule 10(c)(1), we do not believe such errors, as they exist in this case, rise to the level of substantial or gross violations of Rule 10(c)(1) that would warrant sanctions. *See Dogwood*, 362 N.C. at 201, 657 S.E.2d at 367.

In sum, Plaintiff's motion *nunc pro tunc* for an extension of time to deem the record on appeal timely filed is denied. Defendants' motion to seal the documents included within the trial court's protective order is dismissed as moot. Defendants' motion to dismiss Plaintiff's appeal is allowed with respect to Plaintiff's sixth assignment of error. The remainder of Defendants' motion to dismiss is denied. We now turn to the merits of Plaintiff's remaining assignments of error.

II.

Plaintiff raises four arguments on appeal. We consider each of Plaintiff's arguments in turn.

A.

[5] Plaintiff first argues that the trial court erred by granting Defendants' motion for a directed verdict with respect to Mr. Yorke's *res ipsa loquitur* theory of negligence. When ruling on a motion for a directed verdict, a trial court "must view the evidence in the light most favorable to the nonmovant, resolving all conflicts in his favor and giving him the benefit of every inference that could reasonably be drawn from the evidence in his favor." *West v. Slick*, 313 N.C. 33, 40, 326 S.E.2d 601, 605 (1985). The trial court may only grant the motion if "the evidence, when so considered, is insufficient to support a verdict in the nonmovant's favor[.]" *Id.* at 40, 326 S.E.2d at 606. We review a trial court's ruling on a motion for a directed verdict *de novo*. *Denson v. Richmond Cty.*, 159 N.C. App. 408, 411, 583 S.E.2d 318, 320 (2003).

The doctrine of *res ipsa loquitur* applies only where: "[(1)] direct proof of the cause of an injury is not available, [(2)] the instrumentality involved in the accident is under the defendant's control, and [(3)] the injury is of a type that does not ordinarily occur in the

absence of some negligent act or omission." *Grigg v. Lester*, 102 N.C. App. 332, 333, 401 S.E.2d 657, 657-58, *disc. review denied*, 329 N.C. 788, 408 S.E.2d 520 (1991). Plaintiff argues that Mr. Yorke presented sufficient evidence to support each of these elements, and the trial court therefore erred by not allowing Mr. Yorke's *res ipsa loquitur* theory of negligence to go to the jury.

We first consider whether element one was met in this case. Our Court has held that the *res ipsa loquitur* doctrine is only applicable where "there is no direct proof of the cause of the injury available to the plaintiff." *Parks v. Perry*, 68 N.C. App. 202, 207, 314 S.E.2d 287, 290, *disc. review denied*, 311 N.C. 761, 321 S.E.2d 142, 143 (1984). In *Parks*, for example, the defendant doctor performed a hysterectomy on the plaintiff while the plaintiff was under general anesthesia. *Id.* at 204, 314 S.E.2d at 288. When the plaintiff awoke following surgery, she experienced numbness and weakness in her fingers. *Id.* Doctors later determined that the plaintiff had suffered damage to the ulnar nerve in her right arm. *Id.* Our Court held that on these facts, the plaintiff had satisfied the first element required to invoke the *res ipsa loquitur* doctrine:

> [T]here is no direct proof of the cause of the injury available to the plaintiff. The only evidence that [the plaintiff] can testify to is that before the general anesthesia she had a healthy functional right hand, yet after the operation she awoke with numb fingers as a result of damage to her ulnar nerve. Similarly, neither [the defendant nurse] nor the other defendants can offer direct evidence as to how the injury occurred.

Id. at 207, 314 S.E.2d at 290.

In the current case, however, the record reveals that Mr. Yorke offered direct proof of the cause of his injury. During his trial testimony, Mr. Yorke consistently identified the blood pressure cuff as the cause of his injury. Mr. Yorke testified that after he was admitted to Defendant Hospital on 16 December 2001, the head nurse placed a blood pressure cuff on his left arm. The cuff caused Mr. Yorke's arm to hurt, and he asked Defendant McCaskill-Gainey to loosen the cuff. Defendant McCaskill-Gainey refused to loosen the cuff. Mr. Yorke further testified that later during the evening of 16 December 2001 he again told Defendant McCaskill-Gainey that the cuff was "killing" his arm, but Defendant McCaskill-Gainey did not loosen the cuff. Mr. Yorke again called Defendant McCaskill-Gainey into his room and repeated his request, and Defendant McCaskill-Gainey tightened the

cuff, causing Mr. Yorke the most intense pain he had ever felt. Mr. Yorke testified that the cuff remained on his arm for the next three days, during which time it continued to cause tremendous pain to his arm. When Mr. Yorke's treating physician later asked him how his arm was injured, Mr. Yorke replied, "[b]ecause this blood pressure cuff is too tight." Mr. Yorke's expert witness, Dr. John Stirling Meyer (Dr. Meyer), later explained at trial that Mr. Yorke's arm was injured "[b]ecause [the] blood pressure [cuff] was overinflated and was cutting off arterial and venous circulation to the left arm for more or less four days."

Unlike in *Parks*, where the plaintiff was under general anesthesia at the time her injury occurred and therefore could not offer direct proof of its cause, Mr. Yorke here was fully aware of the cause of his alleged injury. In fact, Mr. Yorke identified his blood pressure cuff as the source of his injury numerous times to medical personnel over the four days that his injury allegedly occurred. When a plaintiff offers direct evidence of the negligence that led to his injury, the doctrine of *res ipsa loquitur* is inapplicable. *See Grigg*, 102 N.C. App. at 333, 401 S.E.2d at 657-58.

Plaintiff argues that there was no direct proof of the cause of Mr. Yorke's injury because Defendant McCaskill-Gainey could not explain the cause of Mr. Yorke's injury, and because Defendants failed to produce the blood pressure cuff machine. Plaintiff's argument is without merit. Even if Defendant McCaskill-Gainey did not identify the cause of Mr. Yorke's injury, Mr. Yorke's own testimony was sufficient to identify the negligently-placed blood pressure cuff as the cause of his injury. Further, regarding the blood pressure cuff machine, Defendants did actually identify and produce the machine that allegedly caused Mr. Yorke's injury, as discussed in Part II.D below. Even had Defendants failed to produce the machine, we again note that Mr. Yorke's own testimony was sufficient to identify the cause of his injury.

Because Mr. Yorke offered direct proof of the cause of his injury, the doctrine of *res ipsa loquitur* was not applicable. The trial court therefore did not err by granting Defendants a directed verdict on Mr. Yorke's *res ipsa loquitur* theory of negligence.

Plaintiff also assigns as error the trial court's denial of Mr. Yorke's request for a jury instruction on the doctrine of *res ipsa loquitur*. A specific jury instruction should be given when "(1) the requested instruction was a correct statement of law and (2) was supported by

the evidence, and that (3) the instruction given, considered in its entirety, failed to encompass the substance of the law requested and (4) such failure likely misled the jury." *Liborio v. King*, 150 N.C. App. 531, 534, 564 S.E.2d 272, 274, *disc. review denied*, 356 N.C. 304, 570 S.E.2d 726 (2002). As discussed above, Mr. Yorke's *res ipsa loquitur* theory of recovery was not supported by the evidence because Mr. Yorke introduced direct proof of the cause of his injury. Therefore, the trial court did not err by denying Mr. Yorke's request for a jury instruction on *res ipsa loquitur*. Plaintiff's assignments of error are overruled.

B.

[6] Plaintiff next argues that the trial court erred by excluding testimony by Mr. Yorke's expert witness regarding whether Defendants' failure to prepare an incident report following Mr. Yorke's alleged injury was a violation of the standard of care.

The record in this case reveals that Defendant Hospital has in place a "Quality Assessment Reporting Policy" (the Policy). The Policy provides in part:

> To promote quality patient care and reduce events that might result in injuries to patients . . . it is the policy of Novant Health to have in place (a) an ongoing program of careful monitoring of patient care issues and the environment of patient care, (b) revision of policies and procedures as necessary and appropriate to minimize patient, personnel or visitor injury and to promote quality patient care, and (c) an ongoing and systematic effort to achieve those goals.
>
> Individual Quality Assessment Reports (QARs) are generated . . . at the direction of the Medical Review Committee for the purposes of peer review or quality of care review. The QARs meeting defined risk criteria are sent to risk management. . . .
>
> . . . . If [an] event meets the criteria for reporting to Risk Management, a [QAR] is completed according to the facility procedure. The report is then sent to the regional Risk Management office. Further assessment may be appropriate when data trending and/or pattern analysis suggest opportunities for improvement.

Employees of Defendant Hospital are required to complete a QAR following any event that causes injury to a patient. It is undisputed

that no person associated with Mr. Yorke's care completed a QAR during Mr. Yorke's stay at Defendant Hospital.

Prior to trial, Defendants filed a motion *in limine* to preclude Mr. Yorke's counsel from referencing, referring to, or making any claim pertaining to Defendants' failure to prepare a QAR regarding Mr. Yorke's alleged injury. The trial court deferred its ruling until trial. At trial, Mr. Yorke sought to elicit testimony from his expert witness, Dr. Meyer, that Defendants' failure to prepare a QAR constituted a violation of the standard of care. Defendants sought to exclude such testimony on the basis that it was irrelevant to the issue of Defendants' negligence with respect to Mr. Yorke's injury, and on the basis that the existence or nonexistence of a QAR was protected under N.C. Gen. Stat. § 131E-95(b) as the product of a medical review committee. The trial court excluded the testimony. Dr. Meyer later testified on *voir dire* that Defendants violated the standard of care by failing to file a QAR after Mr. Yorke's alleged injury.

We first address the question of whether the trial court erred by excluding Mr. Yorke's evidence on relevancy grounds. " '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 a trial court's rulings on relevancy are not discretionary and we do not review them for an abuse of discretion, we give them great deference on appeal." *State v. Grant*, 178 N.C. App. 565, 573, 632 S.E.2d 258, 265 (2006), *disc. review denied*, 361 N.C. 223, 642 S.E.2d 712 (2007).

At trial, Mr. Yorke argued that Defendants' failure to complete a QAR was relevant to show breach of the standard of care because Defendants were required to produce such a report pursuant to their own Policy and pursuant to standards issued by the Joint Commission on Hospital Accreditation (JCHA). Therefore, according to Plaintiff, there was "no documentation in [Mr. Yorke's] record documenting that [Mr. Yorke] was injured and the conditions upon which [he] was injured." Similarly, Dr. Meyer testified on *voir dire* that the lack of a QAR related to Mr. Yorke's alleged injury was relevant because it demonstrated a violation of hospital and JCHA policies. Plaintiff argues that had Defendants completed a QAR when Mr. Yorke was allegedly injured on 16 December 2001, Defendants could have discovered Mr. Yorke's injury and could have prevented further injury before Defendants ultimately removed Mr. Yorke's blood pressure cuff four days later.

We conclude that while Defendants' failure to complete a QAR may have been relevant to whether Defendants violated hospital and JCHA policies, the fact that Defendants did not complete a QAR was irrelevant to the issue of whether Defendants breached the standard of care owed to Mr. Yorke. Mr. Yorke offered no evidence from Dr. Meyer or any other source that had a QAR been completed, it would have affected Mr. Yorke's care in any way. Rather, the record demonstrates that QARs were used by Defendant Hospital for broad—based quality control purposes. The Policy gives no indication that a QAR ever becomes part of a patient's medical file, or that a QAR is ever used in conjunction with treating the patient that is the subject of the QAR. Rather, the Policy indicates that QARs are sent to a risk management office where they are reviewed to identify system-wide trends and patterns regarding patient care issues.

Indeed, the trial court recognized this relevancy issue when it addressed Mr. Yorke's counsel at trial:

> [THE COURT]: What you're talking about, [counsel], is something that took place after what your client has filed the lawsuit for. The standard of care that should be the basis of whether or not there's any liability on the [part of Defendant] [H]ospital is whether or not the nurse in the hospital violated the standard of care in the treatment [of Mr. Yorke]. What [Defendants] do after the incident is subsequent and remedial and that simply is not admissible[.]

We agree with the trial court. Defendants' failure to prepare a QAR simply did not make it any more or less probable that Defendants breached the standard of care when applying and monitoring Mr. Yorke's blood pressure cuff. We therefore hold that the trial court did not err by excluding Mr. Yorke's evidence. Because we hold that Mr. Yorke's evidence regarding the QAR report was properly excluded on relevancy grounds, we do not consider whether the trial court erred by also excluding this evidence on grounds of statutory privilege under N.C. Gen. Stat. § 131E-95(b). Plaintiff's assignment of error is overruled.

C.

Plaintiff next argues that the trial court erred by allowing Defendants' motion for a protective order. As discussed in Part I.B above, our Court does not have jurisdiction to consider Plaintiff's assignment of error on this issue. We are therefore unable to review Plaintiff's argument.

D.

[7] Finally, Plaintiff argues that the trial court abused its discretion by denying Mr. Yorke's motion for a new trial under N.C. Gen. Stat. § 1A-1, Rule 59(a). Rule 59(a) provides in part:

> A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes or grounds:
>
> (1) Any irregularity by which any party was prevented from having a fair trial;
>
> . . . .
>
> (3) Accident or surprise which ordinary prudence could not have guarded against;
>
> . . . .
>
> (9) Any other reason heretofore recognized as grounds for new trial.

N.C. Gen. Stat. § 1A-1, Rule 59(a) (2007). "[A]n appellate court's review of a trial judge's discretionary ruling either granting or denying a motion to . . . order a new trial is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the judge." *Worthington v. Bynum*, 305 N.C. 478, 482, 290 S.E.2d 599, 602 (1982). "[A] manifest abuse of discretion must be made to appear from the record as a whole with the party alleging the existence of an abuse bearing that heavy burden of proof." *Id.* at 484-85, 290 S.E.2d at 604. "[A]n appellate court should not disturb a discretionary Rule 59 order unless it is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice." *Id.* at 487, 290 S.E.2d at 605.

Plaintiff argues that an irregularity and surprise occurred at trial regarding the blood pressure cuff machine in Mr. Yorke's hospital room. The record demonstrates that during discovery, Mr. Yorke requested from Defendants:

> Any and all documents concerning the [blood] pressure cuff, including the complete pressure cuff apparatus and machinery, which was placed on the left arm of [Mr. Yorke] at the time of his injury, including, but not limited to, all of the manufacturer's manuals, training and use instructions, inspection requirements, maintenance records, documentation concerning malfunctioning,

> calibration, and records of repairs from the first date of use at [Defendant Hospital] through December 26, 2001.

Defendants responded that there were multiple brands of blood pressure cuff machines in use at Defendant Hospital, and that Defendants were unable to identify the exact machine that was used in Mr. Yorke's room.

At trial, however, the following exchange took place during Defendants' cross-examination of Ms. Scottie Wilson (Ms. Wilson), an operations manager for coronary care at Defendant Hospital:

> [DEFENSE COUNSEL]: Were there automatic blood pressure cuff machines on the fifth-floor [coronary care unit] in December 2001?
>
> [MS. WILSON]: Absolutely.
>
> [DEFENSE COUNSEL]: Okay. How many different kinds of bedside automatic blood pressure machines [were there] on the fifth-floor [coronary care unit] in December 2001?
>
> [MS. WILSON]: One.
>
> [DEFENSE COUNSEL]: What brand was that?
>
> [MS. WILSON]: Hewlett-Packard.

Plaintiff argues that Ms. Wilson's testimony indicates that Defendants gave an incorrect response to Mr. Yorke's evidentiary request, and that as a result, "[Mr. Yorke's] counsel were precluded from having the [blood pressure cuff] machine tested and [from] getting expert witnesses to testify regarding the probable malfunctioning of the machine." Plaintiff argues that the trial court should have granted Mr. Yorke a new trial due to this "surprise."

We disagree with Plaintiff's contentions. The record in this case indicates that on 22 September 2005, defense counsel sent a letter to Mr. Yorke's counsel informing them that:

> [Defense counsel recently] delivered to your office an operating manual for the blood pressure monitor which we now believe was the kind used on Mr. Yorke in the [coronary care unit] in December 2001. We have that device in our office and will be glad to make it available to you for viewing. Please let me know when you would like to view that machine and we will make the arrangements for you to do so.

Mr. Yorke's counsel responded to defense counsel's letter on 27 September 2005 and indicated that they would come view the blood pressure monitor later that week. Defense counsel sent another letter to Mr. Yorke's counsel on 28 September 2005 asking Mr. Yorke's counsel to "contact our office to set up a time that you . . . can come over to view the monitor." Mr. Yorke's counsel, however, never went to defense counsel's office to view the blood pressure machine and did not attempt to introduce or use the machine at trial.

We do not believe that "the trial judge's ruling probably amounted to a substantial miscarriage of justice." *Worthington*, 305 N.C. at 487, 290 S.E.2d at 605. The record reveals that Ms. Wilson's identification of the type of blood pressure machine used on Mr. Yorke did not come as a "surprise" to Mr. Yorke. Mr. Yorke had been aware for some time that defense counsel had identified the machine at issue, and that defense counsel had made the machine available for Mr. Yorke's inspection. We further note that Mr. Yorke requested and received a spoliation instruction regarding any evidence intentionally withheld or destroyed by Defendants. On these facts, we find no irregularity in Mr. Yorke's trial that would have served as a basis for a new trial under Rule 59(a). We therefore hold that the trial court did not abuse its discretion in denying Mr. Yorke's motion for a new trial. Plaintiff's assignment of error is overruled.

Dismissed in part; affirmed in part.

Chief Judge MARTIN and Judge STEPHENS concur.

STATE OF NORTH CAROLINA v. LEKKIE CONSTANTINE WILSON

No. COA07-1077

(Filed 2 September 2008)

1. Appeal and Error— preservation of issues—failure to object to constitutional issue at trial—Article I, Section 24 right to unanimous jury

Although the State contends defendant did not preserve his argument for appeal regarding the trial court's unrecorded bench conferences with the jury foreperson at trial based on his failure to object to the trial court's unrecorded conversations, defendant

is entitled to appellate review of this constitutional argument because, although our appellate courts generally do not review constitutional arguments for the first time on appeal, our Supreme Court has previously recognized an exception to this rule where a defendant alleges a violation of Article I, Section 24 regarding defendant's right to trial by a jury of twelve.

2. Constitutional Law; Jury— right to unanimous jury—unrecorded bench conferences with jury foreperson

The trial court violated defendant's rights under Article I, Section 24 in an armed robbery case when it held unrecorded bench conferences with the jury foreperson because: (1) our appellate courts have recognized that a conviction cannot be based on a unanimous verdict of a jury as required by Article I, Section 24, where the trial court does not provide the same instructions to all twelve jurors, and subsequent case law has made clear that this type of violation occurs only when certain jurors receive one set of instructions and other jurors receive a different set of instructions; (2) in the present case, the trial court gave at least one critical instruction to the jury foreperson that it did not give to the rest of the jury, and the transcript indicated that it likely provided instructions to the jury foreperson at some point during the three unrecorded bench conferences; (3) the trial court instructed the foreperson not to discuss with the remaining eleven jurors the issues that they talked about at the bench and also openly on the record; and (4) the record demonstrated the trial court did not instruct all twelve jurors consistently.

3. Constitutional Law; Jury— right to unanimous jury—automatic reversal based on numerical composition—harmless error analysis for unequal instructions

Harmless error analysis is required in this case to determine whether defendant is entitled to a new trial in an armed robbery case based on the trial court holding unrecorded bench conferences with the jury foreperson because: (1) a violation of Article I, Section 24 requires automatic reversal only where a jury was improperly constituted in terms of its numerical composition, and a verdict rendered by a jury of less than twelve fully-participating jurors makes the verdict a nullity; and (2) a violation of Article I, Section 24 is subject to harmless error review where the error did not affect the numerical structure of the jury, but rather resulted in jurors acting on unequal instructions from the trial court in reaching the verdict.

4. Constitutional Law; Jury— right to unanimous jury—motion for new trial—unrecorded bench conferences with the jury foreperson—harmless error analysis—failure to meet burden of proof—meaningful appellate review

The State failed to meet its burden of showing harmless error in an armed robbery case based on the trial court holding unrecorded bench conferences with the jury foreperson, and defendant is entitled to a new trial, because: (1) the transcript does not disclose the trial court's unrecorded bench conferences with the jury foreperson, nor did the trial court reconstruct the substance of those conferences for the record; and (2) without a record of the trial court's conversations with the jury foreperson, the Court of Appeals cannot exercise meaningful appellate review.

Judge TYSON dissenting.

Appeal by Defendant from judgments entered 2 February 2007 by Judge Jack W. Jenkins in Superior Court, Carteret County. Heard in the Court of Appeals 5 March 2008.

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

L. Jayne Stowers for Defendant.

McGEE, Judge.

A jury found Lekkie Constantine Wilson (Defendant) guilty on 2 February 2007 of armed robbery and conspiracy to commit armed robbery. The trial court arrested judgment on the conspiracy charge and sentenced Defendant to a term of forty-eight to sixty-eight months in prison on the armed robbery charge.

The State's evidence at trial tended to show that Defendant's wife worked at a gas station in Newport, North Carolina. Tavoris Courtney (Mr. Courtney) testified that he and Defendant decided to rob the gas station on 16 October 2005. Defendant was familiar with the layout of the gas station and told Mr. Courtney where the safe and security cameras were located. Mr. Courtney testified that he entered the gas station, pointed a gun at the clerk, and demanded money from the safe. After the robbery, Mr. Courtney ran across the street and got into Defendant's vehicle, and Defendant drove away.

Defendant's evidence at trial tended to show that Mr. Courtney received a reduced bond and other incentives in return for his coop-

eration with police. Defendant also pointed to inconsistencies in certain portions of the State's evidence. Defendant did not testify at trial.

The jury began its deliberations at 3:25 p.m. on 1 February 2007. Twenty minutes later, the bailiff informed the trial court that there had been a knock on the jury room door, and that "there is some issue with the foreperson that needs to be addressed on the record." The trial court, without objection, summoned the foreperson to discuss the issue. The following exchange occurred:

> THE COURT: It's my understanding there may be some issue you may need to address and to the extent you're comfortable telling me, can you tell me what [the] nature of the concern is?
>
> FOREPERSON: They seem to think that I already have my mind made up.
>
> THE COURT: You come here and if counsel will come up here, please.

The trial court conducted an unrecorded bench conference with the foreperson and counsel for both the State and Defendant. Following this conference, the trial court asked the foreperson to step aside, and the trial court conducted another unrecorded bench conference with both counsel. The following exchange then occurred in open court:

> THE COURT: [T]o make sure I understand then, there is an issue that has arisen regarding your opinion about the case basically, is that right?
>
> FOREPERSON: Yes.
>
> THE COURT: Issue between you and the other jurors?
>
> FOREPERSON: Yes.
>
> THE COURT: This is an issue that I believe you and the other jurors need to handle in the jury room.
>
> FOREPERSON: I need to say one more thing.
>
> THE COURT: Yes, sir. Go on.
>
> FOREPERSON: I can't . . .
>
> THE COURT: All right. Come up.

The trial court then conducted a second unrecorded bench conference with the foreperson and both counsel. The trial court then summoned the remaining eleven jurors and conducted another unrecorded bench conference with both counsel.

When all twelve jurors were present, the trial court gave the jury an *Allen* instruction. *See* N.C. Gen. Stat. § 15A-1235(b)-(c) (2007). The trial court then instructed the jurors, with the exception of the foreperson, to return to the jury room but not to resume deliberations. After the eleven jurors left the courtroom, the trial court conducted a third unrecorded bench conference with the foreperson and both counsel. The following exchange next occurred in open court:

> THE COURT: All right. [Foreperson, there is] one other instruction I want to give you first and then have the other jurors come back out. The issues about which we had talked in this courtroom, both here at the bench and also openly on the record, are issues that you are not to share with the other jurors and I do not wish for you to go back in there and somehow talk about what we talked about here or anything else. Do you understand that?
>
> FOREPERSON: Yes, sir.
>
> THE COURT: It's my understanding based on what you have said up here that I do believe you can continue to be a fair and impartial juror in this case, consider the evidence you've heard, the contentions of counsel, instructions of the court and proceed accordingly, is that correct?
>
> FOREPERSON: Yes, sir.
>
> THE COURT: And at this time, do you know of any reason why you cannot continue as a juror in this case?
>
> FOREPERSON: No, sir.

The trial court summoned the remaining eleven jurors, and when they were all present in the courtroom, the trial court instructed the jury to resume its deliberations. The jury returned its verdicts the following day. Defendant appeals.

Defendant argues, *inter alia*, that the trial court's unrecorded bench conferences with the jury foreperson violated Defendant's right to a unanimous jury under Article I, Section 24 of the North Carolina Constitution. *See* N.C. Const. art. I, § 24 (stating that "[n]o

person shall be convicted of any crime but by the unanimous verdict of a jury in open court").

A.

[1] The State first contends that Defendant has not preserved his arguments for appeal because Defendant did not object to the trial court's unrecorded conversations with the jury foreperson at trial. *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").

It is true that our Court generally does not review constitutional arguments for the first time on appeal. *See*, *e.g.*, *State v. King*, 342 N.C. 357, 364, 464 S.E.2d 288, 293 (1995). However, our Supreme Court has previously recognized an exception to this rule where a defendant alleges a violation of Article I, Section 24. *See State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985) (holding that "[w]here . . . the error violates [the] defendant's right to a trial by a jury of twelve, [the] defendant's failure to object is not fatal to his right to raise the question on appeal").

The State correctly notes that in *State v. Tate*, 294 N.C. 189, 239 S.E.2d 821 (1978), our Supreme Court held that the defendant's failure to object at trial precluded the defendant from challenging on appeal the trial court's off-record bench conferences with two jurors. *Id.* at 197-98, 239 S.E.2d at 827. The defendant in *Tate*, however, did not claim a violation of his rights under Article I, Section 24. Rather, the *Tate* defendant argued that the trial court's unrecorded bench conferences with the two jurors violated the defendant's confrontation rights under Article I, Section 23 of the North Carolina Constitution. *See State v. Boyd*, 332 N.C. 101, 104-05, 418 S.E.2d 471, 473 (1992) (explaining the basis of the *Tate* decision). Because *Tate* was a noncapital prosecution, our Supreme Court held that the defendant waived his constitutional argument by failing to object to the alleged error at trial. *Id.*; *see Tate*, 294 N.C. at 197-98, 239 S.E.2d at 827.

In contrast with *Tate*, Defendant in the present case argues that the trial court's unrecorded bench conversations with the jury foreperson violated Defendant's right to a unanimous jury under Article I, Section 24. Our Supreme Court's decision in *Ashe* makes clear that such error is preserved for appellate review even without objection at trial. *See Ashe*, 314 N.C. at 39, 331 S.E.2d at 659. We there-

fore hold that Defendant is entitled to appellate review of his constitutional argument.

B.

[2] We next consider whether the trial court violated Defendant's rights under Article I, Section 24 when it held unrecorded bench conferences with the jury foreperson.

Our Courts have recognized that a conviction cannot be based on a "unanimous verdict of a jury," as required by Article I, Section 24, where the trial court does not provide the same instructions to all twelve jurors. In *Ashe*, for example, the jury foreperson returned alone to the courtroom over an hour after the jury retired for deliberations. *Ashe*, 314 N.C. at 33, 331 S.E.2d at 655. The foreperson informed the trial court that the jury wished to review certain portions of the transcript. *Id.* at 33, 331 S.E.2d at 656. The trial court responded, "I'll have to give you this instruction. There is no transcript at this point. You and the other jurors will have to take your recollection of the evidence as you recall it and as you can agree upon that recollection in your deliberations." *Id.* The jury later found the defendant guilty of first-degree murder. *Id.* at 29, 331 S.E.2d at 653.

On appeal, our Supreme Court found that the trial court violated N.C. Gen. Stat. § 15A-1233(a) by failing to respond to the jury's request with the entire jury present. *Id.* at 35, 331 S.E.2d at 657; *see* N.C. Gen. Stat. § 15A-1233(a) (2007) (stating that "[i]f the jury after retiring for deliberation requests a review of certain testimony or other evidence, the jurors must be conducted to the courtroom," at which point the trial court may respond to the jury's request). In addition to the statutory violation, the Court also agreed with the defendant that "[a] defendant, having the right to a trial by a jury of twelve, has the right to have all twelve jurors instructed consistently." *Ashe*, 314 N.C. at 35-36, 331 S.E.2d at 657. According to the Supreme Court:

> Our jury system is designed to insure that a jury's decision is the result of evidence and argument offered by the contesting parties under the control and guidance of an impartial judge and in accord with the judge's instructions on the law. All these elements of the trial should be viewed and heard simultaneously by all twelve jurors. To allow a jury foreman, another individual juror, or anyone else to communicate privately with the trial court regarding matters material to the case and then to relay the court's response to the full jury is inconsistent with this policy.

Id. at 36, 331 S.E.2d at 657. The Supreme Court therefore found that because the N.C.G.S. § 15A-1233(a) violation resulted in the jury being inconsistently instructed, such violation also constituted a violation of the defendant's right to a trial by a unanimous jury under Article I, Section 24. *Id.* at 39, 40, 331 S.E.2d at 659.

Subsequent case law has made clear that this type of Article I, Section 24 violation occurs only when certain jurors receive one set of instructions and other jurors receive a different set of instructions. In *State v. McLaughlin*, 320 N.C. 564, 359 S.E.2d 768 (1987), for example, the jury sent the trial court a note asking to review a portion of the trial testimony. *Id.* at 567, 359 S.E.2d at 770. The trial court denied the jury's request and asked the bailiff to inform the jury that their request had been denied. *Id.* at 567-68, 359 S.E.2d at 771. On appeal, our Supreme Court agreed with the defendant that the trial court violated N.C.G.S. § 15A-1233(a) by failing to bring the jury back to the courtroom to respond to its inquiry. *Id.* at 568, 359 S.E.2d at 771. However, the Court disagreed with the defendant that the statutory error also amounted to constitutional error. *Id.* Unlike in *Ashe*, where the trial court gave certain instructions to less than twelve jurors, the trial court in *McLaughlin* gave its instruction to all twelve jurors, albeit in a manner prohibited by statute. *Id.* at 570, 359 S.E.2d at 772. Therefore, in *McLaughlin*, "[t]here was . . . no violation of the unanimity provision of Article I, section 24." *Id. See also State v. Colvin*, 92 N.C. App. 152, 159, 374 S.E.2d 126, 131 (1988), *cert. denied*, 324 N.C. 249, 377 S.E.2d 758 (1989) (holding, on similar facts to *McLaughlin*, that there was no constitutional error because "the judge did not communicate with less than all jurors").

In the present case, the trial court gave at least one critical instruction to the jury foreperson that it did not give to the rest of the jury. The transcript indicates that after the jury deliberated for roughly twenty minutes, eleven jurors ejected their foreperson due to concerns regarding the foreperson's impartiality. The trial court specifically instructed the foreperson that "[t]his is an issue that I believe you and the other jurors need to handle in the jury room." The trial court did not instruct the remaining jurors that their concern regarding the foreperson was an issue that the jury was required to "handle in the jury room," although the Court clearly believed that all twelve jurors had a duty to resolve the issue.

Further, the transcript indicates that the trial court likely provided instructions to the jury foreperson at some point during the three unrecorded bench conferences. Immediately following the third

unrecorded bench conference, the trial court informed the foreperson that there was "one other instruction" that the trial court wanted to give to the foreperson. This statement by the trial court indicates that the trial court had previously instructed the foreperson concerning one or multiple other issues, the nature of which do not appear on the record. The trial court then instructed the foreperson that the foreperson was not to discuss with the remaining eleven jurors "[t]he issues about which we had talked about in this courtroom, both here at the bench and also openly on the record[.]" This statement demonstrates not only that the trial court did not want the remaining eleven jurors to be privy to the information the foreperson received during the unrecorded bench conferences, but also that the trial court did not want the foreperson to communicate the trial court's prior instruction that the jurors "handle in the jury room" their concerns regarding the foreperson.

This record demonstrates that the trial court did not instruct all twelve jurors consistently. Defendant was entitled to a consistently-instructed jury under Article I, Section 24. We therefore find constitutional error in the trial court's on-record and off-record conversations with the jury foreperson.

C.

[3] Defendant next argues that the violation of his right to a unanimous jury under Article I, Section 24 was structural error mandating a new trial.

Our Courts have previously held that certain violations of Article I, Section 24 are so fundamental that harmless error analysis is inappropriate and automatic reversal is required. In *State v. Hudson*, 280 N.C. 74, 185 S.E.2d 189 (1971), a juror became ill during trial and was excused from service. *Id.* at 78, 185 S.E.2d at 192. The defendant waived his right to a trial by twelve jurors and allowed the remaining eleven jurors to determine his guilt or innocence. *Id.* Our Supreme Court held that despite the defendant's at-trial waiver, Article I, Section 24 required a jury composed of twelve jurors, and any conviction returned by fewer than twelve jurors was a nullity. *Id.* at 79-80, 185 S.E.2d at 192-93. The Court therefore remanded the case for a new trial. *Id.* at 80, 185 S.E.2d at 193.

Similarly, in *State v. Bunning*, 346 N.C. 253, 485 S.E.2d 290 (1997), a juror became ill during sentencing deliberations and was replaced with an alternate juror. *Id.* at 255, 485 S.E.2d at 291. Our

Supreme Court found a violation of Article I, Section 24, stating that "eleven jurors fully participat[ing] in reaching a verdict, and two jurors participat[ing] partially in reaching a verdict. . . . is not the twelve jurors required to reach a valid verdict in a criminal case." *Id.* at 256, 485 S.E.2d at 292. The Court then determined whether harmless error analysis was appropriate:

> The State contends that if there is error, we should apply a harmless error analysis. This we cannot do. A trial by jury which is improperly constituted is so fundamentally flawed that the verdict cannot stand. In order to determine whether there was prejudice, any hearing would "invade[] the sanctity, confidentiality, and privacy of the jury process," which we should not do.

Id. at 257, 485 S.E.2d at 292 (quoting *State v. Bindyke*, 288 N.C. 608, 627, 220 S.E.2d 521, 533 (1975)). The Court therefore remanded the case for a new sentencing trial. *Id.* at 257, 485 S.E.2d at 293; *see also State v. Poindexter*, 353 N.C. 440, 444, 545 S.E.2d 414, 416 (2001) (holding that where a juror became disqualified during deliberations due to his own misconduct, the jury was rendered "improperly constituted" under Article I, Section 24 and the defendant was automatically entitled to a new trial).

Our Courts have also held, however, that other violations of Article I, Section 24 are subject to harmless error analysis. In *Ashe*, for example, our Supreme Court held that the trial court violated Article I, Section 24 by giving the jury foreperson an instruction and having the foreperson relay the instruction to the jury, rather than instructing all twelve jurors at once. According to the Court, Article I, Section 24 guaranteed the defendant "the right to have all twelve jurors instructed consistently," and the possibility of miscommunication between the foreperson and the rest of the jury regarding the additional instruction deprived the defendant of this right. *Ashe*, 314 N.C. at 35-36, 331 S.E.2d at 657. Nonetheless, the Court applied a harmless error test to determine whether the defendant was entitled to a new trial. *Id.* at 36-39, 331 S.E.2d at 657-59. The Court found that because it was impossible to know whether the foreperson had accurately relayed the trial court's instruction to the rest of the jury, the State could not demonstrate that the trial court's error was harmless, and the defendant was entitled to a new trial. *Id.* at 38-39, 331 S.E.2d at 658-59.

These cases demonstrate that a violation of Article I, Section 24 requires automatic reversal only where a jury was "improperly con-

stituted" in terms of its numerical composition. In other words, where the verdict was rendered by a jury of less than twelve fully-participating jurors, as in *Hudson*, *Bunning*, and *Poindexter*, the verdict is a nullity. However, *Ashe* demonstrates that a violation of Article I, Section 24 is subject to harmless error review where the error did not affect the numerical structure of the jury, but rather resulted in jurors acting on unequal instructions from the trial court in reaching a verdict.[1]

In the current case, Defendant's jury was not "improperly constituted" from a numerical standpoint. Rather, eleven jurors received one set of instructions from the trial court, and one juror received a different set of instructions from the trial court. This type of violation of Article I, Section 24 is not structural error mandating reversal. We therefore apply harmless error analysis to determine whether Defendant is entitled to a new trial.

D.

[4] When a defendant demonstrates an at-trial violation of his rights under the North Carolina Constitution, we may sustain the defendant's conviction only if the State proves beyond a reasonable doubt that the error in the defendant's case was harmless. *State v. Huff*, 321 N.C. 1, 34-35, 381 S.E.2d 635, 654 (1989), *vacated on unrelated grounds*, 497 U.S. 1021, 111 L. Ed. 2d 777 (1990).

In the present case, a serious issue arose during jury deliberations that called into question the jury foreperson's ability to determine Defendant's guilt or innocence. The trial court gave the foreperson instructions on how the jury should handle the issue, but it did not give the remaining jurors similar guidance. We are unable to determine what effect this error had on the jury's final determination of Defendant's guilt or innocence, and we therefore hold that the State has not met its burden in this case.

Further, we have previously held that where a trial court's unrecorded conference with a juror results in constitutional error, the State can meet its burden only if the record reveals the substance of the conversation, or if the conversation is adequately reconstructed at trial, and the error proves to be harmless. In *Boyd*, for example, our Supreme Court held that the trial court violated the

1. While the case law cited above demonstrates that some types of Article I, Section 24 violations are structural and others are not, *Ashe* demonstrates that even non-structural violations of Article I, Section 24 are automatically preserved for appellate review. *See Ashe*, 314 N.C. at 39, 331 S.E.2d at 659.

defendant's right of confrontation by holding unrecorded bench conferences with prospective jurors. *Boyd*, 332 N.C. at 104-05, 418 S.E.2d at 473. The Court then determined that the defendant was entitled to a new trial:

> Where . . . the transcript reveals the substance of the [unrecorded] conversations, or the substance is adequately reconstructed by the trial judge at trial, we have been able to conclude that the error was harmless beyond a reasonable doubt.
>
> Here, the substance of the conversation between the trial judge and the excused juror is not revealed by the transcript nor did the trial judge reconstruct it at trial. The State, therefore, cannot demonstrate the harmlessness of the error beyond a reasonable doubt; and [the] defendant must be given a new trial.

Id. at 106, 418 S.E.2d at 474. *See also*, *e.g.*, *State v. Smith*, 326 N.C. 792, 795, 392 S.E.2d 362, 363-64 (1990) (holding that the State could not meet its burden of proving harmless constitutional error where the record did not disclose the substance of the trial court's unrecorded conversations with potential jurors).

In the present case, the transcript does not disclose the content of the trial court's unrecorded bench conferences with the jury foreperson, nor did the trial court reconstruct the substance of those conferences for the record. Without a record of the trial court's conversations with the jury foreperson, "we cannot exercise meaningful appellate review" and are constrained to hold that the State has failed to meet its burden. *Id.* at 795, 392 S.E.2d at 364. Defendant is therefore entitled to a new trial.

Defendant also assigns error to certain additional jury instructions given by the trial court, and to the trial court's entry of a restitution award in favor of the State. We do not expect that these issues are likely to recur upon retrial, and we therefore decline to address these arguments.

New trial.

Judge STEPHENS concurs.

Judge TYSON dissents with a separate opinion.

TYSON, Judge dissenting.

The majority's opinion grants Lekkie Constantine Wilson ("defendant") a new trial based on the trial court's conferences with only the jury foreman. I disagree and respectfully dissent.

I. Waiver

The majority's opinion correctly notes that "our Court generally does not review constitutional arguments for the first time on appeal." (Citing *State v. King*, 342 N.C. 357, 364, 464 S.E.2d 288, 293 (1995)). Yet, the majority's opinion holds defendant preserved his constitutional argument that the trial court erred when it held "unrecorded" conversations with the jury foreman, *even though defendant failed to object at trial.* The majority's opinion incorrectly relies on our Supreme Court's opinion in *State v. Ashe* as a basis for this holding. 314 N.C. 28, 331 S.E.2d 652 (1985).

In *Ashe*, our Supreme Court held that N.C. Gen. Stat. § 15A-1233(a) "requires all jurors to be returned to the courtroom when the jury 'requests a review of certain testimony or other evidence.' " 314 N.C. at 36, 331 S.E.2d at 657. Our Supreme Court stated:

> Both Art. I, § 24 of the North Carolina Constitution and N.C.G.S. § 15A-1233(a) require the trial court to summon all jurors into the courtroom before hearing and addressing a jury request to review testimony and to exercise its discretion in denying or granting the request. Under the principles stated above, failure of the trial court to comply with these statutory mandates entitles defendant to press these points on appeal, notwithstanding a failure to object at trial.

Id. at 40, 331 S.E.2d at 659.

Our Supreme Court's holding in *Ashe* is simply not applicable to the facts at bar. 314 N.C. at 40, 331 S.E.2d at 659. Here, the trial court did not give an individual explanatory instruction to the foreman after a request to review testimony, as was the case in *Ashe*. 314 N.C. at 33, 331 S.E.2d at 656. The trial court merely spoke with the foreman after he stated, "[the other jurors] seem to think that I already have my mind made up." The trial court conducted all conversations with the foreman in the presence of and without objection from counsel for both the State and defendant.

Our Supreme Court's holding in *State v. Tate* is controlling precedent based on the facts at bar. 294 N.C. 189, 239 S.E.2d 821 (1978). In

Tate, "jurors asked, or started to ask, questions addressed to the [trial] court. In [both instances, the trial court] directed the juror to approach the bench and a private discussion between the judge and juror ensued." 294 N.C. at 197, 239 S.E.2d at 827. Our Supreme Court stated:

> We are of the opinion that the trial court's private conversations with jurors were ill-advised. The practice is disapproved. At least, the questions and the court's response *should be made in the presence of counsel.* The record indicates, however, that defendant did not object to the procedure or request disclosure of the substance of the conversation. *Failure to object in apt time to alleged procedural irregularities or improprieties constitutes a waiver.*

Id. at 198, 239 S.E.2d at 827 (citations omitted) (emphasis supplied).

Based on our Supreme Court's holding in *Tate*, defendant's failure to object to the trial court's conversation with the foreman outside the presence of the other eleven jurors, waived his right to appeal this alleged error. 294 N.C. at 198, 239 S.E.2d at 827. Having determined defendant waived his right to appeal this assignment of error, the issue becomes whether this Court may review defendant's assignment of error under plain error review.

II. Plain Error Review

In *State v. Cummings*, our Supreme Court stated:

> In criminal cases, a question which was not preserved by objection noted at trial and which is not deemed preserved by rule of law without any such action may still be the basis of an assignment of error where the judicial action questioned is specifically and distinctly contended to amount to plain error. *See* N.C. R. App. P. 10(c)(4). When a defendant does not allege plain error, the question may still be reviewed in the exercise of the Court's discretion. *See* N.C. R. App. P. 2.

361 N.C. 438, 469, 648 S.E.2d 788, 807 (2007), *cert. denied*, —— U.S. ——, 170 L. Ed. 2d 760 (2008).

As defendant failed to object to the trial court's conversations with the foreman or to assert or argue plain error to this Court, this issue is not properly preserved for appellate review. N.C.R. App. P. 10(c)(4) (2007). Appellate Rule 2 is the sole basis to review this issue and may only be invoked to prevent "manifest injustice" to

defendant. N.C.R. App. P. 2 (2007); *see State v. Hart*, 361 N.C. 309, 316, 644 S.E.2d 201, 205 (2007) ("This Court has tended to invoke [Appellate] Rule 2 for the prevention of 'manifest injustice' in circumstances in which substantial rights of [a criminal defendant] are affected." (Citations omitted)).

A. Standard of Review

"[P]lain error analysis applies only to instructions to the jury and evidentiary matters." *State v. Greene*, 351 N.C. 562, 566, 528 S.E.2d 575, 578 (citing *State v. Atkins*, 349 N.C. 62, 505 S.E.2d 97 (1998), *cert. denied*, 526 U.S. 1147, 143 L. Ed. 2d 1036 (1999)), *cert. denied*, 531 U.S. 1041, 148 L. Ed. 2d 543 (2000). "The plain error rule is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, . . . it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty." *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quotation omitted).

B. Analysis

The foreman approached the court to convey that the other jurors had expressed a belief that he had already made up his mind. With counsel for both parties present at all times, the trial court told the foreman that "[t]he issues about which we had talked in this courtroom, both here at the bench and also openly on the record, are issues that you are not to share with the other jurors . . . ." The trial court then stated that it believed the foreman could "continue to be a fair and impartial juror" and the foreman agreed that there was no "reason why [he could not] continue as a juror in this case[.]"

Based on the totality of the trial court's conversations with the foreman, it cannot be said that the trial court's conversation with the foreman was an "instruction" or, if so, that "the instructional mistake had a probable impact on the jury's finding that . . . defendant was guilty." *Odom*, 307 N.C. at 660, 300 S.E.2d at 378 (quotation omitted). This assignment of error should be overruled. Having determined that this assignment of error should be overruled, I review defendant's remaining assignments of error.

III. N.C. Gen. Stat. § 15A-1235

Defendant argues that the trial court committed plain error when it "omitt[ed] critical language from [the N.C. Gen. Stat. § 15A-1235] jury instruction . . . ." I disagree.

N.C. Gen. Stat. § 15A-1235(b) (2007) states:

> Before the jury retires for deliberation, the judge may give an instruction which informs the jury that:
>
> (1) Jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;
>
> (2) Each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;
>
> (3) In the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and
>
> (4) No juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.

Defendant argues the trial court committed plain error when it gave the following instruction to the jury:

> You all have a duty to consult with one another and deliberate with a view toward reaching an agreement, if it can be done without violence to individual judgment. Each of you must decide the case for yourself but only after an impartial consideration of the evidence with your fellow jurors. In the course of deliberations, each of you should not hesitate to reexamine your own views and change your opinion, if it is erroneous, but none of you should surrender your honest conviction as to the weight of the evidence solely because of the opinion of your fellow jurors or for the purpose of returning a verdict.

"The instructions prescribed in [N.C. Gen. Stat.] § 15A-1235 . . . need not be given verbatim whenever a jury is deadlocked; rather, such instructions are guidelines, and the trial judge must be allowed to exercise his sound judgment to deal with the myriad different circumstances he encounters at trial." *State v. Jeffries*, 57 N.C. App. 416, 421, 291 S.E.2d 859, 862 (quotation omitted), *disc. rev. denied*, 306 N.C. 561, 294 S.E.2d 374 (1982). The challenged instruction substantially conforms to the guideline instruction in N.C. Gen. Stat. § 15A-1235. *Id.* This assignment of error should be overruled.

IV. Restitution

In his final argument on appeal, defendant argues the trial court erred when it awarded restitution in the amount of $118.86 to the Newport Police Department. I agree.

> A state or a local agency can be the recipient of restitution where the offense charged results in particular damage or loss to it over and above its normal operating costs. It would be reasonable, for example, to require a defendant to pay the State for expenses incurred to provide him with court appointed counsel should he ever become financially able to pay. It would not however be reasonable to require the defendant to pay the State's overhead attributable to the normal costs of prosecuting him.

Shore v. Edmisten, 290 N.C. 628, 633-34, 227 S.E.2d 553, 559 (1976) (internal citations omitted).

The trial court awarded the Newport Police Department $118.86 based on the mileage attributable for the extradition and transportation of a co-defendant from Quantico, Virginia to testify for the prosecution in defendant's trial. The costs to bring a witness in to court to testify does not constitute an expense "over and above [the State's] normal operating costs." *Id.* at 634, 227 S.E.2d at 559. "It [is] not . . . reasonable to require . . . defendant to pay the State's overhead attributable to the normal costs of prosecuting him." *Id.* (citations omitted).

Based on our Supreme Court's holding in *Shore*, the trial court erred when it awarded the Newport Police Department $118.86 in restitution. 290 N.C. at 633-34, 227 S.E.2d at 559. This portion of the trial court's judgment should be vacated.

V. Conclusion

Defendant waived his right to appeal the trial court's conversations with the foreman outside the presence of the other eleven jurors. *Tate*, 294 N.C. at 198, 239 S.E.2d at 827. Without objection to preserve the error or the assertion and argument of plain error, review of this assignment of error pursuant to N.C.R. App. P. 2 is appropriate in order "[t]o prevent manifest injustice to [defendant] . . . ." Defendant failed to show that the trial court's conversation with the foreman was an "instructional mistake" to constitute plain error. *Odom*, 307 N.C. at 660, 300 S.E.2d at 378 (quotation omitted).

The trial court properly instructed the jury pursuant to N.C. Gen. Stat. § 15A-1235(b). *Jeffries*, 57 N.C. App. at 421, 291 S.E.2d at 862. There was no error in the jury's verdict.

The trial court improperly awarded the Newport Police Department restitution in the amount of $118.86. This portion of the trial court's judgment should be vacated. *Shore*, 290 N.C. at 633-34, 227 S.E.2d at 559. In all other respects, there is no error in the jury's verdict or the judgment entered thereon. I respectfully dissent.

GEMINI DRILLING AND FOUNDATION, LLC, PLAINTIFF v. NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, DEFENDANT

No. COA07-1266

(Filed 2 September 2008)

1. Appeal and Error— appealability—interlocutory order—denial of motion to stay pending arbitration—waiver

Although defendant surety contends the trial court erred in a subcontractor's breach of contract case arising from street construction by denying its motion to stay pending arbitration, the merits of this argument are not reached since defendant waived whatever right it had to arbitrate this dispute because, although defendant was not required to immediately appeal the trial court's order denying its motion to compel arbitration, its failure to so appeal or take exception to the order and then engaging in protracted litigation, including a full bench trial, prejudiced plaintiff.

2. Highways and Streets— street construction—subcontractor's action against surety—denial of continuance—no right to conclude administrative procedures with DOT

The trial court did not abuse its discretion in a subcontractor's breach of contract case arising from street construction by denying defendant surety's motion for continuance allegedly without recognizing defendant's right to conclude pending administrative procedures with DOT because: (1) the case had been pending on the docket for over two years, and defendant had substantial time to prepare and complete any necessary procedures in order to be prepared for trial; (2) defendant did not provide a valid reason to wait for DOT to complete its administrative pro-

cedures; and (3) although defendant cites *Nello L. Teer Co.*, 182 N.C. App. 300 (2007), it is inapplicable when DOT is not a party to this case, and therefore the requirement to complete all administrative remedies does not apply.

3. Constitutional Law— right to fair trial—denial of motion for continuance—allegations of trial court's lack of decorum—refusal or rejection of exhibits

Defendant surety was not denied an opportunity for a fair trial in a bench trial of a subcontractor's breach of contract case arising from street construction even though the trial court denied its request for a continuance, allegedly treated it with contempt and bias throughout the course of the trial, and rejected or refused to consider certain exhibits that defense counsel marked as exhibits but did not formally offer into evidence, and defendant is not entitled to a new trial, because: (1) the Court of Appeals already concluded the trial court's decision to deny the motion to continue was supported by reason and was the result of a competent inquiry, and thus it cannot constitute an irregularity that would allow defendant to receive a new trial; (2) the trial court's skepticism about contract trials affected both parties and his criticism, constructive and otherwise, was directed towards counsel for both parties; (3) it did not appear that the trial court harbored such a bias against the trial of civil contract actions that he could not render a proper judgment; (4) although a judge's comments can improperly influence a jury, less judicial restraint is required during a bench trial; and (5) defense counsel had ample opportunity to clarify and rectify the situation regarding the exhibits but failed to do so.

4. Constitutional Law— right to fair trial—denial of motion for continuance—nonresident defense witness late and not allowed to testify

Defendant surety was not denied an opportunity for a fair trial in a bench trial of a subcontractor's breach of contract case arising from street construction even though the trial court denied its motion for a continuance until the next morning to allow a nonresident defense witness construction superintendent who was late to testify because: (1) the trial court did not abuse its discretion when it had already indicated its desire to prevent any further delay by denying two pre-trial motions to continue; and (2) defense counsel explained the nonresident's testimony would consist of corroborating evidence as to the delays and the

effect that it had on the job, and counsel should have attempted to secure testimony through a deposition *de bene esse*.

5. Trials— substitute judge—first judge retired—denial of motion for new trial—ministerial rather than judicial function

A substitute second judge did not err in a breach of contract case arising from street construction by denying defendant's motion for a new trial based on lack of jurisdiction after the first judge had retired, and defendant is not entitled to a new trial, because: (1) *Hoots*, 282 N.C. 477 (1973), and *Graves*, 302 N.C. 332 (1981), provide an exception to the general application of N.C.G.S. § 8C-1, Rule 63 making it inappropriate for a superior court judge who did not try a case to rule upon a motion for a new trial, and in that situation, an appellate court should conduct the review of errors to determine if the party is entitled to a new trial; (2) the function of a substitute judge under this rule is ministerial rather than judicial; and (3) the circumstances and alleged irregularities of defendant's trial did not prevent it from having a fair trial.

Appeal by defendant from order entered 11 May 2005 by Judge John R. Jolly, Jr., judgment entered 21 November 2006 by Judge Narley L. Cashwell in Wake County Superior Court, and order entered 8 June 2007 by Judge Michael R. Morgan in Wake County Superior Court. Heard in the Court of Appeals 16 April 2008.

William E. West, Jr., for plaintiff.

Smith, Currie & Hancock LLP, by Harry R. Bivens, for defendant.

ELMORE, Judge.

I. Background

This appeal arises from a contract between Blythe Construction, Inc. (Blythe or BCI) and Gemini Drilling and Foundation, LLC (plaintiff). On or about 1 May 2002, Blythe contracted with the North Carolina Department of Transportation (DOT) to make improvements to South Wilmington Street in Raleigh (Wilmington Street Project) for the sum of $4,574,263.03. On or about 17 May 2002, Blythe also contracted with the City of Raleigh to make improvements to Duraleigh Road in Raleigh (Duraleigh Project) for

$4,574,263.03. National Fire Insurance of Hartford (defendant) provided the surety payment bonds for Blythe for each of the projects. On 7 May 2002, Blythe entered into a subcontract with plaintiff to perform drilled shaft work on the Duraleigh Project for the sum of $598,816.92. On 17 May 2002, Blythe entered into a subcontract with plaintiff to perform drilled shaft work on the Wilmington Street Project for the sum of $253,630.82.

Blythe terminated its Wilmington Street subcontract with plaintiff on 26 March 2004. This termination followed a series of letters from Blythe to plaintiff alleging that Blythe had incurred damages as result of defendant's "failure . . . to uphold the terms of the Subcontract Agreement." Although defendant had completed most or all of the work on the Duraleigh Road Project, Blythe notified defendant that it would "withhold any further payments for work completed to date *on any contract with Gemini* . . . ." (Emphasis in original.) Blythe explained that "[t]he cost incurred by Blythe will exceed any funds due to [defendant] under all contracts, for the impact of the actions and inactions of [defendant] on the S. Wilmington St. Bridge project." Blythe estimated that defendant's "total direct delay to Blythe's critical path on the" Wilmington Street Project was at least 108 days. Blythe estimated that the potential liquidated damages for the project were $1,000.00 per day, and that it had "suffered extended overhead cost" for the project of at least $126,360.00.

Plaintiff filed a complaint against defendant, Blythe's surety, on 17 June 2004. The complaint alleged that plaintiff had "duly performed all of its work under the Duraleigh Project and a substantial part of its work under the South Wilmington Street Project. Gemini was not able to complete its work on the South Wilmington Street Project because its subcontract was wrongfully terminated by Blythe." Plaintiff alleged that it had demanded payment from Blythe for its work on the two projects and that Blythe had refused to make payment in full. Plaintiff determined that Blythe owed it $322,000.00 plus interest. Plaintiff alleged that it was "an intended beneficiary of the payment bonds issued by National Fire Insurance for Blythe in connection with the Projects" and that "[p]ursuant to the terms of the bonds and of the North Carolina Model Payment and Performance Bond Act (G.S. 44A-25 through 44A-35), Gemini [was] entitled to recover the sums due it directly from National Fire Insurance as the surety for Blythe."

On 4 October 2004, defendant responded with a motion to stay the action pending arbitration in which it asked the trial court

to stay plaintiff's action and compel arbitration. The subcontract between Blythe and plaintiff contains an arbitration clause, which defendant characterized as "an agreement between BCI and Gemini to resolve all disputes arising thereunder by arbitration, if BCI elects this option."[1] Defendant reasoned that because it was entitled to every defense available to its principal, Blythe, it was entitled to elect arbitration.

Judge John R. Jolly, Jr., held a hearing on defendant's motion and issued an order denying the motion on 11 May 2005. The record on appeal does not include a transcript of the hearing, but Judge Jolly explained his ruling in nine findings and conclusions. He concluded "that the arbitration provisions in the subcontracts between BCI and Plaintiff lack mutuality and sufficient consideration, and are against public policy. They therefore are not enforceable against Plaintiff, and Defendant's Motion should be denied."

After one continuance, the action was scheduled for trial on 3 July 2006. Defendant filed a motion for continuance on 27 June 2006, which Judge Narley L. Cashwell denied. Both parties then filed a joint pre-trial motion for a continuance, which Judge Cashwell denied. Both parties also waived a jury trial and consented to a bench trial before Judge Cashwell. After the trial, Judge Cashwell asked the parties to submit proposed orders. Judge Cashwell held that plaintiff was entitled to recover $200,764.80 plus interest from defendant for work performed for Blythe on the Duraleigh Road Project and $95,440.82 plus interest for work performed under the South Wilmington Street Project. He held that defendant should not recover from plaintiff under "its claim for setoff for damages and delays allegedly incurred in connection with the South Wilmington Street Project . . . ." He awarded costs and attorneys' fees in the amount of $25,367.64 to plaintiff.

II. Motion to Compel Arbitration

[1] Defendant first argues that the trial court erred by denying its motion to stay pending arbitration. We do not reach the merits of

1. The arbitration clause states, in relevant part: "Any claim, dispute or other matter in question solely between BCI and Subcontractor relating to this Agreement shall be subject to arbitration at the sole option and discretion of BCI. Arbitration shall commence upon the written demand of BCI and served upon Subcontractor by a manner chosen by BCI. Any legal proceeding previously instituted which otherwise would determine a fact or issue of the claim, dispute or other matter to be arbitrated shall be promptly stayed pending completion of the arbitration proceeding. Such arbitration shall be in accordance with the construction industry arbitration rules of the North Carolina Arbitration Code . . . ."

defendant's argument because we find that defendant waived whatever right it had to arbitrate this dispute. Defendant moved to stay pending arbitration on 4 October 2004, which motion Judge Jolly denied on 11 May 2005. Although an order denying a motion to stay pending arbitration is interlocutory, it is immediately appealable under N.C. Gen. Stat. § 1-277(a) because it affects a substantial right. N.C. Gen. Stat. § 1-277(a) (2007); *Edwards v. Taylor*, 182 N.C. App. 722, 724, 643 S.E.2d 51, 53 (2007). Moreover, both the North Carolina Uniform Arbitration Act (NCUAA) and the Federal Arbitration Act (FAA) specifically permit a party to immediately appeal an order denying a motion to compel arbitration. *See* N.C. Gen. Stat. § 1-567.18(a)(1) (2001) (repealed effective 1 January 2004) ("An appeal may be taken from . . . [a]n order denying an application to compel arbitration . . . ."); 9 U.S.C. § 16(a)(1)(B) (2008) ("An appeal may be taken from . . . an order . . . denying a petition under section 4 of this title [9 USCS § 4] to order arbitration to proceed . . . ."). However, "[t]he language of N.C.G.S. § 1-277 is permissive not mandatory. Thus, where a party is entitled to an interlocutory appeal based on a substantial right, that party may appeal but is not required to do so." *Dep't of Transp. v. Rowe*, 351 N.C. 172, 176, 521 S.E.2d 707, 710 (1999). Similarly, the language of N.C. Gen. Stat. § 1-567.18(a)(1)[2] and 9 U.S.C. § 16(a)(1)(B) is also permissive, not mandatory. Accordingly, defendant was not required to immediately appeal Judge Jolly's order denying its motion to compel arbitration.

Nevertheless, by failing to so appeal or take exception to the order and then engaging in protracted litigation, including a full bench trial, defendant prejudiced plaintiff and waived its right to arbitrate. "Waiver of a contractual right to arbitration is a question of fact." *Cyclone Roofing Co. v. LaFave Co.*, 312 N.C. 224, 229, 321 S.E.2d 872, 876 (1984) (citations omitted). North Carolina public policy strongly favors arbitration and we will only "hold that a party has impliedly waived its contractual right to arbitration if by its delay or by actions it takes which are inconsistent with arbitration, another party to the contract is prejudiced by the order compelling arbitration." *Id.* (citations omitted). "[W]aiver . . . may not rest mechanically on some act such as the filing of a complaint or answer but must find a basis in prejudice to the objecting party[.]" *Id.* (quoting *Carolina Throwing Co. v. S & E Novelty Corp.*, 442 F.2d 329, 331

2. The NCUAA was repealed effective 1 January 2004 and replaced with the Revised Uniform Arbitration Act (RUAA). The RUAA contains a provision that is substantively identical to section 567.18 in the NCUAA. Compare N.C. Gen. Stat. § 1-567.18 (2001) and N.C. Gen. Stat. § 1-569.28 (2005).

(4th Cir. 1971)) (additional citation omitted). Our Supreme Court has explained that

> [a] party may be prejudiced if, for example, it is forced to bear the expenses of a lengthy trial; evidence helpful to a party is lost because of delay in seeking of arbitration; a party's opponent takes advantage of judicial discovery procedures not available in arbitration; or, by reason of delay, a party has taken steps in litigation to its detriment or expended significant amounts of money thereupon.

Id. at 229-30, 321 S.E.2d at 876-77 (citations omitted).

Here, after Judge Jolly denied defendant's motion to compel arbitration, defendant actively litigated this dispute by seeking multiple extensions, engaging in discovery, and participating in a full bench trial. Plaintiff has been prejudiced by defendant's conduct: Plaintiff engaged in a trial that, although it occurred in a single day, was long enough to produce a 189-page transcript, twenty-seven exhibits, and five witnesses. Defendant delayed this trial through its requests for extensions, and the trial concluded fourteen months after Judge Jolly's denial of the motion to compel arbitration and twenty-three months after plaintiff filed its initial claim. Now, three years have passed since Judge Jolly entered his order and four since plaintiff filed this suit. We caution that "[t]he waiver determination is fact-specific and these illustrations are not intended to be predictive or exhaustive." *Cotton v. Slone*, 4 F.3d 176, 180 (2d Cir. 1993). The determination arose from defendant's conduct and plaintiff's resulting prejudice, not merely from defendant's failure to immediately appeal Judge Jolly's order.

Our result is consistent with the legislative intent behind both the FAA and the NCUAA. The U.S. Court of Appeals for the Second Circuit observed that

> Section 16(a) [of the FAA] is designed to streamline the appellate aspect of the litigation process so that parties may realize their arbitration rights at the earliest possible moment. . . . The aims of section 16(a) would be defeated if a party could reserve its right to appeal an interlocutory order denying arbitration, allow the substantive lawsuit to run its course (which could take years), and then, if dissatisfied with the result, seek to enforce the right to arbitration on appeal from the final judgment.

Id. Our Supreme Court has stated that "the principle [*sic*] legislative purpose behind enactment of the Uniform Arbitration Act [is] to provide and encourage an expedited, efficient, relatively uncomplicated, alternative means of dispute resolution, with limited judicial intervention or participation, and without the primary expense of litigation—attorneys' fees." *Nucor Corp. v. General Bearing Corp.*, 333 N.C. 148, 154, 423 S.E.2d 747, 750 (1992) (citations omitted). Indeed, "[t]he purpose of arbitration is to reach a final settlement of disputed matters without litigation . . . ." *J. M. Owen Bldg. Contractors v. College Walk, Ltd.*, 101 N.C. App. 483, 487, 400 S.E.2d 468, 470 (1991) (quotations and citation omitted). N.C. Gen. Stat. § 1-567.18, like 9 U.S.C. § 16(a), encourages such expedited and efficient dispute resolution, while "not much can be said for allowing the party who sought arbitration to litigate and later seek arbitration on appeal if the trial goes badly instead of appealing immediately . . . ." *Colon v. R.K. Grace & Co.*, 358 F.3d 1, 4 (1st Cir. 2003). Accordingly, we overrule defendant's first assignment of error.

III. Motion for Continuance

[2] Defendant next argues that the trial court erred by denying defendant's motion for continuance without recognizing defendant's right to conclude pending administrative procedures with DOT. Defendant contends that the trial judge should have stayed the proceedings until after the administrative procedures were completed. We review the trial judge's denial of defendant's motion for continuance for abuse of discretion. *State v. Jones*, 172 N.C. App. 308, 311-12, 616 S.E.2d 15, 18 (2005). We find no abuse of discretion.

An abuse of discretion is found only when "the trial court's decision was 'unsupported by reason and could not have been the result of competent inquiry.' " *McIntosh v. McIntosh*, 184 N.C. App. 697, 702, 646 S.E.2d 820, 823 (2007) (quoting *Wiencek-Adams v. Adams*, 331 N.C. 688, 691, 417 S.E.2d 449, 451 (1992)). Here, the trial judge's decision to deny defendant's motion for continuance was supported by reason because this case had been pending on the docket for over two years. Defendant had substantial time to prepare and complete any necessary procedures in order to be prepared for trial. In addition, defendant did not provide a valid reason to wait for DOT to complete its administrative procedures.

Defendant also cites *Nello L. Teer Co. v. Jones Bros., Inc.*, to support its contention that the requested continuance should have been granted because administrative procedures with DOT had not been

completed. 182 N.C. App. 300, 641 S.E.2d 832 (2007). In *Teer*, we explained that "before a party may pursue a judicial action against the state for money claimed to be due under a highway construction contract, it must first pursue its administrative remedies." *Id.* at 305, 641 S.E.2d at 836 (quotations and citations omitted). However, we were referring in that case to actions against DOT for payment under highway constructions contracts. *Id.* at 305, 641 S.E.2d at 836. *Teer* is not applicable here because DOT is not a party to this case, and therefore the requirement to complete all administrative remedies does not apply. The trial court correctly concluded that there was no reason to continue the trial to wait for DOT to complete administrative proceedings because those proceedings were not necessary for the trial. Accordingly, we hold that the trial court's decision was supported by reason and was the result of a competent inquiry.

IV. Opportunity for a Fair Trial

[3] Defendant next argues that it did not receive an opportunity for a fair trial because the trial judge denied its request for a continuance and treated it with contempt and bias throughout the course of the trial. Defendant points to Rule 59(a)(1) of our Rules of Civil Procedure, which states that "[a] new trial may be granted to all or any of the parties and on all or part of the issues for . . . [a]ny irregularity by which any party was prevented from having a fair trial . . . ." N.C. Gen. Stat. § 1A-1, Rule 59(a)(1) (2007). Defendant contends that the trial judge's disposition and remarks to defense counsel, and the denial of defendant's motions throughout the trial, constitute irregularities that should allow defendant to receive a new trial.

A. Motion to Continue

"[A] motion to continue is addressed to the discretion of the trial court . . . ." *Jones*, 172 N.C. App. at 311-12, 616 S.E.2d at 18 (quotations and citations omitted). We have already established that the trial court's decision was not unsupported by reason and was the result of a competent inquiry. Therefore, because the trial court's decision not to grant a continuance is not an abuse of discretion, it cannot constitute an irregularity that would allow defendant to receive a new trial.

B. Conduct of the Trial Judge

Defendant asserts that Judge Cashwell's "lack of decorum" deprived defendant of a fair trial. Defendant characterizes Judge Cashwell's comments as "inexplicably hostile," and admittedly, the

comments were not all kind. For example, Judge Cashwell told both attorneys, "Just as an observation, neither one of your [*sic*] gentlemen do a whole lot of trial work, do you?" At the beginning of the trial, Judge Cashwell declared, "In the 16 years I have been a Superior Court judge and the five years I was a District Court judge, I have never, to this day, understood why contract cases ever go to trial." Comments in this vein continued throughout the trial until closing arguments, at which point Judge Cashwell opined:

> Of course, my observation is that in all the cases involving contracts and business, they're all subject to being looked at as a heck of a way to run a railroad. I find it absolutely—lots of things I find absolutely astounding in so-called, quote, "business situations." But that's okay.
>
> Go ahead and finish your argument, and then Mr. Bivens can be heard, and then you can be heard again, and then he can be heard. Each of you can be heard ad nauseam, as long as you want to.

We note first that Judge Cashwell's skepticism about contract trials affected both parties, and that his criticism—constructive and otherwise—was directed towards counsel for both parties. It does not appear to us that Judge Cashwell harbored such "a bias against the trial of civil contract actions" that he could not render a proper judgment.

Moreover, defendant only cites cases in which a judge's impropriety improperly influenced juries. Our Supreme Court has held that "jurors entertain great respect for [a judge's] opinion, and are easily influenced by any suggestion coming from him. As a consequence, he must abstain from conduct or language which tends to discredit or prejudice any litigant in his courtroom." *McNeill v. Durham County ABC Bd.*, 322 N.C. 425, 429, 368 S.E.2d 619, 622 (1988) (quotations and citation omitted; alteration in original). Here, however, both parties agreed to a bench trial. Although a judge's comments can improperly influence a jury, less judicial restraint is required during a bench trial. In such a case,

> the ordinary rules as to the competency of evidence applied in a trial before a jury are to some extent relaxed, for the reason that the judge with knowledge of the law is able to eliminate from the testimony he hears that which is immaterial and incompetent, and consider only that which tends properly to prove the facts to be found.

Munchak Corp. v. Caldwell, 301 N.C. 689, 694, 273 S.E.2d 281, 285 (1981) (quotations and citation omitted). We do not believe that any of Judge Cashwell's comments were inappropriate enough to constitute irregularities that would necessitate a new trial.

C. Exclusion of Exhibits Not Offered into Evidence

Defendant next argues that the trial court erred by rejecting and refusing to consider certain exhibits that defense counsel had marked as exhibits but did not formally offer into evidence. Before closing arguments, Judge Cashwell stated, "All the evidence has now been presented. Anything which was marked but not offered into evidence is not in evidence in this particular case." During the trial, defendant marked twenty-seven exhibits, but only formally offered into evidence five of them. In his order, Judge Cashwell found as fact that although defense counsel "moved the Court to mark certain documents as exhibits and such motions were granted, none of Defendant's marked exhibits were offered by counsel for Defendant and admitted into evidence by the Court except" exhibits 1, 2, 3, 4, and 5.

Defendant claims that defense counsel used the same language to enter into evidence the five admitted exhibits as he did eleven of the non-admitted exhibits, but, "without Trial Counsel's notice, the Court's manner of reply changed, effectively denying admission even though the gist of the Court's response suggested that the documents were entered *as evidence*." (Emphasis in original.) Defendant argues that it made no effort to correct this situation before the end of the trial because

> [t]he Court's change in posture and response was not evident until the Honorable Judge made a comment literally as he left the bench regarding documents not offered into evidence. Given the Court's general attitude towards the litigants, as discussed above, this remark and conduct appears to be an attempt to further demean Counsel for appearing. At any rate, the Judge's immediate withdrawal from the court room following his remark left Counsel no opportunity to inquire or object to the court's statement. The Court's modification of its response to Trial Counsel's request was an unfair surprise which prevented Defendant from receiving a fair trial.

The comment in question, recited above, was not made literally as Judge Cashwell left the bench. It was made before closing statements

and before the parties discussed attorneys' fees. Both attorneys conversed with Judge Cashwell before he closed court and Judge Cashwell specifically asked defense counsel if there was "[a]nything else" that he wanted the court to consider. Defense counsel had ample opportunity to clarify and rectify the situation.

D. Exclusion of Witness

[4] Defendant next argues that the trial court erred by refusing to grant a continuance until the next morning to allow a defense witness who was late to testify. Clive Roberson, a construction superintendent who had firsthand knowledge of plaintiff's performance, agreed to testify at the trial on behalf of defendant. Roberson went on vacation over the Fourth of July weekend and defendant could not reach Roberson "until early on the morning of trial." According to defendant's brief, "Mr. Roberson immediately left his home in South Carolina and proceeded towards Raleigh. He estimated and notified defense Counsel that he would be available at approximately 5:00 on the afternoon of July 5, 2006." After defendant had called its last available witness, defense counsel asked the trial court to adjourn until Roberson could arrive. The trial court asked whether Roberson had been subpoenaed and defense counsel replied, "He is not subject to subpoena. He is outside the state of North Carolina. He has—he has agreed to attend." Judge Cashwell denied defendant's motion, stating, "Your request that court adjourn so that your witness may be in court when he should have been in court this morning at 9:30 is denied. You may call your next witness or rest your case, sir."

Defendant argues that the trial court denied it the opportunity to present a material witness and the trial court's failure "to accommodate a witness who was making all reasonable efforts to attend the trial [was] an unnecessary abuse of discretion and an irregularity which, pursuant to Rule 59(a)(1), prevented Defendant NFIC from having a fair trial." "Denial of a motion for a continuance is reviewable on appeal only for abuse of discretion." *In re Will of Yelverton*, 178 N.C. App. 267, 274, 631 S.E.2d 180, 184 (2006) (citations omitted). We find no abuse of discretion. Judge Cashwell had already indicated his desire to prevent any further delay by denying two pre-trial motions to continue. Furthermore, defense counsel had explained that Roberson's testimony would consist of "corroborating evidence as to the delays and the effect that had on that job . . . ." We have also suggested that in a situation such as this, counsel should attempt to secure testimony through a deposition *de bene esse*. *Id.*; *see also* N.C. Gen. Stat. § 8-83(2) (2007) ("Every deposition taken and returned in

the manner provided by law may be read on the trial of the action or proceeding . . . [i]f the witness is a resident of . . . another state, and is not present at the trial.").

V. Motion for a New Trial

[5] Defendant argues that Judge Michael R. Morgan erred by denying its motion for a new trial on the basis of lack of jurisdiction and asks us to grant it a new trial. We find no error and decline to grant defendant's request for a new trial. Judge Cashwell entered his order on 21 November 2006. Defendant moved for a new trial on 1 December 2006. Judge Cashwell retired in December 2006. Defendant's motion was calendared for 16 April 2007 and heard by Judge Morgan. Judge Morgan denied defendant's motion, explaining in his written order that, "without review or consideration of the merits," he had "considered solely the jurisdictional arguments of counsel and the briefs tendered by the parties as they address the court's jurisdiction of this matter." Judge Morgan concluded that because Judge Cashwell was no longer available, it would not be appropriate for another superior court judge to hear defendant's motion. Judge Morgan decreed in the order that the

> order [was] entered anticipating Defendant's right to assert on appeal, and without prejudice thereto, and to receive a de novo review on any of the grounds for an award of a new trial which it properly could have asserted before the trial judge pursuant to the provisions of Rule 59 of the North Carolina Rules of Civil Procedure.

Judge Morgan based his decision on our Supreme Court's decisions in *Hoots v. Calaway*, 282 N.C. 477, 193 S.E.2d 709 (1973), and *Graves v. Walston*, 302 N.C. 332, 275 S.E.2d 485 (1981).

In *Hoots*, the trial court improperly failed to rule on the defendant's motion for a new trial, explaining that because it granted the defendant's motion for judgment notwithstanding the verdict, it was unnecessary to rule on the defendant's alternative motion for a new trial. *Hoots*, 282 N.C. at 489, 193 S.E.2d at 716-17. Our Supreme Court disagreed, but noted that "the judge who conducted the trial of this case [was] no longer the presiding judge of the Twenty-first Judicial District." *Id.* at 490, 193 S.E.2d at 717. The Court "deem[ed] it inappropriate for a superior court judge who did not try the case to pass now upon defendant's alternative motion for a new trial." *Id.* The Court offered the following solution:

> [J]ustice requires that defendant be afforded an opportunity to have considered on appeal any asserted errors of law which he contends entitles him to a new trial. Accordingly, the judgment of the Court of Appeals . . . is affirmed with direction that upon the entry of such judgment defendant be permitted, if so advised, to except thereto and appeal therefrom and upon appeal obtain a review of the errors for which he asserts he is entitled to a new trial.

Id.

In *Graves*, our Supreme Court was again presented with a case in which a trial court ruled on a motion for judgment notwithstanding the verdict, but failed to rule on the accompanying alternative motion for a new trial as provided in Rule 50. *Graves*, 302 N.C. at 339, 275 S.E.2d at 489. In *Graves*, the Supreme Court held that the trial court had improperly granted the plaintiff's motion for judgment notwithstanding the verdict, and this Court had improperly affirmed. *Id.* at 338-39, 275 S.E.2d at 489-90 (citing *Hoots*). The Supreme Court noted that the judge who tried the case was no longer on the bench, and, citing *Hoots*, concluded that "[i]t would be inappropriate for another superior court judge who did not try the case to now pass upon plaintiffs' alternative motion for a new trial." *Id.* at 340, 275 S.E.2d at 489. The Court then "reviewed the record and [found] error of law prejudicial to plaintiffs," and remanded the case to the trial court for a new trial. *Id.*

Defendant argues that Rule 63 of our Rules of Civil Procedure governs the situation at hand, not *Hoots* and *Graves*. Rule 63 provides, in relevant part, that

> [i]f by reason of . . . retirement . . . a judge before whom an action has been tried or a hearing has been held is unable to perform the duties to be performed by the court under these rules after a verdict is returned or a trial or hearing is otherwise concluded, then those duties, including entry of judgment, may be performed:
>
> (1) In actions in the superior court by the judge senior in point of continuous service on the superior court regularly holding the courts of the district. If this judge is under a disability, then the resident judge of the district senior in point of service on the superior court may perform these duties. If a resident judge, while holding court in the judge's own

> district suffers disability and there is no other resident judge of the district, such duties may be performed by a judge of the superior court designated by the Chief Justice of the Supreme Court.
>
> * * *
>
> If the substituted judge is satisfied that he or she cannot perform those duties because the judge did not preside at the trial or hearing or for any other reason, the judge *may, in the judge's discretion*, grant a new trial or hearing.

N.C. Gen. Stat. § 1A-1, Rule 63 (2007) (emphasis added).

Defendant argues that "when Judge Morgan found that he could not perform the duty of hearing and deciding Defendant's Motion for New Trial, an appropriate course of conduct would have been an order granting a new trial without ruling on the merits." Without considering *Hoots* and *Graves*, defendant is correct that one proper course of conduct would have been to grant a new trial. Our Supreme Court has noted that "[i]n general, the application of Rule 63 presents the 'substituted judge' with two options in how to proceed. The judge could choose to honor" the original judge's decision in the matter or could grant a new trial or hearing. *Lange v. Lange*, 357 N.C. 645, 648, 588 S.E.2d 877, 879 (2003). *Hoots* and *Graves* provide an exception to this "general" application of Rule 63: it is not appropriate for a superior court judge who did not try a case to rule upon a motion for a new trial, and in that situation, an appellate court should conduct the review of errors to determine if the party is entitled to a new trial. This reconciliation of Rule 63 with *Hoots* and *Graves* is consistent with our previous holding that "[t]he function of a substitute judge under this rule is ministerial rather than judicial." *In re Savage*, 163 N.C. App. 195, 197, 592 S.E.2d 610, 611 (2004) (quotations and citation omitted). Morever, the Supreme Court has not overruled or taken exception to the rule in *Hoots* or *Graves*, and thus we, like Judge Morgan, are bound by it.

We review defendant's motion for a new trial as contemplated by *Hoots* and *Graves*, and, for the reasons articulated in the preceding pages, deny it. The circumstances and "irregularities" of defendant's trial did not prevent it from having a fair trial.

Accordingly, for the reasons stated above, we affirm the orders and judgments of the trial court, and deny defendant's motion for a new trial.

Affirmed.

Judges McGEE and JACKSON concur.

LAUREL VALLEY WATCH, INC., a North Carolina Nonprofit Corporation, Plaintiff v. MOUNTAIN ENTERPRISES OF WOLF RIDGE, LLC, a North Carolina Limited Liability Company; HAW MOUNTAIN, INC., a North Carolina Business Corporation; RICHARD BUSSEY, a North Carolina Resident d/b/a SCENIC WOLF LAUREL, LLC; WOLF RIDGES SKI AND REALTY, INC., a North Carolina Business Corporation; SCENIC WOLF DEVELOPMENT, LLC, a North Carolina Limited Liability Company; WOLF'S CROSSING, INC., a North Carolina Business Corporation; MADISON COUNTY, NORTH CAROLINA; and MADISON COUNTY BOARD OF COMMISSIONERS, Defendants

No. COA07-1336

(Filed 2 September 2008)

1. Zoning— reclassification—confusion about new category—no genuine issue of fact

In a declaratory judgment action seeking to halt construction of an airport, the trial court properly granted summary judgment for the county and the board of commissioners where the case began with a request for rezoning from residential to industrial, which would allow the airport, and the minutes of the initial meeting indicated that the rezoning was to residential-resort, which would not allow the airport. The pleadings and affidavits establish that there was no genuine issue as to the material fact that the rezoning was to industrial.

2. Estoppel— equitable—statute of limitations—notice of new zoning category

Equitable estoppel did not apply to prevent assertion of the statute of limitations in a declaratory judgment action seeking to halt construction of an airport. Plaintiff was not incorporated until after the statute of limitations in the case had expired and plaintiff's incorporators and members had notice that the county had rezoned the 12 acres industrial to allow the development of the airport.

3. Zoning— subject matter jurisdiction—administrative remedies not exhausted

The trial court was without subject matter jurisdiction to rule on claims seeking declaratory and injunction relief against developers who allegedly violated a zoning ordinance in beginning construction of an airport. Plaintiff did not exhaust administrative remedies before filing the complaint.

Appeal by Plaintiff from order entered 17 July 2006 by Judge C. Philip Ginn and from judgment entered 26 February 2007, corrected judgment entered 5 March 2007, and order entered 10 May 2007 by Judge James U. Downs in Madison County Superior Court. Heard in the Court of Appeals 2 April 2008.

Gary A. Davis & Associates, by Gary A. Davis, for Plaintiff-Appellant.

Long, Parker, Warren & Jones, P.A., by Philip S. Anderson and Robert B. Long, Jr., and Leake & Scott, by Larry Leake, for Defendants-Appellees.

STEPHENS, Judge.

Laurel Creek runs through Laurel Valley in Madison County. Plaintiff Laurel Valley Watch, Inc., a nonprofit corporation formed by residents of Madison County on 6 January 2006, initiated this action on 9 March 2006 by filing a complaint in superior court seeking declaratory and injunctive relief on allegations that Defendants Mountain Enterprises of Wolf Ridge, LLC, Haw Mountain, Inc., and Richard Bussey ("Rick Bussey" or "Bussey") were violating Madison County's Land Use Ordinance ("Ordinance") by planning to construct an airport on a mountain ridge above Laurel Valley. Plaintiff subsequently amended its complaint, adding Defendants Wolf Ridges Ski and Realty, Inc., Scenic Wolf Development, LLC, and Wolf's Crossing, Inc. (together with Mountain Enterprises, Haw Mountain, and Bussey, "Developers") on the same allegations. Plaintiff also added Defendants Madison County and the Madison County Board of Commissioners in the amended complaint seeking declaratory relief on allegations that the Board of Commissioners improperly rezoned a tract of land on which the Developers were allegedly violating the Ordinance. The trial court resolved all of Plaintiff's claims in favor of Defendants. Plaintiff appeals.

BACKGROUND

The Ordinance delineates three zoning districts pertinent to this appeal: (1) RA-26, Residential-Agricultural District, (2) R-26R, Residential-Resort District, and (3) I-D, Industrial District. On 28 June 2005, Ronnie Ledford, Orville English, and Rick Bussey submitted an application to the County to have 12 acres rezoned from R-26R to I-D.[1] Subsequently, the County's Planning Board issued a Notice of Public Hearing which stated that it would meet on 25 July 2005 to consider:

> 1. Application by Ronnie Ledford, Orville English and Rick Bussey to rezone approximately 12 acres located at the end of Haw Ridge Summit, off Wolf Ridge Drive, from residential-agriculture to industrial.

According to the Board's minutes from the 25 July 2005 meeting: (1) the first item the Board addressed was "Orville English, Rick Bussey—Rezone 12 acres [from] R-26R [sic] to I-D[,]" and (2) Ronnie Ledford told the Board that the rezoning was necessary in order to construct an airport which would accommodate "private jets and aircraft." Under the Ordinance, an airport is a permitted or conditional use only on land zoned I-D. The Planning Board unanimously voted to "[a]pprove rezoning from R-26R [sic] to I-D[.]"

On 26 July 2005, the Board of Commissioners issued a Notice of Public Hearing which stated that the Board would meet on 8 August 2005 to consider:

> 1. Application by Ronnie Ledford, Orville English and Rick Bussey to rezone approximately 12 acres located at the end of Haw Ridge Summit, off Wolf Ridge Drive, from residential-agriculture to industrial district.

The Board's minutes from the 8 August 2005 meeting state:

> [Item] II.
>
> Upon motion of Commissioner Moore, seconded by Commissioner Smathers, the Board voted unanimously to approve the application of Ronnie Ledford, Orville English and Rick Bussey to rezone 12 acres located at the end of Haw Ridge

1. Although the application sought to have the 12 acres rezoned from R-26R to I-D, it is clear from the record before us that the 12 acres was zoned RA-26 at the time the application was filed.

> Summit, off Wolf Ridge Drive, from residential-agriculture to residential-resort district.[2]

On 9 March 2006, Plaintiff filed its initial complaint against Mountain Enterprises, Haw Mountain, and Bussey alleging that these Defendants were violating the Ordinance by planning to construct an airport on land zoned "Residential Resort" and that "[a]n airport is only a permitted use in an Industrial Zoning District[.]" Plaintiff sought declaratory relief that these Defendants were in violation of the Ordinance and preliminary and permanent injunctions to stop the airport's construction. On 13 March 2006, the Board of Commissioners met and passed the following resolution:

> WHEREAS, it has been called to the attention of the Board that a scrivener's error occurred with regard to the minutes of the August 8, 2005 meeting of this Board with regard to Item II with regard to the district to which the [a]ffected property was being rezoned; and
>
> WHEREAS, the Board has the authority to and should amend the minutes of the August 8, 2005 meeting to correct this scrivener's error;
>
> WHEREFORE, Item II of the minutes of the August 8, 2005 meeting of the Madison County Board of Commissioners is hereby amended to read as follows:
>
> [Item] II.
>
> Upon motion of Commissioner Moore, seconded by Commissioner Smathers, the Board voted unanimously to approve the application of Ronnie Ledford, Orville English and Rick Bussey to rezone 12 acres located at the end of Haw Ridge Summit, off Wolf Ridge Drive, from residential-agriculture to industrial district.

Plaintiff filed its amended complaint on 17 March 2006.

On 30 June 2006, Plaintiff filed a motion for summary judgment. In support of this motion, Plaintiff filed the affidavits of its president, Garland Galloway, and one of its members, Kim Garrett. In opposition to the motion, Defendants filed the affidavits of Bussey and Madison County's Zoning Enforcement Officer, Ryan Cody ("Cody"). In Cody's affidavit, he averred: (1) that he attended the Board of Com-

2. As discussed below, the statement that the Board voted to rezone the 12 acres "to residential-resort district[]" is a source of contention between the parties.

missioners' 8 August 2005 and 13 March 2006 meetings, and (2) that he was "familiar with Madison County's record regarding the Board of Commissioners' adoption of the amendment rezoning the 12 acres . . . to industrial."

In an order entered 17 July 2006, Judge C. Philip Ginn concluded:

> 1. There is a genuine issue of material fact whether the [Developers] are using approximately 15 acres of land, which surround the 12 acres rezoned Industrial, in a manner not permitted under current zoning regulations; and
>
> 2. Otherwise, there is no genuine issue of material fact relating to any of [] Plaintiff's claims, and the Defendants are entitled to judgment as a matter of law, pursuant to Rule 56(c) of the North Carolina Rules of Civil Procedure.

On the issue surviving summary judgment, Judge James U. Downs presided over a jury trial held during the 16 October 2006 session of Madison County Superior Court. At the conclusion of all the evidence, Judge Downs submitted, and the jury answered, the following issues:

> 1. Have the Defendants erected, moved, altered, constructed, reconstructed, or used any building or part thereof in the 15 acres surrounding and outside the 12 acres zoned Industrial?
>
> ANSWER: No[;]
>
> 2. Have the Defendants used the 15 acres surrounding and outside the 12 acres zoned Industrial for grading, cut and fill, and erosion and sedimentation control activities and for open space?
>
> ANSWER: Yes[;]
>
> 3. Have the Defendants used the 15 acres surrounding and outside the 12 acres zoned Industrial for any airstrip, taxiway, apron, or airport parking?
>
> ANSWER: No[.]

In a judgment entered 26 February 2007, Judge Downs concluded that the Developers' use of the land surrounding the 12 acres was not in violation of the Ordinance and Judge Downs denied Plaintiff's claims for relief. The judgment taxed the costs of the action against Defendants. In a corrected judgment entered 5 March 2007, Judge Downs taxed the costs of the action against Plaintiff. Following the entry of judgment, Plaintiff filed a motion to set aside the verdict and

for a new trial on grounds of newly discovered evidence and erroneous jury instructions. Judge Downs denied this motion by order entered 10 May 2007. Plaintiff timely appealed.

CLAIM AGAINST MADISON COUNTY

In its sole claim against Madison County and the Board of Commissioners, Plaintiff sought a declaratory judgment that the Board of Commissioners improperly rezoned the 12 acres. On appeal, Plaintiff argues that the trial court erred in entering summary judgment in favor of the County on this claim. We disagree.

A suit to determine the validity of a zoning ordinance is a proper case for a declaratory judgment. N.C. Gen. Stat. § 1-254 (2005); *Blades v. City of Raleigh*, 280 N.C. 531, 187 S.E.2d 35 (1972); *Woodard v. Carteret Cty.*, 270 N.C. 55, 153 S.E.2d 809 (1967). In such an action, summary judgment is properly granted "where '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.' " *Williams v. Blue Cross Blue Shield of N.C.*, 357 N.C. 170, 178, 581 S.E.2d 415, 422 (2003) (quoting N.C. Gen. Stat. § 1A-1, Rule 56(c) (2003)). Our Supreme Court has stated that " 'an issue is genuine if it is supported by substantial evidence,' *DeWitt* [*v. Eveready Battery Co.*], 355 N.C. [672,] 681, 565 S.E.2d [140,] 146 [(2002)], which is that amount of relevant evidence necessary to persuade a reasonable mind to accept a conclusion[.]" *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 579, 573 S.E.2d 118, 124 (2002). Further, "[a]n issue is material if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action." *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972).

"For the purpose of promoting health, safety, morals, or the general welfare, a county may adopt zoning and development regulation ordinances." N.C. Gen. Stat. § 153A-340(a) (2005). "A cause of action as to the validity of any zoning ordinance, or amendment thereto, [so adopted] shall accrue upon adoption of the ordinance, or amendment thereto, and shall be brought within two months as provided in G.S. 1-54.1." N.C. Gen. Stat. § 153A-348 (2005).

[1] In this case, the pleadings and affidavits establish that there is no genuine issue as to the material fact that the County rezoned the

12 acres to the zoning classification I-D on 8 August 2005. The evidence establishing this fact includes: (1) the rezoning application which states that the Developers sought to have the 12 acres rezoned I-D, (2) the Planning Board's notice of public hearing which states that the Planning Board would meet to consider the request to have the 12 acres rezoned I-D, (3) the Planning Board's minutes which state that the Planning Board voted unanimously to approve the request to rezone the 12 acres I-D, (4) the Board of Commissioners' notice of public hearing which states that the Board would meet to consider the request to rezone the 12 acres I-D, (5) that portion of the Board of Commissioners' minutes which states that the Board "voted unanimously to *approve* the application" (emphasis added), (6) a newspaper article published after the Board of Commissioners' 8 August 2005 meeting which states that the Board voted to rezone the 12 acres "to industrial district[,]" (7) the Board's resolution amending the minutes of the 8 August 2005 meeting which states that the minutes contained a scrivener's error and that the Board voted unanimously at the 8 August 2005 meeting to rezone the 12 acres I-D, (8) Cody's affidavit which states that he was "familiar with Madison County's record regarding the Board of Commissioners' adoption of the amendment rezoning the 12 acres . . . to industrial[,]" and (9) Bussey's affidavit which states that he attended the 8 August 2005 meeting and that the Board voted to rezone the 12 acres I-D at that meeting. The only evidence which tends to raise an issue as to this fact is that portion of the Board's 8 August 2005 minutes which states that the Board voted to rezone the 12 acres "from residential-agriculture to residential-resort district." However, this portion of the minutes is clearly opposed to the portion of the minutes which states that the Board voted to "approve" the application, as the application did not seek to have the 12 acres rezoned R-26R. This contradiction is addressed and resolved by the Board of Commissioners' 13 March 2006 resolution which states that the contradiction was the result of a "scrivener's error[.]" Furthermore, Plaintiff did not allege in its amended complaint that the County did not, in fact, rezone the 12 acres I-D at the 8 August 2005 meeting, nor did Garland Galloway or Kim Garrett in their affidavits. Thus, there is no genuine issue as to the fact that the County rezoned the 12 acres I-D at its 8 August 2005 meeting. This fact is material because the statute of limitations had expired by the time Plaintiff filed its complaint. Thus, the trial court properly granted summary judgment in favor of the County and the Board of Commissioners.

[2] In the alternative, however, Plaintiff argues that even if the County properly rezoned the 12 acres at the 8 August 2005 meeting, Defendants are equitably estopped from asserting the statute of limitations because of the error in the minutes of the meeting. The doctrine of equitable estoppel applies

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

Whitacre P'ship v. Biosignia, Inc., 358 N.C. 1, 17, 591 S.E.2d 870, 881 (2004) (citation omitted). We conclude that the doctrine does not apply in this case.

We begin by noting that Plaintiff was not incorporated until 6 January 2006, almost three months after the statute of limitations had expired. Thus, Plaintiff's assertion in its brief that it "could not have challenged the industrial rezoning within the sixty-day limitations period after the 8 August 2005 meeting, because it reasonably relied upon the minutes" is not entirely accurate. Plaintiff could not have challenged the rezoning decision within the limitations period because Plaintiff was not incorporated until after the limitations period expired.

More importantly, however, there is no evidence in the record that suggests that Plaintiff, or any one of Plaintiff's incorporators or members, read and relied upon the minutes before the statute of limitations expired. To the contrary, the evidence tends to show that Garland Galloway, Plaintiff's president, first saw the minutes in December 2005, by which time the statute had run. Moreover, both the Planning Board and the Board of Commissioners issued notices of hearing which appeared in the local newspaper and which stated that the County was considering an application to rezone the 12 acres I-D.[3] The local newspaper also published an article on 24 August 2005 which stated that the Board of Commissioners

---

3. Plaintiff's argument that the notices of hearing did not sufficiently describe the property to be rezoned is unavailing. The notices were "reasonably calculated under all circumstances to apprise interested parties of the pendency of the action or proceeding and afford them an opportunity to present their objections." *Frizzelle v. Harnett Cty.*, 106 N.C. App. 234, 239, 416 S.E.2d 421, 423 (citations omitted), *disc. review denied*, 332 N.C. 147, 419 S.E.2d 571 (1992).

> okayed the application . . . to rezone approximately 12 acres located at the end of Haw Ridge Summit, off Wolf Laurel Drive, from residential-agriculture to industrial district.
>
> The property will be the site of a proposed jet airport on Wolf Ridge. The project has been okayed by the FAA.

In sum, Plaintiff's incorporators and members had notice that the County had rezoned the 12 acres to I-D to allow for the development of the airport. Because the evidence is insufficient to support a determination that Plaintiff reasonably relied on the 8 August 2005 minutes in filing its lawsuit after the expiration of the statute of limitations, the doctrine of equitable estoppel does not apply to this case.

CLAIMS AGAINST THE DEVELOPERS

[3] In its claims against the Developers in the amended complaint, Plaintiff sought declaratory and injunctive relief on allegations that the Developers had begun construction of the airport on the 12 acres and its environs and were, thus, violating the Ordinace. Having carefully reviewed North Carolina's General Statutes and prior decisions of both our Supreme Court and this Court, we conclude that Plaintiff did not exhaust its administrative remedies before filing its complaint and that the trial court, therefore, was without subject matter jurisdiction to rule on these claims.

The enactment and enforcement of county zoning ordinances are exercises of the State's police powers—powers which have been delegated to the counties by our General Assembly. N.C. Gen. Stat. ch. 153A (2005); *Baucom's Nursery Co. v. Mecklenburg Cty.*, 89 N.C. App. 542, 366 S.E.2d 558, *disc. review denied*, 322 N.C. 834, 371 S.E.2d 274 (1988). Typically, counties which have enacted zoning ordinances pursuant to this grant of power designate zoning officials to enforce the ordinances. As discussed above, for example, Madison County appointed Cody as the County's Zoning Enforcement Officer. In the event that a county official refuses to investigate or enforce a county's ordinance, an action will lie in mandamus to compel the official to investigate and enforce the ordinance. *Midgette v. Pate*, 94 N.C. App. 498, 380 S.E.2d 572 (1989).

Any decision made by a county official charged with enforcing a county's ordinance may be appealed by following a specific procedure set forth in Chapter 153A:

> (b) A zoning ordinance or those provisions of a unified development ordinance adopted pursuant to the authority

> granted in this Part shall provide that the board of adjustment shall hear and decide appeals from and review any order, requirement, decision, or determination made by an administrative official charged with the enforcement of that ordinance.
>
> . . . .
>
> (e) The board of adjustment, by a vote of four-fifths of its members, may reverse any order, requirement, decision, or determination of an administrative officer charged with enforcing an ordinance adopted pursuant to this Part, or may decide in favor of the applicant a matter upon which the board is required to pass under the ordinance, or may grant a variance from the provisions of the ordinance.
>
> . . . .
>
> (e2) Each decision of the board is subject to review by the superior court by proceedings in the nature of certiorari.

N.C. Gen. Stat. § 153A-345 (2005). *See*, *e.g.*, *Riggs v. Zoning Bd. of Adjust. of Carteret Cty.*, 101 N.C. App. 422, 399 S.E.2d 149 (1991) (reversing superior court's order affirming board of adjustment's approval of zoning enforcement official's decision). "It is not the function of the reviewing court, in [a proceeding in the nature of certiorari], to find the facts but to determine whether the findings of fact made by the Board are supported by the evidence before the Board." *Capricorn Equity Corp. v. Town of Chapel Hill Bd. of Adjust.*, 334 N.C. 132, 136, 431 S.E.2d 183, 186 (1993) (quotation marks and citations omitted). "The superior court is not the trier of fact but rather sits as an appellate court and may review both (i) sufficiency of the evidence presented to the municipal board and (ii) whether the record reveals error of law." *Id.* (citations omitted).

The Ordinance at issue in the case at bar tracks the procedures set forth in Chapter 153A. Section 100 of the Ordinance provides that "[i]f a ruling of the Zoning Enforcement Officer is questioned, the aggrieved party or parties may appeal such ruling to the Board of Adjustment." Section 105 provides:

> In case any building is erected, constructed, reconstructed, altered, repaired, converted or maintained, or any building or land is used in violation of this ordinance, the Zoning Enforcement Officer or any other appropriate county authority, or any person who would be damaged by such violation, in addition to other

> remedies, may institute an action for injunction or mandamus, or other appropriate action or proceeding to prevent such violation.

Section 114, entitled "Duties of the Zoning Enforcement Officer, Board of Adjustment, Courts and County Commissioners on Matters of Appeal[,]" provides, in part:

> It is the intention of this ordinance that all questions arising in connection with the enforcement of this ordinance shall be presented to the Board of Adjustment only on appeal from the Zoning Enforcement Officer and that from the decision of the Board of Adjustment recourse shall be had to courts as provided by law.

The record before us, however, does not contain any evidence that Plaintiff ever asked Madison County to investigate the Developers' alleged zoning violations. Instead, Plaintiff filed its complaint directly in superior court. We find no authority in our General Statutes, our case law, or in the Ordinance which supports the proposition that such an action is properly brought in superior court in the first instance.[4] In fact, recent decisions of this Court support the proposition that a plaintiff must first seek relief from the county before seeking relief in the courts.

In *Darbo v. Old Keller Farm Prop. Owners' Ass'n*, 174 N.C. App. 591, 621 S.E.2d 281 (2005), plaintiffs submitted a plat to the Watauga County Planning and Inspection Department proposing to subdivide one lot into five new lots. Plaintiffs proposed to service the five new lots by a forty-five-foot right-of-way. Upon learning of the proposed subdivision, defendants "notified the Planning Department that it disputed whether plaintiffs had a sufficient right-of-way to allow the subdivision as proposed[.]" *Id.* at 592, 621 S.E.2d at 282. The planning department refused to consider plaintiffs' subdivision plans and "notified plaintiffs that 'when there has been a dispute regarding right-of-way, . . . the Planning Board has taken the position that the parties resolve the dispute themselves, rather than ask the County to

4. In *Sedman v. Rijdes*, 127 N.C. App. 700, 492 S.E.2d 620 (1997), plaintiff filed a complaint on allegations that defendant, plaintiff's neighbor, was using land so as to constitute a nuisance and in violation of the Orange County Zoning Ordinance. The trial court granted summary judgment in favor of defendant "on the issue of the alleged violation of the Orange County Zoning Ordinance[,]" *id.* at 702, 492 S.E.2d at 621 (quotation marks omitted), and plaintiff appealed. On appeal, this Court held that defendant's use of the land was exempt from compliance with the ordinance and this Court affirmed the trial court. This Court did not address the issue of subject matter jurisdiction.

do so, as these are actually private legal issues over which the courts, not the County, have jurisdiction.' " *Id.* Plaintiffs thereafter filed an action in superior court seeking a declaratory judgment concerning the right-of-way. After reviewing, *inter alia*, the Watauga County Ordinance to Govern Subdivisions and Multi Unit Structures, the trial court granted judgment in favor of plaintiffs.

On appeal, this Court reached the merits of the appeal and affirmed the trial court's judgment. It appears from our decision that the parties did not raise the issue of subject matter jurisdiction on appeal. Perhaps in light of the planning board's refusal to rule on plaintiff's proposed plat and directive to resolve the dispute in the courts, this Court did not raise the issue *sua sponte* before addressing the merits. However, we began our analysis by stating that "the issues presented in this case are issues that are properly addressed to and resolved by county or municipal planning and inspections departments as an initial matter, rather than our courts." *Id.* at 593, 621 S.E.2d at 283.

In *Ward v. New Hanover Cty.*, 175 N.C. App. 671, 625 S.E.2d 598, *disc. review denied*, 360 N.C. 582, 636 S.E.2d 200 (2006), plaintiffs owned a marina that was subject to a special use permit granted by New Hanover County in 1971. In 2002, plaintiffs asked the county's planning staff to approve the use of a forklift on the marina. Plaintiffs contended that such a use was "covered" by the permit, the planning staff disagreed, and plaintiffs and the County attempted to resolve the dispute. *Id.* at 672, 625 S.E.2d at 599. Before either the planning staff or the County's Superintendent of Inspections reached a formal decision on plaintiffs' request, plaintiffs filed a complaint for declaratory judgment in superior court alleging that "judicial declaration is necessary and appropriate at this time under all of the circumstances[.]" *Id.* at 673, 625 S.E.2d at 600 (quotation marks omitted). Plaintiffs sought: (1) a "decree[] that [plaintiffs] are entitled to use a forklift [on the property] in connection with their operation of a commercial marina[,]" and (2) "a permanent injunction enjoining [defendant], its officers and agents from interfering with [plaintiffs'] lawful use of a forklift on [the property] under [the Permit]." *Id.* at 673-74, 625 S.E.2d at 600 (quotation marks omitted). The trial court concluded that there were no material issues of fact between the parties as to whether plaintiffs exhausted their administrative remedies with the county, and the trial court granted summary judgment in the county's favor. Plaintiffs appealed.

On appeal, this Court stated:

> "As a general rule, where the legislature has provided by statute an effective administrative remedy, that remedy is exclusive and its relief must be exhausted before recourse may be had to the courts." *Presnell v. Pell*, 298 N.C. 715, 721, 260 S.E.2d 611, 615 (1979) (citations omitted); *see also Justice for Animals, Inc. v. Robeson County*, 164 N.C. App. 366, 369, 595 S.E.2d 773, 775 (2004) ("If a plaintiff has failed to exhaust its administrative remedies, the court lacks subject matter jurisdiction and the action must be dismissed.") (citing *Shell Island Homeowners Ass'n v. Tomlinson*, 134 N.C. App. 217, 220, 517 S.E.2d 406, 410 (1999)).

Id. at 674, 625 S.E.2d at 601. Quoting *Presnell*, 298 N.C. at 721-22, 260 S.E.2d at 615 (citations omitted), the Court then stated:

> This is especially true where a statute establishes . . . a procedure whereby matters of regulation and control are first addressed by commissions and agencies particularly qualified for the purpose. In such a case, the legislature has expressed an intention to give the administrative entity most concerned with a particular matter the first chance to discover and rectify error. Only after the appropriate agency has developed its own record and factual background upon which its decision must rest should the courts be available to review the sufficiency of its process. An earlier intercession may be both wasteful and unwarranted. "To permit the interruption and cessation of proceedings before a commission by untimely and premature intervention by the courts would completely destroy the efficiency, effectiveness, and purpose of administrative agencies."

Id. at 674-75, 625 S.E.2d at 601. We concluded that plaintiffs "failed to first exhaust their administrative remedies by obtaining a formal determination from defendant regarding their proposed use of the marina and rights under the [p]ermit," and we affirmed the trial court's order granting summary judgment in favor of defendant. *Id.* at 679, 625 S.E.2d at 603.

As in *Ward*, Plaintiff in this case did not exhaust its administrative remedies before seeking relief in the courts. Plaintiff could have: (1) sought and received a ruling from Madison County's zoning officials, (2) appealed an adverse ruling of the officials to the Planning Board, and (3) appealed an adverse ruling of the Planning Board to

the superior court. N.C. Gen. Stat. § 153A-345. Instead, Plaintiff filed its case directly to the superior court. By taking such action, Plaintiff bypassed the statutorily prescribed procedures for resolving zoning disputes. *Id.* The General Assembly did not signify an intent in Chapter 153 to give private citizens the right to initiate an action in superior court to enforce zoning ordinances. Plaintiff having failed to exhaust its administrative remedies, we conclude that the trial court was without subject matter jurisdiction to rule on Plaintiff's claims concerning the Developers.

In reaching this conclusion, we are cognizant of the efforts expended by the parties to resolve Plaintiff's claims on the merits. We recognize that neither this Court, where the parties appeared to present oral arguments, nor the trial court, where Judge Downs conducted a jury trial on Plaintiff's claims, addressed the issue of subject matter jurisdiction. Indeed, we acknowledge that we raise this issue *sua sponte*. However, 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. Furthermore, " '[a] universal principle as old as the law is that the proceedings of a court without jurisdiction of the subject matter are a nullity.' " *In re T.R.P.*, 360 N.C. 588, 590, 636 S.E.2d 787, 790 (2006) (quoting *Burgess v. Gibbs*, 262 N.C. 462, 465, 137 S.E.2d 806, 808 (1964)).

To the extent that the trial court, in its 17 July 2006 order, granted summary judgment in favor of the County and the Board of Commissioners on Plaintiff's claim that the County improperly rezoned the 12 acres, the trial court's order is affirmed. To the extent that the trial court granted summary judgment in favor of the Developers on Plaintiff's claim that the Developers were violating the Ordinance on the 12 acres, the trial court's 17 July 2006 order is vacated. The judgment and corrected judgment are vacated.

AFFIRMED IN PART; VACATED IN PART.

Judges McGEE and TYSON concur.

WILLOW BEND HOMEOWNERS ASSOCIATION, INC., PLAINTIFF v. THURSTON ROBINSON AND CHARLOTTE ROBINSON, DEFENDANTS

No. COA07-1290

(Filed 2 September 2008)

1. Associations— homeowners association—power to impose assessment—restrictive covenants—propriety of challenge—ultra vires action

The trial court erred by concluding as a matter of law that defendant lot owners did not challenge, by appropriate pleading, plaintiff homeowners association's power to impose the disputed assessment because: (1) while it is possible that N.C.G.S. § 55A-3-04 foreclosed defendants' argument regarding the validity of plaintiff's corporate actions, it did not prohibit defendants from challenging the underlying validity of the restrictive covenants as a matter of contract law; and (2) although homeowners in previous cases have challenged assessments by bringing injunctive actions and arguing that such assessments were ultra vires, the Court of Appeals has also previously allowed parties to assert a defensive challenge to the validity of assessment-related restrictive covenants without bringing a separate ultra vires action.

2. Associations— homeowners association—power to impose assessment—welfare covenant—assessment of attorney fees—nonmaintenance expenditure

The trial court did not err by concluding as an alternative basis for judgment in plaintiff homeowners association's favor that a restrictive covenant allowing plaintiff to levy assessments "to promote the . . . welfare of residents" was not vague as to the right of plaintiff to assess attorney fees against its members which are incurred by plaintiff in defending itself and its members against claims brought against plaintiff because: (1) although defendants contend the covenant failed the three-part test set out in *Allen*, 119 N.C. App. 761 (1995), that test was inapplicable since plaintiff levied an assessment for a nonmaintenance expenditure instead of for property maintenance; (2) the general standard is that covenants imposing affirmative obligations on the grantee must contain some ascertainable standard by which the court can objectively determine both that the amount of the assessment and the purpose for which it is levied fall

within the contemplation of the covenant; (3) the parties agreed that the covenant contemplated assessments for payment of court judgments, and thus, it follows that it surely contemplated assessments for the employment of legal counsel to defend such judgments; (4) an assessment for legal fees under the "welfare" covenant was foreseeable by the parties at the time that defendants purchased their lot in the subdivision; and (5) the covenant contained an ascertainable standard since defendants did not argue that the amount of the assessment was greater than the expense plaintiff incurred in securing legal representation, nor that they were assessed more than their pro rata share of plaintiff's legal costs.

3. Associations— homeowners association—attorney fees—recovery of assessment

The trial court did not err by entering judgment for plaintiff homeowners association to recover an assessment for attorney fees even though defendants contend plaintiff was not entitled to recover attorney fees absent statutory authority because: (1) contrary to defendants' assertion, plaintiff was not seeking to recover attorney fees it previously incurred in defending against defendants' prior discrimination claims, but instead was seeking to recover a valid assessment that it levied against defendants; and (2) the fact that this assessment will be used to pay attorney fees incurred in prior administrative proceedings does not preclude plaintiff's claim under the rule cited in *Washington*, 132 N.C. App. 347 (1999).

4. Associations; Costs— denial of attorney fees—good faith argument

The trial court did not abuse its discretion by denying plaintiff homeowners association's motion for attorney fees under N.C.G.S. § 6-21.5 because: (1) defendants raised an appropriate challenge to the validity of the pertinent restrictive covenant; and (2) defendants made a good faith argument regarding the invalidity of the restrictive covenant even though the argument was not meritorious.

5. Associations; Costs— mandatory attorney fees—lien for assessments

The trial court did not err by denying plaintiff homeowners association's motion for attorney fees under the liens for assessments section of the North Carolina Planned Community

Act (PCA) in N.C.G.S. § 47F-3-116(e) because: (1) N.C.G.S. § 47F-3-116(e) only mandates an award of attorney fees where the requesting party prevailed in an action brought under this section; (2) the type of action created by this statute is not one in which a homeowners association sues on the underlying debt created by a homeowner's failure to pay an assessment, but instead the action created is one in which a homeowners association forecloses on a lien created under N.C.G.S. § 47F-3-116(a) for unpaid assessments; (3) in the instant case plaintiff has not sought to foreclose on a lien, but instead sued on the underlying debt owed by defendants; and (4) while the statute contemplates that a homeowners association may bring such an action, it is not the type of action that allows the collection of mandatory attorney fees.

Appeal by Defendants from order entered 24 April 2007 by Judge Kimbrell Kelly Tucker in District Court, Cumberland County, and appeal by Plaintiff and Defendants from order entered 25 May 2007 by Judge John W. Dickson in District Court, Cumberland County. Heard in the Court of Appeals 19 March 2008.

Ronald E. Winfrey for Plaintiff.

Newman & Newman, PLLC, by James T. Newman, Jr. and Ryann W. Angle, for Defendants.

McGEE, Judge.

The record in this case shows that the Willow Bend Subdivision is a small neighborhood located in Cumberland County, North Carolina, and that it consists of eight separate lots. The Willow Bend Homeowners Association, Inc. (Plaintiff) is a nonprofit corporation incorporated on or about 26 February 1997. The Willow Bend Architectural Review Committee (ARC) is an unincorporated association that was established to approve proposed building plans in the Willow Bend Subdivision.

The developer of the Willow Bend Subdivision filed a "Declaration of Covenants[,] Conditions and Restrictions for Willow Bend Subdivision" (the Declaration) with the Cumberland County Register of Deeds on 25 June 1998. Article IV of the Declaration provides in part:

Section 1. . . . Personal Obligation of Assessment. . . . [E]ach Owner of any Lot by acceptance of a deed therefor, whether or

not it shall be so expressed in such deed, is deemed to covenant and agree to pay the [Willow Bend Homeowners] Association:

(1) annual assessments or charges[.]

. . . .

Section 2. Purpose of Assessments. The assessments levied by the [Willow Bend Homeowners] Association shall be used exclusively to promote the recreation, health, safety, and welfare of the residents in the properties and for the improvements and maintenance of the Common Area.

Section 3. Maximum Annual Assessment. . . . [T]he annual maximum assessment shall be Five Hundred and No/100 ($500.00) Dollars per Lot.

. . . .

(b) . . . [T]he annual maximum assessment may be increased . . . by a vote of three-fourths (3/4) of each class of members who are voting in person or by proxy, at a meeting duly called for this purpose.

Thurston and Charlotte Robinson (Defendants) purchased a lot in the Willow Bend Subdivision in June 2003. Defendants submitted a proposed building plan for a single-family residence to the ARC in January 2005. The ARC denied approval of Defendants' building plan because the plan did not comply with setback requirements contained in the Declaration.

After numerous unsuccessful attempts at amending the setback requirements, Defendants, who are African-American, filed a complaint against Plaintiff with the Fayetteville Human Relations Commission (FHRC) alleging that Plaintiff had discriminated against them on the basis of their race. Defendants also filed discrimination charges against Plaintiff with the Department of Housing and Urban Development, which referred the charges to the North Carolina Human Relations Commission (NCHRC). The FHRC found on 14 April 2005 that Plaintiff had not discriminated against Defendants. The outcome of Defendants' complaint with the NCHRC is not clear from the record.[1] Plaintiff retained counsel to defend itself in the pro-

1. In a 16 June 2006 letter from Plaintiff's counsel to Defendants, Plaintiff's counsel states that the NCHRC "dismissed [Defendants'] charges with a determination that no reasonable grounds existed to believe [Plaintiff] or its officers had committed an unlawful discriminatory housing practice against [Defendants]." In subsequent filings

ceedings before the FHRC and NCHRC. As of 31 December 2005, Plaintiff had a bank balance of $153.40 and outstanding legal bills totaling $4,331.99.

Plaintiff held a meeting on 1 January 2006 and voted seven-to-one to increase the 2006 annual assessment from $500.00 to $1,000.00 per lot to cover Plaintiff's outstanding legal bills. Defendants were the sole members of the Willow Bend Homeowners Association to vote against the assessment. Over the following months, Defendants informed Plaintiff that they "exclud[ed themselves] from the group who wishe[d] to support [Plaintiff] financially" in defending itself. Defendants also made numerous attempts to pay Plaintiff $500.00 to cover the original 2006 assessment. On each occasion, Plaintiff refused to accept Defendants' $500.00 payment and asked Defendants to pay the full $1,000.00 assessment.

Plaintiff filed a small claim complaint against Defendants on 25 September 2006 to recover the $1,000.00 assessment, plus interest and attorney's fees. A judgment was entered on 19 October 2006 in Plaintiff's favor, but the judgment did not award Plaintiff attorney's fees. Defendants appealed the judgment to District Court, and Plaintiff appealed the denial of attorney's fees to District Court. Defendants filed a motion for leave to assert an answer, defenses, counterclaims, and third-party complaints in District Court on 24 January 2007. The District Court issued an order on 14 February 2007 allowing Defendants to assert defenses but denying the remainder of Defendants' motion. Defendants then filed a general denial of the allegations in Plaintiff's complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 8(b).

Plaintiff and Defendants filed opposing motions for summary judgment on 15 and 21 March 2007, respectively. District Court Judge Kimbrell Kelly Tucker (Judge Tucker) issued an order on 24 April 2007 denying both parties' motions. This action was tried before District Court Judge John W. Dickson (Judge Dickson) on 24 April 2007. Judge Dickson determined that there were no material facts in dispute and that this action could be decided as a matter of law. Both parties agreed that Judge Dickson could decide the relevant issues as a matter of law without overruling Judge Tucker's prior order.

As to the merits of Plaintiff's claim, Defendants acknowledged the $1,000.00 assessment but argued that the restrictive covenants

---

with the trial court, however, Defendants state that the NCHRC in fact issued a right-to-sue letter to Defendants in response to Defendants' complaint.

purporting to allow Plaintiff to impose the assessment were vague and unenforceable. Plaintiff responded that the assessment was proper and that the restrictive covenants were valid. Plaintiff further noted that under N.C. Gen. Stat. § 55A-3-04, Defendants were required to challenge the validity of corporate action through an injunctive proceeding. According to Plaintiff, Defendants had not challenged Plaintiff's action by an appropriate pleading, and therefore were unable to raise their argument concerning the covenants as a defense in the current case. Plaintiff also argued that it was entitled to attorney's fees under N.C. Gen. Stat. § 6-21.5 and N.C. Gen. Stat. § 47F-3-116(e).

Judge Dickson entered an order on 25 May 2007 containing two conclusions of law that served as alternative bases for awarding judgment in Plaintiff's favor:

> 1. [D]efendants did not challenge, by appropriate pleading, the power of [Plaintiff] to make the disputed assessment.
>
> 2. The Declaration . . . is not vague as to the right of [Plaintiff] to assess attorney's fees, against its members, which are incurred by [Plaintiff] in defending itself and its members against claims brought against [Plaintiff].

Judge Dickson awarded Plaintiff $1,000.00, plus interest, on its claim for the past-due assessment. However, Judge Dickson denied Plaintiff's requests for attorney's fees under N.C. Gen. Stat. § 6-21.5 and N.C. Gen. Stat. § 47F-3-116(e). Plaintiff and Defendants appeal.

I. Defendants' Appeal

Defendants raise three issues in their appeal. We consider each of Defendants' arguments in turn.

A.

[1] Defendants first argue that the trial court erred by concluding as a matter of law that Defendants did not challenge, by appropriate pleading, Plaintiff's power to impose the disputed assessment. We review a trial court's legal conclusions *de novo*. *See*, *e.g.*, *Bruning & Federle Mfg. Co. v. Mills*, 185 N.C. App. 153, 156, 647 S.E.2d 672, 674, *cert. denied*, 362 N.C. 86, 655 S.E.2d 837 (2007).

The North Carolina Nonprofit Corporation Act provides in part:

> (a) Except as provided in subsection (b) of this section, the validity of corporate action shall not be challenged on the ground that the corporation lacks or lacked power to act.

(b) A corporation's power to act may be challenged:

(1) In a proceeding by a member or a director against the corporation to enjoin the act[.]

N.C. Gen. Stat. § 55A-3-04(a)-(b)(1) (2007). Defendants argue that N.C.G.S. § 55A-3-04 is inapplicable in the current case. According to Defendants, their argument is not that Plaintiff acted *ultra vires* in derogation of corporate by-laws, resolutions, or other corporate documents. Rather, Defendants merely challenge the validity and enforceability of the restrictive covenants at issue. Plaintiff responds that the crux of Defendants' trial defense was that Plaintiff lacked the power to impose the assessment at issue. Therefore, according to Plaintiff, N.C.G.S. § 55A-3-04 required Defendants to enjoin Plaintiff's action through a compulsory counterclaim, which Defendants did not do.

We agree with Defendants' contentions. Defendants did argue at trial that Plaintiff lacked the power to impose the assessment at issue, but they also argued that the restrictive covenants under which Plaintiff imposed the assessment were invalid and unenforceable. While it is possible that N.C.G.S. § 55A-3-04 foreclosed Defendants' former argument regarding the validity of Plaintiff's corporate actions, it did not prohibit Defendants from challenging the underlying validity of the restrictive covenants as a matter of contract law.

It is true that homeowners in previous cases have challenged assessments by bringing injunctive actions and arguing that such assessments were *ultra vires*. *See*, *e.g.*, *Parker v. Figure "8" Beach Homeowners' Ass'n*, 170 N.C. App. 145, 146, 611 S.E.2d 874, 874 (2005). However, this Court has also previously allowed parties to assert a defensive challenge to the validity of assessment-related restrictive covenants without bringing a separate *ultra vires* action. In *Beech Mountain Property Owner's Assoc. v. Seifart*, 48 N.C. App. 286, 269 S.E.2d 178 (1980), for example, the plaintiff homeowners' association sued to recover unpaid assessments owed by the defendant property owners. *Id.* at 287, 269 S.E.2d at 179. The defendants did not attempt to enjoin the plaintiff from imposing the assessments, but rather filed a motion for summary judgment arguing that the covenants upon which the plaintiff relied in assessing the defendants were unenforceable. *Id.* at 294, 269 S.E.2d at 182. The trial court granted the defendants' motion, and our Court affirmed the trial court's decision. *Id.* at 297, 269 S.E.2d at 184. *See also*, *e.g.*, *Figure Eight Beach Homeowners' Association v. Parker*, 62 N.C. App. 367,

367, 303 S.E.2d 336, 337, *disc. review denied*, 309 N.C. 320, 307 S.E.2d 170 (1983) (where the plaintiff homeowners' association sued for unpaid assessments, the defendant homeowners filed a motion for summary judgment contesting the validity of the assessment covenants); *Snug Harbor Property Owners Assoc. v. Curran*, 55 N.C. App. 199, 200, 284 S.E.2d 752, 753 (1981), *disc. review denied*, 305 N.C. 302, 291 S.E.2d 151 (1982) (where the plaintiff homeowners' association sued for unpaid assessments, the defendant homeowners filed a motion to dismiss under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) on the grounds that the assessment covenants were invalid).

We therefore hold that the trial court erred by concluding, as one basis supporting judgment in Plaintiff's favor, that Defendants had not challenged by appropriate pleading Plaintiff's power to impose the disputed assessment.

B.

[2] Defendants next argue that the trial court erred by concluding as an alternative basis for judgment in Plaintiff's favor that the restrictive covenants contained in the Declaration are "not vague as to the right of [Plaintiff] to assess attorney fees, against its members, which are incurred by [Plaintiff] in defending itself and its members against claims brought against [Plaintiff]."[2] We review the trial court's legal conclusions *de novo*. *Mills*, 185 N.C. App. at 156, 647 S.E.2d at 674.

Our Court has previously stated that covenants imposing affirmative obligations on a grantee must contain "some ascertainable standard . . . by which the court can objectively determine both that the amount of the assessment and the purpose for which it is levied fall within the contemplation of the covenant." *Seifart*, 48 N.C. App. at 295, 269 S.E.2d at 183. For example, "a covenant which purports to bind the grantee of land to pay future assessments in whatever amount to be used for whatever purpose the assessing entity might from time to time deem desirable would fail to provide the court with a sufficient standard." *Id.* Defendants argue that the covenant allowing Plaintiff to levy assessments "to promote the . . . welfare of residents" allows Plaintiff to levy assessments for any amount and for any purpose, and is therefore vague and unenforceable.

---

2. Defendants also assign error to Judge Tucker's 24 April 2007 order denying Defendants' motion for summary judgment as to the validity of the restrictive covenants. Our Court will not review a denial of summary judgment where the trial court has issued a final judgment on the merits. *WRI/Raleigh, L.P. v. Shaikh*, 183 N.C. App. 249, 252, 644 S.E.2d 245, 246-47 (2007).

In support of their argument, Defendants point to a series of cases in which our Court has held that a covenant was too vague to support a maintenance assessment imposed by a homeowners' association. In *Allen v. Sea Gate Ass'n*, 119 N.C. App. 761, 460 S.E.2d 197 (1995), for example, our Court examined a restrictive covenant requiring homeowners to pay a sixty-dollar annual assessment "for the maintenance, upkeep and operations of the various areas and facilities by [the homeowners' association.]" *Id.* at 764, 460 S.E.2d at 199-200. Our Court applied a three-part test to determine the validity of the covenant:

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

Id. at 764, 460 S.E.2d at 199 (quoting *Figure Eight*, 62 N.C. App. at 376, 303 S.E.2d at 341 (citation omitted)). Because the covenant did not name any particular properties to be maintained and did not contain a standard by which our Court could assess how the homeowners' association chose which properties to maintain, our Court held that the assessment covenant was unenforceable. *Id.* at 764-65, 460 S.E.2d at 200. *See also Snug Harbor*, 55 N.C. App. at 203-04, 284 S.E.2d at 755 (holding invalid a covenant providing that assessments would be used for "[m]aintenance and improvement of [the neighborhood] and its appearance, sanitation, easements, recreation areas and parks"); *Seifart*, 48 N.C. App. at 288, 295-97, 269 S.E.2d at 179, 183-84 (holding invalid covenants establishing, *inter alia*, "reasonable annual assessment charges for road maintenance and maintenance of the trails and recreational areas").

Defendants argue that the covenant in the present case fails the three-part test set out in *Allen* because it does not specifically enumerate the various types of expenditures for which Plaintiff may levy assessments to promote the welfare of its members. While we agree that the test used in *Allen*, *Snug Harbor*, and *Seifart* required a clear level of specificity, we note that each of those cases involved covenants allowing assessments for maintenance of physical property. Indeed, the test itself references the "property" and "facilities" to be maintained. If Plaintiff in the present case had levied an assessment for property maintenance pursuant to the "welfare" covenant,

we would apply the *Allen* test to determine the validity of the covenant with respect to that assessment. However, Plaintiff here levied an assessment for a non-maintenance expenditure. By its own terms, the *Allen* test is inapplicable to the facts of the present case. Rather, we evaluate the covenant at issue according to the general standard that covenants imposing affirmative obligations on the grantee must contain "some ascertainable standard . . . by which the court can objectively determine both that the amount of the assessment and the purpose for which it is levied fall within the contemplation of the covenant." *Seifart*, 48 N.C. App. at 295, 269 S.E.2d at 183.

We first determine whether the purpose of the assessment falls within the contemplation of the covenant. The covenant allows Plaintiff to levy assessments "to promote the . . . welfare of residents" in the Willow Bend Subdivision. We acknowledge that a covenant allowing assessments for the "welfare" of neighborhood residents may be vague and unenforceable with respect to many types of assessments. In the current case, however, we determine only whether the covenant contemplates an assessment levied to cover legal costs incurred by Plaintiff in defending itself and its members in a lawsuit or administrative proceeding.

In North Carolina, a nonprofit corporation generally must be represented by a licensed attorney and cannot represent itself in a legal proceeding. *See Lexis-Nexis v. Travishan Corp.*, 155 N.C. App. 205, 207-09, 573 S.E.2d 547, 549 (2002). If a homeowners' association were unable to employ an attorney to defend against outside claims, the association and its members could face significant monetary liability. Defendants admitted at the summary judgment hearing before Judge Tucker that Plaintiff could levy an assessment against its members to pay a court judgment. Such an assessment would clearly serve the "welfare" of the association members. *Cf. Ocean Trail Unit Owners Ass'n v. Mead*, 650 So. 2d 4, 7 (Fla. 1994) (noting that "[i]f assessments cannot be enforced to pay judgments which have been entered against [a condominium] association and which can be executed against the association property, the condominium could be destroyed, to the detriment of all the owners"). If the covenant at issue contemplates assessments for the payment of court judgments, it surely contemplates assessments for the employment of legal counsel to defend against such judgments in the first instance.

Further, we note that an assessment for legal fees pursuant to the "welfare" covenant was clearly foreseeable by the parties at the

time that Defendants purchased their lot in the Willow Bend Subdivision. Under the North Carolina Nonprofit Corporation Act, which was enacted prior to 2003, Plaintiff has the power "to do all things necessary or convenient to carry out its affairs," including the power "[t]o sue and be sued, [and] complain and defend in its corporate name[.]" N.C. Gen. Stat. § 55A-3-02(a)(1) (2007). We must presume that Defendants, at the time they purchased their lot, were aware of Plaintiff's ability to defend itself. *See Wise v. Harrington Grove Cmty. Ass'n*, 357 N.C. 396, 406, 584 S.E.2d 731, 739, *reh'g denied*, 357 N.C. 582, 588 S.E.2d 891 (2003) (noting that "[a] real estate covenant is a contract, and parties are generally presumed to take into account all existing laws when entering into a contract"). We also must presume that Defendants were aware that Plaintiff would be required to employ and pay legal counsel in the event it needed to defend itself. *See Lexis-Nexis*, 155 N.C. App. at 207-09, 573 S.E.2d at 549. Therefore, Defendants could have foreseen that if Plaintiff ever incurred legal fees in its own defense, it would levy a reasonable assessment to pay these fees "to promote the welfare . . . of the residents" of the Willow Bend Subdivision.

We next determine whether there is an ascertainable standard by which our Court can objectively determine that the amount of the assessment fell within the contemplation of the covenant. We find that such a standard does exist. Specifically, we find that when Plaintiff employed an attorney to defend itself, the amount of the assessment contemplated by the covenant at issue was the cost incurred by Plaintiff in securing legal representation. Further, Defendants do not argue that the amount of the assessment was greater than the expense Plaintiff incurred in securing legal representation, nor do Defendants argue that they were assessed more than their *pro rata* share of Plaintiff's legal costs.

Based on the above, we hold that the covenant at issue contains an "ascertainable standard . . . by which [our] [C]ourt can objectively determine both that the amount of the assessment and the purpose for which it is levied fall within the contemplation of the covenant." *Seifart*, 48 N.C. App. at 295, 269 S.E.2d at 183. We further hold that both the purpose and amount of the assessment do in fact fall within the contemplation of the covenant. Therefore, the "welfare" covenant is not vague with respect to the specific assessment at issue, and is enforceable against Defendants.

Defendants contend that this holding would give homeowners' associations "unlimited discretion to rely upon vague covenants to

assess property owners any amount [they] choose[] and for whatever reason [they] desire[]." Defendants' concerns are unfounded. We do not hold that covenants allowing homeowners' associations to levy non-maintenance assessments for the "welfare" of their members are sufficiently definite to support any and all assessments, no matter their purpose or amount. We hold only that in this case, the covenant at issue is not vague as to Plaintiff's ability to levy an assessment for the costs of defending itself and its members against claims brought against Plaintiff. The trial court did not err in reaching the same limited conclusion as an alternative basis for judgment in Plaintiff's favor. Defendants' assignment of error is overruled.

C.

[3] Finally, Defendants argue that the trial court erred in entering judgment for Plaintiff even though Plaintiff was not entitled to recover attorney's fees absent statutory authority permitting such recovery. Defendants note that "[a]s a general rule, in the absence of some contractual obligation or statutory authority, attorney fees may not be recovered by the successful litigant as damages or a part of the court costs." *Washington v. Horton*, 132 N.C. App. 347, 349, 513 S.E.2d 331, 333 (1999). According to Defendants, Plaintiff is seeking to recover attorney's fees it incurred in defending against Defendants' prior discrimination claims, but has cited no contractual obligation or statutory authority permitting such recovery. Therefore, Defendants contend, Plaintiff is unable to recover on its claim.

Defendants' argument is without merit. Plaintiff is not seeking to recover the attorney's fees it previously incurred in defending against Defendants' prior discrimination claims. Rather, Plaintiff is seeking to recover a valid assessment that it levied against Defendants. The fact that this assessment will be used to pay attorney's fees incurred in prior administrative proceedings does not preclude Plaintiff's claim under the rule cited in *Washington*. Defendants' assignment of error is overruled.

II. Plaintiff's Appeal

Plaintiff raises two issues in its appeal. We consider each of Plaintiff's arguments in turn.

A.

[4] Plaintiff first argues that the trial court erred by denying Plaintiff's motion for attorney's fees under N.C. Gen. Stat. § 6-21.5. This statute provides:

> In any civil action . . . the court, upon motion of the prevailing party, may award a reasonable attorney's fee to the prevailing party if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading. . . . A party who advances a claim or defense supported by a good faith argument for an extension, modification, or reversal of law may not be required under this section to pay attorney's fees.

N.C. Gen. Stat. § 6-21.5 (2007). Where attorney's fees are available under N.C.G.S. § 6-21.5, we review the trial court's denial of attorney's fees for abuse of discretion. *Cf. Phillips v. Warren*, 152 N.C. App. 619, 629, 568 S.E.2d 230, 236-37 (2002), *disc. review denied*, 356 N.C. 676, 577 S.E.2d 633 (2003) (setting the standard of review for a trial court's decision to award attorney's fees under N.C. Gen. Stat. § 6-21.1).

Plaintiff argues that attorney's fees were available and appropriate under N.C.G.S. § 6-21.5 because Defendants did not raise any justiciable issue of law or fact in this case. We disagree. As discussed above, Defendants raised an appropriate challenge to the validity of the restrictive covenant at issue. Further, we find that Defendants made a good-faith argument regarding the invalidity of the restrictive covenants, even though Defendants' argument was not meritorious. Because Defendants presented a justiciable issue in this case, Plaintiff was unable to recover attorney's fees pursuant to N.C.G.S. § 6-21.5. The trial court therefore did not abuse its discretion by declining to award Plaintiff attorney's fees under N.C.G.S. § 6-21.5. Plaintiff's assignment of error is overruled.

B.

[5] Plaintiff next argues that the trial court erred by denying Plaintiff's motion for attorney's fees under N.C. Gen. Stat. § 47F-3-116(e). This statute, which is part of the North Carolina Planned Community Act (PCA), is titled "Lien for assessments" and provides in part:

> (a) Any assessment levied against a lot remaining unpaid for a period of 30 days or longer shall constitute a lien on that lot . . . . [T]he [homeowners'] association may foreclose the claim of lien in like manner as a mortgage on real estate under power of sale[.]
>
> . . . .

> (d) This section does not prohibit other actions to recover the sums for which subsection (a) of this section creates a lien[.]
>
> (e) A judgment, decree, or order in any action brought under this section shall include costs and reasonable attorneys' fees for the prevailing party.

N.C. Gen. Stat. § 47F-3-116(e) (2007). We review a trial court's decision whether to award mandatory attorney's fees *de novo*. *Cf. Turner v. Duke University*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989) (stating that a "trial court's decision to impose or not to impose mandatory sanctions under N.C.G.S. § 1A-1, Rule 11(a) is reviewable *de novo* as a legal issue").

We first note that the PCA generally applies only to planned communities created after 1 January 1999. *See* N.C. Gen. Stat. § 47F-1-102(a) (2007). However, certain portions of the PCA are retroactive and apply to pre-1999 planned communities unless a planned community's declaration or articles of incorporation expressly state otherwise. *See* N.C. Gen. Stat. § 47F-1-102(c) (2007). N.C.G.S. § 47F-3-116 is among the provisions made retroactive by N.C.G.S. § 47F-1-102(c), and the Declaration of the Willow Bend Subdivision does not provide otherwise. Therefore, N.C.G.S. § 47F-3-116 applies to the Willow Bend Subdivision.

Plaintiff argues that because it was the prevailing party in an action to recover an assessment, N.C.G.S. § 47F-3-116(e) required the trial court to award Plaintiff reasonable attorney's fees. We disagree. N.C.G.S. § 47F-3-116(e) only mandates an award of attorney's fees where the requesting party prevailed in an action "brought under this section." The type of action created by N.C.G.S. § 47F-3-116 is not one in which a homeowners' association sues on the underlying debt created by a homeowner's failure to pay an assessment. Rather, the action created by N.C.G.S. § 47F-3-116 is one in which a homeowners' association forecloses on a lien created under N.C.G.S. § 47F-3-116(a) for unpaid assessments. Plaintiff here has not sought to foreclose on a lien; rather, Plaintiff has sued on the underlying debt owed by Defendants. While N.C.G.S. § 47F-3-116(d) contemplates that a homeowners' association may bring such an action, it is not the type of action that allows the homeowners' association to collect mandatory attorney's fees under N.C.G.S. § 47F-3-116(e). We therefore hold that the trial court did not err by denying Plaintiff's request for attorney's fees under N.C.G.S. § 47F-3-116(e). Plaintiff's assignment of error is overruled.

In Defendants' appeal we affirm.

In Plaintiff's appeal we affirm.

Judges TYSON and STEPHENS concur.

FAYETTEVILLE PUBLISHING COMPANY, Plaintiff v. ADVANCED INTERNET TECHNOLOGIES, INC., Defendant

No. COA07-1203

(Filed 2 September 2008)

1. Judges— comment—discovery—sanctions—dismissal of counterclaims—written order controlling

There was no abuse of discretion in the dismissal of defendant's counterclaims as a sanction for failure to a comply with a discovery order. The written court order as entered is controlling rather than the trial judge's comments during the hearing, and the short time between the hearing and the order is not per se grounds for setting it aside.

2. Discovery— sanctions—dismissal of counterclaims

The choice of dismissal of defendant's counterclaims as a discovery sanction was proper where there were findings that defendant's response to a discovery order was piecemeal and defiant, and the trial court noted that it had considered less severe sanctions.

3. Civil Procedure— summary judgment—affirmative defenses—forecast of evidence

The trial court did not err by granting summary judgment for plaintiff in an action for the recovery of computer servers where defendant argued that its affirmative defenses remained viable even if the dismissal of its counterclaims was proper. Defendant did not forecast any evidence demonstrating specific facts as to its security interest or any other affirmative defense.

4. Discovery— summary judgment—no pending procedures leading to relevant evidence

There was no merit to the argument that the trial court erred by granting summary judgment when discovery was allegedly

ongoing, even if the issue had been preserved for appeal. The record contains no indication that any discovery procedures which might have led to the production of relevant evidence was still pending when the summary judgment motion was granted.

Appeal by defendant from summary judgment entered 26 March 2007 by Judge Gregory A. Weeks in Cumberland County Superior Court. Heard in the Court of Appeals 19 March 2008.

Helms Mulliss & Wicker, PLLC, by H. Landis Wade, Jr. and A. Jordan Sykes, for plaintiff-appellee.

Amber A. Corbin for defendant-appellant.

STROUD, Judge.

Defendant Advanced Internet Technologies, Inc. appeals from order entered 7 March 2007 dismissing its counterclaims and order entered 26 March 2007 granting summary judgment for plaintiff. We affirm both orders.

I. Background

Plaintiff Fayetteville Publishing Company ("Fayetteville Publishing" or "FPC") filed a verified complaint on 4 January 2006 against Advanced Internet Technologies, Inc. ("AIT"). The complaint sought injunctive relief for the recovery of four computer servers, with a total value of eight-thousand dollars ($8,000.00). Plaintiff alleged that it entered into four co-location agreements with defendant to provide services related to four computer servers owned by plaintiff. The four servers were placed at defendant's facility, and three of the four servers were used to make plaintiff's website available to Internet users. Plaintiff and defendant also had other business relationships in addition to the co-location agreements, including web hosting and online advertising.

Plaintiff further alleged that by letter dated 29 November 2005, defendant claimed that plaintiff was in breach of a contract for online advertising. Over the next several weeks, plaintiff requested information from defendant regarding the alleged breach. During this time, one of plaintiff's servers located at defendant's facility had a problem which needed attention by plaintiff's technical staff, but defendant would not allow plaintiff's employee access to the server. On 16 December 2005, plaintiff notified defendant by letter that defendant's services regarding the four servers and the co-location agreements

were no longer required. Despite plaintiff's demands for return of the servers, defendant failed to return them.

Plaintiff alleged that it had terminated the co-location agreements, paid all sums due under the agreements, and that it was entitled to immediate return of the four servers. Plaintiff's complaint requested an interim order for immediate possession pursuant to N.C. Gen. Stat. § 1-472 *et seq.* as well as temporary and permanent injunctive relief. Plaintiff obtained an order of seizure in claim and delivery on 23 January 2006 and posted a bond pursuant to N.C. Gen. Stat. § 1-475 in the amount of sixteen thousand dollars ($16,000.00). However, the servers were not seized as defendant also posted a bond on 23 January 2007 in the amount of sixteen thousand dollars ($16,000.00) pursuant to N.C. Gen. Stat. § 1-478.

On 27 January 2006, plaintiff filed a Verified Motion for Temporary Restraining Order and Injunctive Relief pursuant to N.C. Gen. Stat. § 1A-1, Rule 65. The motion described in detail plaintiff's concerns that defendant had copied or intended to copy information from plaintiff's servers for use, possibly in a class action lawsuit defendant was pursuing as lead plaintiff against Google. The motion alleged that defendant had been "totally uncooperative" with plaintiff in its efforts to prevent any use by defendant of the servers in violation of N.C. Gen. Stat. § 14-458(5). The motion sought a temporary restraining order and injunction to prevent defendant from copying, imaging, or taking any other action regarding the information on the servers. It also sought an injunction requiring defendant to turn over to plaintiff any such information which it might have already copied and to turn the servers over to a third party designated by the court to secure them until further order of the court.

On 30 January 2006, the court entered a temporary restraining order and preliminary injunction with the consent of both parties. The order required that defendant "not copy, image or otherwise take any physical or other action of any kind with respect to the computer servers, except the action specifically required to comply with the terms of th[e] Temporary Restraining Order." The order further required defendant to turn the servers and any information which defendant had copied or imaged from the servers over to David McCarn, the designated third party, within 2 days from entry of the order.

On or about 7 April 2006, defendant filed its unverified Answer and Counterclaims, also raising several affirmative defenses.

Defendant pled the affirmative defenses of want of consideration, unclean hands, and a security interest in the servers. Defendant made counterclaims for breach of contract, unjust enrichment, unfair or deceptive trade practices, and fraud. Defendant prayed for compensatory and punitive damages pursuant to the counterclaims, and for "declaratory judgment with respect to the special property and security interest and determining the rights of the parties[.]" On 20 July 2006, plaintiff filed a reply, denying the material allegations in the counterclaims.

On 17 July 2006, plaintiff served defendant with its first Request for Production of Documents including, *inter alia*, "all documents evidencing the amounts paid by Defendant for advertising of the type that is the subject of the Answer and Counterclaims." After thirty days, defendant had neither produced the requested documents nor obtained an extension of time to respond. On 5 September 2006, plaintiff's counsel sent a letter to defendant's counsel with a copy of a motion to compel discovery, advising that he would not file the motion to compel if defendant would confirm that the documents would be produced the next week. The documents still were not produced. On 28 September 2006, plaintiff filed a Motion to Compel Discovery. The motion alleged "[o]n 13 September 2006, rather than producing the requested documents, [d]efendant's counsel served . . . responses and objections[.]" The motion further alleged that "[d]efendant produced a paltry number of documents in response to just a few requests" and made "numerous objections, often on multiple grounds, to practically every request." The motion to compel averred that defendant's objections were waived since they were not made within 30 days of the request for production as required by N.C. Gen. Stat. § 1A-1, Rule 34, and that even if the objections had not been waived, they were not meritorious.

On 7 November 2006, the trial court entered its order on plaintiff's motion to compel discovery. The trial court ordered defendant to copy and produce to plaintiff within ten days "all documents responsive to Requests 1 through 27 of Plaintiff's First Request for Production of Documents" and directed how defendant should address any documents which it deemed to be proprietary or documents withheld upon a claim of attorney-client or work product privilege. The trial court withheld ruling upon plaintiff's request for attorney's fees pursuant to Rule 37 until after defendant's response to the Request for Production of Documents.

On 1 December 2006, plaintiff filed a Motion for Appropriate Relief, (hereinafter referred to as the "Rule 37 motion") seeking relief under N.C. Gen. Stat. § 1A-1, Rules 37 and 11. Plaintiff alleged that defendant made an untimely response, which was also "misleading, evasive, incomplete, and non-responsive[,]" to the discovery order of 7 November 2006. Plaintiff requested that the trial court strike defendant's recent interrogatories to plaintiff and strike defendant's counterclaims against plaintiff.

On 7 December 2006, defendant filed a response to plaintiff's Rule 37 motion, claiming that defendant had responded to the discovery request with "hundreds of pages of documents and a computer disc containing 65,000 pages of material," and that although there may have been "minor deficiencies" in the materials provided and timing of production, defendant had made a "determined good faith effort to provide [p]laintiff with an enormous amount of discovery in a usable form within a short time period at the expenditure of significant resources and time."

On 20 and 21 February 2007, Steve Young ("Young") and Sean Murray ("Murray") testified for defendant at a deposition noticed by plaintiff. Young brought some responsive documents on 20 February and some on 21 February, but did not provide the requested documents in their entirety.

On 26 February 2007, Judge Gary Locklear heard plaintiff's Rule 37 motion. On 7 March 2007, the trial court entered its order dismissing defendant's counterclaims as a sanction for failure to comply with the order compelling discovery responses. The 7 March 2007 order stated that the trial court "reviewed the pleadings, the Motion, the materials and exhibits presented by the parties, the applicable authorities presented by the parties and . . . fully heard and considered the arguments of counsel for both parties[.]" The order also contains twenty-one detailed findings of fact regarding the discovery issues. None of these findings were assigned as error by defendant.

On 14 March 2007, plaintiff filed a motion for summary judgment on the "one claim asserted in the Complaint, finding that Plaintiff is the rightful owner of the subject property" and for sanctions pursuant to Rule 11, including costs and attorney's fees. On 26 March 2007, the trial court heard and granted plaintiff's motion for summary judgment. On 18 June 2007, the trial court entered a further order awarding fees and expenses necessitated by Plaintiff's Motion to Compel Discovery pursuant to Rule 37 in the amount of four-

thousand three hundred twenty dollars ($4,320.00). Defendant appeals from the trial court's orders of 7 March 2007, which dismissed defendant's counterclaims, and of 26 March 2007, which granted summary judgment for plaintiff.

II. Order Dismissing Defendant's Counterclaims

Defendant argues that the trial court made an arbitrary decision to impose sanctions, thereby abusing its discretion, because it: (1) failed to consider all the evidence and case law before it, and (2) imposed sanctions based upon "the trial court's personal opinion of one of the officers of defendant corporation that was not formed upon evidence presented to the court[.]" Defendant further argues that even if the decision to impose sanctions was proper, the trial court's choice of dismissal of the counterclaims as a sanction was excessive and not merited by the facts of the case.

A. Standard of Review

"If a party . . . fails to obey an order to provide or permit discovery . . . a judge of the court in which the action is pending may make such orders in regard to the failure as are just, [including] . . . [a]n order . . . dismissing the action . . . ." N.C. Gen. Stat. § 1A-1, Rule 37(b)(2). "Sanctions under Rule 37 are within the sound discretion of the trial court . . . ." *Hursey v. Homes by Design, Inc.*, 121 N.C. App. 175, 177, 464 S.E.2d 504, 505 (1995). "Before dismissing the action, however, the [trial] court must first consider less severe sanctions." *Baker v. Charlotte Motor Speedway, Inc.*, 180 N.C. App. 296, 299, 636 S.E.2d 829, 831 (2006), *disc. review denied*, 361 N.C. 425, 648 S.E.2d 204 (2007).

This Court reviews the trial court's action in granting sanctions pursuant to Rule 37, including dismissal of claims, for abuse of discretion. *Baker*, 180 N.C. App. at 299, 636 S.E.2d at 831. "A trial court may be reversed for 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 [or was] manifestly unsupported by reason." *Id.* (citations and quotation marks omitted); *see also In re Pedestrian Walkway Failure*, 173 N.C. App. 237, 246, 618 S.E.2d 819, 826 (2005) ("An abuse of discretion may arise if there is no record evidence which indicates that defendant acted improperly, or if the law will not support the conclusion that a discovery violation has occurred."), *disc. review denied*, 360 N.C. 290, 628 S.E.2d 382 (2006).

B. Analysis

[1] Defendant specifically contends that at the end of the hearing on 26 February 2007, the trial court "admitted that it did not read the entire case file, that it did not read all the law that was handed up by the parties, and that it did not read the affidavits in support of the [d]efendant." Defendant further contends, citing portions of the transcript, that the trial court rendered its decision after only "a cursory review of a portion of the case file and some of the case law before it, over whatever portion of an hour remained after the court had lunch." Finally defendant quotes these comments from the trial judge as he rendered judgment in open court:

> I get the impression that [Mr. Briggs] insists on, not only doing his business his way, but his way is the only satisfactory way for him, I think, to resolve these Court issues. . . . He's strong willed. But he's—he's imposed his rules, I think, with respect to these discovery issues. And he's adamant about doing it his way. And I think that is now inured to his detriment[.]"

The trial judge's comments during the hearing as to its consideration of the entire case file, evidence and law are not controlling; the written court order as entered is controlling. *Draughon v. Harnett Cty. Bd. of Educ.*, 158 N.C. App. 208, 215, 580 S.E.2d 732, 737 (2003), *aff'd per curiam*, 358 N.C. 131, 591 S.E.2d 521 (2004). "A judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court. The announcement of judgment in open court is the mere rendering of judgment, not the entry of judgment." *Draughon*, 158 N.C. App. at 214, 580 S.E.2d at 737. The order entered on 7 March 2007 states specifically that the trial court "reviewed the pleadings, the Motion, the materials and exhibits presented by the parties, the applicable authorities presented by the parties and . . . fully heard and considered the arguments of counsel for both parties" before making its ruling. Furthermore, the short time which passed between hearing the motion and rendering the order in open court is not *per se* grounds for setting it aside. *See State v. Whitman*, 179 N.C. App. 657, 672, 635 S.E.2d 906, 915-16 (2006) ("[S]hortness of time in deliberating a verdict . . . , in and of itself, simply does not constitute grounds for setting aside a verdict." (Citation and quotation marks omitted.)). Again, the written order is controlling. *Draughon*, 158 N.C. App. at 215, 580 S.E.2d at 737. The motion was heard on 26 February 2007, then the order was executed 28 February 2007 and entered 7 March 2007. Between 26 February and 7 March 2007, the

trial court had ample time to review the evidence and law, as stated in the written order.

Additionally, the order contains twenty-one detailed findings of fact regarding the discovery issues, and none of these findings of fact were assigned as error by defendant. These findings are therefore "presumed to be supported by competent evidence and [are] binding on appeal." *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). In fact, defendant does not even argue that the trial court's findings of fact are not supported by the evidence, but only that there was other evidence which was favorable to defendant. Re-weighing evidence presented to the trial court is not appropriate for this Court under an abuse of discretion standard of review. *Hursey*, 121 N.C. App. at 177, 464 S.E.2d at 505.

In regard to the trial judge's comments regarding Mr. Briggs, CEO of defendant, the court's order made no reference to and no findings regarding Mr. Briggs. Even if we were to assume that the trial judge's comments regarding Mr. Briggs were not supported by the evidence, as defendant claims, the comments are irrelevant. According to the written order, the trial judge's comments regarding Mr. Briggs were not a part of the basis for the trial court's ruling. The order did find extensive facts, which are binding on appeal, completely unrelated to Mr. Briggs, to support its conclusions of law. In short, defendant has shown no prejudice arising from these comments, therefore this argument is without merit. *See State v. Wright*, 172 N.C. App. 464, 469, 616 S.E.2d 366, 369 ("A trial judge "must abstain from conduct or language which tends to discredit or prejudice any litigant in his or her courtroom . . . [but] the burden of showing prejudice [is] upon the appellant." (Citations and quotation marks omitted.)), *aff'd per curiam*, 360 N.C. 80, 621 S.E.2d 874 (2005).

[2] Defendant also argues that even if the decision to impose discovery sanctions was appropriate, the choice of dismissal as a sanction was not proper because there was no "clear, willful violation of the discovery rules[.]" We disagree.

The trial court found as fact:

> 19. . . . Documents clearly responsive to Plaintiff's requests that were required to be produced pursuant to the Discovery Order were not initially produced and then were produced piecemeal by Defendant. This piecemeal production was contrary to the Discovery Order, and was done by Defendant on its own authority, without any approval by the Court.

> 20. Defendant also undertook a defiant posture with respect to its obligations under the Discovery Order, as reflected in the January 27 letter drafted by Defendant, not Defendant's outside attorneys. Defendant elected to respond to the discovery on its own terms, even though its own terms were inconsistent with the requirements of the Discovery Order.

These findings were supported by the evidence and were not challenged by defendant on appeal.

Even when violation of a discovery order is clear from the record, a trial court is required to consider less severe sanctions before dismissing the action. *Baker*, 180 N.C. App. at 299, 636 S.E.2d at 831. The trial court noted in the order that it had

> considered imposing less severe sanctions than the dismissal of the counterclaims of Defendant; however, after considering all possible sanctions pursuant to Rule 37 of the North Carolina Rules of Civil Procedure, the Court concludes that the appropriate remedy in light of the misconduct of Defendant as described [in the findings of fact], is dismissal of the counterclaims in this action. This decision, in the opinion of the Court, when considering all the facts and circumstances, is consistent with and necessitated by the interests of justice in this case and for the administration of justice as a whole.

On this record, we discern no abuse of discretion in the dismissal of defendant's counterclaims as a sanction for failure to comply with a discovery order. This assignment of error is overruled.

III. Summary Judgment

[3] Defendant next argues that the trial court erred in granting summary judgment to plaintiff because there are "unsolved questions of fact regarding the ownership of the servers, the main issue in plaintiff's claims" and that "defendant's denials, negative averments, and affirmative defenses remain[] of record, raising both factual and legal issues."

A. Standard of Review

Summary judgment is proper where "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). "With regard to an affirma-

tive defense, summary judgment is appropriate if the movant establishes that the non-movant cannot prevail on at least one of the elements of his affirmative defense." *Bunn Lake Prop. Owner's Ass'n, Inc. v. Setzer*, 149 N.C. App. 289, 294-95 (2002); *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972) ("An issue is material if [*inter alia*] the facts alleged would constitute a legal defense[.]").

"The party moving for summary judgment bears the burden of bringing forth a forecast of evidence which tends to establish that there is no triable issue of material fact." *Inland Constr. Co. v. Cameron Park II, Ltd., LLC*, 181 N.C. App. 573, 576, 640 S.E.2d 415, 418 (2007) (citation and quotation marks omitted).

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

N.C. Gen. Stat. § 1A-1, Rule 56(e). In other words, "[o]nce 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." *Draughon*, 158 N.C. App. at 212, 580 S.E.2d at 735 (citations and quotation marks omitted). "Further, this Court has held that a defendant's unverified pleadings are insufficient to defeat a motion for summary judgment since they do not comply with the requirements of Rule 56(e)." *Weatherford v. Glassman*, 129 N.C. App. 618, 623, 500 S.E.2d 466, 470 (1998).

"On appeal, an order allowing summary judgment is reviewed *de novo*." *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004). *De novo* review

> of the grant of a motion for summary judgment requires a two-part analysis of whether, (1) the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact; and (2) the moving party is entitled to judgment as a matter of law.

Von Viczay v. Thoms, 140 N.C. App. 737, 738, 538 S.E.2d 629, 630 (2000) (citation and quotation marks omitted), *aff'd per curiam*, 353 N.C. 445, 545 S.E.2d 210 (2001).

B. Affirmative Defenses

Defendant argues that even if dismissal of its counterclaims was proper, the affirmative defenses contained in its answer are still viable in opposition to plaintiff's claim for possession of the servers. Defendant argues that the order dismissing its counterclaims left "three Defenses . . . and two Affirmative Defenses not associated with Counterclaims undeniably of record" and that the "truth and weight of the exhibits attached to the Answer" are also still at issue. Therefore, defendant argues, a genuine issue of material fact remains so that summary judgment was improperly granted in favor of plaintiff. Plaintiff argues that because it established ownership of the servers and defendant failed to establish the elements of any affirmative defenses, the trial court properly granted summary judgment in its favor. We agree with plaintiff.

In order to prevail in its action for return of the servers, plaintiff needed to show that it was entitled to immediate possession of the property. *Young v. Stewart*, 191 N.C. 297, 301, 131 S.E. 735, 737 (1926); *Black's Law Dictionary* 481 (8th ed. 2004) ("A claim in detinue lies at the suit of a person who has an immediate right to the possession of the goods against a person who is in actual possession of them, and who, upon proper demand, fails or refuses to deliver them up without lawful excuse."). In support of its summary judgment motion, plaintiff relied upon its verified complaint as well as affidavits from employees of plaintiff which clearly set forth the facts establishing plaintiff's ownership of the servers, plaintiff's satisfaction of its obligations to defendant under the co-location agreements, defendant's possession of the servers, and defendant's wrongful detention of the servers. On these facts, we conclude that plaintiff met its burden to forecast evidence demonstrating its entitlement to summary judgment. *Draughon*, 158 N.C. App. at 212, 580 S.E.2d at 735.

Plaintiff having met its burden, the burden shifted to defendant "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." *Draughon*, 158 N.C. App. at 212, 580 S.E.2d at 735 (citations and quotation marks omitted). Defendant did not contest

plaintiff's ownership of the servers. Defendant argues that "three Defenses . . . and two Affirmative Defenses," in its answer create a genuine issue of material fact, but defendant appears to rely solely on one affirmative defense—a security interest in the servers arising from plaintiff's alleged breach of contract. However, defendant did not forecast any evidence demonstrating specific facts as to its security interest or any other affirmative defense. Defendant did not state before the trial court or in its brief what material facts related to the security interest were in dispute. The record contains a copy of the Co-location Agreement between the parties which would have created a security interest in the servers if plaintiff "fail[ed] to pay . . . or otherwise breach[ed the co-location] Agreement," but defendant did not submit any affidavits or other evidence of plaintiff's failure to pay or another breach of the agreement. In fact, defendant submitted no evidence at all in opposition to the summary judgment motion, but rested on its unverified answer to oppose the motion. This is unavailing. *Glassman*, 129 N.C. App. at 623, 500 S.E.2d at 470. ("[A] defendant's unverified pleadings are insufficient to defeat a motion for summary judgment since they do not comply with the requirements of Rule 56(e).").

We conclude therefore, that plaintiff's evidence tended to establish that there was no genuine issue of material fact as to its ownership and right to immediate possession. Defendant failed to forecast evidence opposing plaintiff's evidence of ownership and right to possession or in support of a security interest in plaintiff's servers. Therefore, this argument is without merit.

C. Ongoing Discovery

[4] Defendant also argues that the trial court erred in granting summary judgment "when discovery was still ongoing, before plaintiff had been required to respond to defendant's request for production of documents and denying defendant the same opportunity for discovery as plaintiff[.]" Plaintiff argues that there was no discovery pending at the time summary judgment was granted.

Defendant did not make this argument before the trial court, which ordinarily results in waiver of the argument on appeal. *See State v. Hope*, 189 N.C. App. 309, 318, 657 S.E.2d 909, 914 (2008) ("Where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount on appeal." (Citations, internal brackets and quotation marks omitted.)). Furthermore, we conclude that

even if this issue had been properly preserved for appeal, defendant's argument is without merit.

This Court has held that summary judgment is premature "when discovery procedures, which might lead to the production of evidence relevant to the motion, are still pending and the party seeking discovery has not been dilatory in doing so." *American Travel Corp. v. Central Carolina Bank*, 57 N.C. App. 437, 441, 291 S.E.2d 892, 895, *disc. review denied*, 306 N.C. 555, 294 S.E.2d 369 (1982) (citation and quotation marks omitted). However, the record *sub judice* contains no indication that any discovery procedures which might have led to the production of relevant evidence were still pending when the summary judgment motion was granted. Defendant argued that discovery was pending because plaintiff failed to respond to Defendant's Request for Document Production, but the 7 March 2007 order specifically decrees that "Plaintiff is not required to respond to any discovery by or from defendant relating to the counterclaims, including but not limited to the pending Defendant's *Request to Plaintiff Fayetteville Publishing Company for Document Production*." (Emphasis added.) Defendant quibbles with the wording of the trial court's order, arguing that plaintiff was still required to respond to any requests for documents which did not have to do with the counterclaims. However, we read the trial court's order as negating defendant's entire Request for Document Production. It therefore appears from the record that there was no discovery request from defendant to plaintiff outstanding at the time of entry of summary judgment. Defendant's argument is without merit.

IV. Conclusion

The trial court's order dismissing defendant's counterclaims for failure to comply with discovery was supported by reason and was therefore not an abuse of discretion. Defendant failed to demonstrate a genuine issue of material fact for trial under Rule 56, so the trial court did not err in granting summary judgment for plaintiff on its claim for possession of the servers. Accordingly, the 7 March 2007 and the 19 April 2007 orders of the trial court are affirmed.

Affirmed.

Judges HUNTER and ELMORE concur.

REGINALD DUDLEY JACKSON, PLAINTIFF v. CHANCE MITCHELL CARLAND, INDIVIDUALLY, AND CARLAND FORD TRACTOR, INC., DEFENDANTS

No. COA07-1122

(Filed 2 September 2008)

1. Evidence— relevancy—testimony—conduct at time of accident—agency

The trial court did not abuse its discretion in a negligence case arising out of an automobile accident by permitting witnesses to testify regarding defendant individual's conduct in fleeing the scene after the accident because: (1) although the record indicated defendants stipulated to negligence and permissive use, defendants' stipulation was equivocal as to whether defendant individual was acting as an agent of defendant company at the time of the accident; (2) the fact that an individual operated a vehicle with the owner's knowledge, consent, or authorization is not determinative as to the owner's liability, and plaintiff still bore the burden of proving defendant individual was the agent of defendant company; (3) the testimony regarding defendant individual fleeing the scene was relevant to show his motivation for leaving the scene as it related to the possibility that he was acting as an agent for the company; (4) even assuming arguendo that the admission of this testimony was error, defendants failed to meet their burden of showing how the trial result would have been different had the trial court not admitted this evidence; (5) even though defendants contend the testimony was inadmissible under N.C.G.S. § 8C-1, Rule 608, that rule governs reference to specific instances of conduct only on cross-examination regarding the credibility of any witness and prohibits proof by extrinsic evidence; and (6) N.C.G.S. § 8C-1, Rule 404(b) provides that evidence regarding extrinsic acts is not limited to cross-examination and may be proved by extrinsic evidence as well as through cross-examination.

2. Evidence— automobile accident—diminished earning capacity

The trial court did not abuse its discretion in a negligence case arising out of an automobile accident by permitting plaintiff's employer to testify concerning plaintiff's diminished earning capacity given his limitations and the amount he would receive from other employers in the area given these limitations because:

(1) in personal injury actions, great latitude is allowed in the introduction of evidence to aid in determining the extent of the damages; (2) as a general rule, any evidence which tends to establish the nature, character and extent of injuries which are the natural and proximate consequences of the tortfeasor's acts is admissible in such actions, if otherwise competent; (3) our courts have acknowledged that some degree of speculation is inherent in the determination of compensation for lost earning capacity claims; (4) objections to evidence of lost earning capacity on the ground that such evidence is speculative go to the weight of the evidence rather than its admissibility; (5) defendant failed to show the trial court's decision lacked a basis in reason; and (6) although the employer's estimate of plaintiff's earning capacity involved some speculation, his testimony related directly to the question of damages which was a fact at issue in the case.

3. Negligence— automobile accident—instruction—lost income—earning capacity

The trial court did not err in a negligence case arising out of an automobile accident by instructing the jury that it could award damages for plaintiff's future lost income and earning capacity where the evidence allegedly failed to support the instruction because: (1) the testimony from plaintiff's employer concerning plaintiff's job limitations and the amount he would receive from other employers in the area given these limitations went to the question of damages; (2) evidence of a plaintiff's earning capacity is often speculative, and the ultimate question of damages is one for the jury; and (3) the trial court was presented with sufficient evidence to support a jury instruction regarding plaintiff's future lost income and earning capacity.

4. Automobiles— improper instruction—family purpose doctrine—new trial

The trial court erred in a negligence case arising out of an automobile accident by incorrectly instructing the jury regarding the family purpose doctrine, and defendant is entitled to a new trial because: (1) plaintiff sought to recover damages from defendant based on the doctrine of respondeat superior; (2) although our Supreme Court has noted that the family purpose doctrine is, in essence, a means of establishing liability under a theory of respondeat superior, our courts have not expanded this doctrine to encompass company-owned vehicles; (3) even in

jurisdictions that have extended the family purpose doctrine to cover company-owned vehicles, the courts commonly focus on whether the vehicle in question was provided for the general use of the family; (4) the trial court provided an altered version of the family purpose doctrine which extended the doctrine to cover company-owned vehicles and removed the requirement that the vehicle be provided for family use, thus failing to align with either traditional notions of liability under the doctrine of respondeat superior or the exceptional liability provided under the family purpose doctrine; and (5) the instruction constituted a misstatement of the law and likely misled the jury in its determination of defendant's liability.

5. Trials— motion for new trial—erroneous instruction—substantial miscarriage of justice

The trial court erred in a negligence case arising out of an automobile accident by denying defendant employer's motion for a new trial on the ground that improper evidence was admitted at trial and that the trial court provided erroneous instructions to the jury because: (1) although defendants' contentions concerning the testimony of the witnesses was found to be without merit, the trial court did err in its instruction to the jury regarding the family purpose doctrine which likely misled the jury; and (2) the failure to grant a new trial constituted a substantial miscarriage of justice.

Appeal by defendants from judgment entered 27 April 2007 by Judge James U. Downs in Henderson County Superior Court. Heard in the Court of Appeals 20 February 2008.

Pulley, Watson, King & Lischer, P.A., by Richard N. Watson, for plaintiff appellee.

Van Winkle, Buck, Wall, Starnes & Davis, P.A., by Michelle Rippon, for Carland Ford Tractor defendant appellant.

Young, Morphis, Bach & Taylor, L.L.P., by Paul E. Culpepper, for Chance Mitchell Carland defendant appellant.

McCULLOUGH, Judge.

Defendants appeal from a jury verdict awarding plaintiff $275,000 in damages. We remand for a new trial.

FACTS

On 26 August 2003, Reginald Jackson ("plaintiff") and Chance Carland ("Chance"), an employee of Carland Ford Tractor, Inc. ("Carland Ford Tractor"), were involved in an automobile collision. In addition to being an employee of Carland Ford Tractor, Chance was also the son of the company's owner, Tony Carland. Chance was driving a company truck at the time he struck plaintiff's vehicle.

After colliding with the rear of plaintiff's truck, Chance left the scene of the accident and drove to an abandoned restaurant nearby. He was followed by Harry Roberts, who observed the accident and reported it to the State Highway Patrol. Shortly after receiving this report, Trooper Chris Goodson arrived at the restaurant to determine if the truck parked near the restaurant was the vehicle that had been involved in the earlier collision. When he arrived, Trooper Goodson found Chance circling the truck, trying to determine the extent of the damage. Trooper Goodson testified that had he not received the tip from Mr. Roberts regarding the vehicle's location, he would not have been able to locate it.

On 28 November 2005, plaintiff filed a complaint against Chance Carland and Carland Ford Tractor, Inc. ("defendants"), alleging that Chance's negligence was the proximate cause of the 26 August 2003 accident, and that Carland Ford Tractor was liable for Chance's negligence under the doctrine of *respondeat superior*. Thus, plaintiff sought to recover damages for, *inter alia*, his medical expenses, loss of earnings, decreased earning capacity, mental and/or emotional distress, disability, and pain and suffering.

On 12 April 2007, plaintiff's action was heard before a jury in Henderson County Superior Court. As an initial matter, defendants stipulated (1) that Chance Carland had negligently caused the accident, and (2) that Chance Carland had permission to use the truck owned by Carland Ford Tractor. Following defendants' stipulations, plaintiff put forward evidence to support his remaining claims. According to plaintiff, the collision with Chance's truck caused his head to strike the top of his pickup cab and his body to then hit the back of his seat. Dr. Jonathan Sherman testified that as a result of these injuries, plaintiff began to experience neck pain and was diagnosed with cervical extension syndrome, which he referred to as a "whiplash injury." Although he received several medications, this pain persisted. Plaintiff was later diagnosed with a herniated disc, which, according to testimony provided by Dr. Sherman,

was directly correlated to the injuries he sustained from the 26 August 2003 accident.

Plaintiff also presented testimony from several other witnesses. Among these witnesses were Trooper Goodson and Mr. Roberts, who testified about Chance Carland's actions following the accident. Additional testimony, provided by plaintiff's employer, Bradley Snider, indicated that plaintiff's ability to perform his job had been limited since the accident occurred.

On 27 April 2007, the jury found Chance Carland had operated the truck owned by Carland Ford Tractor with the express or implied permission of the owner and determined that plaintiff was entitled to $275,000 in damages as a result of the 26 August 2003 accident. Defendants now appeal.

I.

[1] Defendants first argue the trial court erred in permitting witnesses to testify regarding defendant Chance Carland's conduct at the time of the accident. According to defendants, this evidence lacked relevancy, was highly prejudicial, and was inadmissible under Rule 608 of the North Carolina Rules of Evidence. We disagree.

"Evidence is relevant if it has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.' " *Dunn v. Custer*, 162 N.C. App. 259, 266, 591 S.E.2d 11, 17 (2004) (citation omitted); N.C. Gen. Stat. § 8C-1, Rule 401 (2007). On appeal, the trial court's rulings on relevancy are given great deference. *Dunn*, 162 N.C. App. at 266, 591 S.E.2d at 17. "Moreover, even if the testimony admitted were irrelevant, a new trial would not be granted unless the objecting party was prejudiced thereby." *Ferrell v. Frye*, 108 N.C. App. 521, 526, 424 S.E.2d 197, 200, *disc. review denied*, 333 N.C. 537, 429 S.E.2d 557 (1993). For the judgment to be set aside, the defendant must show "that a different result would have ensued in the absence of the evidence." *Id.*

"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). "The exclusion of evidence under Rule 403 is a matter generally left to the sound discretion of the trial court." *State v. Alston*, 341 N.C. 198, 237, 461

S.E.2d 687, 708 (1995), *cert. denied*, 516 U.S. 1148, 134 L. Ed. 2d 100 (1996). The trial court's decision in this matter "will only be reversed upon a showing that the trial court's ruling was manifestly unsupported by reason or was so arbitrary that it could not have been the result of a reasoned decision." *State v. Womble*, 343 N.C. 667, 690, 473 S.E.2d 291, 304 (1996), *cert. denied*, 519 U.S. 1095, 136 L. Ed. 2d 719, *reh'g denied*, 520 U.S. 1111, 137 L. Ed. 2d 322 (1997).

Here, defendants argue that the testimony provided by Trooper Goodson and Mr. Roberts, regarding Chance Carland's behavior after the accident, was irrelevant, unfairly prejudicial, and inadmissible under Rule 608 of the North Carolina Rules of Evidence. Defendants contend that because they stipulated (1) that Chance Carland was negligent and (2) that Chance Carland had permission to use the truck, the only issue before the court was the proper amount of damages. As evidence of Chance Carland's behavior at the time of the accident bears no relevance as to plaintiff's damages, defendants argue, this testimony was admitted in error and caused defendants to be prejudiced.

On review, we are unpersuaded by defendants' contentions. Although the record indicates defendants stipulated to negligence and permissive use, defendants' stipulation was equivocal as to whether Chance Carland was acting as an agent of Carland Ford Tractor at the time of the accident. As our Supreme Court has previously noted, the fact that an individual operated a vehicle with the owner's knowledge, consent, or authorization is not determinative as to the owner's liability. *See Passmore v. Smith*, 266 N.C. 717, 719, 147 S.E.2d 238, 241 (1966). Under the doctrine of *respondeat superior*, the owner is liable for the other individual's negligence "only upon allegation and proof" that the individual was an agent of the owner and "that this relationship existed at the time and in respect of the very transaction out of which the injury arose." *Id.* (citation omitted). Thus, in the instant case, plaintiff still bore the burden of proving Chance Carland was the agent of Carland Ford Tractor. If Chance were acting as an agent of Carland Ford Tractor, it is possible that he desired to conceal this agency by running away from the scene. Therefore, the testimony of Trooper Goodson and Mr. Roberts regarding Chance's actions in fleeing the scene was relevant to show Chance's motivation for leaving the scene as it related to the possibility that he was acting as an agent for Carland Ford Tractor. Even assuming *arguendo* that the admission of this testimony was error, defendants have failed to meet their burden of showing how the trial

result would have differed had the trial court not admitted this evidence. Therefore, we hold the aforementioned testimony was relevant and the trial court did not abuse its discretion by allowing this testimony to be admitted at trial.

Defendants further argue that this testimony, which concerned prior acts of misconduct by Chance Carland, was inadmissible under Rule 608 of the North Carolina Rules of Evidence. Rule 608 of our Rules of Evidence provides:

> *Specific instances of conduct.*—Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

N.C. Gen. Stat. § 8C-1, Rule 608(b) (2007). According to defendant, the introduction of testimony concerning Chance Carland's actions was meant to disparage his credibility. Because Chance did not testify, defendants argue, the issue of his credibility was not before the trial court and such testimony was inadmissible.

On review, we find defendants' contention to be without merit. "Rule 608(b) governs reference to specific instances of conduct only on cross-examination regarding the credibility of any witness and prohibits proof by extrinsic evidence." *State v. Morgan*, 315 N.C. 626, 636-37, 340 S.E.2d 84, 91 (1986). However, under Rule 404(b), "evidence regarding extrinsic acts is not limited to cross-examination and *may* be proved by extrinsic evidence as well as through cross-examination." *Id.* at 637, 340 S.E.2d at 91; *see Commentary*, N.C. Gen. Stat. § 8C-1, Rule 608. Rule 404(b) "allows the use of extrinsic conduct evidence so long as the evidence 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." *Morgan*, 315 N.C. at 637, 340 S.E.2d at 91. As we have previously discussed, the aforementioned testimony was relevant to show Chance's motivation in leaving the scene of the accident. Therefore, we find defendants' assignments of error to be without merit.

II.

[2] Defendants next argue the trial court erred in permitting plaintiff's employer, Bradley Snider, to testify concerning plaintiff's diminished earning capacity. We disagree.

"In personal injury actions great latitude is allowed in the introduction of evidence to aid in determining the extent of the damages[.]" *Smith v. Corsat*, 260 N.C. 92, 96, 131 S.E.2d 894, 897 (1963). As a general rule, "any evidence which tends to establish the nature, character and extent of injuries which are the natural and proximate consequences of the tortfeasor's acts is admissible in such actions, if otherwise competent." *Id.* The trial court's determination regarding the admissibility of evidence " 'will not be disturbed on appeal absent a clear showing the court abused its discretion by admitting, or excluding, the contested evidence. A trial court abuses its discretion when its decision lacks any basis in reason.' " *City of Charlotte v. Ertel*, 170 N.C. App. 346, 348, 612 S.E.2d 438, 441 (2005) (citations omitted).

Here, plaintiff proffered testimony from Mr. Snider, a contractor and developer in Buncombe, Henderson, and Rutherford Counties, regarding plaintiff's employment as a working superintendent. According to Mr. Snider, after being involved in the accident with Chance Carland, plaintiff was no longer able to fulfill all the duties associated with his position. Therefore, Mr. Snider had assigned plaintiff to "light duty" work. Despite plaintiff's limited ability to perform his job, Mr. Snider did not lower his pay because of his "loyalty" to plaintiff. However, Mr. Snider further testified that due to his limitations, plaintiff would probably receive twenty to thirty percent less than his current wages if he left employment with Mr. Snider and sought work elsewhere in the area. According to defendants, this testimony concerning plaintiff's limitations should not have been allowed because (1) plaintiff laid an insufficient foundation for such testimony, (2) the testimony was speculative, and (3) the testimony was highly prejudicial.

As our Supreme Court has noted, in personal injury actions

> *the jury should estimate the damages on the injured party's ability to earn money rather than what he actually received*, and the amount which plaintiff is capable of earning, and not that which he has actually earned since the injury, is to be taken for

> the purpose of comparison with his previous earnings as showing the diminution of earning capacity.

Owens v. Kelly, 240 N.C. 770, 773, 84 S.E.2d 163, 166 (1954) (emphasis added). Further, our courts have acknowledged that "some degree of speculation is inherent in the determination of compensation for lost earning capacity claims." *Curry v. Baker*, 130 N.C. App. 182, 193, 502 S.E.2d 667, 676, *disc. review denied*, 349 N.C. 355, 517 S.E.2d 890 (1998). Therefore, objections to evidence of lost earning capacity on the grounds that such evidence is speculative go to the weight of the evidence rather than its admissibility. *Curry*, 130 N.C. App. at 194, 502 S.E.2d at 676 (analogizing personal injury claims to wrongful death claims, where our Supreme Court has held:

> The present monetary value of the decedent to the persons entitled to receive the damages recovered will usually defy any precise mathematical computation. Therefore, the assessment of damages must, to a large extent, be left to the good sense and fair judgment of the jury—subject, of course, to the discretionary power of the judge to set its verdict aside when, in his opinion, equity and justice so require. The fact that the full extent of the damages must be a matter of some speculation is no ground for refusing all damages.

Brown v. Moore, 286 N.C. 664, 673, 213 S.E.2d 342, 348-49 (1975) (citations omitted)).

On review, we hold defendant has failed to show the trial court's decision lacked a basis in reason. Our Rules of Evidence provide:

> If [a] witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

N.C. Gen. Stat. § 8C-1, Rule 701 (2007). In the case at bar, Mr. Snider, a local contractor, testified that he had worked with plaintiff, both before and after his injury. Thus, Mr. Snider was familiar with the duties associated with plaintiff's position, as well as plaintiff's current limitations with respect to the fulfillment of these duties. Based on this knowledge, Mr. Snider delivered opinions as to plaintiff's ability to perform his job and his earning capacity. Although Mr. Snider's estimate of plaintiff's earning capacity involved some speculation, his testimony related directly to the question of damages, a fact at issue

in the case. Therefore, we hold the trial court did not abuse its discretion in allowing Mr. Snider's testimony.

III.

[3] Defendants also argue the trial court erred in instructing the jury that it could award damages for plaintiff's future lost income and earning capacity where the evidence failed to support the instruction. We disagree.

"In reviewing the trial court's decision to give or not give a jury instruction, the preliminary inquiry is whether, in the light most favorable to the proponent, the evidence presented is sufficient to support a reasonable inference of the elements of the claim asserted." *Blum v. Worley*, 121 N.C. App. 166, 168, 465 S.E.2d 16, 18 (1995). Should the trial court choose to charge the jury with regard to the claim, the court will consider the charge "contextually and in its entirety." *Bass v. Johnson*, 149 N.C. App. 152, 160, 560 S.E.2d 841, 847 (2002). "The charge will be held to be sufficient if 'it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed[.]' " *Hughes v. Webster*, 175 N.C. App. 726, 730, 625 S.E.2d 177, 180-81 (quoting *Jones v. Development Co.*, 16 N.C. App. 80, 86-87, 191 S.E.2d 435, 440, *cert. denied*, 282 N.C. 304, 192 S.E.2d 194 (1972)), *disc. review denied*, 360 N.C. 533, 633 S.E.2d 816 (2006).

Here, the trial court was presented with testimony from plaintiff's employer, Mr. Snider, concerning plaintiff's job limitations and the amount he would receive from other employers in the area given these limitations. As we have previously discussed, this testimony went to the question of damages, and the trial court did not abuse its discretion by admitting this evidence. In addition, we have noted that evidence of a plaintiff's earning capacity is often speculative, and that the ultimate question of damages is one for the jury. *See Owens*, 240 N.C. at 773, 84 S.E.2d 166. After reviewing the record, we hold that the trial court was presented with sufficient evidence to support a jury instruction regarding plaintiff's future lost income and earning capacity. We further hold that this instruction presents no reasonable cause to believe the jury would be misinformed as to the applicable law. Therefore, defendants' assignment of error is overruled.

IV.

[4] Defendants additionally argue the trial court erred in instructing the jury. Specifically, defendant argues the trial court provided

an incorrect instruction regarding the family-purpose doctrine. We agree.

A jury instruction will be held to be sufficient if " 'it presents the law of the case in such [a] manner as to leave no reasonable cause to believe the jury was misled or misinformed[.]' " *Bass v. Johnson*, 149 N.C. App. 152, 160, 560 S.E.2d 841, 847 (2002) (citation omitted). Where a party has assigned error to a jury instruction, that party

> bears the burden of showing that the jury was misled or that the verdict was affected by [the] instruction. "Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury."

Id. (citations omitted). On review, the charge to the jury will be viewed as a whole. *State v. Glynn*, 178 N.C. App. 689, 693, 632 S.E.2d 551, 554, *appeal dismissed, disc. review denied*, 360 N.C. 651, 637 S.E.2d 180 (2006). If an isolated portion of the charge is erroneous, but the charge as a whole is correct, the incorrect portion will not be held prejudicial. *Id.*

"At best the family purpose doctrine is an anomaly in the law." *Smith v. Simpson*, 260 N.C. 601, 612, 133 S.E.2d 474, 483 (1963). "Under [this] doctrine, the owner or person with ultimate control over a vehicle is held liable for the negligent operation of that vehicle by a member of his household." *Byrne v. Bordeaux*, 85 N.C. App. 262, 264, 354 S.E.2d 277, 279 (1987). "[It] is essentially a means for establishing liability of responsible parties on a theory of *respondeat superior* whereby the responsible party is the principal and the party actively negligent is agent." *Carver v. Carver*, 310 N.C. 669, 680, 314 S.E.2d 739, 746 (1984). For a plaintiff to recover under this doctrine, he must show:

> "(1) [T]he operator was a member of the family or household of the owner or person with control and was living in such person's home; (2) that the vehicle was owned, provided and maintained for the general use, pleasure and convenience of the family; and (3) that the vehicle was being so used with the express or implied consent of the owner or person in control at the time of the accident."

Loy v. Martin, 156 N.C. App. 622, 627, 577 S.E.2d 407, 410, *disc. review denied*, 357 N.C. 251, 582 S.E.2d 274 (2003).

In the case *sub judice*, the trial court noted that the circumstances of the case were "first cousin" to those that would give rise to an instruction regarding the family-purpose doctrine. However, the trial court noted that it was not a family-purpose case and provided an altered version of the doctrine over the objection of defense counsel. In his charge to the jury, the trial court informed the jury that in order to find for plaintiff, he must prove by a greater weight of the evidence that: (1) Chance Carland was operating the truck owned by Carland Ford Tractor with the company's permission at the time of the accident; (2) Carland Ford Tractor provided the vehicle for the use, convenience, or pleasure of Chance Carland while he was employed by the company; and (3) at the time of the accident, Chance Carland was driving the vehicle with the knowledge, approval, and consent of the company. The trial court further informed the jury that it was "not necessary that [Chance Carland's] use had been for some purpose directly benefitting the defendant—the defendant company."

On review, we find the trial court's instruction regarding the family-purpose doctrine was misleading and represented an incorrect statement of the law. As we have previously noted, plaintiff sought to recover damages from defendant based on the doctrine of *respondeat superior*. Under this doctrine, for plaintiff to recover he must show, *inter alia*, that Chance Carland was an agent of Carland Ford Tractor and that he was acting within the scope of his agency at the time of the accident. *See Passmore*, 266 N.C. at 719, 147 S.E.2d at 241. Although our Supreme Court has noted that the family-purpose doctrine is, in essence, a means of establishing liability under a theory of *respondeat superior*, our courts have not expanded this doctrine to encompass company-owned vehicles. *See Carver*, 310 N.C. 680, 314 S.E.2d 746. Further, even in jurisdictions that have extended the family-purpose doctrine to cover company-owned vehicles, the courts commonly focus on whether the vehicle in question was provided for the general use of the family. *See Temple v. Chastain*, 109 S.E.2d 897, 899 (Ga. Ct. App. 1959); *Durso v. A. D. Cozzolino, Inc.*, 20 A.2d 392, 394 (Conn. 1941); *Hexter v. Burgess*, 184 S.E. 769, 773 (Ga. Ct. App. 1936). Here, the trial court provided an altered version of the family-purpose doctrine which (1) extended the doctrine to cover company—owned vehicles, and (2) removed the requirement that the vehicle be provided for family use. Thus, the trial court's instruction did not align with either our traditional notions of liability under the doctrine of *respondeat superior* or the exceptional liability provided

under the family-purpose doctrine. *See Passmore*, 266 N.C. at 719, 147 S.E.2d at 241; *Loy*, 156 N.C. App. at 626-27, 577 S.E.2d at 410. Therefore, we hold the trial court's instruction constituted a misstatement of the law and likely misled the jury in its determination of defendants' liability. As such, we award defendants a new trial.

V.

[5] Defendants lastly argue the trial court erred in denying Carland Tractor's motion for a new trial. We agree.

"Generally, a motion for new trial is addressed to the sound discretion of the trial court, and its ruling will not be disturbed absent a manifest abuse of that discretion." *Kinsey v. Spann*, 139 N.C. App. 370, 372, 533 S.E.2d 487, 490 (2000). "However, where the motion involves a question of law or legal inference, our standard of review is *de novo*." *Id.*

Here, defendants made a motion to the trial court for a new trial on the grounds that improper evidence was admitted at trial and that the trial court provided erroneous instructions to the jury. On appeal, defendant's argue the trial court erred in denying this motion. In support of this argument, defendants reassert their previous arguments with respect to (1) the testimony of Trooper Goodson and Mr. Roberts; (2) the testimony of Mr. Snider, plaintiff's employer; and (3) the trial court's instruction regarding the family-purpose doctrine. Although we have found defendants' contentions concerning the testimony of the witnesses to be without merit, we hold the trial court erred in its instruction of the jury. As we have previously discussed, the trial court provided an incorrect instruction regarding the family-purpose doctrine which likely misled the jury. Thus, this instruction was erroneous and the court's failure to grant a new trial constituted a substantial miscarriage of justice. We, therefore, remand for a new trial. *See Edwards v. Hardy*, 126 N.C. App. 69, 73, 483 S.E.2d 724, 727 (1997).

New trial.

Judges ELMORE and ARROWOOD concur.

IN RE N.C.H., G.D.H., D.G.H.

[192 N.C. App. 445 (2008)]

IN THE MATTERS OF: N.C.H., G.D.H., D.G.H.

No. COA08-413

(Filed 2 September 2008)

Termination of Parental Rights— subject matter jurisdiction— failure to issue summonses in names of juveniles—caption of summons

The trial court had subject matter jurisdiction in a termination of parental rights case even though no summonses were issued in the juveniles' names as required by N.C.G.S. § 7B-1106(a)(5) because: (1) service on the guardian ad litem constitutes service on the juvenile, which is sufficient to establish subject matter jurisdiction when combined with naming the juvenile in the caption of the summons; and (2) in the instant case, the captions of the summonses naming the parents as respondents state the names of the juveniles, and the guardian ad litem for the juveniles certified that she accepted service of the petition on the juveniles' behalf.

Judge STROUD dissenting.

Appeal by respondent-mother from orders entered 18 January 2008 by Judge Mary F. Covington in Davidson County District Court. Heard in the Court of Appeals 5 August 2008.

Staff Attorney Charles E. Frye, III for petitioner-appellee Davidson County Department of Social Services; Laura B. Beck for appellee Guardian ad Litem.

Don Willey for respondent-appellant.

HUNTER, Judge.

Respondent-mother ("respondent") appeals the orders terminating her parental rights to the minor children, G.D.H., D.G.H., and N.C.H. G.D.H. was born in 1999, D.G.H. in 2000, and N.C.H. in 2001. On 22 June 2006, the Davidson County Department of Social Services ("DSS") filed a petition alleging the children were abused and neglected. The children were placed in the nonsecure custody of DSS and have remained in DSS custody. On 27 February 2007, the children were adjudicated abused and neglected. Respondent appealed the orders and this Court affirmed the trial court's decision in an opinion

filed 2 October 2007. *See In the Matter of G.D.H., D.G.H., N.C.H.*, 186 N.C. App. 304, 650 S.E.2d 675 (2007) (unpublished).

On 31 January 2007, DSS filed petitions to terminate respondent's parental rights. The respective birth and legal fathers relinquished their rights and executed consents for adoption as to the children. On 18 January 2008, the trial court entered orders terminating respondent's parental rights, from which respondent now appeals.

Respondent argues that the trial court lacked subject matter jurisdiction because no summonses were issued in the juveniles' names as required by N.C. Gen. Stat. § 7B-1106(a)(5) (2007). We find this Court's recent decision in *In re J.A.P. & I.M.P.*, 189 N.C. App. 683, 659 S.E.2d 14 (2008), controlling on this issue. In that case, the summonses issued named the juveniles in the case caption, but did not name the juveniles as respondents. A guardian ad litem had been appointed for the juveniles. The guardian ad litem was not served with a copy of the summonses; however, the attorney advocate for the guardian ad litem was served. We held that where a juvenile's guardian ad litem is represented by an attorney advocate, service of the summons on the attorney advocate constitutes service on the guardian ad litem. Further, service on the guardian ad litem constitutes service on the juvenile, which is sufficient to establish subject matter jurisdiction when combined with naming the juvenile in the caption of the summons. *Id.* at 686, 659 S.E.2d at 17.

In the case of *In re S.D.J.*, 192 N.C. App. ——, ——, ——, S.E.2d ——, —— (2008), filed simultaneously herewith, we found that the trial court had subject matter jurisdiction even though a summons was not issued to the juvenile. *Id.* We reasoned that "the captions of the summonses naming the parents as respondents state the name of the juvenile, and the guardians ad litem for the juvenile certified that they accepted service of the petition on the juvenile's behalf[.]" *Id.* at ——, —— S.E.2d at ——. In *S.D.J.* we adhered to the precedent set in *J.A.P.*

Here, the record before us shows summonses captioned as follows: "In the Matter of: [N.C.H.]"; "In the Matter of: [G.D.H.]"; and "In the Matter of: [D.G.H.]." The record also contains certifications from the guardian ad litem appointed for the juveniles that she was served with a copy of the summonses. We find that there are no significant distinctions between the facts of this case and those in *J.A.P.* or *S.D.J.* Therefore, in accordance with our holdings in those cases, we conclude that the trial court had subject matter jurisdiction over these proceedings. The orders are affirmed.

Affirmed.

Judge McGEE concurs.

Judge STROUD dissents in a separate opinion.

STROUD, Judge dissenting.

Because I do not believe the trial court had subject matter jurisdiction to enter the orders terminating parental rights as to the three juveniles, I respectfully dissent.

I. Background

The majority opinion correctly states the procedural history of this case. However, the failure of this Court in some of its prior opinions to identify clearly and to state in the opinion the factual details regarding the summonses which were actually issued has caused some of the confusion in the cases. Therefore, I would like to note that in this case, termination of parental rights ("TPR") summonses were issued on 1 February 2007.[1] Each juvenile's name appeared in the caption of a summons, but no summons appearing in the record was issued to a juvenile as respondent. On 3 February 2007, the guardian *ad litem* for the juveniles signed an acceptance of service, which was filed with the trial court on 6 February 2007, for each of the three TPR summonses (one naming each juvenile in the caption) and the TPR petitions.

II. Legal Analysis

Respondent argues that the trial court lacked subject matter jurisdiction because no summonses were issued in the juveniles' names as required by N.C. Gen. Stat. § 7B-1106(a)(5). I agree.

A. Concepts and Rules

"Subject matter jurisdiction refers to the power of the court to deal with the kind of action in question [and] is conferred upon the courts by either the North Carolina Constitution or by statute."

1. In this case, as well as in each of the cases cited in subsection B and several others not cited herein, the summons was issued using the obsolete AOC form J-208 (New 7/99), which has the option to identify a respondent by checking a box for "Juvenile, if 12 or older" based upon superseded N.C. Gen. Stat. § 1106(a)(5) (2001). I would stress that those filing the TPR petitions must stay informed as to statutory changes and that they should use the most current AOC form J-208 for summons in TPR cases where the issuance and service of a summons is mandated by statute.

Harris v. Pembaur, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987) (citations omitted). More specifically, "[j]urisdiction 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." *In re C.T. & R.S.*, 182 N.C. App. 472, 473, 643 S.E.2d 23, 24 (2007) (citations and quotation marks omitted). "Jurisdiction rests upon the law and the law alone. It is never dependent upon the conduct of the parties." *In re T.R.P.*, 360 N.C. 588, 595, 636 S.E.2d 787, 793 (2006) (citation and quotation marks omitted). Therefore, "[s]ubject matter jurisdiction cannot be conferred upon a court by consent, waiver or estoppel, and failure to demur or object to the jurisdiction is immaterial." *C.T.*, 182 N.C. App. at 473, 643 S.E.2d at 24 (citations and quotation marks omitted).

The district court is vested with exclusive original jurisdiction over proceedings for the termination of parental rights ("TPR"). N.C. Gen. Stat. § 7B-200(a)(4) and § 7B-1101 (2007). For the district court to acquire subject matter jurisdiction over a particular TPR proceeding, strict compliance with the statutory provisions enacted by the General Assembly is necessary. *In re S.F.*, 190 N.C. App. 779, 782, 660 S.E.2d 924, 928 (2008); *see also T.R.P.*, 360 N.C. at 590, 636 S.E.2d at 790 (vacating custody review order when statutory verification requirements were not strictly complied with).

The district court's subject matter jurisdiction as to a particular action to terminate parental rights is invoked by the filing of a motion, N.C. Gen. Stat. § 7B-1102(a) (2007) or a petition,[2] N.C. Gen. Stat. § 7B-1105 (2007), in accordance with the statutory mandates of Article 11 of Chapter 7B of the North Carolina General Statutes, which "provide judicial procedures for terminating the legal relationship between a juvenile and the juvenile's biological or legal parents[,]" N.C. Gen. Stat. § 7B-1100(1) (2007). N.C. Gen. Stat. § 7B-1106(a) sets forth the requirement that a summons be issued to certain parties, including the juvenile, as respondents.[3] Upon the filing of a termination petition, N.C. Gen. Stat. § 7B-1106(a) mandates that "the court *shall* cause a summons to be *issued*. The summons *shall be directed to* the following persons or agency, not otherwise a party petitioner, who *shall be named as respondents*

2. Filing of a motion has relaxed notice and jurisdictional requirements compared to a petition. N.C. Gen. Stat. § 7B-1102; *In re I.D.G.*, 188 N.C. App. 629, 630, 655 S.E.2d 858, 859 (2008). A petition was filed in the instant case.

3. N.C. Gen. Stat. § 7B-1105 makes some exceptions to this requirement, not relevant *sub judice*, if a parent of the juvenile is unknown.

[including, *inter alia*,] [t]he juvenile." N.C. Gen. Stat. § 7B-1106(a)(5) (2007) (emphasis added); *see also In re Poole*, 151 N.C. App. 472, 475, 568 S.E.2d 200, 202 (2002) (Timmons-Goodson, J., dissenting) ("The issuance and service of process is the means by which the court obtains jurisdiction [in an abuse, neglect, or dependency proceeding] thus where no summons is issued, the court acquires jurisdiction over neither the parties nor the subject matter of the action." (Citations and emphasis in original omitted.)), *rvs'd*, 357 N.C. 151, 579 S.E.2d 248 (2003) (reversing per curiam for the reasons stated in the dissenting opinion).

In general, the summons in a civil action is the means of obtaining *personal* jurisdiction over the defendant. N.C. Gen. Stat. § 1A-1, Rule 4(j); *Draughon v. Harnett Cty. Bd. of Educ.*, 166 N.C. App. 449, 451, 602 S.E.2d 717, 718 (2004) ("In order for a court to obtain personal jurisdiction over a defendant, a summons must be issued and service of process secured by one of the statutorily specified methods."); *Childress v. Forsyth County Hosp. Auth.*, 70 N.C. App. 281, 285, 319 S.E.2d 329, 332 (1984) ("The summons constitutes the means of obtaining jurisdiction over the defendant."), *disc. review denied*, 312 N.C. 796, 325 S.E.2d 484 (1985). *But see Conner Bros. Mach. Co. v. Rogers*, 177 N.C. App. 560, 562, 629 S.E.2d 344, 345 (2006) (holding that subject matter jurisdiction did not exist in a civil action when no summons was issued within five days of filing the complaint, because the action was deemed never to have commenced per N.C. Gen. Stat. § 1A-1, Rule 4(a)); *Dozier v. Crandall*, 105 N.C. App. 74, 78, 411 S.E.2d 635, 638 ("[T]he action is discontinued as to *any defendant* not served within the time allowed and treated as if it had never been filed" per N.C. Gen. Stat. § 1A-1, Rule 4(e). (Emphasis in original omitted, emphasis added.)), *disc. review improvidently allowed*, 332 N.C. 480, 420 S.E.2d 826 (1992). However, the issuance of the summons confers *subject matter jurisdiction* in a proceeding for termination of parental rights, perhaps because the juvenile is both a person and the subject matter of the litigation. *See In re Mitchell*, 126 N.C. App. 432, 433, 485 S.E.2d 623, 624 (1997) ("In a juvenile action, the petition is the pleading; the summons is the process. The issuance and service of process is the means by which the court obtains jurisdiction. Where no summons is issued the court acquires jurisdiction over neither the persons nor the subject matter of the action." (Citations omitted.)); *see also In re I.D.G.*, 188 N.C. App. 629, 630, 655 S.E.2d 858, 859 (2008) ("[A]s no summons was issued to the juvenile in this case, we conclude that the trial court lacked subject matter jurisdiction. . . .").

B. Recent Case Law

Several recent panels of this Court have struggled with the question of subject matter jurisdiction where a summons is not "issued" to the juvenile as a respondent in an action for termination of parental rights. *See*, *e.g.*, *In re C.T. & R.S.*, 182 N.C. App. 472, 643 S.E.2d 23 (2007); *In re K.A.D.*, 187 N.C. App. 502, 653 S.E.2d 427 (2007); *In re I.D.G.*, 188 N.C. App. 629, 655 S.E.2d 858 (2008); *In re A.F.H-G.*, 189 N.C. App. 160, 657 S.E.2d 738 (2008); *In re J.A.P. & I.M.P*, 189 N.C. App. 683, 659 S.E.2d 14 (2008); *In re S.F.*, 190 N.C. App. 779, 660 S.E.2d 924 (2008). The desire to uphold the permanency of court rulings which profoundly affect children whose lives have been plagued with uncertainty makes a ruling which appears to be based on a "technicality" (such as the location of a child's name on a summons form) seem unfair and unjust. *See T.R.P.*, 360 N.C. at 599, 636 S.E.2d at 795 (Newby, J., dissenting) ("The majority's preference for form over substance in juvenile proceedings threatens to introduce additional instability into the lives of at-risk children."). A ruling based on a "technicality" seems especially unjust to the juvenile in cases where it is clear that all of the proper parties had actual notice of the termination action and where the facts of the case fully support the need for termination of parental rights. This Court's recent opinions appear to struggle with this tension, and are somewhat confusing and difficult to reconcile. *See*, *e.g.*, *In re K.A.D.*, 187 N.C. App. 502, 653 S.E.2d 427 (2007); *In re J.A.P. & I.M.P.*, 189 N.C. App. 683, 659 S.E.2d 14 (2008).

A recounting of several recent cases is in order. On 3 April 2007, this Court filed *In re C.T.*, 182 N.C. App. 472, 643 S.E.2d 23. In *C.T.*, Forsyth County DSS filed a petition to terminate parental rights as to two juveniles, R.S. and C.T. *Id.* at 473, 643 S.E.2d at 24. The summons issued by the trial court contained the name of C.T., but not R.S., in the caption. *Id.* However, the summons was not *issued to* either R.S. or C.T. as respondent.[4] *Id.* This Court *vacated the termination order with respect to R.S.* for lack of subject matter jurisdiction, but reviewed the merits and *affirmed the termination order as to C.T. Id.* at 475-76, 643 S.E.2d at 25. Unfortunately, *C.T.* failed to differentiate between the *issuance* of a summons and *reference* to the juve-

4. The content of the underlying summons in *C.T.* is not precisely clear in the opinion of this Court, but is clear from a review of the records of this Court in case No. COA06-923. Although I prefer not to inquire into the records of previous opinions, it was necessary in this situation in an attempt to find a way to reconcile apparently conflicting holdings. *See In re A.F.H-G.*, 189 N.C. App. 160, 161, 657 S.E.2d 738, 740-41 n.1 (2008) (Stephens, J., concurring with reservations in a separate opinion).

nile's name in the summons' case caption. *See id.* at 473-75, 643 S.E.2d at 24-25. *C.T.* noted in the introduction that the summons "referenced only C.T." and there was "no summons with respect to R.S." *Id.* at 473, 643 S.E.2d at 24. However, the stated reason for the holding of *C.T.'s* which vacated the TPR order as to R.S. is that "[i]n the instant case, the record fails to show that a summons was ever *issued* to R.S." *Id.* at 475, 643 S.E.2d at 25. (emphasis added). While that statement is true, the record also failed to show that a summons was ever issued to C.T., yet this Court reviewed the merits of the order terminating parental rights as to C.T. and affirmed it without discussion of the trial court's jurisdiction over the action. *Id.* at 479-80, 643 S.E.2d at 28.

On 3 December 2007, this Court decided *In re K.A.D.*, 187 N.C. App. 502, 653 S.E.2d 427 (2007). *K.A.D.* extended the holding of *C.T.* as to the juvenile R.S., while impliedly contradicting *C.T.* as to the juvenile C.T. *K.A.D.* at 503-04, 653 S.E.2d at 428-29; *see also In re A.F.H-G.*, 189 N.C. App. 160, 161, 657 S.E.2d 738, 740-41 (2008) (Stephens, J., concurring with reservations in a separate opinion and discussing the differences of *K.A.D.* and *C.T.*) *K.A.D.* vacated the order terminating parental rights when the summons issued by the trial court contained the child's name in the caption, but was *not issued to the child as respondent.*[5] *K.A.D.*, 187 N.C. App. at 502, 653 S.E.2d at 427. ("Failure to issue a summons deprives the trial court of subject matter jurisdiction. . . . Because no summons was issued to the juvenile as required by N.C. Gen. Stat. § 7B-1106(a) (2005), we must vacate the order terminating Respondent-father's parental rights." (Citation footnote and quotation marks omitted.))

On 5 February 2008, *K.A.D.* was followed by *In re I.D.G.*, 188 N.C. App. 629, 630, 655 S.E.2d 858, 859 (2008), a case with similar facts to *K.A.D. I.G.D.* held that "as no summons was *issued* to the juvenile in this case, we conclude that the trial court lacked subject matter jurisdiction, and vacate the order terminating respondent-father's parental rights[,]" 188 N.C. App. at 630, 655 S.E.2d at 859 (emphasis added), but went on to state that "DSS's failure to *serve* a summons on the juvenile compels our ruling in this case[.]" *Id.* (emphasis added). *I.G.D.* further

> note[d] that had DSS filed a *motion* to terminate in the ongoing juvenile abuse, neglect, and dependency case as provided by N.C.

5. The content of the underlying summons in *K.A.D.* is not precisely clear in the opinion of this Court, but is clear from a review of the records of this Court in case No. COA07-662. *See* footnote 2.

> Gen. Stat. § 7B-1102, the issuance of a summons would not have been required. In such pending cases, a party seeking termination is only required to serve notice of the motion to terminate on the parties which are specified in N.C. Gen. Stat. § 7B-1106.1. Section 1106.1(a)(6) requires service of the notice on the juvenile only where the juvenile is age twelve or older.

Id. at 631, 655 S.E.2d at 859 (emphasis in original).

On 15 April 2008, this Court decided *In re J.A.P. & I.M.P*, 189 N.C. App. 683, 659 S.E.2d 14 (2008). In that case, summonses were issued with the names of *J.A.P.* and *I.M.P.* in the case caption, but the summonses did not name the juveniles as respondents. *Id.* at 683, 659 S.E.2d at 17. A guardian *ad litem* had been appointed for the juveniles. *Id.* The guardian *ad litem* was not served with a copy of the summonses; however, the attorney advocate for the guardian *ad litem* was served. *Id.* This Court held that where a juvenile's guardian *ad litem* is represented by an attorney advocate, service of the summons on the attorney advocate constitutes service on the guardian *ad litem*. *Id.* Further, *J.A.P.* held that service on the guardian *ad litem* constituted service on the juvenile, which in turn cured the failure of the trial court to issue a summons, vesting the court with subject matter jurisdiction when service on the guardian *ad litem* was combined with naming the juvenile in the caption of the summons. *Id.*

J.A.P. did not address the trial court's failure to *issue* a summons to the juvenile, holding

> the record on appeal includes copies of summonses captioned: "In the Matter of: [J.A.P.]" and "In the Matter of: [I.M.P.]" The record also contains certifications by the Attorney Advocate for the Guardian *ad Litem* that she accepted service of process regarding both minors. . . . Thus, unlike in *C.T.* where no summons was issued regarding R.S., summonses were issued referencing both J.A.P. and I.M.P. Furthermore, unlike in *K.A.D.* where no summons was issued to the minor child, here, as in *J.B.*, summonses were accepted on behalf of the minor children by the attorney advocate for the children's guardian *ad litem*. . . . Accordingly, we conclude that the trial court had subject matter jurisdiction over these proceedings.

189 N.C. App. at 686, 659 S.E.2d at 17 (internal footnote and citations omitted). *J.A.P.* and *K.A.D.* cannot be reconciled, at least not without the potential of creating even more confusion for the trial

courts and practitioners in this area of the law.[6] *K.A.D.* held that *failure to issue* the summons to the juvenile as respondent is a defect which deprives the trial court of jurisdiction. 187 N.C. App. at 502, 653 S.E.2d at 428-29. *J.A.P.* held that service upon the guardian *ad litem* of a summons which was *issued* to a parent but "referenced" the juvenile's name in the caption was sufficient to cure the jurisdictional defect arising from the failure to issue a summons to the juvenile. 189 N.C. App. at 686, 659 S.E.2d at 17.

C. Application *Sub Judice*

The record *sub judice* shows three summonses issued on 1 February 2007 captioned as follows: "In the Matter of: [N.C.H.];" "In the Matter of: [G.D.H.];" and "In the Matter of: [D.G.H.]." None of those summonses were issued to the captioned juvenile as a respondent. The record also contains certifications from the guardian *ad litem* appointed for the juveniles that she was timely served with a copy of the summonses and the TPR petitions on 3 February 2007.

If the majority is correct in following *J.A.P.*, these facts would be sufficient to vest the trial court with subject matter jurisdiction to enter a TPR order as to all three juveniles. 189 N.C. App. at 686, 659 S.E.2d at 17. However, subject matter "[j]urisdiction rests upon the law and the law alone. It is *never* dependent upon the conduct of the parties." *T.R.P.*, 360 N.C. at 595, 636 S.E.2d at 793 (citation and

---

6. *J.A.P.* and *K.A.D.* could possibly be reconciled by construing the petition for termination in *J.A.P.* as a motion in the cause which would allow for issuance of notice rather than summonses. *See* N.C. Gen. Stat. § 7B-1102 (2007). The district court would have had jurisdiction over the termination proceeding in *J.A.P.* as a result of prior petitions alleging neglect of the subject juveniles. However, I would decline to reconcile the cases in this way because: (1) strictly interpreting the statutory requirements for subject matter jurisdiction, the title of the document requesting termination of parental rights is controlling, *In re S.F.*, 190 N.C. App. at 782-83, 660 S.E.2d at 927-28 (vacating an order terminating parental rights and admonishing DSS that it could have avoided the necessity of a summons to the juvenile if it had filed a *motion* rather than a petition, even though the case number of the petition was the same as the prior proceeding adjudicating the children as abused and neglected); (2) more than two years elapsed between the filing of the petition for an adjudication of neglect and the petition for termination of parental rights, N.C. Gen. Stat. § 7B-1102(b)(1)(c); and (3) the relaxed jurisdictional requirements of N.C. Gen. Stat. § 7B-1102 were not mentioned at all in *J.A.P.* as a basis for finding subject matter jurisdiction. 189 N.C. App. at 686, 659 S.E.2d at 17. In addition, if the title of the document which begins the termination of parental rights process, either as a motion or a petition, is not controlling, but the trial court must examine the substantive content of the document and the procedural history of DSS's involvement with the juvenile to determine whether it is *really* a petition or a motion, it would introduce even more uncertainty in this already conflicted area of the law.

quotation marks omitted) (emphasis added). Accordingly, I conclude that this case is controlled by *K.A.D.*, 187 N.C. App. at 503-04, 653 S.E.2d at 428-29, which is based upon *T.R.P.*, which strictly interpreted the statutes governing jurisdiction in a termination of parental rights case. The law requires that a summons be *issued to the juvenile*, no matter the age of the juvenile.[7] Because N.C. Gen. Stat. § 7B-1106(a)(5) requires the summons which has *already been issued* to the juvenile to be served on the guardian *ad litem*, *id.*, *service* on the guardian *ad litem* is unavailing to cure the jurisdictional defect which arises from failure to *issue* a summons. *See C.T.*, 182 N.C. App. at 475, 643 S.E.2d at 25 ("[A] case . . . where a statutorily required summons was not *issued* regarding a proceeding concerning a juvenile [is] a situation different from that presented by technical defects in *service* of a summons." (Emphasis in original omitted, emphasis added.)); *Mitchell*, 126 N.C. App. at 433, 485 S.E.2d at 624 ("Where no summons is issued [in a juvenile action] the court acquires jurisdiction over neither the persons nor the subject matter of the action."). Accordingly, I conclude that N.C. Gen. Stat. § 7B-1106(a) mandates that the order terminating parental rights with respect to N.C.H., G.D.H. and D.G.H. be vacated for want of subject matter jurisdiction. I am aware that this result would have the potential to "introduce additional instability into the lives of at-risk children." *T.R.P.*, 360 N.C. at 599, 636 S.E.2d at 795 (Newby, J., dissenting). However, "[w]hen confronted with such a cause, the urge is strong to write into the statute exceptions that do not appear therein. In such case, we must bear in mind *Lord Campbell's* caution: Hard

---

7. Prior to 1 January 2002, the statute required that a summons be issued and served upon the juvenile only if the juvenile was age 12 or older. N.C. Gen. Stat. § 7B-1106(a)(5) (2001). However, the General Assembly amended subsubsection (5) with application to all actions filed on or after 1 January 2002 as follows:

> (5) The ~~juvenile, if the juvenile is 12 years of age or older at the time the petition is filed.~~juvenile. . . . Except that the summons and other pleadings or papers directed to the juvenile shall be served upon the juvenile's guardian ad litem if one has been appointed, service ~~Service of~~ of the summons shall be completed as provided under the procedures established by ~~G.S. 1A-1, Rule 4(j); but~~ G.S. 1A-1, Rule 4(j). But the parent of the juvenile shall not be deemed to be under a disability even though the parent is a minor.

2001 N.C. Sess. Law 208.

Although I cannot speculate as to the General Assembly's rationale for requiring issuance of a summons to children under age 12, most of whom could not possibly have any comprehension of the meaning or significance of this piece of paper, the 2001 amendment clearly eliminated any limitation based upon the age of the juvenile, and this Court is bound by the statute as it is written.

cases must not make bad laws." *Shearin v. Lloyd*, 246 N.C. 363, 371, 98 S.E.2d 508, 514 (1957) (citation and quotation marks omitted). I respectfully dissent.

DAVID LEE JACKSON, PLAINTIFF v. DEBORAH SAULS JACKSON, (NOW DEBORAH LOUISE SAULS), DEFENDANT

No. COA07-1182

(Filed 2 September 2008)

1. Child Support, Custody, and Visitation— contempt order—custody modified—appeal

Plaintiff had the right to appeal those portions of a contempt order that he argued impermissibly modified child custody or exceeded the court's authority, but an appeal from the criminal contempt finding would have been dismissed.

2. Child Support, Custody, and Visitation— custody—modification—no pending motion—subsequent amendment of pleadings insufficient—no best interest finding

The trial court abused its discretion by modifying child custody absent a pending motion to modify custody. Although the parties subsequently filed motions to amend the pleadings, the record does not indicate that either party understood or reasonably should have understood the evidence or arguments to be grounds for modifying custody. Furthermore, the court's order includes only a best interest conclusion without findings or conclusions about a substantial change of circumstances affecting the child.

3. Child Support, Custody, and Visitation— parenting coordinator—sua sponte appointment

The trial court satisfied the criteria for sua sponte appointing a parenting coordinator where the court made findings and concluded that the custody case was high-conflict, that the parents could pay for the coordinator, and that the appointment was in the child's best interest.

4. Child Support, Custody, and Visitation— custody—contempt proceeding—Rule 11 sanctions

The trial court did not abuse its discretion by awarding defendant attorney fees as a Rule 11 sanction in a contempt pro-

ceeding arising from a child custody proceeding. Plaintiff's allegations did not rise to the level of legal sufficiency needed to allege criminal contempt of court.

Appeal by plaintiff from orders entered 16 February 2007, 28 March 2007, 14 May 2007, and 19 June 2007 by Chief Judge Albert A. Corbett, Jr. in Johnston County District Court. Heard in the Court of Appeals 14 April 2008.

Sandlin & Davidian, P.A., by Deborah Sandlin and Lisa Kamarchik, for plaintiff-appellant.

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

BRYANT, Judge.

Plaintiff David Jackson appeals from an Order Re Contempt (Contempt Order) entered 16 February 2007, an order for attorney's fees entered 28 March 2007, an order appointing parenting coordinator entered 14 May 2007, and an order allowing Defendant Deborah Jackson's motion to amend the Contempt Order (Amended Order) entered 19 June 2007.

Plaintiff and defendant married 9 October 1988 and are the parents of a minor child born 7 December 2001. On 3 September 2002, plaintiff filed for joint custody of the minor child. On 19 November 2002, a trial court granted the parties a judgment for absolute divorce. On 12 December 2002, the trial court entered a consent order awarding plaintiff and defendant joint custody of the minor child—with defendant having primary custody, care, and control and plaintiff having secondary custody. Plaintiff had custody every other weekend and every other Wednesday.

The trial court also decreed that the parties were entitled to reasonable telephone contact and ordered the parties to confer with each other concerning decisions about the schooling, discipline, religion, health, and well-being of the child. Each parent was to notify the other immediately of any medical emergency related to the child.

On 15 November 2005 and 11 January 2006, plaintiff filed motions for order to show cause and order of contempt. On 24 April 2006, the trial court entered an order decreeing that defendant was in willful civil contempt of the 12 December 2002 court order, but continued prayer for judgment. On 6 July 2006 and 27 September 2006, plaintiff

filed a third and fourth motion for order to show cause and order of contempt. Defendant filed a motion to dismiss, motion for more definite statement, motion for sanctions, and a response to plaintiff's fourth motion for order to show cause.

On 16 February 2007, the trial court entered a Contempt Order decreeing:

> 3. Plaintiff's third motion for contempt is denied and the Defendant is not guilty of criminal contempt as alleged in the Third Motion.
>
> 4. Defendant is not guilty of criminal contempt as alleged in the [plaintiff's] Fourth Motion, except that the Defendant is guilty of criminal contempt with respect to the Custody Order for her failure to allow the Plaintiff reasonable telephone access with the minor child. The Defendant is sentenced to 30 days in the Johnston County Jail. This sentence is indefinitely suspended pursuant to the conditions set forth below which shall apply to both Plaintiff and Defendant[.]
>
> . . .
>
> I. The Court, on its own motion, appoints a parenting coordinator. . . . Failure either to comply with the directions of the parenting coordinator or to pay his/her fees in a timely fashion shall be punishable by contempt.
>
> 5. To the extent that the terms and conditions of the Custody Order have not been modified by the above modifications, the Custody Order remains in full force and effect.

On 26 February 2007, pursuant to North Carolina Civil Procedure Rule 59, plaintiff filed motions to amend and stay the Contempt Order. Plaintiff argued "[t]he inclusion of any provision in the Contempt Order that modifies the terms of the Custody Order, . . . must be removed" and "the appointment of a parenting coordinator improperly modifies the Custody Order and exceeds the relief allowed . . . ."

On 6 March 2007, defendant filed a motion to amend the pleadings pursuant to Rule 15(b). Defendant asked that the pleadings be amended to address the issue of modification of the Custody Order to bring it in accord with the trial court's Contempt Order, as well as the appointment of a parenting coordinator.

On 28 March 2007, pursuant to defendant's motion for sanctions against plaintiff, the trial court issued an order for attorney's fees, finding as fact and concluding as a matter of law that "the award of attorney's fees as a sanction against the Plaintiff pursuant to Rule 11 of the Rules of Civil Procedure with respect to the filing of the Plaintiff's fourth motion for contempt is appropriate . . . ." The trial court ordered that plaintiff pay defendant's attorneys $3,000.

On 19 June 2007, the trial court entered an order which allowed defendant's motion to amend the pleadings pursuant to Civil Procedure Rule 15(b) and plaintiff's motion to modify the contempt order pursuant to Rule 59 but denied plaintiff's motion to Stay and Reconsider the Contempt order. In modifying its Contempt Order, the trial court made the following additional findings of fact:

(i) The parties do not relate well one to another and the conflict between the Plaintiff and the Defendant has increased . . . . The conflict between the Plaintiff and the Defendant is negatively impacting [the minor child].

(ii) The Plaintiff is gainfully employed as a Certified Public Accountant.

(iii) The Defendant is gainfully employed with the State Employees Credit Union.

and the following conclusions of law:

(i) This is a high-conflict case. The parties are able to pay for a Parenting Coordinator and the appointment of a parenting Coordinator is in [the minor child's] best interest as set forth in G.S. 50-91(b).

(ii) The best interests of [the minor child] require that the Custody Order previously entered by this Court in 2002 and 2006 be modified as set forth in the Order of the Court filed February 16, 2007.

The trial court re-captioned the Contempt Order as "Order Modifying Custody Order and for Contempt, and for the Appointment of a Parenting Coordinator." Plaintiff appeals from the Contempt Order and all subsequent related orders.

On appeal, plaintiff raises the following three issues: whether the trial court erred in (I) modifying child custody, (II) appointing a par-

enting coordinator, and (III) imposing sanctions in the form of an attorney's fee award on plaintiff.

[1] We first respond to defendant's question whether plaintiff's appeal is properly before this Court. Defendant argues the Contempt Order and the Amended Order from which plaintiff has given notice of appeal are orders regarding defendant's criminal contempt and from those orders plaintiff has no right to appeal. Plaintiff, however, asserts that he appeals from only those provisions that impermissibly modify custody without the required motion for modification by any interested party, or that exceed the trial court's authority.

Under North Carolina General Statutes, section 7A-27(c), "[f]rom any final judgment of a district court in a civil action appeal lies of right directly to the Court of Appeals," N.C. Gen. Stat. § 7A-27 (c) (2007), and "[f]rom any interlocutory order or judgment of a superior court or district court in a civil action or proceeding which (1) [a]ffects a substantial right," N.C.G.S. § 7A-27 (d)(1) (2007).

We note for the record that while the contempt order addresses criminal contempt it does so within the court's civil jurisdiction over a dispute in a case bearing the identification File Number 02-CVD-2605. We further note the court's action seems to confuse the purposes of modification and contempt. *See Kennedy v. Kennedy*, 107 N.C. App. 695, 703, 421 S.E.2d 795, 799 (1992) ("The trial court may modify custody only upon motion by either party or 'anyone interested.' N.C.G.S. § 50-13.7 (1987). The trial court may not *sua sponte* enter an order modifying a previously entered custody decree."). *See also* 3 Suzanne Reynolds, *Lee's North Carolina Family Law* § 13.52 (5th ed. 2002) (when a custody order is violated "ordinarily the proper response is a finding of contempt, not modification") (citation omitted). Therefore, we hold that as to those aspects of the Contempt Order that plaintiff argues impermissibly modify custody or exceed the trial court's authority, plaintiff has a right to appeal to this Court.[1]

I

[2] Plaintiff asserts the trial court committed reversible error by modifying child custody absent a pending motion to modify custody and absent any finding of substantial change of circumstances affecting the welfare of the child. We agree.

1. We note that had plaintiff appealed from the trial court's finding of criminal contempt, his appeal would have been dismissed.

Under North Carolina General Statutes, section 50-13.7(a), "an order of a court of this State for custody of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested." N.C. Gen. Stat. § 50-13.7(a) (2007). "The trial court may modify custody only upon motion by either party or anyone interested. The trial court may not *sua sponte* enter an order modifying a previously entered custody decree." *Kennedy*, 107 N.C. App. at 703, 421 S.E.2d at 799 (internal citation and quotations omitted).

Here, neither plaintiff nor defendant had a pending motion to modify custody provisions at the time the trial court entered the Contempt Order. But, on 16 February 2007, the trial court entered the Contempt Order in which it found defendant in criminal contempt and modified the following child custody provisions established by the 12 December 2002 consent order:

> 6. Plaintiff and defendant shall confer with each other concerning decisions about the schooling, discipline, religion, health and well-being of the child.

The trial court also imposed the following new custody provisions:

> C. When Defendant has the minor child, she may schedule activities for the minor child as she desires; . . . Plaintiff may not attend such activities without Defendant's consent;
>
> . . .
>
> E. Defendant is not required to confer with Plaintiff regarding medical decisions made by Defendant regarding the minor child while the child is in her custody . . . .
>
> H. Plaintiff and Defendant shall not speak at exchanges. If the parties desire to communicate information to the other party concerning the minor child, they will communicate in writing.

Thus, we agree with plaintiff that provisions in the Contempt Order impermissibly modify custody. However, the record also indicates that after 16 February 2007 both plaintiff and defendant filed motions to amend the pleadings, and therein each addressed issues regarding modification of custody.

Plaintiff, on 25 February 2007, filed a motion to amend the pleadings pursuant to Civil Procedure Rule 59 and a motion to stay the trial court's Contempt Order. Therein plaintiff alleged that the

Contempt Order improperly modified the Custody Order and further asserted that "[t]he inclusion of any provision in the Contempt Order that modifies the terms of the Custody Order . . . must be removed from the Contempt Order pursuant to Rule 59(a)(1), (a)(7), (a)(8), and (a)(9)."[2]

Defendant, on 8 March 2007, filed a motion to amend the pleadings pursuant to Rule 15(b).[3] Defendant asked that the pleadings be amended to conform to the evidence presented at the hearing, address the issue of modification of the custody order, and rename the order "Order Modifying Custody Order and for Contempt and for the Appointment of a Parenting Coordinator."

On 19 June 2007, the trial court entered an order allowing both plaintiff's motion to amend the Contempt Order pursuant to Rule 59 and defendant's motion to amend pleadings pursuant to Rule 15(b). The trial court then amended the Contempt Order to make the following additional findings:

(i) Based upon the facts of this case, the parties do not communicate with one another. The lack of communication between the parties relates to [the minor child's] activities, doctors visits and other issues. The parties do not relate well one to another and the conflict between the Plaintiff and the Defendant has increased since the entry of this Court's Order entered following a hearing in January 2006. The conflict between the Plaintiff and the Defendant is negatively impacting [the minor child].

(ii) The Plaintiff is gainfully employed as a Certified Public Accountant.

---

2. Pursuant to Rule 59, "[o]n a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment." N.C. R. Civ. P. 59(a) (2007).

3. Amendments to conform to the evidence.—"When issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, either before or after judgment . . . . If evidence is objected to at the trial on the ground that it is not within the issues raised by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be served thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits." N.C. R. Civ. P. 15(b) (2007).

(iii) The Defendant is gainfully employed with the State Employees' Credit Union.

and the following conclusions:

(i) This is a high conflict case. The parties are able to pay for a Parenting Coordinator and the appointment of a Parenting Coordinator is in [the minor child's] best interest . . . .

(ii) The best interest of [the minor child] require that the Custody Order previously entered by this Court in 2002 and 2006 be modified as set forth in the Order of this Court filed February 16, 2007.

The trial court re-captioned the Contempt Order "Order Modifying Custody Order and for Contempt, and for the Appointment of a Parenting Coordinator."

We acknowledge the liberal application of our Rules of Civil Procedure and the discretion afforded trial judges. "[W]hen construing the Rules of Civil Procedure technicalities and form are to be disregarded in favor of the merits of the case[] and that liberality is the canon of construction." *Excel Staffing Serv., Inc. v. HP Reidsville, Inc.*, 172 N.C. App. 281, 285, 616 S.E.2d 349, 352 (2005) (citing *Lemons v. Old Hickory Council, Boy Scouts, Inc.*, 322 N.C. 271, 275, 367 S.E.2d 655, 657 (1988)) (internal quotations omitted). The Rules of Civil Procedure "provid[e] for and encourag[e] liberal amendments to conform pleadings and evidence . . . after entry of judgment under Rules 15(b), 59 and 60." *Roberts v. William N. & Kate B. Reynolds Memorial Park*, 281 N.C. 48, 56, 187 S.E.2d 721, 725 (1972). "Discretion in allowing amendment of pleadings is vested in the trial judge and his ruling will not be disturbed on appeal absent a showing of prejudice to the opposing party." *Goodrich v. Rice*, 75 N.C. App. 530, 533, 331 S.E.2d 195, 197 (1985) (citation omitted).[4] However, notwithstanding such discretion and despite the broad remedial purposes of these provisions, Rule 15(b) and Rule 59 do not permit judgment by ambush. *Paris v. Michael Kreitz, Jr., P.A.*, 75 N.C. App. 365, 375, 331 S.E.2d 234, 242 (1985) (quoting *Eudy v. Eudy*, 288 N.C. 71, 76, 215 S.E.2d 782, 786 (1975), *overruled on other*

4. "This Court and our Supreme Court have consistently held that a trial court's order under Rule 59 is not to be disturbed absent an affirmative showing of manifest abuse of discretion by the judge or a substantial miscarriage of justice." *Branch Banking & Trust Co. v. Home Federal Sav. & Loan Ass'n*, 85 N.C. App. 187, 199-200, 354 S.E.2d 541, 548 (1987) (citations omitted).

grounds by Quick v. Quick, 305 N.C. 446, 290 S.E.2d 653 (1982)) (remaining citation omitted).

Our Supreme Court has held that an amendment under Rule 15(b) "is appropriate only where sufficient evidence has been presented at trial without objection to raise an issue not originally pleaded and where the parties understood, or reasonably should have understood, that the introduction of such evidence was directed to an issue not embraced by the pleadings." *W & H Graphics, Inc. v. Hamby*, 48 N.C. App. 82, 86, 268 S.E.2d 567, 570 (1980); *see also Yancey v. Lea*, 139 N.C. App. 76, 78, 532 S.E.2d 560, 561 (2000) ("The effect of Rule 15(b) is to allow amendment by implied consent to change the legal theory of the cause of action so long as the opposing party has not been prejudiced in presenting his case, *i.e.*, *where he had a fair opportunity to defend his case*.") (citation and internal quotations omitted) (emphasis added). Under Rule 59, where a trial court opens an order, makes additional findings of fact and conclusions of law, and enters an amended order, the reasoning must be the same.

Here, the record indicates that the trial court held a hearing on 19 December 2006 to address plaintiff's third and fourth motions for order to show cause and order of contempt and defendant's motion to dismiss, motion for a more definite statement, and motion for sanctions and attorney's fees with respect to plaintiff's fourth motion for order to show cause and order of contempt. The record gives no indication either party understood or reasonably should have understood the evidence presented or the arguments made to be grounds for the modification of custody made by the trial court when it entered its Contempt Order. Furthermore, pursuant to subsequent motions to modify, the trial court entered an Amended Order amending its Contempt Order, but "[did] not elect to take any new evidence . . . ."

Despite re-captioning the Contempt Order "Order Modifying Custody Order and for Contempt, and for the Appointment of a Parenting Coordinator" the trial court effectively denied both parties an opportunity to submit evidence or present arguments regarding custody modification. Furthermore, the trial court's order does not include findings of fact or conclusions of law regarding a substantial change in circumstances affecting the welfare of the minor child, only a best interest conclusion.

> When the court modifies custody or visitation because of violations of a visitation order, it must be careful not to confuse the purposes of modification and contempt. The court modifies cus-

> tody or visitation because substantial changes in circumstances have made a different disposition in the best interest of the child. A custodian should not violate the visitation order, but if he or she does, then ordinarily the proper response is a finding of contempt, not modification. *Woncik v. Woncik*, 82 N.C. App. 244, 248, 346 S.E.2d 277, 279 (1986).

Reynolds, *supra*. Therefore, we hold the trial court abused its discretion in modifying child custody provisions absent proper notice to the parties and without affording the parties an opportunity to address the issue of custody modification. Accordingly, we vacate those provisions set out in the Contempt Order and the Amended Order which impermissibly modify prior custody orders.

II

[3] Next, plaintiff questions whether the trial court committed reversible error in appointing a parenting coordinator. Plaintiff argues the trial court failed to make adequate findings of fact to support the appointment of a parenting coordinator on its own motion. We disagree.

> Under North Carolina General Statute section 50-91(b),
>
> [t]he court may appoint a parenting coordinator without the consent of the parties upon entry of a custody order other than an ex parte order, or upon entry of a parenting plan only if the court also makes specific findings that the action is a high-conflict case, that the appointment of the parenting coordinator is in the best interests of any minor child in the case, and that the parties are able to pay for the cost of the parenting coordinator.

N.C. Gen. Stat. § 50-91(b) (2007).

Here, in the Contempt Order, the trial court, on its own motion, appointed a parenting coordinator and stated "[t]he parties shall follow the directions of the parenting coordinator with respect to issues addressed to the parenting coordinator. Failure either to comply with the directions of the parenting coordinator or to pay his/her fees in a timely fashion shall be punishable by contempt." In response, plaintiff filed a motion to amend the judgment under Rule 59(a)(1), (a)(7), (a)(8), and (a)(9).

Under Rule 59(a), "[o]n a motion for a new trial in an action tried without a jury, the court *may* open the judgment if one has been entered, take additional testimony, amend findings of fact and con-

clusions of law or make new findings and conclusions, and direct the entry of a new judgment." N.C. R. Civ. P. 59(a) (2007) (emphasis added). Without taking any new evidence, the trial court made the following additional findings of fact:

(i) Based upon the facts of this case, the parties do not communicate with one another. The lack of communication between the parties relates to [the minor child's] activities, doctors' visits and other issues. The parties do not relate well one to another and the conflict between the Plaintiff and the Defendant has increased since the entry of this Court's Order entered following a hearing in January 2006. The conflict between the Plaintiff and the Defendant is negatively impacting [the minor child].

(ii) The Plaintiff is gainfully employed as a Certified Public Accountant.

(iii) The Defendant is gainfully employed with the State Employees' Credit Union.

On these findings, the trial court concluded "[t]his case is a high-conflict case. The parties are able to pay for a Parenting Coordinator and the appointment of a Parenting Coordinator is in [the minor child's] best interest as set forth in G.S. 50-91(b)."

We hold the trial court has satisfied the criteria for *sua sponte* appointing a parenting coordinator as set forth under N.C.G.S. § 50-91(b). Accordingly, plaintiffs assignment of error is overruled.

III

[4] Last, plaintiff questions whether the trial court committed reversible error by sanctioning plaintiff in the form of an attorney's fee award to defendant. We affirm the trial court.

"The trial court's decision whether or not to impose Rule 11 sanctions is reviewable de novo. In general, an order imposing or denying sanctions must be supported by findings of fact and conclusions of law." *Golds v. Cent. Express, Inc.*, 142 N.C. App. 664, 668, 544 S.E.2d 23, 26-27 (2001) (citations omitted) (emphasis removed).

Pursuant to North Carolina Civil Procedure Rule 11,

> [t]he 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. R. Civ. P. 11(a) (2007). "In other words, Rule 11 provides that a pleading must contain the following to avoid the imposition of sanctions: (1) legal sufficiency; (2) factual sufficiency; and (3) a proper purpose." *Golds*, 142 N.C. App. at 668, 544 S.E.2d at 27.

On plaintiff's third motion for order to show cause and order of contempt, the trial court found defendant not guilty with respect to the allegations of criminal contempt. In plaintiff's fourth motion for order to show cause and order of contempt, plaintiff alleged that defendant violated the custody order by:

A. Enrolling the minor child in swimming lessons without discussing with the Plaintiff or notifying him of the time and place of the lessons so that he could attend and talk with the child about how the lessons were going.

B. On July 29, 2006, changing the pickup location from Defendant's house to Defendant's neighbor's house, without first talking about it with Plaintiff and having the parties agree to it in writing.

C. By failing to timely advise and consult with Plaintiff regarding the child's strep throat and impetigo that caused the child to miss two days of school.

D. By failing to timely advise and consult with Plaintiff regarding the child's sickness on August 23 and 24, 2006, that caused the child to repeatedly throw up.

E. By failing to notify Plaintiff of the child's medical appointment(s).

F. By refusing to speak with Plaintiff at exchanges.

G. By refusing to answer or timely return Plaintiff's calls to the minor child when the child is with Defendant.

The trial court found that allegations A through F should not have been filed because they do not rise to the level of contemptible actions.

We agree with the trial court's finding that plaintiff's allegations did not rise to the level of legal sufficiency needed to allege criminal contempt of court. We therefore hold the trial court was within its discretion to award defendant attorney's fees for defending the action. Accordingly, plaintiff's assignment of error is overruled. The trial court's orders of 28 March and 14 May 2007 are affirmed. The trial court's orders of 16 February and 19 July 2007 are vacated in part.

Affirmed in part; vacated in part.

Chief Judge MARTIN and Judge ARROWOOD concur.

DAVID M. GOODMAN, PLAINTIFF v. HOLMES & McLAURIN ATTORNEYS AT LAW, A/K/A HOLMES & McLAURIN, A/K/A HOLMES & McLAURIN, ATTORNEYS, A NORTH CAROLINA PARTNERSHIP; HOLMES & McLAURIN, L.L.P., A NORTH CAROLINA REGISTERED LIMITED LIABILITY PARTNERSHIP; R. EDWARD McLAURIN, JR., P.L.L.C., A NORTH CAROLINA PROFESSIONAL LIMITED LIABILITY COMPANY; RALPH EDWARD McLAURIN, JR.; AND EDWARD S. HOLMES, DEFENDANTS

No. COA07-199

(Filed 2 September 2008)

1. Appeal and Error— appealability—court's dismissal of some claims—voluntary dismissal of remaining claims

The appeal of a plaintiff in a legal malpractice action was not interlocutory where some of plaintiff's claims were dismissed by the trial court and the surviving claims were dismissed by plaintiff. Defendants' argument that a voluntary dismissal without prejudice is not a final determination is based on a case that is factually distinguishable and not controlling.

2. Statutes of Limitation and Repose— legal malpractice—no statutory exceptions

Plaintiff's legal malpractice claim was barred by the statute of repose, and the trial court did not err by dismissing plaintiff's claim, where the last opportunity for defendant McLaurin to act on plaintiff's claim occurred nearly seven years before the action was brought and N.C.G.S. § 1-15(c) allows four years for such claims. Although defendant McLaurin's alleged actions are partic-

ularly egregious, it is for the legislature to create exceptions to statutes of repose.

3. Partnerships— legal—fraud—liability of partners

Although a partnership is liable for loss caused by a partner in the ordinary course of business, fraud associated with legal representation is not in the ordinary course of a partnership and the trial court here did not err by dismissing plaintiff's claims against the partners.

4. Appeal and Error— denial of motion to dismiss—voluntary dismissal of claim

The trial court's denial of defendant's motion to dismiss a fraud claim was not before the Court of Appeals where plaintiff had taken of voluntary dismissal of that claim.

Appeal by plaintiff from judgment entered 2 November 2006 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 11 October 2007.

Hedrick Murray & Cheek, P.L.L.C., by Josiah S. Murray, III and John C. Rogers, III, for plaintiff-appellant.

Bailey & Dixon, L.L.P., by Kenyann Brown Stanford and John T. Crook, for defendant-appellees R. Edward McLaurin, Jr., PLLC, and R. Edward McLaurin, Jr.

Young Moore and Henderson, P.A., by Walter E. Brock, Jr. and Elinor M. Johnsey, for defendants Holmes & McLaurin and Holmes.

STEELMAN, Judge.

Where plaintiff's professional negligence claim was barred by the statute of repose, the trial court did not err in dismissing this claim pursuant to N.C. R. Civ. P. 12(b)(6). Fraudulent conduct is not in the ordinary course of business of a law partnership, and the trial court did not err in dismissing plaintiff's claim of fraud as to McLaurin's partners.

I. Factual and Procedural Background

Since these matters were decided by the trial court on defendants' motions to dismiss pursuant to Rules 12(b)(6) and 12(c) of the Rules of Civil Procedure, both the trial court and this court must

treat the factual allegations contained in plaintiff's complaint as true. *See Cage v. Colonial Bldg. Co.*, 337 N.C. 682, 683, 448 S.E.2d 115, 116 (1994). The following are the facts as alleged in plaintiff's complaint.

On 31 July 1992, David M. Goodman (plaintiff) was injured in an automobile collision. Plaintiff hired the law firm of Holmes & McLaurin (H&M Partnership) to represent him with respect to his personal injury and property damage claims. Edward McLaurin, Jr. (McLaurin) had primary responsibility for plaintiff's representation and filed a complaint on 28 July 1995. On 21 October 1997, McLaurin filed a voluntary dismissal without prejudice, without the knowledge or consent of plaintiff. When McLaurin failed to re-file plaintiff's lawsuit within one year, plaintiff's claims against the original tortfeasors were barred by the three year statute of limitations pursuant to N.C. Gen. Stat. §§ 1A-1, Rule 41(a) and 1-52(5).

Following the filing of the voluntary dismissal, McLaurin took affirmative steps to conceal his action, or lack of action, from plaintiff. He advised plaintiff that the insurer of the tortfeasors in the 1992 accident was St. David's Trust, located in Barcelona, Spain. In fact, no such entity ever existed. McLaurin advised plaintiff that he was negotiating a settlement with St. David's Trust, and in June 2000, faxed a purported "settlement offer" to plaintiff. This offer was rejected by plaintiff. Subsequently, two further offers, supposedly made by St. David's Trust, were submitted to plaintiff. Plaintiff eventually "accepted" a settlement in the amount of $200,000. McLaurin forwarded to plaintiff a "Trust Memorandum" allegedly from St. David's Trust, dated 29 September 2000, showing that the settlement would be paid in two installments of $100,000 on 31 December 2001 and 31 December 2002. The settlement was to be funded by St. David's Trust or the Landau Foundation. Between January and July of 2001, there were three transfers of funds from the H&M Partnership's Trust Account to plaintiff's bank account, totaling $25,000. McLaurin represented to plaintiff that these funds represented "interim payments" by St. David's Trust to assist plaintiff with his medical bills.

From 2001 through 2003, McLaurin continued to assure plaintiff that he was still "dealing with" St. David's Trust to obtain the monies provided for in the "Trust Memorandum." In January 2004, McLaurin sent plaintiff a copy of a purported complaint against the original tortfeasors and St. David's Trust. The complaint sought damages from St. David's Trust for breach of the settlement agreement and for unfair and deceptive trade practices. McLaurin asked plaintiff to exe-

cute a verification of the complaint. Plaintiff was told by McLaurin that the complaint had been filed. When plaintiff pressed McLaurin for confirmation on the status of this matter, McLaurin sent plaintiff a copy of an e-mail supposedly from a lawyer in Spain.

On 11 December 2001, plaintiff was injured in a second automobile accident. He hired the H&M partnership to represent him with respect to his personal injury claim. In November 2005, plaintiff learned for the first time of McLaurin's 1997 dismissal of plaintiff's claims and his subsequent failure to re-file the action within one year. Plaintiff also learned that McLaurin had not filed suit against St. David's Trust.

On 9 May 2006 Plaintiff filed a complaint against defendants, seeking to recover damages based upon the negligent and fraudulent conduct of McLaurin, which plaintiff alleged was imputed to the other defendants by virtue of their relationship with McLaurin. The complaint asserted five causes of action: (1) negligence and professional malpractice arising out of the handling of plaintiff's 1992 accident claim; (2) negligence and professional malpractice arising out of the handling of plaintiff's 2001 accident claim; (3) fraud arising out of the alleged cover-up of McLaurin's actions concerning the 1992 accident; (4) gross negligence, including a claim for punitive damages; and (5) breach of fiduciary duty. The defendants included McLaurin, H&M Partnership, one of McLaurin's partners, Edward S. Holmes (Holmes), and two successor law firms created by McLaurin in 2003: the Holmes & McLaurin L.L.P. (the "H&M L.L.P.") and R. Edward McLaurin, Jr., P.L.L.C. (the "McLaurin P.L.L.C.").

On 16 August 2006, Holmes, the H&M Partnership, and the H&M L.L.P. (hereinafter collectively referred to as the "Holmes defendants") filed a Rule 12(b)(6) motion to dismiss plaintiff's claims against them on the grounds that plaintiff's claims were barred by the statute of repose pursuant to N.C. Gen. Stat. § 1-15(c). On 21 August 2006, McLaurin and the McLaurin PLLC (hereinafter collectively referred to as the "McLaurin defendants") filed an answer to plaintiff's complaint, and on 22 September 2006 the McLaurin defendants filed a motion to dismiss the first, third, fourth, and fifth causes of action pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b)(6) and 12(c).

On 2 November 2006, the trial court filed two orders. The first order granted the McLaurin defendants' motion to dismiss plaintiff's first, fourth, and fifth causes of action. The McLaurin defendants' motion to dismiss as to the third cause of action and the portion of

the fourth cause of action asserting a claim for punitive damages based upon conduct alleged in the third cause of action was denied. The second order granted the Holmes defendants' motion to dismiss as to all of plaintiff's claims.

On 29 November 2006, plaintiff dismissed without prejudice his third cause of action and his claim for punitive damages against the McLaurin defendants. On 22 December 2006, plaintiff voluntarily dismissed without prejudice his negligence cause of action arising out of the McLaurin defendants' legal representation of his claim for the 2001 accident.

On 29 November 2006, plaintiff filed notice of appeal from each of the trial court's orders. On 11 December 2006, the McLaurin defendants filed notice of appeal as to the denial of their motion to dismiss plaintiff's third cause of action and the claim for punitive damages. On 22 December 2006, plaintiff filed a second notice of appeal.

II. Motion to Dismiss Appeal

[1] We first address the McLaurin defendants' motion to dismiss plaintiff's appeal. The McLaurin defendants contend that, because the trial court dismissed only some of plaintiff's claims, the trial court's order is interlocutory and is not immediately appealable. We disagree.

"A judgment is either interlocutory or the final determination of the rights of the parties." *Curl v. American Multimedia, Inc.*, 187 N.C. App. 649, 652, 654 S.E.2d 76, 78 (2007) (quoting N.C. Gen. Stat. § 1A-1, Rule 54(a) (2005)). "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Id.* (quoting *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950)). "Ordinarily, an appeal from an order granting summary judgment to fewer than all of a plaintiff's claim is premature and subject to dismissal." *Combs & Assocs. v. Kennedy*, 147 N.C. App. 362, 367, 555 S.E.2d 634, 638 (2001) (citation omitted). However, "[p]laintiff's voluntary dismissal of [the] remaining claim does not make the appeal premature but rather has the effect of making the trial court's grant of partial summary judgment a final order." *Id.* (citation omitted).

In the instant case, plaintiff voluntarily dismissed all of the claims which survived the trial court's two orders of 2 November

2006. Thus plaintiff's claims were no longer interlocutory, and any rationale for dismissing the appeal as interlocutory fails.

Defendant's rely on *Hill v. West*, 177 N.C. App. 132, 627 S.E.2d 662 (2006) for the proposition that the voluntary dismissal without prejudice of the surviving claims of a partial summary judgment is not a "final determination of the rights of the parties," and cannot be used to render a partial summary judgment appealable.

The plaintiffs in *Hill* appealed the trial court's order of partial summary judgment twice. On the first appeal, this Court concluded that the appeal was interlocutory because plaintiffs' claims against certain defendants remained pending. This Court dismissed plaintiffs' appeal, and admonished plaintiffs for violating Rule 28(b)(4) of the Rules of Appellate Procedure for failing to include in their appellate brief a statement of the grounds for appellate review. *Id.* at 133, 627 S.E.2d at 663.

Following the dismissal of their appeal, plaintiffs voluntarily dismissed their remaining claims without prejudice and again appealed. On the second appeal, this Court concluded that the merits of plaintiffs' appeal would not be reached because plaintiffs again failed to include a statement of the grounds for appellate review. The *Hill* Court went on to state that the partial summary judgment was interlocutory because plaintiffs remained at liberty to re-file their voluntarily dismissed claims. *Id.* at 135-36, 627 S.E.2d at 664.

Plaintiff argues, and we agree, that *Hill* is not controlling. *Hill* is factually distinguishable from the instant case. Unlike the plaintiffs in *Hill*, plaintiff in the instant case followed the Rules of Appellate Procedure. *See Curl* at 354, 654 S.E.2d at 80 ("[T]he Court in *Hill* stated several reasons for the dismissal, including plaintiffs' repeated failure to comply with the North Carolina Rules of Appellate Procedure, and the Court's perception that the appellants were 'manipulating the Rules of Civil Procedure in an attempt to appeal the 2003 summary judgment that otherwise would not be appealable.' ").

We hold the trial court's order is not interlocutory and plaintiff's appeal is properly before this Court. Defendants' argument is without merit.

III. Dismissal of Plaintiff's Negligence Claim

[2] In his first argument, plaintiff contends that the trial court erred by concluding that plaintiff could not use equitable estoppel to pre-

vent McLaurin, the H&M Partnership, and Holmes from relying on the statute of repose, and dismissing his first cause of action for negligence and professional malpractice against McLaurin, the H&M Partnership, and Holmes. We disagree.

A. Standard of Review

The standard of review of an order allowing a Rule 12(b)(6) motion is "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory[.]" *Bowman v. Alan Vester Ford Lincoln Mercury*, 151 N.C. App. 603, 606, 566 S.E.2d 818, 821 (2002) (quotation omitted). "The complaint should be 'liberally construed, and the court should not dismiss the complaint unless it appears beyond doubt that [the] plaintiff could prove no set of facts in support of his claim which would entitle him to relief.' " *State ex rel. Cooper v. Ridgeway Brands Mfg., L.L.C.*, 184 N.C. App. 613, 618, 646 S.E.2d 790, 795 (2007) (quotation omitted). We evaluate all facts alleged and permissible inferences therefrom in the light most favorable to plaintiff. *Stephenson v. Town of Garner*, 136 N.C. App. 444, 447, 524 S.E.2d 608, 611 (2000).

B. Statute of Repose

N.C. Gen. Stat. § 1-15(c) governs legal malpractice claims, and establishes a three-year statute of limitations and a four-year statute of repose. *Fender v. Deaton*, 153 N.C. App. 187, 189, 571 S.E.2d 1, 2 (2002) (citation omitted). The statute provides in pertinent part:

> [A] cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action. . . . [I]n no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action[.]

N.C. Gen. Stat. § 1-15(c) (2007).

The North Carolina Supreme Court has articulated the difference between a statute of limitations and a statute of repose:

> . . . the period contained in the statute of repose begins when a specific event occurs, regardless of whether a cause of action has accrued or whether any injury has resulted. . . . Thus, the repose serves as an unyielding and absolute barrier that prevents a plain-

> tiff's right of action even before his cause of action may accrue, which is generally recognized as the point in time when the elements necessary for a legal wrong coalesce.

Black v. Littlejohn, 312 N.C. 626, 633, 325 S.E.2d 469, 474-75 (1985) (internal citations omitted). "A statute of repose creates an additional element of the claim itself which must be satisfied in order for the claim to be maintained." *Hargett v. Holland*, 337 N.C. 651, 654, 447 S.E.2d 784, 787 (1994) (citation omitted). "If the action is not brought within the specified period, the plaintiff 'literally has *no* cause of action. The harm that has been done is *damnum absque injuria*—a wrong for which the law affords no redress.' " *Id.* (quotations omitted).

C. Equitable Estoppel

The issue presented is whether the courts can apply principles of equity to circumvent the "unyielding and absolute barrier" of a statute of repose.

Plaintiff cites the cases of *Wood v. BD&A Constr., L.L.C.*, 166 N.C. App. 216, 601 S.E.2d 311 (2004); *Cacha v. Montaco, Inc.*, 147 N.C. App. 21, 554 S.E.2d 388 (2001); *Bryant v. Adams*, 116 N.C. App. 448, 448 S.E.2d 832 (1994); and *One North McDowell Assn. v. McDowell Development*, 98 N.C. App. 125, 389 S.E.2d 834 (1990), for the proposition that "[e]quitable estoppel may . . . defeat a defendant's statute of repose defense." *Wood* at 220, 601 S.E.2d at 314.

The cases cited by plaintiff are inapplicable to the instant case. Unlike plaintiff's professional malpractice claim, governed by N.C. Gen. Stat. § 1-15(c), the cases cited by plaintiff dealt with claims governed by N.C. Gen. Stat. § 1-50(a)(5), which provides a six-year statute of repose for actions "to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property . . ." N.C. Gen. Stat. § 1-50(a)(5) (2007). Subsection (e) of this statute specifically states that the six year statute of repose "shall not be asserted as a defense by any person who shall have been guilty of fraud, or willful or wanton negligence . . . or to any person who shall wrongfully conceal any such fraud, or willful or wanton negligence." *Id.*

N.C. Gen. Stat. § 1-15(c) contains no comparable exception to its four year statute of repose. This Court has consistently refused to apply equitable doctrines to estop a defendant from asserting a

statute of repose defense in the legal malpractice context, and the line of cases addressing this issue specifically state that "G.S. § 1-15(c) contains a four year statute of repose, and equitable doctrines do not toll statutes of repose." *State ex rel. Long v. Petree Stockton, L.L.P.*, 129 N.C. App. 432, 445, 499 S.E.2d 790, 798 (1998) (citing *Stallings v. Gunter*, 99 N.C. App. 710, 716, 394 S.E.2d 212, 216 (1990)); *see also Hargett v. Holland*, 337 N.C. 651, 447 S.E.2d 784 (1994); *Teague v. Isenhower*, 157 N.C. App. 333, 579 S.E.2d 600 (2003); *Fender v. Deaton*, 153 N.C. App. 187, 571 S.E.2d 1 (2002); and *Sharp v. Teague*, 113 N.C. App. 589, 439 S.E.2d 792 (1994).

Plaintiff's reliance on *Duke Univ. v. Stainback*, 320 N.C. 337, 357 S.E.2d 690 (1987) is likewise misplaced. In *Stainback*, the North Carolina Supreme Court held that the doctrine of equitable estoppel could be invoked to bar a defendant from relying on a statute of limitations. *Id.* at 341, 357 S.E.2d at 692. The Court was not presented with a statute of repose issue, and the statute of repose was not addressed in the opinion. Additionally, the subsequent Supreme Court decision in *Hargett v. Holland* established that the statute of repose is an element of the claim itself, whereas the statute of limitations is an affirmative defense to which estoppel may apply. *See Hargett* at 654-55, 447 S.E.2d at 787. Based upon this distinction, this Court has refused to apply principles of equity to the bar imposed by the statute of repose contained in N.C. Gen. Stat. § 1-15(c).

In the instant case, the facts show that on 21 October 1997, McLaurin voluntarily dismissed without prejudice plaintiff's claims arising from the 1992 accident. Rule 41(a) of the North Carolina Rules of Civil Procedure requires that any new action after a voluntary dismissal be refiled within one year after the dismissal. N.C. Gen. Stat. § 1A-1, Rule 41(a) (2007). Thus, the last opportunity for McLaurin to act on plaintiff's claim occurred on 21 October 1998. Plaintiff brought his professional malpractice action against McLaurin on 9 May 2006, nearly seven years after McLaurin's last act. Thus, plaintiff's professional negligence claim was barred by the statute of repose, and the trial court did not err in dismissing plaintiff's claim.

We note that the actions of McLaurin, as alleged in plaintiff's complaint, are particularly egregious. However, it is for the legislature, and not the courts, to establish statutes of limitations, statutes of repose, and any exceptions to those rules. It is not the role of the courts to create exceptions to the laws established by the legislature

where the intent of the legislature is made manifestly clear on the face of the statute. *See Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 389, 628 S.E.2d 1, 4-5 (2006).

This argument is without merit.

III. Partnership Law

[3] In his second argument, plaintiff contends that the trial court erred by refusing to "apply settled principles of partnership law" to hold the Holmes defendants liable for the actions of McLaurin, and dismissing plaintiff's claims against the Holmes defendants. We disagree.

The Holmes defendants acknowledge that McLaurin's representation of plaintiff for his claims associated with the 1992 accident was with the authority of the partnership. They contend, however, that the fraudulent concealment of McLaurin's negligence "took him outside the scope of any arguable agency of the firm" and "went so far beyond a lawyer's legitimate role as to place it outside the ordinary scope of business of a law partnership."

A partnership is liable for loss or injury caused by any wrongful act or omission of any partner acting in the ordinary course of business of the partnership or with the actual or apparent authority of his copartners. *Heath v. Craighill, Rendleman, Ingle & Blythe, P.A.*, 97 N.C. App. 236, 241, 388 S.E.2d 178, 181 (1990); N.C. Gen. Stat. § 59-43 (2007). "The rules governing partnership tort liability are fully applicable to law partnerships." *Jackson v. Jackson*, 20 N.C. App. 406, 407, 201 S.E.2d 722, 723 (1974). "The general rule in this jurisdiction is that a partner or officer cannot bind the partnership or corporation beyond the normal scope of his authority." *Zimmerman v. Hogg & Allen*, 22 N.C. App. 544, 546, 207 S.E.2d 267, 269, *rev'd on other grounds*, 286 N.C. 24, 209 S.E.2d 795 (1974). Thus the question at issue is whether a lawyer who engages in fraudulent concealment of his professional negligence is acting in the ordinary course of his law firm's business. *See Jackson* at 407, 201 S.E.2d at 723.

In *Jackson*, a law partnership was sued on the grounds that one of the partners instituted a malicious prosecution. In determining whether the attorney's conduct was within the scope of the partnership, this Court noted that the Rules of Professional Conduct prohibit an attorney from instituting an action on behalf of his client that he knows would merely serve to harass or maliciously injure another. *Id.* at 408, 201 S.E.2d at 724. Based on these rules, we con-

cluded that malicious prosecution was not within the ordinary course of business of a law partnership.

The Rules of Professional Conduct of the North Carolina State Bar require:

> Rule 1.4: Communication
>
> (a) A lawyer shall:
>
> (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent . . ., is required by these Rules;
>
> . . .
>
> (3) keep the client reasonably informed about the status of the matter
>
> (4) promptly comply with reasonable requests for information
>
> . . .
>
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

As previously discussed, the statute of repose barred plaintiff's claims for professional negligence and malpractice. Thus, the only remaining claim for which the Holmes defendants could be liable was McLaurin's fraudulent concealment of his professional negligence. As in *Jackson*, the representation of a plaintiff in a personal injury action is clearly within the normal range of activities for a typical law partnership. However, fraud associated with such representation, including the failure to keep a client informed about the status of his or her case and the active concealment of the true state of affairs, in violation of the standards of the legal profession, is not in the ordinary course of the partnership business. There is nothing in plaintiff's complaint to suggest that the Holmes defendants authorized, participated in, or even knew about McLaurin's fraudulent conduct.

The trial court did not err in dismissing plaintiff's claims against the Holmes defendants.

This argument is without merit.

IV. Fraud

[4] In the McLaurin defendants' first cross-assignment of error, they argue that the trial court erred in denying their motion to dismiss the fraud claim in plaintiff's third cause of action on the grounds that plaintiff sustained no actual damages as a result of the alleged fraud.

As plaintiff voluntarily dismissed his fraud claim against the McLaurin defendants, this claim is not before this Court. *See Brannock v. Brannock*, 135 N.C. App. 635, 523 S.E.2d 110 (1999).

We hold that this argument is without merit.

AFFIRMED.

Judges BRYANT and GEER concur.

IN THE MATTER OF: S.D.J.

No. COA08-360

(Filed 2 September 2008)

1. Termination of Parental Rights— subject matter jurisdiction—failure to issue summons in name of juvenile

The trial court did not err in a termination of parental rights case by concluding it had subject matter jurisdiction over the proceeding because: (1) even though the record before the Court of Appeals contained no summons issued to the juvenile naming the juvenile as a respondent in this matter, the captions of the summonses naming the parents as respondents state the name of the juvenile, and the guardians ad litem for the juvenile certified that they accepted service of the petition on the juvenile's behalf; and (2) there was no indication in the record that respondent was prejudiced in any way by petitioner's failure to properly issue a summons directed to and naming the juvenile as a respondent in this matter.

2. Evidence— hearsay—business record exception—results of drug screens—letter

The trial court did not err in a termination of parental rights case by admitting the reports of the results of drug screens and a letter from Alcohol and Drug Services (ADS), even though respondent contends the documents were hearsay, because the evidence was admissible as a business record exception under N.C.G.S. § 8C-1, Rule 803(6) when: (1) a social worker testified that she collected all but one of the samples used in the drug tests and then sealed and shipped the samples to the laboratory for testing; and (2) the social worker also testified that she relied on the reports in the ordinary course of her business and that the reports were collected as part of petitioner's record in this case.

3. Termination of Parental Rights— neglect—sufficiency of findings of fact

The trial court did not err by concluding that grounds existed to terminate respondent mother's parental rights based on neglect because the trial court's findings were supported by evidence presented at the hearing and were sufficient to establish a history of neglect and the probability of future neglect.

4. Termination of Parental Rights— judicial notice—findings of fact—prior orders

The trial court in a termination of parental rights case did not improperly take judicial notice of and base its findings of fact on all the prior orders in this case because: (1) it is well-established that a trial court may take judicial notice of earlier proceedings in the same cause; (2) the presumption in a bench trial is that the trial court will disregard incompetent evidence; (3) the pertinent findings of fact were supported by the testimony of the social worker at the termination proceeding and were not based on the prior orders; and (4) the findings were based on clear, cogent, and convincing evidence and support the trial court's conclusions of law that sufficient grounds existed to terminate respondent's parental rights to the juvenile based on a history of neglect and probability of repetition of the neglect.

Judge STROUD dissenting.

Appeal by respondent-mother from an order entered 28 December 2007 by Judge Sherry F. Alloway in Guilford County District Court. Heard in the Court of Appeals 23 July 2008.

Mercedes O. Chut for petitioner-appellee Guilford County Department of Social Services.

Smith, James, Rowlett & Cohen, L.L.P., by Margaret Rowlett, for appellee Guardian ad Litem.

Mary McCullers Reece for respondent-appellant mother.

HUNTER, Judge.

Respondent-mother appeals from the trial court's order, entered 28 December 2007, terminating her parental rights to her minor child S.D.J. After careful review, we affirm.

On 4 June 2007, the Guilford County Department of Social Services ("petitioner") filed a petition for termination of respondent's parental rights in Guilford County District Court. As grounds for termination, the petition alleged respondent (1) willfully left S.D.J. in foster care or placement outside the home for more than twelve months without showing that reasonable progress under the circumstances had been made in correcting those conditions that led to the removal of S.D.J. from the home, and (2) is incapable of providing for the proper care and supervision of S.D.J. such that S.D.J. is a dependent juvenile.

The petition came on for hearing by the trial court on 16 August 2007 and continued on 24 September and 19 November 2007. On 28 December 2007, the trial court entered an order terminating respondent's parental rights to S.D.J. on the grounds alleged in the petition. Respondent appeals.

[1] As a preliminary matter, we must determine whether the trial court had subject matter jurisdiction over the termination proceedings in this case. It is well established that " '[t]he question of subject matter jurisdiction may be raised at any time, even in the Supreme Court. When the record clearly shows that subject matter jurisdiction is lacking, the Court will take notice and dismiss the action *ex mero motu*.' " *In re A.F.H-G*, 189 N.C. App. 160, 160-61, 657 S.E.2d 738, 739 (2008) (quoting *Lemmerman v. Williams Oil Co.*, 318 N.C. 577, 580, 350 S.E.2d 83, 85-86 (1986)). This Court has held that a failure to issue a summons to the juvenile deprives the trial court of subject matter jurisdiction. *In re S.F.*, 190 N.C. App. 779, 779-80, 660 S.E.2d 924, 926-27 (2008) (citing *In re K.A.D.*, 187 N.C. App. 502, 502, 653 S.E.2d 427, 428-29 (2007). However, if a summons is not properly issued naming the juvenile as a respondent in a

proceeding to terminate parental rights to the juvenile, the trial court will retain subject matter jurisdiction over the termination proceeding where the caption of an issued summons refers to the juvenile by name and a designated representative of the juvenile certifies the juvenile was served with the petition. *See In re J.A.P., I.M.P.*, 189 N.C. App. 683, 686, 659 S.E.2d 14, 17 (2008) (holding the trial court had subject matter jurisdiction over a termination of parental rights proceeding where no summons was issued naming the juveniles as respondents, but the attorney advocate for the juveniles' guardian ad litem certified that she accepted service of process regarding both juveniles).

Here, the record contains no summons issued to the juvenile, naming S.D.J. as a respondent in this matter, and no indication that a summons was ever actually issued to the juvenile. On 4 June 2007 two summonses were issued naming respondent mother, the legal father, and "Any Unknown Putative Father" as respondents in this matter. Respondent was served with a summons on 6 June 2007, and the legal father and unknown putative father were served by publication on 13, 20, and 27 June 2007. While S.D.J.'s name appears on the summons forms in the case caption, neither summons names S.D.J. as a respondent. The record does, however, contain two certificates of acceptance of service signed by two different guardians ad litem for the juvenile. Upon appointment by the court, it is the responsibility of the guardian ad litem to represent the juvenile in court and in all respects "to protect and promote the best interests of the juvenile[.]" N.C. Gen. Stat. § 7B-601(a) (2007). In furtherance of this responsibility, it is within the purview of a guardian ad litem to stand in for the juvenile and accept service of a petition on a juvenile's behalf. *In re J.A.P., I.M.P.*, 189 N.C. App. at 686, 659 S.E.2d at 17 (citing N.C. Gen. Stat. § 7B-1105 (2007)); *In re N.C.H., G.D.H., D.G.H.*, 192 N.C. App. 445, ——, —— S.E.2d ——, —— (2008) (subject matter jurisdiction was proper with the trial court where the summonses contained the names of the juveniles in the caption and the guardian ad litem for the juveniles certified that she was served with copies of the summonses).

Therefore, even though the record before this Court contains no summons issued to S.D.J., naming the juvenile as a respondent in this matter, because the captions of the summonses naming the parents as respondents state the name of the juvenile, and the guardians ad litem for the juvenile certified that they accepted service of the petition on the juvenile's behalf, we hold the trial court had subject mat-

ter jurisdiction to hear the petition. Further, we note that there is no indication in the record that respondent was prejudiced in any way by petitioner's failure to properly issue a summons directed to and naming S.D.J. as a respondent in this matter.

[2] Respondent first argues the trial court erred in admitting the reports of the results of drug screens and a letter from Alcohol and Drug Services ("ADS") because the documents were hearsay and fell under no recognized exception. " 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2007). Hearsay is inadmissible except when allowed by statute or the North Carolina Rules of Evidence. N.C. Gen. Stat. § 8C-1, Rule 802 (2007). One exception to the hearsay rule is the business record exception, which provides that business records of regularly conducted activity are not excluded by the hearsay rule, even though the declarant is unavailable as a witness. N.C. Gen. Stat. § 8C-1, Rule 803(6) (2007). A business record includes:

> 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.

Id. A qualifying business record "is admissible when 'a proper foundation . . . is laid by testimony of a witness who is familiar with the . . . records and the methods under which they were made so as to satisfy the court that the methods, the sources of information, and the time of preparation render such evidence trustworthy.' " *State v. Price*, 326 N.C. 56, 77, 388 S.E.2d 84, 95 (1990) (quoting *State v. Springer*, 283 N.C. 627, 636, 197 S.E.2d 530, 536 (1973)); *see also State v. Miller*, 80 N.C. App. 425, 429, 342 S.E.2d 553, 556 (" '[o]ther qualified witness' has been construed to mean a witness who is familiar with the business entries and the system under which they are made"), *appeal dismissed and disc. review denied*, 317 N.C. 711, 347 S.E.2d 448 (1986). While the foundation must be laid by a person familiar with the records and the system under which they are made, there is "no requirement that the records be authenticated by the per-

son who made them." *State v. Wilson*, 313 N.C. 516, 533, 330 S.E.2d 450, 462 (1985). Additionally, the foundational requirements of Rule 803(6) may be satisfied through the submission of:

> An affidavit from the custodian of the records in question that states that the records are true and correct copies of records made, to the best of the affiant's knowledge, by persons having knowledge of the information set forth, during the regular course of business at or near the time of the acts, events or conditions recorded . . . .

In re S.W., 175 N.C. App. 719, 725, 625 S.E.2d 594, 598, *disc. review denied*, 360 N.C. 534, 635 S.E.2d 59 (2006).

In the present case, during the adjudicatory phase of the hearing, the trial court admitted the reports and the letter over objection by respondent's trial attorney, finding each was admissible under the business records exception to the hearsay rule. Here, a social worker in the employ of petitioner testified that she collected all but one of the samples used in the drug tests and then sealed and shipped the samples to the laboratory for testing. She further testified that she relied on the reports in the ordinary course of her business and that the reports were collected as part of petitioner's record in this particular case.

Respondent argues the trial court erred in admitting, over respondent's objection, her drug test results and the accompanying letter from ADS on the grounds that they fell under no exception to the rule against hearsay. We disagree.

Our Court's decision in *Miller*, 80 N.C. App. 425, 342 S.E.2d 553, is dispositive. In *Miller*, our Court found that the trial court did not err in allowing an emergency room nurse who ordered a blood test to testify at trial as a "qualified witness" regarding the trustworthiness of a blood test as a business record even though the nurse did not actually analyze the blood in the laboratory. *Id.* At 428-29, 342 S.E.2d at 555-56. We held, "the results of the blood test constitute a record made in the usual course of business" and that "[a]uthentication is not undermined because the person who actually analyzed the blood in the . . . laboratory was not present to testify as a witness." *Id.* at 429, 342 S.E.2d at 556. Similarly, in the present case, the testifying social worker collected the samples, sent the samples to the laboratory for testing and relied on the test results in the ordinary course of her business.

Also apposite to the case at bar is our decision in *Barber v. Babcock & Wilson Construction Co.*, 98 N.C. App. 203, 390 S.E.2d 341 (1990), *reversed on other grounds on rehearing*, 101 N.C. App. 564, 400 S.E.2d 735 (1991). In *Barber*, we examined whether an employer in a workers' compensation case was qualified to authenticate the results of a test performed by a private laboratory under Rule 803(6). We found that "[a]lthough [the employer] was not personally knowledgeable about the scientific method used in obtaining the data, he was familiar with the system used by his company in obtaining tests and filing the results with his office." *Id.* at 208, 390 S.E.2d at 344. Accordingly, we held that the employer was qualified to introduce the test results under the business records exception.

In the case at bar, petitioner's witness, in the course of regularly conducted business activity, collected respondent's sample, ordered the drug test and subsequently filed the results of the drug test with her office. As such, petitioner's witness was qualified to introduce the results of the drug test and the letter from ADS under the business records exception to the hearsay rule. Thus, we find that the trial court did not err in allowing the admission of the results of respondent's drug screens and a letter from ADS as hearsay evidence under the business records exception.

[3] Here, the trial court ultimately concluded, *inter alia*, that the juvenile continued to be neglected by respondent and terminated respondent's parental rights to the child under N.C. Gen. Stat. § 7B-1111(a)(1). A child is considered neglected "if the court finds the juvenile to be . . . a neglected juvenile within the meaning of G.S. 7B-101." N.C. Gen. Stat. § 7B-1111(a)(1) (2007). A neglected juvenile is defined as one

> who does not receive proper care, supervision, or discipline from the juvenile's parent, . . . ; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or who has been placed for care or adoption in violation of law.

N.C. Gen. Stat. § 7B-101(15) (2007). Where a juvenile has not been in the custody of a parent for a significant period of time prior to the termination hearing, a trial court may find that grounds for termination exist upon a showing of a "history of neglect by the parent and the probability of a repetition of neglect." *In re Shermer*, 156 N.C. App. 281, 286, 576 S.E.2d 403, 407 (2003).

The trial court's conclusion that grounds to terminate respondent's parental rights based on neglect are supported by the following, unchallenged findings of fact which are binding on this Court:

16. [Respondent] is not present today, and there has been no explanation for her absence [from the termination hearing].

17. The child is a neglected child, and the child was adjudicated neglected on April 13, 2006 after an Adjudicatory hearing by clear, cogent and convincing evidence.

. . .

19. Initially, when the child came into care, [respondent] was cooperative with [petitioner] and complying with her case plan; however, the circumstances changed around January or February, 2007.

20. [Respondent] has not visited with her child since February 12, 2007.

. . .

22. [Respondent] entered into a case plan where she was required to contact Ryan Wiese at ADS, follow through with any recommendations made by Mr. Wiese, attend all recommended programs on a regular basis, and submit to random drug screening for testing. Her visits were to be suspended if she had a positive drug screen, and they would be reinstated once she produced a clean screen.

. . .

24. [Respondent] was required in her case plan to follow through with mental heath appointments and take her medication as prescribed.

25. Initially [respondent] was complying with this, but is not more recently complying. She has not provided any documentation to [petitioner] that she is complying with these conditions.

. . .

27. [Respondent] was residing at 115 Brentwood Ave. from October 2006 until the summer of 2007.

28. The last time [petitioner] was able to confirm that [respondent] was in that home was on April 25, 2007. On April 25,

2007, [a social worker] visited the home, and [respondent] told the [social worker] to leave and not come back.

29. The social worker did attempt to visit at the home in May, and [respondent] was not present at that time.

30. Sometime during the summer of 2007, [petitioner] confirmed that [respondent] was no longer residing at the 115 Brentwood address, in that the 115 Brentwood home was boarded up and padlocked.

31. [Respondent] indicated that she lived at the Sheraton Towers, but [petitioner] was unable to confirm that she lived at the Sheraton Towers.

32. The last conversation with [respondent] and [petitioner], was that she could be contacted at the Brentwood Address, and [respondent] gave the social worker two phone numbers.

33. The social worker has attempted to contact [respondent] on those two numbers, and to locate her at the Sheraton Towers and the Brentwood Avenue address, but [respondent] has not been located, and the telephone numbers are invalid.

. . .

37. In March 2007, [respondent] did not have any heat in [her] home; therefore, the child could not reside with her or visit with her there.

. . .

41. The social worker attempted to visit [respondent] at the Brentwood Address on May 4, 10, 11, and 14. [Respondent] was not present at those times.

42. [Respondent] has not provided [petitioner] with a verified address since April 2007.

43. [Respondent] periodically contacts [petitioner] and has periodically submitted to drug screens. But these drugs screens are done when she makes herself available, and they are not necessarily random.

See Koufman v. Koufman, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) ("[w]here 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"). The trial court further found:

38. In March of 2007, [respondent] began allowing a convicted sex offender to live with her. . . .

39. In April 2007, [respondent] still had no heat in her home . . . and still had the sex offender residing with her.

These findings are supported by evidence presented at the termination hearing and combined they are sufficient to establish a history of neglect and the probability of future neglect sufficient to terminate respondents parental rights to the juvenile. *See In re L.O.K., J.K.W., T.L.W. & T.L.W.*, 174 N.C. App. 426, 436, 621 S.E.2d 236, 242 (2005) ("the trial court's conclusion that grounds existed for termination under N.C. Gen. Stat. § 7B-1111(a)(1) is also supported by the court's findings establishing that respondent failed to maintain contact with her children for extended periods of time"); *In re Leftwich*, 135 N.C. App. 67, 72, 518 S.E.2d 799, 803 (1999) (trial court could properly find a probability of future neglect when respondent mother had not made meaningful progress in improving her lifestyle); *In re Davis*, 116 N.C. App. 409, 414, 448 S.E.2d 303, 306 (the parents' failure to "obtain[] continued counseling, a stable home, stable employment, and [attend] parenting classes" was sufficient to show a probability that neglect would be repeated if the child were returned to the care of the parents), *disc. review denied*, 338 N.C. 516, 452 S.E.2d 808 (1994).

[4] Respondent also argues the trial court erred by taking judicial notice of and basing its findings of fact on all the prior orders in this case because all of the orders were not based upon clear, cogent, and convincing evidence. It is well established, however, that " '[a] trial court may take judicial notice of earlier proceedings in the same cause.' " *In re J.B.*, 172 N.C. App. 1, 16, 616 S.E.2d 264, 273 (2005) (quoting *In re Isenhour*, 101 N.C. App. 550, 553, 400 S.E.2d 71, 73 (1991)). Equally well established is the presumption that, in a bench trial, the trial court will disregard any incompetent evidence. *In re Huff*, 140 N.C. App. 288, 298, 536 S.E.2d 838, 845 (2000). As discussed *supra*, the above referenced findings of fact are supported by the testimony of the social worker at the termination proceeding and were not based on the prior orders. These findings are based upon clear, cogent, and convincing evidence and support the trial court's conclusion of law that sufficient grounds existed to terminate respondent's parental rights to the juvenile based on a history of neglect and probability of repetition of the neglect. "Since we have concluded that the trial court properly concluded that the ground of neglect existed, we need not review the other ground relied upon by the trial court." *In*

re L.O.K., 174 N.C. App. at 436, 621 S.E.2d at 243 (citing *In re B.S.D.S.*, 163 N.C. App. 540, 546, 594 S.E.2d 89, 93-94 (2004) ("[h]aving concluded that at least one ground for termination of parental rights existed, we need not address the additional ground of neglect found by the trial court")).

Affirmed.

Judge McGEE concurs.

Judge STROUD dissents in a separate opinion.

STROUD, Judge, dissenting.

For the reasons set forth in my dissenting opinion in *In re N.C.H., G.D.H., and D.G.H.* (No. COA08-413), filed simultaneously with this case, I respectfully dissent.

ROBBIE C. SCARBORO, Employee, Plaintiff v. EMERY WORLDWIDE FREIGHT CORP., Employer, CONSTITUTION STATE SERVICE COMPANY, Carrier, Defendants

No. COA07-1437

(Filed 2 September 2008)

1. Workers' Compensation— lawn care services—not a reasonable medical expense

The Industrial Commission did not err in a workers' compensation case by denying lawn care services to plaintiff despite the inclusion of such services in a life care plan as a reasonable medical expense. The conclusion that the lawn care services were an ordinary expense of life not included in medical compensation was supported by the findings, and defendants are not necessarily required to pay for each item mentioned in the life care plan.

2. Workers' Compensation— life care plan—reasonable rehabilitative service

The Industrial Commission's decision in a workers' compensation case that a life care plan was a reasonable rehabilitative

service was supported by a physician's opinion that the plan was medically necessary for plaintiff.

Appeal by plaintiff and defendants from opinion and award entered 7 August 2007 by the Full Commission. Heard in the Court of Appeals 30 April 2008.

Sellers, Hinshaw, Ayers, Dortch and Lyons, P.A. by John F. Ayers, III, for plaintiff.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by M. Duane Jones, for defendants.

ELMORE, Judge.

Both parties in this case appeal from an Opinion and Award issued by the Full Commission on 7 August 2007. For the reasons stated below, we affirm the Full Commission's Opinion and Award.

Robbie Scarboro (plaintiff) was employed as a utility driver for Emery Worldwide Freight Corporation (defendant). On 4 November 1998, plaintiff injured his upper back and left shoulder while he was unloading freight off of a truck. Defendants filed a Form 60 admitting compensability of plaintiff's injuries. On 14 March 2001, Deputy Commissioner (now Commissioner) Pamela T. Young filed an Opinion and Award which found plaintiff's injury to be causally related to his 4 November 1998 accident.

Since plaintiff's injury, he has been treated by numerous physicians. On 5 January 2001, neurologist Dr. Erik Borresen began treating plaintiff and has remained his primary treating physician. Dr. Borresen diagnosed plaintiff as having "left low thoracic neuropathy, left pectoralis transposition, chronic myofascial neck and shoulder pain, chest pain, lumbar disc disease, right knee meniscal tear, depression, and muscle contraction headaches." Plaintiff has a fifty percent permanent partial impairment as a result of his chronic pain disorder and a forty percent permanent functional impairment to his left shoulder. Dr. Borresen said that it was highly unlikely that plaintiff would return to gainful employment. On 2 February 2002, a life care plan was prepared for plaintiff by Ms. Laura Weiss, a registered nurse, certified life care planner, certified case manager, and certified disability management specialist. The life care plan included recommendations that plaintiff be provided lawn care services and that grab rails and handrails be installed in his home. Dr. Borresen

reviewed the life care plan and agreed that the recommendations were reasonable and medically necessary.

Deputy Commissioner Bradley W. Houser heard this case on 23 July 2003. Deputy Commissioner Houser issued an Opinion and Award on 12 November 2003. Plaintiff appealed the 12 November 2003 Opinion and Award to the Full Commission. On 26 October 2004, the Full Commission entered an Opinion and Award that ordered defendants to provide the Botox injections ordered by Dr. Borresen and the recommended home guard rails. It also concluded that there was insufficient evidence on the issue of lawn care services, but did not make a final decision as to whether medical evidence could sufficiently support lawn care services for plaintiff.

On 26 May 2005, plaintiff requested that defendants reimburse him for $4,700.58, the cost of the life care plan, but defendants refused. On 1 July 2005, plaintiff filed a Motion for Approval of Specific Medical Treatment/Life Care Plan, which Special Deputy Commissioner Meredith Henderson denied on 22 July 2005. Plaintiff subsequently filed a Form 33 appealing the 22 July 2005 order and requesting further decision on the medical necessity for lawn care services.

On 16 November 2005, the appeal was heard before Deputy Commissioner Ronnie E. Rowell. Deputy Commissioner Rowell filed an Opinion and Award on 10 October 2006 that required defendants to pay for the preparation of plaintiff's life care plan and to provide plaintiff compensation for lawn care services.

Defendants appealed the 10 October 2006 Opinion and Award and the matter was heard before the Full Commission on 24 May 2007. On 7 August 2007, the Full Commission entered an Opinion and Award that denied plaintiff compensation for lawn care services and ordered defendants to reimburse plaintiff for the costs associated with preparing his life care plan. Plaintiff appeals the Full Commission's denial of lawn care services and defendants appeal the order requiring them to pay for the preparation of plaintiff's life care plan.

I. STANDARD OF REVIEW

Our review of an appeal from a decision of the North Carolina Industrial Commission is limited to the following: (1) "whether there was any competent evidence to support the Full Commission's findings of fact" and (2) "whether these findings of fact support the conclusions of law." *Ard v. Owens-Illinois*, 182 N.C. App. 493, 496, 642

S.E.2d 257, 259 (2007) (quotations and emphasis omitted). A finding of fact is "conclusive on appeal if supported by any competent evidence[,]" even where there is evidence to contradict the finding. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (quotations removed). We review the Full Commission's conclusions of law *de novo*. *Oxendine v. TWL, Inc.*, 184 N.C. App. 162, 164, 645 S.E.2d 864, 865 (2007).

II. PLAINTIFF'S APPEAL

[1] Plaintiff appeals the Full Commission's denial of the lawn care services and assigns error to conclusion of law 4, which states the following:

> An ordinary necessity of life is to be paid from the statutory wages provided by the Workers' Compensation Act. Extraordinary and unusual expenses are embraced in the "other treatment" language of N.C. Gen. Stat. § 97-25. . . . In the present case, the lawn care services recommended by the life care plan are ordinary expenses of life for plaintiff and are not extraordinary and unusual expenses that plaintiff has incurred as a result of his work-related injury. Accordingly, these expenses are not payable by defendants. N.C. Gen. Stat. §§ 97-25; -2(19); -29.

Plaintiff has not assigned error to any findings of fact; therefore all factual findings are "presumed to be supported by the evidence and are binding on appeal." *Watson v. Employment Security Comm.*, 111 N.C. App. 410, 412, 432 S.E.2d 399, 400 (1993) (citing *Beaver v. Paint Co.*, 240 N.C. 328, 330, 82 S.E.2d 113, 114 (1954)). Our review of plaintiff's appeal is limited to whether conclusion of law 4 is supported by the factual findings.

The North Carolina Workers' Compensation Act requires employers to provide medical compensation to workers "who suffer disability by accident arising out of and in the course of their employment." *Henry v. Leather Co.*, 234 N.C. 126, 127, 66 S.E.2d 693, 694 (1951). N.C. Gen. Stat. § 97-25 states that "[m]edical compensation shall be provided by the employer." N.C. Gen. Stat. § 97-25 (2007).[1] Medical compensation is:

> medical, surgical, hospital, nursing, and rehabilitative services, and medicines, sick travel, and *other treatment*, including med-

1. All relevant provisions in N.C. Gen. Stat. § 97-25 and N.C. Gen. Stat. § 97-2(19) contained the same language when plaintiff filed his claim. *See* N.C. Gen. Stat. § 97-2(19) (2003); N.C. Gen. Stat. § 97-25 (2003).

> ical and surgical supplies, as may reasonably be required to effect a cure or give relief and for such additional time as, in the judgment of the Commission, will tend to lessen the period of disability[.]

N.C. Gen. Stat. § 97-2(19) (2007) (emphasis added). Plaintiff argues that the lawn care services, recommended by the life care plan, are reasonably medically necessary because of his chronic pain condition. Plaintiff asserts that the lawn care services are not an ordinary expense, but instead are an extraordinary and unusual expense included in the "other treatment" language of N.C. Gen. Stat. § 97-25. N.C. Gen. Stat. § 97-25 (2007).

"One purpose of the Workers' Compensation Act is to [e]nsure a limited and determinate liability for employers." *Grantham v. Cherry Hosp.*, 98 N.C. App. 34, 40, 389 S.E.2d 822, 826 (1990). "While the Act should be liberally construed to benefit the employee, the plain and unmistakable language of the statute must be followed." *Id.* To this end, "courts must not legislate expanded liability under the guise of construing a statute liberally." *McDonald v. Brunswick Elec. Membership Corp.*, 77 N.C. App. 753, 756, 336 S.E.2d 407, 409 (1985).

North Carolina courts have previously interpreted the term "other treatment" in relation to N.C. Gen. Stat. § 97-29.[2] N.C. Gen. Stat. § 97-29 (Supp. 1989); *see McDonald*, 77 N.C. App. at 755-57, 336 S.E.2d at 409 (holding that neither "other treatment or care" nor "rehabilitative services" can be interpreted to include providing the wheelchair-using plaintiff with compensation for his specially equipped van); *Godwin v. Swift & Co.*, 270 N.C. 690, 694-95, 155 S.E.2d 157, 160-61 (1967) (determining that providing compensation to the relatives of a claimant who needed constant care was included in "other treatment").

In *Grantham v. Cherry Hospital*, this Court held that the Full Commission improperly ordered the defendant to pay the plaintiff's consumer debts under the "other treatment . . . or rehabilitative services" provision of N.C. Gen. Stat. § 97-29. 98 N.C. App. at 40, 389 S.E.2d at 825; N.C. Gen. Stat. § 97-29 (Supp. 1989). In *Grantham*, the

---

2. N.C. Gen. Stat. § 97-29 previously stated that "compensation, including reasonable and necessary nursing services, medicines, sick travel, medical, hospital, and *other treatment of* [sic] care or rehabilitative services shall be paid by the employer [.]" N.C. Gen. Stat. § 97-29 (Supp. 1989) (emphasis added). Similar language is now codified in N.C. Gen. Stat. § 97-2(19), which is used to define for "medical compensation" in N.C. Gen. Stat. § 97-25. N.C. Gen. Stat. § 97-2(19) (2007); N.C. Gen. Stat. § 97-25 (2007); N.C. Gen. Stat. § 97-29 (Supp. 1989).

plaintiff had accumulated nearly $28,000.00 in debt because his income had substantially decreased after he became disabled. *Id.* at 35, 389 S.E.2d at 822. The plaintiff's physician testified that as a result of the plaintiff's indebtedness, the plaintiff had developed depression, which was interfering with his rehabilitation. *Id.* The defendant was ordered to pay the plaintiff's debts in order to improve his rehabilitation. *Id.* at 36, 389 S.E.2d at 823. We reversed this order and held that the Industrial Commission had misinterpreted the statute by ordering expenses for basic necessities under the guise of rehabilitative services. *Id.* at 40-41, 389 S.E.2d at 826. Applying the above principles to the facts of this case, we do not find that the lawn care services for plaintiff fall into the category of "other treatment" pursuant to N.C. Gen. Stat. § 97-25.

The determination of "what treatment is appropriate for a particular employee is a matter within the exclusive jurisdiction of the [Full] Commission." *N.C. Chiropractic Assoc. v. Aetna Casualty & Surety Co.*, 89 N.C. App. 1, 5, 365 S.E.2d 312, 314 (1988). The Full Commission "is not required to make 'exhaustive findings as to each statement made by any given witness or make findings rejecting specific evidence[.]' " *Smith v. Beasley Enters., Inc.*, 148 N.C. App. 559, 562, 577 S.E.2d 902, 904 (2002) (quoting *Bryant v. Weyerhaeuser Co.*, 130 N.C. App. 135, 139, 502 S.E.2d 58, 62 (1998)). The factual findings are sufficient so long as this Court can "reasonably infer that [the Full Commission] gave proper consideration to all relevant testimony." *Id.* Here, the findings of fact contain information about plaintiff's injury and medical treatments, plaintiff's testimony about his lawn care services, and a few physicians' recommendations on the matter. These factual findings provided the Full Commission with all of the relevant information it needed to decide whether the lawn care services for plaintiff were medically necessary.

The recommendations in plaintiff's life care plan as well as his physicians' testimony supported his argument that the lawn care services were medically necessary. However, defendants also provided evidence supporting their contention that the lawn care services for plaintiff were an ordinary expense, not included in his medical compensation from defendants. This Court may not weigh the evidence or evaluate the credibility of witnesses, as " '[t]he Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony.' " *Adams*, 349 N.C. at 680, 509 S.E.2d at 413 (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965)).

We find that the Full Commission's factual findings support its conclusion of law that the lawn care services for plaintiff are not extraordinary or unusual expenses included in the "other treatment" language of N.C. Gen. Stat. § 97-25. N.C. Gen. Stat. § 97-25 (2007). Findings of fact 8 and 9 recount Dr. Dickerson's opinions that "with [plaintiff's] orthopedic problems, specifically [his] back problems . . . yard work is contraindicated in [his] case" and "it would be hard for [plaintiff] to do his yard work without having a lot of pain, so I don't have an objection to [lawn care services] in this particular case." In finding of fact 10, Dr. Chewning, an orthopedic surgeon, testified that "due to [plaintiff's] back and his shoulder problems, plaintiff should stay away from lawn mowing activities[.]" Furthermore, factual finding 11 stated that plaintiff had previously cut his own grass and has since hired a lawn care service because "he feared penalties would be levied against him by his homeowners' association for violating his restrictive covenants by failing to keep his lawn presentable."

Plaintiff contends that the Full Commission's factual findings could only support a conclusion that the lawn care services are medically necessary for plaintiff. We disagree. The factual findings establish that because of plaintiff's medical condition, he should refrain from mowing his lawn. We understand and appreciate plaintiff's efforts to keep his yard in compliance with the rules of his homeowners' association. However, providing plaintiff with the resources to comply with this restrictive covenant does not rise to the level of "other treatment[.]" These factual findings support the conclusion that the lawn care services are an ordinary expense of life, which is not included in medical compensation, pursuant to N.C. Gen. Stat. § 97-2(19) and N.C. Gen. Stat.§ 97-25.

We also agree with defendants' argument that just because the life care plan was determined to be a reasonable medical expense, defendants are not necessarily required to pay for each item mentioned in the plan. *See Timmons v. N.C. Dept. of Transportation*, 130 N.C. App. 745, 750, 504 S.E.2d 567, 570 (1998) (*Timmons II*) (finding that an order requiring the defendant to pay for preparation of the plaintiff's life care plan does not require that the defendant must pay for each item recommended in the plan), *rev'd on other grounds*, 351 N.C. 177, 522 S.E.2d 62 (1999) (*Timmons IV*). Due to the aforementioned factors, we do not find error in the Full Commission's denial of lawn care services for plaintiff.

II. DEFENDANTS' APPEAL

[2] Defendants appeal the Full Commission's order requiring them to pay the costs of preparing a life care plan for plaintiff. Defendants assign error to conclusion of law 2 which states the following:

> The greater weight of the evidence shows that the life care plan has been pertinent to plaintiff's case and was reasonably necessary for plaintiff to function optimally, avoid potential complications related to his injuries, and live a productive life. As such, the life care plan was a "reasonable rehabilitative service." N.C. Gen. Stat. §§ 97-2(19);-25; *Timmons v. N.C. Dept. of Transportation*, 351 N.C. 177, 522 S.E.2d 62 (1999).

The Full Commission's conclusion that plaintiff's life care plan was a "reasonable rehabilitative service[,]" pursuant to N.C. Gen. Stat. § 97-2(19) and N.C. Gen. Stat. § 97-25, is supported by its factual findings. We affirm the Full Commission's order taxing the costs of preparing plaintiff's life plan to defendants.

In workers' compensation cases, the employer is required to provide the injured employee with medical compensation, which includes "medical, surgical, hospital, nursing, and *rehabilitative services* . . . as may reasonably be required to effect a cure or give relief[.]" N.C. Gen. Stat. § 97-2(19) (2007) (emphasis supplied); N.C. Gen. Stat. § 97-25 (2007). The Full Commission "has discretion in determining whether a rehabilitative service will effect a cure, give relief, or will lessen a claimant's period of disability." *Foster v. U.S. Airways, Inc.*, 149 N.C. App. 913, 923, 563 S.E.2d 235, 242 (2002). Defendants contend that the order was improper because plaintiff's life care plan was never recommended by an authorized treating physician. Defendants also question Ms. Weiss's qualifications to prepare the life care plan and argue that they have never used the life care plan in their medical treatment decisions for plaintiff. The arguments have no merit and are irrelevant to our review of the Full Commission's Opinion and Award.

As previously discussed, we can only review a decision of the North Carolina Industrial Commission to determine if the factual findings are supported by competent evidence and if the conclusions of law are supported by the factual findings. *Ard*, 182 N.C. App. at 496, 642 S.E.2d at 259. We find that conclusion of law 2 is sufficiently supported by the factual findings.

Our Supreme Court has previously decided that pursuant to N.C. Gen. Stat. § 97-2(19) and N.C. Gen. Stat. § 97-25, preparation of a life care plan can constitute a rehabilitative service. *See Timmons IV*, 351 N.C. at 182, 522 S.E.2d at 65. In *Timmons IV*, a rehabilitation expert recommended developing a life care plan to evaluate the plaintiff's medical needs. *Id.* at 182, 522 S.E.2d at 64-65. Our Supreme Court held that the rehabilitation expert's recommendation provided competent evidence to support the finding that the plaintiff's life care plan was a rehabilitative service, pursuant to N.C. Gen. Stat. § 97-25. *Id.*

We do not need to discuss each of the Full Commission's factual findings that support conclusion of law 2. Conclusion of law 2 can be sufficiently supported by finding of fact 6, which states the following:

> On February 6, 2002, a life care plan was prepared by Laura Weiss, a registered nurse, certified life care planner, certified case manager, and certified disability management specialist. The life care plan included recommendations that plaintiff be provided lawn care services and that grab rails be installed in plaintiff's home. Dr. Borresen subsequently reviewed the life care plan and agreed that such accommodations were reasonable and medically necessary. Defendants provided handrails and grab rails for Plaintiff, but denied lawn care services.

Defendants have not assigned error to this factual finding; therefore the finding is "presumed to be supported by the evidence and [is] binding on appeal." *Watson*, 111 N.C. App. at 412, 432 S.E.2d at 400. Dr. Borresen's opinion, that the life care plan was medically necessary for plaintiff, supports the Full Commission's conclusion that the life care plan was a "reasonable rehabilitative service" for plaintiff. For these reasons, we affirm the Full Commission's order to tax the cost of preparing plaintiff's life plan to defendants.

III. CONCLUSION

Having conducted a thorough review of the record and briefs, we discern no error in the Full Commission's Opinion and Award. Accordingly, we must affirm.

Affirmed.

Judges McGEE and JACKSON concur.

GREAT AMERICAN INSURANCE CO., PLAINTIFF v. TRENTON FREEMAN, DEFENDANT

No. COA07-659

(Filed 2 September 2008)

Insurance— automobile—UIM coverage—fleet policy—valid rejection or selection required

The trial court did not err in a declaratory judgment action by concluding that Omega Development's fleet policy with plaintiff insurance company provided underinsured motorist (UIM) coverage in the amount of $1,000,000 for defendant employee's injuries resulting from a 24 September 2004 accident because: (1) N.C.G.S. § 20-279.21(b)(4) provides that although plaintiff's fleet policy was not subject to the jurisdiction of the North Carolina Rate Bureau and was thus not required to use the Rate Bureau's approved form, plaintiff nonetheless was required to prove that Omega Development had validly rejected UIM coverage or selected alternative UIM coverage limits; and (2) the record was devoid of any evidence that Omega Development made such a rejection or selection. As a consequence, N.C.G.S. § 20-279.21(b)(4) provides that if the named insured does not reject UIM coverage and does not select different coverage limits, the amount of UIM coverage shall be equal to the highest limit of bodily injury liability coverage for any one vehicle in the policy. Further, defendant employee's use of his own motorcycle in Omega Development's business fell within the policy's definition of "any auto" and was a "covered auto" under the policy.

Appeal by plaintiff from order entered 2 February 2007 by Judge Ripley E. Rand in Durham County Superior Court. Heard in the Court of Appeals 28 November 2007.

Edgar & Paul, by Patrick M. Anders, for plaintiff-appellant.

Kirby & Holt, L.L.P., by David F. Kirby, Isaac L. Thorp, and William B. Bystrynski, for defendant-appellee.

GEER, Judge.

Plaintiff Great American Insurance Co. appeals from the trial court's order concluding that its motor vehicle insurance policy with Omega Development Co., LLC provided underinsured motorist ("UIM") coverage in the amount of $1,000,000.00 to defendant

Trenton Freeman, an Omega Development employee. While Great American contends that since its policy was a fleet policy, it was exempt from any statutory requirement that it obtain a rejection or selection of policy limits for UIM coverage, we read the controlling statute differently. Under N.C. Gen. Stat. § 20-279.21(b)(4) (2007),[1] Great American was not subject to the jurisdiction of the North Carolina Rate Bureau and, therefore, was not required to use the Rate Bureau approved form, but it nonetheless was required to prove that Omega Development had validly rejected UIM coverage or selected alternative UIM coverage limits. As the record is devoid of any evidence that Omega Development made such a rejection or selection, we affirm the trial court's order.

Facts

On 24 September 2004, Freeman was an employee of Omega Development. Freeman had been assigned the use of a company-owned truck that day, but "because it was a pretty day outside," he decided to ride his motorcycle, which he personally owned and insured. An underinsured motorist ran a stop sign and struck Freeman's motorcycle, causing Freeman to sustain severe injuries that, in part, necessitated the amputation of his left leg.

Omega Development had a business automobile insurance policy issued by Great American that was in effect on 24 September 2004. Omega Development submitted its original insurance application to Great American for this policy in December 2000. The application contained a list of available coverage categories, including liability, uninsured motorist ("UM"), and UIM coverages. Next to each coverage category, there was a space for the applicant to place an "X" to indicate selection of that type of coverage. The application also provided options within each of the coverage categories to select different kinds of motor vehicles that would be "covered autos" within those categories.

In its application, Omega Development selected liability insurance coverage in the amount of $1,000,000.00 for "any 'auto' " within the list of "covered autos" options. Omega Development, how-

1. This provision was substantially amended by 2008 N.C. Sess. Laws ch. 124, sec. 1.1, to provide in pertinent part: "Notwithstanding the provisions of this subsection, no policy of motor vehicle liability insurance applicable solely to commercial motor vehicles as defined in G.S. 20-4.01(3D) or applicable solely to fleet vehicles shall be required to provide underinsured motorist coverage." This amendment is effective 1 January 2009 and applies to policies issued or renewed on or after that date. *Id.* sec. 12.1.

ever, failed to make any selection on the application regarding UIM coverage.

The application also contained a separate section listing various options from which Omega Development could choose regarding selection or rejection of UM or UIM coverage. There was a signature line next to each of the options, but Omega Development left all of the signature lines blank.

Great American subsequently issued a policy that provided Omega Development with liability coverage in the amount of $1,000,000.00 for "any 'auto.' " With respect to UM/UIM coverage, the policy provided $1,000,000.00 coverage, but defined "covered autos" for UM/UIM purposes as "only those autos described in Item Three of the declarations . . . ." Freeman's motorcycle was not one of the vehicles identified on the declarations page.

Great American filed a declaratory judgment action in Durham County Superior Court on 30 June 2006, seeking a declaration that its policy with Omega Development did not provide UIM coverage for Freeman's injuries resulting from the 24 September 2004 accident. Following a bench trial, the trial court entered an order on 2 February 2007 concluding that Great American bore the burden of proving that Omega Development had made a valid rejection of UIM coverage or had selected different limits for UIM coverage; that Great American had failed to satisfy this burden; and as a result, that its policy provided UIM coverage for Freeman's accident in the amount of $1,000,000.00. Great American timely appealed to this Court.

Discussion

The sole issue in this appeal is whether the policy issued by Great American to Omega Development provided UIM coverage for Freeman's accident. North Carolina's Motor Vehicle Safety and Financial Responsibility Act ("the Act"), N.C. Gen. Stat. §§ 20-279.1 to -279.39 (2007), establishes the requirements for North Carolina motor vehicle insurance liability policies, although it exempts from its coverage certain types of policies. *See* N.C. Gen. Stat. § 20-279.32 (2007) (exempting motor vehicles owned and operated by "for-hire motor carrier[s]" or by federal, state, or local governments). Although the policy issued to Omega Development is a fleet policy because it covers five or more vehicles leased or owned by Omega Development, *see* N.C. Gen. Stat. § 58-40-10(2) (2007), fleet policies do not fall within any of the exceptions to the Act. Accordingly, the terms of the Act apply to the Omega Development policy.

The Act's requirements with respect to UIM coverage are laid out in N.C. Gen. Stat. § 20-279.21(b)(4), which states in pertinent part:

> The coverage required under this subdivision shall not be applicable where any insured named in the policy rejects the coverage. An insured named in the policy may select different coverage limits as provided in this subdivision. If the named insured does not reject underinsured motorist coverage and does not select different coverage limits, the amount of underinsured motorist coverage shall be equal to the highest limit of bodily injury liability coverage for any one vehicle in the policy.

As this Court explained in *Hendrickson v. Lee*, 119 N.C. App. 444, 450, 459 S.E.2d 275, 279 (1995) (internal citation omitted), under N.C. Gen. Stat. § 20-279.21(b)(4), "although an insured is not legally obligated to contract for UIM coverage in *any* amount, UIM coverage equal to a policy's liability limits will be assumed *unless* the insured validly rejects that amount of coverage."

Fleet policies, such as the one issued to Omega Development, are required to provide UIM coverage in accordance with N.C. Gen. Stat. § 20-279.21(b)(4). *Hlasnick v. Federated Mut. Ins. Co.*, 136 N.C. App. 320, 324-25, 524 S.E.2d 386, 389, *aff'd in part on other grounds and disc. review improvidently allowed in part*, 353 N.C. 240, 539 S.E.2d 274 (2000). As this Court explained in *Hlasnick*, N.C. Gen. Stat. § 20-279.21(b)(4) sets the "floor" for UIM coverage that insurers must provide—necessarily including fleet policies—although the insured has the freedom to reject all UIM coverage or to select different coverage limits so long as the limits meet the statutory minimum. 136 N.C. App. at 325-26, 524 S.E.2d at 390.

For all policies not exempt from the Act, there must be a rejection of UIM coverage or a selection of alternative coverage limits to avoid the incorporation of the UIM coverage limits dictated by N.C. Gen. Stat. § 20-279.21(b)(4). *Hlasnick*, 136 N.C. App. at 326, 524 S.E.2d at 390. For policies within the jurisdiction of the North Carolina Rate Bureau, "[r]ejection of or selection of different coverage limits for underinsured motorist coverage . . . shall be made in writing by the named insured on a form promulgated by the Bureau and approved by the Commissioner of Insurance." N.C. Gen. Stat. § 20-279.21(b)(4). "Only when issuing insurance policies outside the jurisdiction of the Rate Bureau may the insurer 'permissibly use[] its own form for selection or rejection of underinsured motorist coverage.' " *Erie Ins. Exch. v. Miller*, 160 N.C. App. 217, 222, 584 S.E.2d

857, 860 (2003) (quoting *Hlasnick*, 136 N.C. App. at 325, 524 S.E.2d at 389).

Because the Omega Development policy was a fleet policy, it was not subject to the Rate Bureau's jurisdiction. N.C. Gen. Stat. § 58-36-1 (2007) (limiting Rate Bureau's jurisdiction to those motor vehicle policies covering "nonfleet private passenger motor vehicles"). Therefore, as *Hlasnick* confirms, Great American could "permissibly use[] its own form for selection or rejection of underinsured motorist coverage." 136 N.C. App. at 325, 524 S.E.2d at 389.

Great American contends that because the policy is not within the Rate Bureau's jurisdiction no "selection/rejection form" or "written rejection" was required at all and, therefore, the trial court erred in concluding that Great American failed to meet its burden of proving that Omega Development selected alternative coverage for UIM coverage. While *Hlasnick* stated that N.C. Gen. Stat. § 20-279.21(b)(4) "requires that rejection be in writing only when the policy is under Rate Bureau jurisdiction," 136 N.C. App. at 325, 524 S.E.2d at 389, nothing in *Hlasnick* frees an insurer from having to prove that the insured in fact rejected or selected different UIM coverage limits.

Instead, in *Hlasnick*, this Court determined that the rejection of UIM coverage could be inferred from the form used by the insurer. *Id.*, 524 S.E.2d at 390. That form included a space that the insured could mark to select coverage, but it did not have a place for the insured to indicate rejection of UIM coverage or selection of other limits. *Id.*, 524 S.E.2d at 389. The Court concluded that since the insured did not choose to select UIM coverage, it could be inferred that the insured intended to reject coverage. *Id.*, 524 S.E.2d at 390. According to *Hlasnick*, the insurer's form met the "bare statutory requirements" for rejection. *Id.* We stressed, however, that "it would be preferable if the form contained a written provision allowing an insured unambiguously to reject such coverage . . . ." *Id.* Thus, *Hlasnick* acknowledges that there are still "statutory requirements" for proving that an insured has rejected UIM coverage.

In this case, because of the nature of the Great American application form, the inference found sufficient to prove rejection in *Hlasnick* cannot be drawn. Great American used a form that contained a provision that allowed Omega Development to unambiguously reject UIM coverage or select alternative coverage limits, but Omega Development did not do so.

The insurance application contained a section titled "UNINSURED AND UNDERINSURED MOTORISTS COVERAGE" with instructions to "[c]heck the appropriate box(es) below and sign where applicable." The application then provided:

> I understand and acknowledge that uninsured motorist (UM) and underinsured motorist (UIM) coverages have been explained to me. I have been offered the options of:
>
> ( ) Selecting UM and UIM limits equal to my liability limits,
>
> ( ) Selecting UM and UIM limits lower than my liability limits, or
>
> ( ) Rejecting coverage entirely.
>
> I understand that the coverage selection and limit choices indicated here will apply to all future policy renewals, continuations and changes unless I notify you otherwise in writing.
>
> 1. I select UM and UIM limits indic[ated] in this app[lication]
>
> 2. I reject UM bodily injury coverage
>
> 3. I reject UIM bodily injury coverage
>
> 4. I reject UM property damage coverage
>
> 5. I reject UIM property damage coverage

Next to each of the options numbered one through five, there was a space for "applicant's signature."

In Omega Development's completed application, there were no marks indicating that any of the options had been offered to Omega Development, and the spaces for signatures next to the options being selected were all left blank. In addition, on the application's first page, where the applicant could place an "X" beside the type of coverage selected and the types of motor vehicles that would be "covered autos" for each type of coverage, Omega Development did not indicate that it was selecting UM or UIM coverage or designate the type of vehicles that would be "covered autos" for UM/UIM coverage.

Thus, in this case, the insured had the option to either select UIM coverage or reject UIM coverage, and it did neither. The insured had the option of selecting a different definition of "covered autos" than it did for its liability coverage, but it did not do so. We cannot, therefore, draw from these facts any inference that Omega Development intended to select a different type of coverage for UIM

than for liability. Such an inference on these facts would amount to mere speculation.

In the absence of the inference found in *Hlasnick*, the record in this case contains no evidence of any rejection or selection of alternative coverage limits with respect to UIM coverage, oral or written. The trial court, therefore, correctly determined that Great American failed to meet its burden of proving that Omega Development had selected different UIM coverage.

As a consequence, N.C. Gen. Stat. § 20-279.21(b)(4) applies: "If the named insured does not reject underinsured motorist coverage and does not select different coverage limits, the amount of underinsured motorist coverage shall be equal to the highest limit of bodily injury liability coverage for any one vehicle in the policy." This Court construed § 20-279.21(b)(4) in *Vasseur v. St. Paul Mut. Ins. Co.*, 123 N.C. App. 418, 473 S.E.2d 15, *disc. review denied*, 345 N.C. 183, 479 S.E.2d 209 (1996).[2]

In *Vasseur*, the plaintiff, who was riding his own motorcycle, was struck by an underinsured vehicle while in the course and scope of his employment. The plaintiff sought UIM coverage under his employer's policy. That policy provided $1,000,000.00 in liability coverage for "any auto," which included vehicles not owned by the employer, but owned by employees and used for the employer's business. UIM coverage was, however, restricted to "any owned autos"—vehicles actually owned by the employer. Although there was no dispute that the insurer had failed to obtain the statutorily-required rejection of UIM coverage, the insurer argued—like Great American here—that "an insurer may restrict UIM coverage only to certain automobiles covered under a policy's liability provisions without receiving the statutorily-required rejection of UIM insurance." *Id.* at 423, 473 S.E.2d at 18. This Court rejected that argument, reasoning:

> Restriction of UIM coverage only to certain of the autos covered under a policy necessarily involves "rejection" of UIM coverage for those autos afforded liability coverage but not UIM coverage. This "rejection" must therefore comply with the mandates of G.S. § 20-279.21(b)(4). [The employer] executed no rejection

2. While Great American contends that *Vasseur* is inapplicable to this case because it did not involve a fleet policy, the nature of the policy—fleet or non-fleet—is relevant only in deciding what was required for there to be a valid rejection of UIM coverage or a valid selection of UIM limits different from those provided for liability coverage. Nothing in § 20-279.21(b)(4) suggests that the consequences of an invalid rejection or selection are different for fleet policies and non-fleet policies.

> form in accordance with G.S. § 20-279.21(b)(4), and thus did not validly reject UIM coverage for "nonowned autos." *See Hendrickson*, 119 N.C. App. at 450, 459 S.E.2d at 279. [The employer]'s policy with defendant therefore provided $1,000,000 UIM coverage upon such autos.

Id.

In Omega Development's policy with Great American, the highest limit of bodily injury liability coverage for purposes of § 20-279.21(b)(4) is $1,000,000.00 for "any 'auto.' " The policy, however, provides UIM coverage to only "specifically described 'autos' " set out in the declarations, which in turn listed only vehicles owned by Omega Development. Since we have concluded that Great American failed to prove that Omega Development either rejected UIM coverage for autos that it did not own or selected a different scope of coverage for UIM, *Vasseur* compels the conclusion that the policy's liability limit of $1,000,000.00 for "any 'auto' " applies with respect to UIM coverage.

The Omega Development policy defines an "auto" as "a land motor vehicle, 'trailer' or semitrailer designed for travel on public roads but does not include 'mobile equipment.' " Its definition of "any 'auto' " encompasses "nonowned 'autos,' " which includes "those 'autos' you do not own, lease, hire, rent or borrow that are used in connection with your business. This includes 'autos' owned by your 'employees' . . . but only while used in your business or your personal affairs." Because Freeman, an employee of Omega Development, was using his motorcycle in Omega Development's business, it falls within the policy's definition of "any 'auto' " and is a "covered auto" under Great American's policy. Accordingly, the trial court properly concluded that Omega Development's policy with Great American provide UIM coverage in the amount of $1,000,000.00 for Freeman's injuries resulting from the 24 September 2004 accident. The trial court's declaratory judgment order is, therefore, affirmed.

Affirmed.

Judges McCULLOUGH and STEELMAN concur.

THOMAS R. VELASQUEZ, PLAINTIFF v. ROCHELLE D. RALLS, DEFENDANT

No. COA08-102

(Filed 2 September 2008)

Child Support, Custody, and Visitation— inconvenient forum— abuse of discretion standard

The trial court did not abuse its discretion by denying defendant mother's motion under N.C.G.S. § 50A-207 alleging that North Carolina was an inconvenient forum for any future child custody matters even though defendant contends the trial court failed to consider the factors listed in N.C.G.S. § 50A-207 because: (1) the trial court's findings showed it considered relevant evidence submitted in support of or in opposition to defendant's motion to transfer; (2) the consent order, to which the parties both agreed, specifically provided that the parties shall attend mediation in North Carolina to review this custody order when the children reach two years of age, and further indicated that North Carolina was the home state of the children with the trial court retaining jurisdiction over the children; (3) a court is not required to make findings of fact on all the evidence presented, but need only make brief, pertinent and definite findings and conclusions about the matters in issue; and (4) the factors listed in the statute are necessary when the current forum is inconvenient, and not when the forum is convenient.

Judge STEPHENS dissenting.

Appeal by defendant from order entered 21 September 2007 by Judge Christy T. Mann in Mecklenburg County District Court. Heard in the Court of Appeals 12 June 2008.

No brief for plaintiff-appellee.

Horack, Talley, Pharr & Lowndes, PA, by Elizabeth J. James and Kary C. Watson, for defendant-appellant.

BRYANT, Judge.

Rochelle D. Ralls (defendant) appeals from an order entered 21 September 2007 denying her motion to transfer jurisdiction because of inconvenient forum.

Facts

Defendant and Thomas Velasquez (plaintiff) were born and raised in California. In July of 2004, defendant and plaintiff moved to North Carolina and lived together for a little over one year. On 25 July 2005, two children were born to the parties. Defendant and the children resided with plaintiff for approximately four months until defendant returned to California on 15 November 2005. On 28 November 2005, defendant filed a child custody action in the Superior Court of San Luis Obispo County, California. In response, plaintiff filed a complaint in Mecklenburg County, North Carolina seeking custody of the children and requesting a Temporary Parenting Agreement. After speaking with Judge Rebecca T. Tin of the Mecklenburg County District Court, the court in California determined North Carolina was the home state of the children and any custody matters should be resolved in North Carolina. In March of 2006, the parties entered into a Consent Order, awarding the parties joint legal custody of the children and defendant primary physical custody. Pursuant to the order, plaintiff was granted visitation with the children, but was prevented from taking the children out of the State of California. The Consent Order also provided that when the children reached two years of age, the parties were to attend mediation in North Carolina to review the custody arrangement.

On 17 July 2007, defendant filed a motion pursuant to N.C. Gen. Stat. § 50A-207 alleging that North Carolina was an inconvenient forum for any future child custody matters. Defendant filed affidavits from her mother, the children's childcare providers, and the children's healthcare providers in support of her motion. On 21 September 2007, the trial court denied defendant's motion to transfer jurisdiction. Defendant appeals.

On appeal, defendant raises one issue: whether the trial court abused its discretion by failing to consider the factors listed in N.C. Gen. Stat. § 50A-207.

The standard of review for a child custody proceeding is abuse of discretion. *See Martin v. Martin*, 167 N.C. App. 365, 367, 605 S.E.2d 203, 204 (2004). We review the trial court's findings of fact to determine whether there is any evidence to support them. *Owenby v. Young*, 357 N.C. 142, 147, 579 S.E.2d 264, 268 (2003). We reverse for an abuse of discretion only upon a showing that the trial court's actions are manifestly unsupported by reason. *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). If the findings are supported

by the evidence, they are conclusive on appeal even though the evidence might sustain findings to the contrary. *Owenby*, 357 N.C. at 147, 579 S.E.2d at 268.

When a custody proceeding involves an interstate custody dispute, subject matter jurisdiction is generally governed by the Uniform Child Custody Jurisdiction Act, which has been codified in North Carolina under Chapter 50A of the North Carolina General Statutes. *In re M.E.*, 181 N.C. App. 322, 324, 638 S.E.2d 513, 514 (2007). Pursuant to N.C. Gen. Stat. § 50A-207, when a court has jurisdiction over a child custody determination, the court "may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances, and that a court of another state is a more appropriate forum." N.C.G.S. § 50A-207 (a) (2007). The statute further provides:

> Before determining whether it is an inconvenient forum, a court of this State shall consider whether it is appropriate for a court of another state to exercise jurisdiction. For this purpose, the court shall allow the parties to submit information and shall consider *all relevant factors*, including:
>
> (1) Whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;
>
> (2) The length of time the child has resided outside this State;
>
> (3) The distance between the court in this State and the court in the state that would assume jurisdiction;
>
> (4) The relative financial circumstances of the parties;
>
> (5) Any agreement of the parties as to which state should assume jurisdiction;
>
> (6) The nature and location of the evidence required to resolve the pending litigation, including testimony of the child;
>
> (7) The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and
>
> (8) The familiarity of the court of each state with the facts and issues in the pending litigation.

N.C. Gen. Stat. § 50A-207 (b) (emphasis supplied).

Defendant contends the trial court failed to consider all relevant factors when it denied her motion to transfer jurisdiction. Defendant contends that § 50A-207(b) requires the trial court to make findings regarding each relevant factor, and the trial court abused its discretion by not making findings regarding each relevant factor. We disagree.

In its order, the trial court made the following relevant findings:

> 4. The parties lived together in Charlotte, North Carolina from July 2004 through November 2005.
>
> 5. Defendant moved to California, with the parties children, on or about November 2005. Plaintiff was unaware that Defendant moved to California . . . .
>
> . . .
>
> 8. On January 17, 2006, a court in San Luis Obispo County, California, after speaking with Judge Rebecca T. Tin, determined that North Carolina was the home state of the children and any custody matters should be heard here.
>
> 9. On March 23, 2006, a Consent Order for Child Custody and Child Support was entered herein that awarded Defendant primary custody of the children and which allowed her to remain in California with the children.
>
> 10. The court is denying Defendant's Motion at this time as Plaintiff remains in North Carolina and the children are only two years old.
>
> 11. Defendant left the State of North Carolina with the children and it would be unfair to now transfer jurisdiction to California.
>
> 12. As the children get older and begin school and more evidence regarding them will be in California, the Court can foresee a time when it will be appropriate to transfer jurisdiction to California.

The trial court's findings show the trial court considered relevant evidence submitted in support of or opposition to defendant's motion to transfer. However, the trial court, in its discretion, declined to transfer jurisdiction to California. Evidence supporting the trial court's findings—and its ultimate conclusion—include the consent order entered 23 March 2006 where the trial court initially assumed jurisdiction over the children pursuant to Chapters 50 and 50A of the North Carolina General Statutes. The consent order, to which the par-

ties both agreed, specifically provided "the parties shall attend mediation in North Carolina to review this custody order" when the children reached two years of age. Additionally, the consent order specifically indicated that North Carolina is the "home" state of the children and that the trial court retained jurisdiction over the children.

The findings outlined above show the trial court considered relevant factors in determining whether jurisdiction should be transferred to California. Additionally, we note that a "court is not required to make findings of fact on all the evidence presented," but need only "make brief, pertinent and definite findings and conclusions about the matters in issue[.]" *In re J.A.A.*, 175 N.C. App. 66, 75, 623 S.E.2d 45, 51 (2005) (citation omitted). The factors listed in N.C.G.S. § 50A-207(b) are necessary when the current forum is inconvenient, not when the forum is convenient. *Compare In re M.E.*, 181 N.C. App. 322, 638 S.E.2d 513 (2007) (determining forum was inconvenient), *with Wilson v. Wilson*, 121 N.C. App. 292, 465 S.E.2d 44 (1996) (determining continued jurisdiction was convenient). Nevertheless, the trial court's findings are sufficient. The trial court did not abuse its discretion in denying defendant's motion. Therefore, defendant's assignment of error is overruled.

AFFIRMED.

Judge McCULLOUGH concurs.

Judge STEPHENS dissents in a separate opinion.

STEPHENS, Judge, dissenting.

Because I conclude that the trial court did not make the necessary findings of fact on all relevant factors listed in N.C. Gen. Stat. § 50A-207, I respectfully dissent.

Pursuant to N.C. Gen. Stat. § 50A-207, a court "may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances, and that a court of another state is a more appropriate forum." N.C. Gen. Stat. § 50A-207(a) (2005). The statute further provides:

> (b) Before determining whether it is an inconvenient forum, a court of this State shall consider whether it is appropriate for a court of another state to exercise jurisdiction. For this purpose,

the court shall allow the parties to submit information and shall consider all relevant factors, including:

> (1) Whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;
>
> (2) The length of time the child has resided outside this State;
>
> (3) The distance between the court in this State and the court in the state that would assume jurisdiction;
>
> (4) The relative financial circumstances of the parties;
>
> (5) Any agreement of the parties as to which state should assume jurisdiction;
>
> (6) The nature and location of the evidence required to resolve the pending litigation, including testimony of the child;
>
> (7) The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and
>
> (8) The familiarity of the court of each state with the facts and issues in the pending litigation.

Id.

First, I disagree with the majority that "[t]he factors listed in N.C.G.S. § 50A-207(b) are necessary when the current forum is inconvenient, not when the forum is convenient." It is only *after* considering the relevant factors listed in N.C. Gen. Stat. § 50A-207(b) that a trial court is able to determine whether the current forum is inconvenient or convenient. Thus, the factors listed apply to all proceedings under N.C. Gen. Stat. § 50A-207, regardless of their outcome. The majority's interpretation puts the cart before the horse.

Furthermore, while the majority correctly states that a trial "court is not required to make findings of fact on all the evidence presented," *In re J.A.A.*, 175 N.C. App. 66, 75, 623 S.E.2d 45, 51 (2005) (citation omitted), a trial court must make findings of fact on all material issues raised by the evidence. *See, e.g.*, *Rosenthal's Bootery, Inc. v. Shavitz*, 48 N.C. App. 170, 174-75, 268 S.E.2d 250, 252 (1980) (remanding to the Superior Court for the judge to "find the facts specially from the record evidence as to all the material issues

raised by the evidence"). When determining whether "[a] court of this State . . . is an inconvenient forum under the circumstances," N.C. Gen. Stat. § 50A-207(a), the statute mandates that the trial court consider, at a minimum, the factors enumerated in the statute. Accordingly, by virtue of the plain language of the statute, the enumerated factors are material to the trial court's determination, and the trial court must make findings of fact on all factors about which evidence was submitted. *See Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 387, 628 S.E.2d 1, 3 (2006) ("When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute[.]").

In this case, the trial court made findings of fact concerning the length of time the children had resided outside of North Carolina, *see* N.C. Gen. Stat. § 50A-207(b)(2), and the parties' agreement to jurisdiction in North Carolina contained in the 23 March 2006 Consent Order. *See* N.C. Gen. Stat. § 50A-207(b)(5). Additionally, the trial court found that Plaintiff was a citizen of North Carolina and Defendant was a citizen of California, implicitly acknowledging the distance between North Carolina and California. *See* N.C. Gen. Stat. § 50A-207(b)(3). However, even though Defendant submitted evidence regarding her financial circumstances, the trial court did not consider the relative financial circumstances of the parties. *See* N.C. Gen. Stat. § 50A-207(b)(4). Furthermore, although Defendant submitted affidavits from her mother, the children's babysitter, the children's daycare provider, and the children's pediatrician, the trial court failed to consider "[t]he nature and location of the evidence required to resolve the pending litigation[,]" N.C. Gen. Stat. § 50A-207(b)(6), or the ability of the courts in North Carolina and California "to decide the issue expeditiously and the procedures necessary to present the evidence[.]" N.C. Gen. Stat. § 50A-207(b)(7). Thus, although the trial court made findings regarding some relevant factors, I disagree with the majority that "the trial court's findings are sufficient." Because the trial court did not "consider all relevant factors," N.C. Gen. Stat. § 50A-207(b), I am unable to discern whether the trial court's decision to deny Defendant's motion to transfer jurisdiction was an abuse of discretion. *See Martin v. Martin*, 167 N.C. App. 365, 604 S.E.2d 203 (2004) (stating that the standard of review for a child custody proceeding is abuse of discretion). Accordingly, I would remand to the trial court for additional findings of fact as warranted by the evidence, and for an order consistent with such findings.

TERRY CARMON BENNETT, ADMINISTRATOR OF THE ESTATE OF STEPHANIE RENEE BENNETT, DECEASED, PLAINTIFF v. EQUITY RESIDENTIAL, ERP OPERATING LIMITED PARTNERSHIP, EQR-RALEIGH VISTAS, INC., AND EQUITY RESIDENTIAL PROPERTIES MANAGEMENT CORP., DEFENDANTS

No. COA07-1240

(Filed 2 September 2008)

Costs— voluntary dismissal—expert witness fees—discretion of court

The trial court did not abuse its discretion in a negligence case by denying defendant's motion for expert witness fees after the claim was voluntarily dismissed. Although defendant argued an abuse of discretion based on the amount of the costs and the timing of the dismissal, the trial judge who presided at trial was fully familiar with the merits of the case and is in a better position to decide whether the award is justified. N.C.G.S. § 1A-1, Rule 41(d).

Appeal by defendants from memorandum opinion and order entered on 12 June 2007 by Judge Ripley E. Rand in Superior Court, Wake County. Heard in the Court of Appeals on 19 May 2008.

Bently Law Offices, P.A. by Michael D. Calhoun and Charles A. Bentley, Jr., for plaintiff-appellee.

Cranfill, Sumner & Hartzog, L.L.P., by Dan M. Hartzog, Jaye E. Bingham, and Gloria T. Becker, for defendant-appellant.

STROUD, Judge.

This action arises out of the murder of Stephanie Renee Bennett ("Ms. Bennett"). Plaintiff, Terry Carmon Bennett, administrator of the estate of Ms. Bennett, brought a claim against defendants Equity Residential, ERP Operating Limited Partnership, EQR-Raleigh Vistas, Inc., Equity Assets Management, Inc., and Equity Residential Properties Management Corp. for the wrongful death of Ms. Bennett, claiming that her death was caused by defendants' negligence. Twenty days into the trial plaintiff voluntarily dismissed this suit. Defendants requested that the trial court award certain costs, totaling approximately $170,000.00, which they had accrued for their defense of the case. The trial court only partially granted defendants' request, awarding the sum of $1,726.25. Defendants appeal to this Court, asking that we reverse the trial court on the issue of expert witness fees

and remand the case to the trial court for the awarding of these fees. North Carolina statutes and case law place the award of expert witness fees within the discretion of the trial court. As we find that the trial court did not abuse its discretion, we affirm its decision.

I. Background

On or about 19 May 2004, plaintiff filed a wrongful death action, and on 28 May 2004 plaintiff filed an amended complaint. On 17 June 2004, defendant removed the case to federal court, but on or about 10 November 2005 the case was remanded to Superior Court, Wake County. On or about 30 June 2005, defendants designated an expert witness. On or about 23 November 2005, defendants filed their answer to plaintiff's amended complaint, and on 28 November 2005 plaintiff filed a motion to supplement and amend the complaint. On 10 January 2006, plaintiff's motion was allowed, and thereafter on that same date plaintiff filed a supplemental amended complaint. On 12 January 2006, defendants moved the court for an extension of time "to serve an Answer or otherwise plead to Plaintiff's Supplemental Amended Complaint," and on this same date the motion was granted by the trial court. On 10 March 2006, defendants filed their answer to the supplemental amended complaint.

On 8 February 2006, defendants filed a motion for summary judgment. On or about 3 October 2006, defendants designated four additional expert witnesses. On 19 October 2006, the trial court denied defendants' motion for summary judgment. On 29 December 2006, Senior Resident Superior Court Judge Donald W. Stephens entered an order designating Judge Ripley Rand to preside over the case. Plaintiff and defendants entered into a pre-trial order, and on 2 January 2007, the trial began.

Twenty days into the trial, on 22 January 2007, plaintiff filed a voluntary dismissal without prejudice pursuant to Rule 41(a)(1) of the North Carolina Rules of Civil Procedure. On 31 January 2007, defendants filed a motion for costs pursuant to Rule 41(d) of the North Carolina Rules of Civil Procedure. The motion for costs was accompanied by an affidavit of the billing manager of defendants' law firm, Rhonda Taylor, a comprehensive list of the costs incurred by defendants, and an affidavit of defendants' attorney, Gloria T. Becker. In their motion, defendants argued that plaintiff's claims "involved highly complex issues" in which defendants incurred costs amounting to $167,724.29. On 12 June 2007, the trial court partially allowed defendants' motion for costs.

The trial court determined that the defendants were entitled to costs for "(1) court costs in the amount of $150.00; and (2) mediation fees in the amount of $1576.25[;]" however, the trial court denied defendants motion to tax all other costs including "expert fees and expenses . . . . deposition costs, . . . witness mileage expenses, costs for service of subpoenas, costs for trial exhibits, significant copy expenses, investigative service expenses, postage expenses, research expenses, costs for travel expenses for hearings and trial, and other miscellaneous trial preparation expenses." Defendants appeal the trial court's failure to award expert witness costs.

II. Awarding of Costs

Though defendants made several assignments of error only those regarding expert witness fees are argued in defendants' brief, and thus the other assignments of error are deemed abandoned. *See* N.C.R. App. P. 28(b)(6). Defendants argue that the trial court (1) erred in failing to award them expert witness fees pursuant to N.C. Gen. Stat. § 7A-305, N.C. Gen. Stat. § 1A-1, Rule 41(d) or, (2) in the alternative, abused its discretion in not awarding expert witness fees pursuant to N.C. Gen. Stat. § 7A-305 and N.C. Gen. Stat. § 6-20. Specifically, defendants request that the trial court's order should be reversed and remanded as to expert witness fees.

A trial court's taxing of costs is reviewed under an abuse of discretion standard. *Vaden v. Dombrowski*, 187 N.C. App. 433, 437, 653 S.E.2d 543, 545 (2007). "An abuse of discretion is a decision manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *Id.* at 545-46 (citation and internal quotation marks omitted) (quoting *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998)). We have recognized in prior opinions that there is a lack of uniformity in this Court's cases addressing whether certain costs can or should be taxed against a party. *Id.* at 438-39, 653 S.E.2d at 546; *see also Dep't of Transp. v. Charlotte Area Mfd. Housing, Inc.*, 160 N.C. App. 461, 466-70, 586 S.E.2d 780, 783-85 (2003). As this Court noted in *Vaden*,

> Effective 1 August 2007 the General Assembly addressed the inconsistencies within our case law by providing that N.C. Gen. Stat. § 7A-305 is a "complete and exclusive . . . limit on the trial court's discretion to tax costs pursuant to G.S. 6-20." However, the present case is not governed by this newly enacted

> legislation and thus we must review the costs pursuant to our current case law.

Vaden at 438, 653 S.E.2d at 546, n.3 (internal citation omitted).

Rule 41(d) of the North Carolina Rules of Civil Procedure provides for the taxing of costs against a plaintiff who takes a voluntary dismissal without prejudice. N.C. Gen. Stat. § 1A-1, Rule 41(d).

> A plaintiff who dismisses an action or claim under section (a) of this rule shall be taxed with the costs of the action unless the action was brought in forma pauperis. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant before the payment of the costs of the action previously dismissed, unless such previous action was brought in forma pauperis, the court, upon motion of the defendant, shall make an order for the payment of such costs by the plaintiff within 30 days and shall stay the proceedings in the action until the plaintiff has complied with the order. If the plaintiff does not comply with the order, the court shall dismiss the action.

N.C. Gen. Stat. § 1A-1, Rule 41(d).

We analyze mandatory costs and discretionary costs differently, as mandatory costs are required to be assessed and discretionary costs are not required to be assessed. *See*, *e.g.*, N.C. Gen. Stat. §§ 6-20; 6-21; 7A-305 (2005).

> In analyzing whether costs are properly assessed under Rule 41(d), we must undertake a three-step analysis. 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. Second, for items not costs under N.C. Gen. Stat. § 7A-305, it must be determined if they are "common law costs" under the rationale of *Charlotte Area*. Third, as to "common law costs" we must determine if the trial court abused its discretion in awarding or denying these costs under N.C. Gen. Stat. § 6-20.

Lord v. Customized Consulting Specialty, Inc., 164 N.C. App. 730, 734, 596 S.E.2d 891, 895 (2004). The trial court in this case awarded court costs and mediation fees. Defendants argue that the trial court erred by its failure to award expert witness fees as a mandatory cost, or in the alternative, that the court abused its discretion by its failure to award the expert witness fees. We have determined that the greater weight of the authority is that expert witness fees are

discretionary, "common law" costs. *See, e.g., Vaden* at 440, 653 S.E.2d at 547.

> Expert witness fees are not specifically provided for in N.C. Gen. Stat. § 7A-305(d). However . . . this Court [has] recognized that expert witness fees *could* be taxed as costs when a witness has been subpoenaed.
>
> Pursuant to N.C. Gen. Stat. § 7A-305(d)(1) witness fees are assessable as costs as provided by law. This refers to the provisions of N.C. Gen. Stat. § 7A-314 which provides for witness fees where the witness is under subpoena.

Id. at 440, 653 S.E.2d at 547 (internal citations omitted and emphasis added). Issuance of a subpoena to the expert witness does not convert the costs associated with the expert witness into a mandatory cost. *See Blackmon v. Bumgardner*, 135 N.C. App. 125, 132-33, 519 S.E.2d 335, 340 (1999). "Since the enumerated costs sought by [defendants] are not expressly provided for by law, it was within the discretion of the trial court whether to award them." *Estate of Smith v. Underwood*, 127 N.C. App. 1, 13, 487 S.E.2d 807, 815, *disc. review denied*, 347 N.C. 398, 494 S.E.2d 410 (1997).

Defendants argue vigorously that N.C. Gen. Stat. § 1A-1, Rule 41(d) requires that the court award expert witness fees in this case, citing *Lord v. Customized Consulting Specialty, Inc.*, 164 N.C. App. 730, 596 S.E.2d 891 (2004) and quoting that

> [t]he two purposes of Rule 41(d) are, "reimbursing defendants for costs when through no fault of their own they are denied a hearing on the merits," and "curtailing vexatious litigation by creating *consequences* for the plaintiff's voluntary dismissial." *Id.* at 733, 596 S.E.2d at 894. (emphasis added). The trial court's Order in this case, awarding defendants *only $1,726.25* of their *$170,008.04 total costs*,[1] betrays the stated purpose of Rule 41(d), as it results in almost *no* consequences for plaintiff's voluntary dismissal and fails to properly reimburse defendants, despite the fact that plaintiff did not dismiss the case before trial or even on the eve of trial, but *three weeks into the case*.

(Emphasis in original.) Essentially, defendants argue that the trial court's failure to award costs was an abuse of discretion simply by virtue of the amount of the costs and the timing of the dismissal.

1. We note that the total costs noted in defendants' brief, $170,008.04, is different from the costs requested in the their motion, $167.724.29.

Despite the monetary amounts involved in this case, the trial judge, who presided over twenty days of trial, is fully familiar with the merits of this case and is in a far better position than this Court to assess whether an award of costs is justified when considering the purposes of Rule 41(d). Just as the trial court here could have exercised its discretionary authority to award expert witness fees, the court equally has the discretionary power to deny them; we find no abuse of that discretion, and thus defendant's argument is overruled. *See* N.C. Gen. Stat. § 7A-305(d), *Blackmon* at 132-33, 519 S.E.2d at 340; *Estate of Smith* at 13, 487 S.E.2d at 815.

III. Conclusion

For the foregoing reasons, we affirm the order of the trial court.

AFFIRMED.

Chief Judge MARTIN and Judge CALABRIA concur.

STATE OF NORTH CAROLINA v. FRED GABRIEL

No. COA08-59

(Filed 2 September 2008)

Search and Seizure— driver license checkpoint—motion to suppress—primary programmatic purpose—reasonableness

The trial court erred in a driving while impaired and driving while license revoked case by denying defendant's motion to suppress evidence obtained at a driver license checkpoint without making findings of fact as to the primary purpose and reasonableness of the check point. Defendant's convictions are vacated and the case is remanded to the trial court for findings of fact and conclusions of law regarding the checkpoint's primary programmatic purpose. If the trial court finds the primary programmatic purpose of the checkpoint was lawful, it must also determine whether the checkpoint was reasonable based upon the individual circumstances of the case.

Appeal by defendant from judgments entered 3 April 2007 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 20 August 2008.

Attorney General Roy Cooper, by Assistant Attorney General Sebastian Kielmanovich, for the State.

Janna D. Allison, for defendant-appellant.

TYSON, Judge.

Fred Gabriel ("defendant") appeals from an order entered denying his motion to suppress. We vacate the order appealed from and remand this case to the trial court to enter further findings of fact and conclusions of law.

I. Background

On 23 August 2006, Trooper C.J. White ("Trooper White") and other members of the North Carolina State Highway Patrol established a driver's license checkpoint at the intersection of Highway I-85 and Glenwood Drive in Charlotte, North Carolina. Several armed robberies had occurred near this area the preceding week. In the most recent incident, the suspects were last seen driving a stolen sports utility vehicle in the vicinity of the checkpoint's location.

In accordance with State Highway Patrol policies, Sergeant Fred Hardgro was notified of the checkpoint's location. The checkpoint began between 9:00 and 10:00 p.m. As vehicles approached the checkpoint, they were stopped and the occupants were asked to produce a valid driver's license and vehicle registration "unless the traffic [did not] allow it." Each motorist was detained for a period no longer than required to produce and verify their license and registration. Citations were issued for any violations the checkpoint produced.

At approximately 11:00 p.m., defendant approached the checkpoint and was asked by Trooper White to produce his driver's license and vehicle registration. Trooper White testified he detected a strong odor of alcohol both on defendant's breath and emanating from defendant's vehicle. Trooper White also observed that defendant had "red glassy eyes" and "slurred speech." Defendant was directed to place his vehicle in park and exit the vehicle. Defendant exited his vehicle with its transmission still in drive. Trooper White testified that defendant was unsteady on his feet and used the vehicle for support to remain standing. When Trooper White reached out to assist

him, defendant responded "I'm okay, I will not fall; I'm not high; I'm not high."

Defendant was subsequently issued citations for driving while impaired and driving while license revoked. In district court, defendant pled guilty to driving while impaired and the trial court imposed a suspended sentence of 120 days imprisonment and placed defendant on unsupervised probation for a period of 12 months. Defendant gave notice of appeal to the superior court. On 23 February 2007, defendant filed a motion to suppress the evidence obtained at the checkpoint on the ground that the checkpoint was unconstitutional.

On 3 April 2007, after the motion to suppress hearing, the superior court denied defendant's motion. Defendant pled guilty to driving while impaired and driving while license revoked, reserving the right to appeal the trial court's adverse ruling on his motion to suppress. The trial court imposed a suspended sentence of 120 days imprisonment and defendant was placed on unsupervised probation for a period of 24 months for his driving while impaired charge. The trial court also imposed a suspended sentence of 45 days imprisonment for defendant's driving while license revoked charge. Defendant appeals.

II. Issue

Defendant argues the trial court erred by denying his motion to suppress.

III. Standard of Review

This Court has stated:

> The trial court's findings of fact regarding a motion to suppress are conclusive and binding on appeal if supported by competent evidence. This Court determines if the trial court's findings of fact support its conclusions of law. Our review of a trial court's conclusions of law on a motion to suppress is *de novo*.

State v. Edwards, 185 N.C. App. 701, 702, 649 S.E.2d 646, 648 (internal citations and quotations omitted), *disc. rev. denied*, 362 N.C. 89, 656 S.E.2d 281 (2007).

IV. Motion to Suppress

Defendant asserts the trial court erred by denying his motion to suppress the evidence obtained at the 23 August 2006 checkpoint. Defendant argues the primary purpose of the driver's license

checkpoint was unconstitutional, any seizure that occurred when his vehicle was stopped was unlawful and his rights under the Fourth and Fourteenth Amendments of the United States Constitution and Article 1, §§ 19, 21, and 23 of the North Carolina Constitution were violated.

It is well-established that police officers effectuate a "seizure" under the Fourth Amendment when they stop a vehicle at a driver's license checkpoint. *State v. Rose*, 170 N.C. App. 284, 288, 612 S.E.2d 336, 339, *disc. rev. denied*, 359 N.C. 641, 617 S.E.2d 656 (2005). In order to conform with the Fourth and Fourteenth Amendments, the checkpoint must be "reasonable." *Id.* "A search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing." *Id.* (citation and quotation omitted). However, the general requirement of individualized suspicion is not necessary under certain situations, including: (1) checkpoints, which screen for driver's license and vehicle registration violations; (2) "sobriety checkpoints[;]" and (3) checkpoints designed to intercept illegal aliens. *Id.* (citations omitted).

Conversely, "[s]tops justified only by the generalized and ever-present possibility that interrogation and inspection may reveal that any given motorist has committed some crime[]" are unconstitutional and cannot be sanctioned by this Court. *Id.* at 289, 612 S.E.2d at 339. Further, a checkpoint with an unlawful primary purpose will not become constitutional when coupled with a lawful secondary purpose. *See State v. Veazey*, 191 N.C. App. 181, 185, 662 S.E.2d 683, 686 (2008) ("[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. Otherwise, . . . law enforcement authorities would be able to establish checkpoints for virtually any purpose so long as they also included a license or sobriety check." (Citations and quotations omitted)).

"When considering a challenge to a checkpoint, the reviewing court must undertake a two-part inquiry to determine whether the checkpoint meets constitutional requirements." *Id.* The court must first "determine the primary programmatic purpose of the checkpoint program." *Id.* (citing *City of Indianapolis v. Edmond*, 531 U.S. 32, 40-42, 148 L. Ed. 2d 333, 343 (2000)). Once a legitimate primary programmatic purpose is determined, the court must also analyze whether the checkpoint was reasonable by weighing the public's interest in the checkpoint against the intrusion on the defendant's

Fourth and Fourteenth Amendments privacy interests. *Rose*, 170 N.C. App. at 293, 612 S.E.2d at 342.

A. Primary Programmatic Purpose

In considering the constitutionality of a checkpoint, the trial court must initially "examine the available evidence to determine the purpose of the checkpoint program." *Id.* at 289, 612 S.E.2d at 339 (citation and quotation omitted). This Court recently stated:

> 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. 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.*

Veazey, 191 N.C. App. at 187, 662 S.E.2d at 687-88 (internal citations and quotations omitted) (emphasis supplied). We also further held that when a trooper's testimony varies concerning the primary purpose of the checkpoint, the trial court is "required to make findings regarding the actual primary purpose of the checkpoint and . . . to reach a conclusion regarding whether this purpose was lawful." *Id.* at 190, 662 S.E.2d at 689.

Here, the State's evidence at the motion to suppress hearing consisted solely of Trooper White's testimony. During the hearing, Trooper White testified that "[t]he reason for that particular checkpoint . . . [was] we had several armed robberies within the area . . . [t]hey were all last seen or last sighting [sic] were in that approximate area." However, Trooper White also testified that "[t]here's no systematic plan of what we were particularly looking for[] . . . *[t]he purpose of the checkpoint was to issue citations for anything that came through*. If we just so happen to have that [stolen] vehicle come through, I mean, within that immediate area, but we don't particularly investigate robberies." (Emphasis supplied).

After Trooper White's cross-examination, the State attempted to submit to the trial court that the primary programmatic purpose of the checkpoint was to "stop and check individual's driver's license, registration, etcetera [sic] [.]" The trial court acknowledged the variances in Trooper White's testimony by stating: "at one point [Trooper White] did say that, but at one point he said that there was nothing that [they] were looking for in particular. No systematic plan of what

they were going to do." Because Trooper White's testimony varied regarding the primary programmatic purpose of the checkpoint, the trial court could "not simply accept the State's invocation of a proper purpose, but instead [was required to] carry out a close review of the scheme at issue." *Rose*, 170 N.C. App. at 289, 612 S.E.2d at 339 (citation and quotation omitted).

This type of searching inquiry is required "to ensure 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." *Veazey*, 191 N.C. App. at 187, 662 S.E.2d at 688 (citations and quotations omitted). Without independent findings of fact regarding the actual primary purpose of the checkpoint, "the trial court could not . . . issue a conclusion regarding whether . . . the checkpoint was lawful." *Id.* at 190, 662 S.E.2d at 689 (citation omitted).

The record on appeal is devoid of a written order containing the requisite findings of fact and conclusions of law. The trial court also failed to enunciate its findings and conclusions in open court. The only evidence to indicate the trial court denied defendant's motion to suppress, is its statement "[m]y understanding is that you're going to plead guilty to these charges, because I have ruled against you on your Motion to Suppress."

Because the trial court denied defendant's motion to suppress without making any findings of fact or conclusions of law regarding the checkpoint's primary programmatic purpose, we are unable to determine the constitutionality of the checkpoint. *Id.* at ——, 662 S.E.2d at 689. We vacate the order appealed from and remand this case to the trial court to take additional evidence and enter the required findings of fact and conclusions of law regarding the primary programmatic purpose of the checkpoint.

B. Reasonableness

If the trial court finds that the primary programmatic purpose of the checkpoint was lawful, its inquiry does not end with that finding. *Rose*, 170 N.C. App. at 293, 612 S.E.2d at 342. The trial court must also determine whether the checkpoint was reasonable based upon the individual circumstances of each case. *Id.*

To determine whether the checkpoint was reasonable, the trial court must weigh the public's interest in the checkpoint against the individual's Fourth and Fourteenth Amendments privacy interests. *Id.* When conducting this balancing inquiry the court should examine:

"(1) the gravity of the public concern 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 293-94, 612 S.E.2d at 342 (citation and quotation omitted). If these factors weigh in favor of the public interest, the checkpoint is reasonable and constitutional. *Veazey*, 191 N.C. App. at 195, 662 S.E.2d at 687. On remand, if the trial court finds that the checkpoint had a proper primary programmatic purpose, it must also enter findings of fact and conclusions of law regarding the reasonableness of the checkpoint.

V. Conclusion

The trial court is required to take additional evidence and enter findings of fact and conclusions of law regarding the primary programmatic purpose and the reasonableness of the driver's license checkpoint. Because defendant pled guilty to driving while impaired and driving while license revoked subject to the court's adverse ruling on his motion to suppress, we vacate defendant's convictions and the judgments entered thereon. This case is remanded to the trial court for further proceedings not inconsistent with this opinion.

Vacated and Remanded.

Judges CALABRIA and ELMORE concur.

CONNIE H. JERNIGAN, PLAINTIFF v. BOBBY B. McLAMB AND WIFE, SONJA McLAMB; ROSEMARY McLAMB HERRING AND HUSBAND, CARL HERRING; MELANIE LOU McLAMB PATRICK, SINGLE; IVA ESTELLE JERNIGAN, SINGLE; CAPE FEAR FARM CREDIT; AND HENRY T. McDUFFIE, TRUSTEE

No. COA07-1540

(Filed 2 September 2008)

Easements— by necessity—permissive use

The trial court erred by denying plaintiff an easement by necessity because: (1) it is not necessary that the person over whose property the easement is sought be the immediate grantor, provided that there was at one time common ownership of both lots, and the evidence supported the trial court's finding that plaintiff and defendant both own lots from the original J.R. Tew property; (2) although plaintiff has permissive use of two routes

to access his property from Highway 55, at least one of which crosses a stranger's property, plaintiff has no legally enforceable access to his property when permissive use may be revoked at any time; and (3) the lack of any legally enforceable access to the property may have a present deleterious impact on the value of the property.

Appeal by plaintiff from judgment entered 11 May 2007 by Judge W. Allen Cobb in Sampson County Superior Court. Heard in the Court of Appeals 11 June 2008.

McLeod & Harrop, by Donald E. Harrop, Jr. for plaintiff-appellant.

Daughtry, Woodard, Lawrence & Starling, by Luther D. Starling, Jr. and Emily Tomczak for defendants-appellees.

JACKSON, Judge.

The instant action arose out of a dispute between the parties concerning access to plaintiff's property. Connie Jernigan ("plaintiff") contends that he acquired an easement by necessity, or, in the alternative, an easement by prescription over the property of Bobby McLamb (B. McLamb), Rosemary McLamb Herring, and Melanie Lou McLamb Patrick (collectively, "defendants"). In 1925, the J.R. Tew tract, located in Sampson County, was divided among his six heirs. Four lots from the 1925 Tew division are relevant to plaintiff's appeal: "Lot 1," now owned by defendants; "Lot 4," now owned by plaintiff; "Lot 3," now owned by Iva Jernigan;[1] and "Lot 5".[2] Defendants acquired title to Lot 1 by operation of law on 18 September 1984 from the deceased Mila Rose Bass McLamb[3] (wife to defendant B. McLamb and mother to defendants Rosemary McLamb Herring and Melanie Lou McLamb Patrick), whose father purchased Lot 1 from Roy Tew, the Lot 1 grantee in the 1925 Tew division. Plaintiff acquired fee simple title to the property on 10 December 1999 from his brother, Bobby Jernigan. Bobby Jernigan purchased the property from the heirs of Cora Tew Blackmon, the Lot 4 grantee, on 26 September 1980. Thus, neither plaintiff nor defendants are direct heirs or descendants from the 1925 Tew division.

---

1. The owner of Lot 3, Iva Estelle Jernigan, originally was a party to the action, but was voluntarily dismissed from the suit by plaintiff prior to trial because she granted plaintiff permission to use a farm path across her property as an easement.

2. The owners of this property are not identified in the record.

3. Mila Rose Bass McLamb died intestate.

Lot 1 is a forty-nine point four acre parcel with access to a public road, Jernigan Loop. Lot 1 is situated south of and contiguous to Lot 3—a seventy acre parcel—such that the entire northern border of Lot 1 is part of the southern border of Lot 3. Lot 3 shares a common border with Lot 4—a fifty-three acre parcel—so that the entire southern border of Lot 4 is a common border with the entire northern border of Lot 3. Mingo Swamp borders Lots 3 and 4 on the west side. Lot 4 is bordered on the north by what was Lot 5 of the Tew Division. The evidence tends to show that plaintiff's property does not have direct access to a public roadway.

Plaintiff asserts that in order to access Lot 4, his predecessors in title used a farm path between Jernigan Loop and Highway 55, which crossed Lots 1, 3, 4, and 5, as well as portions of property not part of the original J.R. Tew estate. In order to farm Lot 4, plaintiff and his predecessors in title mainly used the part of the path crossing Lots 1 and 3.

In 1975, B. McLamb built a home in the center of Lot 1. Around 1980, B. McLamb closed part of the farm path across Lot 1 between Jernigan Loop and Highway 55, because when it rained, the farm path would wash out. Approximately twenty-six years ago, B. McLamb built a new driveway to access his house on Lot 1 in a different location—about 200 feet east of the original path—which connected to the remainder of the original path. Plaintiff's predecessors in title and others used B. McLamb's driveway to access the farm path between Jernigan Loop and Highway 55 after it was moved.

In 1999, B. McLamb told plaintiff that he could access Lot 4 by way of Lot 1. However, on 2 June 2002, plaintiff damaged B. McLamb's personal property when B. McLamb attempted to use his truck as a barricade, blocking plaintiff from use of the path. Plaintiff has permissive access to his property via two alternate routes. One of these routes crosses what was apparently Lot 5 of the 1925 Tew division and a portion of property that was not part of the original division.

As a result of defendants' denying plaintiff access across Lot 1, plaintiff brought suit on 16 June 2003 in Sampson County Superior Court, claiming he had acquired an implied easement by necessity, or in the alternative: an easement implied by prior use; an easement by estoppel; or an easement by prescription. In its 11 May 2007 order, the trial court's conclusions of law stated:

> (3) Plaintiff has access to his property from Highway 55 and is currently receiving the full use and benefit of his property, and it is not necessary for [p]laintiff to use the [d]efendants' McLamb, Herring, and Patrick (now McLamb) property . . . to have the full fair, convenient, and reasonable, physical, economical, and comfortable use, benefit, and enjoyment of his property.
>
> . . . .
>
> (6) Plaintiff has no claims to defendants' . . . property.

On these grounds, the trial court found that plaintiff did not have an easement over defendants' property. From the trial court's 11 May 2007 order, plaintiff appeals. Specifically, plaintiff challenges the trial court's rulings that he had no right to an easement by necessity, and had not acquired a prescriptive easement.

Plaintiff first argues that the trial court erred in ruling he was not entitled to an easement by necessity. We agree.

Plaintiff claims he is entitled to an implied easement by necessity. Plaintiff specifically argues that Lot 4 and the property in dispute was owned and conveyed by J.R. Tew, that the two current means of permissive access from Lot 4 to public roads are over the property of strangers to his title, and that he has no legally enforceable access to his property.

Our Supreme Court has explained

> [a] way of necessity arises when one grants a parcel of land surrounded by his other land, or when the grantee has no access to it except over grantor's other land or land of a stranger. In such cases, grantor impliedly grants a right-of-way over his land as an incident to purchaser's occupation and enjoyment of the grant.

Oliver v. Ernul, 277 N.C. 591, 599, 178 S.E.2d 393, 397 (1971) (quotations and citations omitted). Such easements are a " 'result of the application of the presumption that whenever a party conveys property, he conveys whatever is necessity *(sic)* for the beneficial use of that property . . . .' " *Pritchard v. Scott*, 254 N.C. 277, 282, 118 S.E.2d 890, 894 (1961) (quoting 17A Am. Jur., Easements § 58).

To satisfy the elements of an easement by necessity, the claimant must prove that: " '(i) the claimed dominant tract and the claimed subservient tract were once held in common ownership that was severed by a conveyance and (ii) the necessity for the easement arose out of the conveyance.' " *Whitfield v. Todd*, 116 N.C. App. 335, 339,

447 S.E.2d 796, 799 (1994) (quoting *Cieszko v. Clark*, 92 N.C. App. 290, 296, 374 S.E.2d 456, 460 (1988)). The necessity must arise at the time of conveyance from the common grantor. *Broyhill v. Coppage*, 79 N.C. App. 221, 226, 339 S.E.2d 32, 37 (1986) (citing *Smith v. Moore*, 254 N.C. 186, 190, 118 S.E.2d 436, 438 (1961)). It is not necessary that the person over whose property the easement is sought be the immediate grantor, provided that there was at one time common ownership of both lots. *Oliver*, 277 N.C. at 599, 178 S.E.2d at 397.

Absolute necessity need not be demonstrated; physical conditions and use that would lead one reasonably to believe that the grantor intended the grantee to have access are sufficient. *Moore*, 254 N.C. at 190, 118 S.E.2d at 438-39. "Although a plaintiff may have a permissive right-of-way to a public highway, a plaintiff who has no legally enforceable right-of-way to a public highway may be entitled to an easement by necessity." *Whitfield*, 116 N.C. App. at 339, 447 S.E.2d at 799 (citing *Wilson v. Smith*, 18 N.C. App. 414, 418, 197 S.E.2d 23, 25, *cert. denied*, 284 N.C. 125, 199 S.E.2d 664 (1973)).

In *Wilson*, this Court affirmed an award to the plaintiffs of an easement by necessity when they were unable to obtain a deed of trust for the construction of their dwelling because, although they had permissive access to a public road, they had no legally enforceable access, and, as a result, they did not have the "full beneficial use of their property." *Wilson*, 18 N.C. App. at 418, 197 S.E.2d at 26. Further, in *Whitfield*, without requiring the showing of any present economic hardship or loss of use of the plaintiff's property, this Court granted the plaintiff an easement by necessity when the plaintiff only had permissive access to his property. *Whitfield*, 116 N.C. App. at 339, 447 S.E.2d at 799.

In the instant case, the evidence supports the trial court's findings that plaintiff and defendant both own lots from the original J.R. Tew property, that defendants' property abuts a public roadway, and that plaintiff has permissive use of two routes to access his property from Highway 55, at least one of which crosses a stranger's property.

The relevant issue in this case is whether J.R. Tew intended the recipient of Lot 4 to have a right of access to that lot at the time his property was subdivided and distributed to his heirs such that permissive use of access given after the initial division of the property should be irrelevant. *Broyhill*, 79 N.C. App. at 223, 339 S.E.2d at 35. There is no evidence that J.R. Tew intended to deny access to Lot 4 over the other property constituting his original tract. The trial court

made no findings of fact as to whether the routes plaintiff currently uses were in existence at the time of the 1925 Tew division, and therefore, there is no evidence that Tew intended any route of access to Lot 4 other than across some portion of his original tract. Plaintiff has no legally enforceable access to his property, and, though he has permissive use, he is entitled to an easement by necessity. *See Wilson*, 18 N.C. App. at 418, 197 S.E.2d at 26; *Whitfield*, 116 N.C. App. at 339, 447 S.E.2d at 799.

This lack of any legally enforceable access to Lot 4 denies plaintiff the full use and enjoyment of his property, because permissive use may be revoked at any time, subjecting plaintiff to the expense of another lawsuit, and potentially preventing him from deriving the financial benefit he enjoys from farming his property. Further, plaintiff could be subject to the same problems faced by the plaintiff in *Wilson* if he either decides to build upon the property, or sell it. Finally, the lack of any legally enforceable access to the property may well have a present deleterious impact on the value of the property.

We hold that the portion of the trial court's ruling denying plaintiff an easement by necessity is affected by an error of law. We reverse and remand to the trial court for entry of an order consistent with this opinion.

In light of our holding above, it is unnecessary and we do not address plaintiff's second argument.

REVERSED AND REMANDED.

Judges HUNTER and TYSON concur.

MARILYN WILLIAMS, PLAINTIFF v. NEW HOPE FOUNDATION, INC., DEFENDANT

No. COA08-19

(Filed 2 September 2008)

Employer and Employee— retaliatory discharge—ratio of damages to attorney fees—no abuse of discretion

The trial court did not abuse its discretion in a retaliatory discharge action by awarding $25,000.00 in attorney fees and $2,534.14 in costs to plaintiff pursuant to N.C.G.S. § 95-25.22(d) on damages of $72.00 (for unpaid wages and liquidated damages).

> The purpose of the statute is to provide relief for a person who has sustained damage so small that defendant would have an unjustly superior bargaining position in settlement negotiations.

Appeal by defendant from order entered on or after 18 June 2007 by Judge J. Richard Parker in Hertford County Superior Court. Heard in the Court of Appeals 20 August 2008.

Glenn, Mills, Fisher & Mahoney, P.A., by Stewart W. Fisher, for plaintiff-appellee.

Hairston Lane Brannon, P.A., by Anthony M. Brannon, for defendant-appellant.

TYSON, Judge.

New Hope Foundation, Inc. ("defendant") appeals from order entered, which awarded Marilyn Williams ("plaintiff") attorney's fees and costs. We affirm.

I. Background

On or about 18 June 2005, plaintiff was discharged from her employment with defendant. Plaintiff filed an employment discrimination complaint with the North Carolina Department of Labor Workplace Retaliatory Discrimination Division ("DOL"). On or about 16 September 2005, the DOL issued a "Right to Sue" letter, to enable plaintiff the right to file a lawsuit under the North Carolina Retaliatory Employment Discrimination Act ("REDA").

On 26 November 2005, plaintiff filed a complaint, which alleged claims for relief under REDA and the North Carolina Wage and Hour Act ("Wage Act"). Defendant denied all allegations. An order allowing plaintiff to file an amended complaint, to add a claim for wrongful discharge, was granted on 26 February 2007. The case was tried the week of 9 April 2007 and the jury awarded plaintiff $36.00 in unpaid wages incurred as a result of unpaid travel expenses. The trial court then awarded an additional $36.00 in liquidated damages. Defendant did not appeal the jury's verdict nor the judgment entered thereon.

On 22 May 2007, plaintiff moved "for an award of attorney's fees and costs[]" pursuant to N.C. Gen. Stat. § 95-25.22(d). Plaintiff requested $50,100.00 in attorney's fees and $3,982.19 in costs. The trial court awarded plaintiff attorney's fees of $25,000.00 and costs of $2,534.14 on 18 June 2007. Defendant appeals.

II. Issue

Defendant argues the trial court erred when it granted plaintiff's motion for attorney's fees and costs.

III. Standard of Review

"The case law in North Carolina is clear that to overturn the trial judge's determination [of attorney's fees and costs], the defendant must show an abuse of discretion." *Hillman v. United States Liability Ins. Co.*, 59 N.C. App. 145, 155, 296 S.E.2d 302, 309 (1982) (citation omitted), *disc. rev. denied*, 307 N.C. 468, 299 S.E.2d 221 (1983). To show an abuse of discretion, the defendant must prove that the trial court's ruling was "manifestly unsupported by reason. 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) (internal citation omitted).

IV. N.C. Gen. Stat. § 95-25.22

Defendant argues the trial court abused its discretion when it awarded $25,000.00 in attorney's fees and $2,534.14 in costs when a judgment of only $72.00 was awarded to plaintiff and the remaining claims for violation of REDA and wrongful discharge were dismissed with prejudice. We disagree.

"The general rule is that attorney fees may not be recovered by the successful litigant as damages or a part of the court costs, unless expressly authorized by statute or a contractual obligation." *Whiteside Estates, Inc. v. Highlands Cove, L.L.C.*, 146 N.C. App. 449, 466-67, 553 S.E.2d 431, 443 (2001) (citing *Stillwell Enterprises, Inc. v. Interstate Equip. Co.*, 300 N.C. 286, 289, 266 S.E.2d 812, 814 (1980)), *disc. rev. denied*, 356 N.C. 315, 571 S.E.2d 220 (2002).

N.C. Gen. Stat. § 95-25.22(d) (2005) states, "[t]he court, in any action brought under this Article *may, in addition to any judgment awarded plaintiff,* order costs and fees of the action and reasonable attorneys' fees to be paid by the defendant." (Emphasis supplied). Before awarding attorney's fees, the trial court must make specific findings of fact concerning: (1) the lawyer's skill; (2) the lawyer's hourly rate; and (3) the nature and scope of the legal services rendered. *In re Baby Boy Searce*, 81 N.C. App. 662, 663-64, 345 S.E.2d 411, 413, *disc. rev. denied*, 318 N.C. 415, 349 S.E.2d 590 (1986); *see also Kelly v. N.C. Dep't of Env't & Natural Res.*, 192 N.C. App. 129,

—, — S.E.2d —, — (2008) ("Although the award of attorney's fees is within the discretion of the trial judge . . ., the trial court must make findings of fact 'as to the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney.' " (Quoting *N.C. Dep't of Corr. v. Myers*, 120 N.C. App. 437, 442, 462 S.E.2d 824, 828, *aff'd per curiam*, 344 N.C. 626, 476 S.E.2d 364 (1996))).

In *Whiteside Estates, Inc.*, the defendant appealed attorney and expert witness fees awarded under the Sedimentation Pollution Control Act of 1973. 146 N.C. App. at 468, 553 S.E.2d at 444. The record on appeal revealed that "detailed invoices for legal fees were submitted to the trial court along with an affidavit of . . . [the] plaintiff's counsel, which set forth the hourly rates for the legal services rendered, the fact that the hourly rates charged were commensurate with the type of work involved, and [were] within the range of such fees and charges customarily charged in the community." *Id.* This Court affirmed the trial court's award of attorney's fees and stated, "[the] [d]efendant . . . presented no evidence that the trial court ignored its motion, responses, or arguments. Absent such a showing by [the] defendant, we cannot find an abuse of discretion." *Id.* at 469, 553 S.E.2d at 444.

Here, defendant concedes that the trial court's factual findings with regard to the skill and hourly rate of plaintiff's counsel are adequate, but disputes the trial court's findings with regard to the nature and scope of the legal services rendered:

> (6) That the hours expended by [p]laintiff's counsel in order to obtain a verdict in [p]laintiff's favor were reasonable considering the issues in this case and the manner in which the case was defended.
>
> (7) That the Court has taken into consideration the jury's verdict on the [REDA] claim and the fact that the jury ultimately ruled in favor of [d]efendant on its affirmative defense. That the Court is not awarding fees for this cause of action.
>
> (8) That the Court has taken into account the nature of the settlement negotiations between the parties and finds that it was reasonable and necessary for [p]laintiff to seek a jury trial of her case.
>
> [9] That the fees being awarded by the Court were necessary to the prosecution of this case and the rendering of a final judg-

> ment in favor of [p]laintiff on her claim for unpaid wages under the Wage and Hour Act.

Defendant has failed to show that the trial court, in making these findings: (1) did not hear all of the attorneys' arguments; (2) observe their litigation strategies; (3) watch their examination of witnesses; (4) rule on their evidentiary objections; (5) read their briefs; (6) listen to their summations of the evidence; and (7) consider their post-trial motions. "Absent such a showing by defendant, we cannot find an abuse of discretion." *Id.*

Adopting the position advocated by defendant could hinder future parties from litigating claims when attorney fees and costs might outweigh the award received. In *Hicks v. Albertson*, our Supreme Court reviewed an award of attorney's fees in a property damage claim case. 284 N.C. 236, 200 S.E.2d 40 (1973). Our Supreme Court affirmed the trial court's award and stated:

> The obvious purpose of th[e] statute [at issue was] to provide relief for a person who has sustained injury or property damage in an amount so small that, if he must pay his attorney out of his recovery, he may well conclude that is not economically feasible to bring suit on his claim. In such a situation the Legislature apparently concluded that the defendant, though at fault, would have an unjustly superior bargaining power in settlement negotiations.

Id. at 239, 200 S.E.2d at 42. Here, although plaintiff's claim for attorney's fees and costs stemmed from a jury's verdict awarding plaintiff unpaid wages, the same reasoning articulated by our Supreme Court in *Hicks* is equally applicable. 284 N.C. at 239, 200 S.E.2d at 42.

Based upon our Supreme Court's reasoning in *Hicks* and this Court's reasoning in *Whiteside Estates, Inc.*, defendant has failed to show the trial court abused its discretion when it awarded to plaintiff attorney's fees and costs pursuant to N.C. Gen. Stat. § 95-25.22. *Hicks*, 284 N.C. at 239, 200 S.E.2d at 42; *Whiteside Estates, Inc.*, 146 N.C. App. at 469, 553 S.E.2d at 444. This assignment of error is overruled.

V. Conclusion

Defendant failed to show that the trial court's order "was so arbitrary that it could not have been the result of a reasoned decision." *White*, 312 N.C. at 777, 324 S.E.2d at 833. The trial court's order, which awarded attorney's fees and costs to plaintiff, is affirmed.

Affirmed.

Judges CALABRIA and ELMORE concur.

JOHNNY BATTS AND GLORIA BATTS, PLAINTIFFS v. LUMBERMEN'S MUTUAL CASUALTY INSURANCE COMPANY, AN ILLINOIS CORPORATION, DEFENDANT

No. COA07-1514

(Filed 2 September 2008)

1. Motor Vehicles— registration card issuance—not necessary to pass ownership

Issuance of a registration card is not one of the three statutory requirements for an ownership interest in a motor vehicle to pass to the purchaser of the vehicle.

2. Motor Vehicles— ownership interest—point of transfer

The ownership interest in the motor vehicle is transferred and the transferee becomes the "owner" of the vehicle when the three requirements of N.C.G.S. § 20-72(b) are satisfied.

3. Insurance— motor vehicle—untimely notice of purchase—point of transfer of ownership

In an action to determine whether an insurer was given timely notice of a vehicle purchase, the statutory requirements for the ownership interest to pass were satisfied when the dealer executed and had notarized the reassignment of title form, plaintiffs took actual possession, and the certificate of title was delivered to the lienholder. The notice to defendant-insurer following an accident was not within 30 days of these events, as required by the policy, and the vehicle was not covered by the policy.

Appeal by defendant from judgment entered 9 August 2007 by Judge Joseph Blick in Pitt County District Court. Heard in the Court of Appeals 1 May 2008.

The Foster Law Firm, P.A., by Jeffrey B. Foster, for plaintiff appellees.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Reid Russell, for defendant appellant.

McCULLOUGH, Judge.

Lumbermens Mutual Casualty Insurance Company ("defendant") appeals from a declaratory judgment, holding that at the time of Johnny Batts' and Gloria Batts' ("plaintiffs") automobile accident, the policy of insurance issued by defendant was in force, and defendant is liable for damages suffered by plaintiffs.

The relevant facts and procedural history, as stipulated by the parties, are as follows: On 12 May 2003, defendant issued a personal automobile insurance policy to plaintiffs. Plaintiffs' policy stipulated that for a newly acquired additional or replacement auto to be covered under plaintiffs' existing policy, plaintiffs must ask defendant to insure the new auto "within 30 days after [plaintiffs] become the owner[s]."

On 29 June 2003, following the issuance of plaintiffs' insurance policy, plaintiffs purchased a 2002 Chevrolet Avalanche Truck ("Chevrolet Avalanche") from Greenville Nissan. The sales invoice corresponds with this date. On 29 June 2003, plaintiff Gloria Batts ("Mrs. Batts") signed a Title Application for the Chevrolet Avalanche. Also on 29 June 2003, Barbara Noller of Greenville Nissan signed a "Dealer's Reassignment of Title to a Motor Vehicle" form, which reassigned the title to the Chevrolet Avalanche from Greenville Nissan to Mrs. Batts. Greenville Nissan then delivered the certificate of title to the lienholder, Nissan Motors Acceptance Corporation. Finally on 29 June 2003, plaintiffs took possession of the vehicle. Greenville Nissan agreed to notify plaintiffs' insurance agent, Kinston Insurance Agency ("Kinston Insurance"), of the purchase of the vehicle for the purpose of insuring the vehicle.

On 15 July 2003, the North Carolina Department of Motor Vehicles ("NCDMV") issued a registration card for the Chevrolet Avalanche in the name of Johnny Batts and Gloria Batts.

On 13 August 2003, Mrs. Batts was in a single vehicle accident which damaged the Chevrolet Avalanche. That same day, Mrs. Batts notified Kinston Insurance of her accident. This was the first notice plaintiffs' insurance agent had that plaintiffs had purchased the Chevrolet Avalanche. Also on 13 August 2003, Kinston Insurance notified defendant's underwriting department of the accident. This was the first notice that defendant had regarding plaintiffs' purchase of the vehicle.

Defendant thereafter denied plaintiffs' claim for damages resulting from the accident on the grounds that the Chevrolet Avalanche was not a covered vehicle under plaintiffs' policy because plaintiffs

had not asked defendant to insure the vehicle within 30 days after plaintiffs became owners of the vehicle.

On 27 September 2005, plaintiffs filed an action for declaratory judgment seeking to resolve the issue of whether plaintiffs had provided notice to defendant of the purchase of the vehicle within the 30-day window prescribed in the policy and whether defendant was required to provide coverage. The parties agreed that the matter would be decided by the court on cross motions for summary judgment; on 12 April 2006 and 24 April 2006, respectively, defendant and plaintiff moved for summary judgment.

The trial court granted plaintiffs' motion for summary judgment, reasoning that under *Insurance Co. v. Hayes*, 276 N.C. 620, 174 S.E.2d 511 (1970), "ownership to a motor vehicle passes when a duly assigned certificate of title is delivered to the transferee or lienholder. . . . [T]he best evidence of that date is the date of issue of the [vehicle's] registration card which was July 15, 2003." Because plaintiffs notified defendant of the accident on 13 August 2003, within 30 days of 15 July 2003, the trial court concluded that the notification to defendant of the accident occurred within the 30-day period contemplated by the insurance policy. Accordingly, the trial court concluded that plaintiffs' losses were covered under the insurance policy.

[1] The granting of 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." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2007). Here, the parties have stipulated all of the material facts. The sole issue on appeal is whether the trial court properly concluded that plaintiffs became the owners of their vehicle on 15 July 2003, the date in which the NCDMV issued its registration card. We reverse, as we conclude that pursuant to N.C. Gen. Stat. § 20-72(b) (2007), issuance of a registration card for a vehicle by the NCDMV is not a necessary requirement for an ownership interest to vest in the purchaser of a vehicle.

We find that the trial court misconstrued the holding of *Hayes.* In *Hayes*, our Supreme Court expressly stated, that "[t]he provisions of G.S. 20-72(b) contain specific, definite and *comprehensive* terms concerning the transfer of ownership of a motor vehicle." *Hayes*, 276 N.C. at 639, 174 S.E.2d at 523 (emphasis added). The Court held that under N.C. Gen. Stat. § 20-72(b), no ownership interest in a motor vehicle passes to the purchaser of the vehicle until:

> (1) the **owner executes**, in the presence of a person authorized to administer oaths, **an assignment and warranty of title** on the reverse of the certificate of title, including the name and address of the **transferee**, (2) there is an actual or constructive **delivery of the motor vehicle**, **and** (3) the duly assigned certificate of **title is delivered** to the transferee. In the event a security interest is obtained in the motor vehicle from the transferee, the requirement of delivery of the duly assigned certificate of title is met by delivering it to the lien holder.

Hayes, 276 N.C. at 640, 174 S.E.2d at 524 (emphasis added).

Thus, under the comprehensive terms provided by N.C. Gen. Stat. § 20-72(b), there are only three requirements that must be satisfied in order for an ownership interest in a motor vehicle to pass to the purchaser of the vehicle. The issuance of a registration card, however, is not one of those three requirements. If the General Assembly had intended to require a purchaser of a vehicle to register his vehicle with the NCDMV before an ownership interest would pass to such person, the General Assembly would have provided this requirement in the comprehensive list of requirements set forth in N.C. Gen. Stat. § 20-72(b).

[2] Having decided that issuance of a registration card is not a prerequisite for an ownership interest in a vehicle to vest in a purchaser under § 20-72(b), we address plaintiffs' contention that because N.C. Gen. Stat. § 20-57, the statute governing vehicle registration, uses the term "owner," whereas § 20-72(b) uses the term "transferee," the purchaser of a vehicle does not become the vehicle's "owner" until the registration card is issued by the NCDMV. We find this argument to be without merit.

First, our Supreme Court in *Hayes* held that the legislature, in enacting N.C. Gen. Stat. § 20-72(b), "used the word 'title' as a synonym for the word 'ownership.' " *Hayes*, 276 N.C. at 630, 174 S.E.2d at 517. Therefore, the terms "ownership" and "title" can be used interchangeably. Adding such term, N.C. Gen. Stat. § 20-72(b) provides, in part: "In order to . . . transfer title *[or ownership]* in any motor vehicle . . . the owner shall execute . . . an assignment and warranty of title *[or ownership]*, including . . . the name . . . of the transferee[.]" *See* N.C. Gen. Stat. § 20-72(b). Thus, the term "transferee," as used in § 20-72(b), refers to the party to whom title or ownership of the vehicle is transferred. By definition, a party to whom ownership or title of a vehicle is transferred is the "owner" of the vehicle. N.C.

Gen. Stat. § 20-4.01(26) (2007) (defining the term "owner" as "[a] person holding the legal tile to a vehicle[.]"). Therefore, once the three requirements of § 20-72(b) are satisfied, the ownership interest in the vehicle is transferred to the transferee, and the transferee is then the "owner" of the vehicle.[1]

[3] Finally, we conclude that the three requirements for the ownership interest in the Chevrolet Avalanche to pass to plaintiffs, as set forth in N.C. Gen. Stat. § 20-72(b), were satisfied on 29 June 2003. First, on 29 June 2003, Greenville Nissan executed, in the presence of a notary public, the reassignment of title form. This reassignment of title was on a standard form provided by the NCDMV and included the name and address of the transferee, Mrs. Batts. Second, on 29 June 2003, plaintiffs took actual possession of the Chevrolet Avalanche. Third, Greenville Nissan delivered the Certificate of Title to the lienholder, Nissan Motors Acceptance Corporation. Thus, 29 June 2003 is the date that the legal ownership interest in the Chevrolet Avalanche vested in plaintiffs. It is irrelevant that the NCDMV did not issue the registration card for that vehicle until 15 July 2003.

Because plaintiffs did not notify defendant that they had purchased the Chevrolet Avalanche within the 30 days following the date that they became legal owners of that vehicle, 29 June 2003, such vehicle was not covered under plaintiffs' existing auto insurance policy on 13 August 2003, the date of the accident.

Accordingly, we reverse the trial court's judgment. This case is remanded for the entry of an order not inconsistent with this opinion.

Reversed and remanded.

Judges TYSON and STROUD concur.

---

1. We also note that while § 20-57 is intended to govern a situation in which there is only one owner at issue, the party registering the vehicle, § 20-72(b) is intended to govern a situation in which an ownership interest is being transferred between two parties. The first party being the original "owner" of the vehicle; the second party being the future "owner" of the vehicle. Therefore, use of the term "owner," where there are potentially two owners at issue, would be somewhat ambiguous. Instead, for clarity, the statute refers to the original owner, here Greenville Nissan, as the "owner." The future owner to whom title or ownership of the vehicle is transferred and to whom the vehicle is delivered, here Mrs. Batts, is simply referred to as the "transferee." Plaintiffs' contention that N.C. Gen. Stat. § 20-57 governs the transfer of the ownership interest in a vehicle simply because the statute uses the term "owner" is misguided.

IN RE A.M., J.M.

[192 N.C. App. 538 (2008)]

IN THE MATTER OF: A.M., J.M.

No. COA08-484

(Filed 2 September 2008)

Termination of Parental Rights— neglect—failure to make independent determination at time of hearing—oral testimony required

The trial court erred in a termination of parental rights case by failing to make an independent determination that neglect existed at the time of the termination hearing because: (1) N.C.G.S. § 1A-1, Rule 43(a) furthers the purpose of the Juvenile Code in assuring a fair termination hearing which results in a disposition based on consideration of the facts; (2) allowing our courts to rely solely on documentary evidence would obviate the need for a termination hearing, thus conflicting with the court's duty to hear the evidence; (3) requiring oral testimony, rather than relying merely on documentary evidence, comports with the Court of Appeals' prior decisions that termination petitions not be summarily determined; and (4) in the instant case the trial court entered an order based solely on the written reports of DSS and the guardian ad litem, prior court orders, and oral arguments by the attorneys involved in the case, without the additional necessary oral testimony of witnesses.

Appeal by respondents from orders entered 18 February 2008, by Judge Beverly Scarlett in District Court, Chatham County. Heard in the Court of Appeals 5 August 2008.

No brief for petitioner-appellee Chatham County Department of Social Services.

Carol Ann Bauer, for respondent-appellant-mother.

David A. Perez, for respondent-appellant-father.

Klein & Freeman, PLLC, by Marc S. Gentile, for guardian ad litem-appellee.

STROUD, Judge.

Respondents appeal from orders terminating their parental rights to A.M. and J.M. We reverse and remand.

On 18 January 2007, the Chatham County Department of Social Services ("DSS") filed petitions alleging that A.M. and J.M. were neglected juveniles. The petitions were "a result of a report of serious domestic violence" committed in front of and involving the juveniles. DSS assumed custody by a non-secure custody order. On 2 May 2007, A.M. and J.M. were adjudicated neglected juveniles.

On 5 September 2007, DSS filed motions to terminate respondents' parental rights. DSS alleged that: (1) respondents had neglected the juveniles pursuant to N.C. Gen. Stat. § 7B-101; and (2) respondents were "incapable of providing for the proper care and supervision of the juvenile[s], such that the juvenile[s] [were] . . . dependent juvenile[s] within the meaning of G.S. 7B-101, and that there [was] a reasonable probability that such incapability [would] continue for the foreseeable future."

A hearing was held on the motions to terminate respondents' parental rights on 13 December 2007. Respondents did not appear at the hearing. Both respondents' counsel moved to continue the hearing, but the motion was denied. At the hearing, DSS requested the following:

> Judge, Mr. Brown has prepared reports which uh, are not very lengthy because there's not much that the parents have done, so there's not much to write about. But we would ask the Court to uh, take judicial notice of previous findings of fact in the record to include in this Order and to accept our reports as our evidence in this case on which to find that the criteria does exist to terminate [respondents'] parental rights and that it's in the best interest of these two children to do so.

The court received the reports into evidence over respondents' general objections. The trial court then concluded that it was in the juveniles' best interest that respondents' parental rights be terminated. Respondents appeal.

We first address respondents' argument that the trial court failed to make an independent determination that neglect existed at the time of the termination hearing. Respondents assert that the court's order was based solely on prior court orders, written reports received by the trial court, and the arguments of counsel. After careful review of the record, briefs, and contentions of the parties, we reverse and remand.

The General Assembly has set out the judicial procedure to be used in juvenile proceedings in Chapter 7B of the General Statutes. "This Court has held that the North Carolina Rules of Civil Procedure do 'not provide parties in termination actions with procedural rights not explicitly granted by the juvenile code.' " *In re B.L.H. & Z.L.H.*, 190 N.C. App. 142, 145, 660 S.E.2d 255, 257 (2008) (quoting *In re S.D.W. & H.E.W*, 187 N.C. App. 416, 421-22, 653 S.E.2d 429, 432 (2007)). "The Rules of Civil Procedure will, however, apply to fill procedural gaps where Chapter 7B requires, but does not identify, a specific procedure to be used in termination cases." *Id.* (citing *In re S.D.W. & H.E.W*, 187 N.C. App. 416, 421-22, 653 S.E.2d 429, 432 (2007)); see *also In Re L.O.K.*, 174 N.C. App. 426, 431, 621 S.E.2d 236, 240 (2005) ("[T]he Rules of Civil Procedure apply only when they do not conflict with the Juvenile Code and only to the extent that the Rules advance the purposes of the legislature as expressed in the Juvenile Code." (citations omitted)).

N.C. Gen. Stat. § 7B-1109(e) provides that "[t]he court shall take evidence, find the facts, and shall adjudicate the existence or nonexistence of any of the circumstances set forth in G.S. 7B-1111 which authorize the termination of parental rights of the respondent." N.C. Gen. Stat. § 7B-1109(e) (2007). The Juvenile Code is silent regarding whether the evidence received by the Court in termination hearings must be oral testimony or if the evidence can be solely documentary. Rule 43(a) of the North Carolina Rules of Civil Procedure provides that "[i]n all trials the testimony of witnesses shall be taken *orally* in open court[.]" N.C. Gen. Stat. § 1A-1, Rule 43(a) (emphasis added). Thus, we must look to the purposes of the Juvenile Code to determine whether Rule 43(a) of the North Carolina Rules of Civil Procedure is applicable to termination proceedings. See *In Re L.O.K.* at 431, 621 S.E.2d at 240.

"We have recognized the constitutional protection afforded to family relationships." *In re Eckard*, 148 N.C. App. 541, 547, 559 S.E.2d 233, 236 (citation omitted), *disc. rev. denied*, 356 N.C. 163, 568 S.E.2d 192 (2002). One of the stated 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[.]" N.C. Gen. Stat. § 7B-100(1) (2007). Another stated purpose is "[t]o develop a disposition in each juvenile case that reflects consideration of the facts, the needs and limitations of the juvenile, and the strengths and weaknesses of the family." N.C. Gen. Stat. § 7B-100(2) (2007).

We conclude that Rule 43(a) of the North Carolina Rules of Civil Procedure furthers the purpose of the Juvenile Code in assuring a fair termination hearing which results in a disposition based on consideration of the facts. Foremost, allowing our courts to rely solely on documentary evidence would obviate the need for a termination hearing, conflicting with the court's "duty to hear the evidence[.]" *In re J.N.S*, 165 N.C. App. 536, 539, 598 S.E.2d 649, 651 (2004) (citing N.C. Gen. Stat. § 7B-1109(e) (2003)). Furthermore, requiring oral testimony, rather than relying merely on documentary evidence, comports with this Court's prior decisions that termination petitions not be summarily determined. *See, e.g.*, *In re J.N.S.* at 539, 598 S.E.2d at 651; *see also Curtis v. Curtis*, 104 N.C. App. 625, 627-28, 410 S.E.2d 917, 919 (1991) (while construing former Chapter 7A, this Court determined that the Juvenile Code "does not provide for a summary proceeding to determine whether the petitioner has proven the existence of one or more of the grounds for termination."); *In re Tyner*, 106 N.C. App. 480, 483, 417 S.E.2d 260, 261 (1992) ("To construe N.C.G.S. § 7A-289.28 so as to allow a 'default type' order terminating parental rights would require termination even when the facts do not support termination and thereby permit termination inconsistent with the best interests of the child.") (citation omitted)); *In re Quevedo*, 106 N.C. App. 574, 586, 419 S.E.2d 158, 164 (1992) (Greene, J., concurring) ("The Act implicitly prohibits judgments on the pleadings, default judgments, and summary judgments. This is so because N.C.G.S. § 7A-289.28 (1989) requires the trial court to conduct a hearing on the petition to terminate the respondent's parental rights[.]"). In *In re J.N.S*, this Court determined that:

> Chapter 7B of the North Carolina General Statutes contains absolutely no provision allowing for the use of a summary judgment motion in a juvenile proceeding. In fact, the provisions of Chapter 7B implicitly prohibit such use by imposing on the trial court the duty to *hear the evidence* and make findings of fact on the allegations contained in the juvenile petition. This duty is incompatible with the law on summary judgment, which rests on the non-existence of genuine issues of fact prior to a hearing on the merits.

Id. at 539, 598 S.E.2d at 650-51 (emphasis added) (citations omitted).

" 'The key to a valid termination of parental rights on neglect grounds where a prior adjudication of neglect is considered is that the court must make an *independent* determination of whether neglect authorizing the termination of parental rights existed at the

time of the hearing.' " *In re P.L.P.*, 173 N.C. App. 1, 10, 618 S.E.2d 241, 247 (2005) (internal quotation marks omitted) (quoting *In re McDonald*, 72 N.C. App. 234, 241, 324 S.E.2d 847, 851 (1984)) (emphasis in original), *aff'd per curiam*, 360 N.C. 360, 625 S.E.2d 779 (2006). "The burden is on the petitioner to prove the allegations of the termination petition by clear, cogent, and convincing evidence." *In re R.B.B.*, 187 N.C. App. 639, 643, 654 S.E.2d 514, 518 (2007) (citing N.C.G.S. § 7B-1109(f) (2005)), *disc. review denied*, 362 N.C. 235, 659 S.E.2d 738 (2008).

In the case *sub judice*, the trial court entered an order based solely on the written reports of DSS and the guardian *ad litem*, prior court orders, and oral arguments by the attorneys involved in the case. DSS did not present any witnesses for testimony, and the trial court did not examine any witnesses. We conclude, therefore, that the trial court failed to hold a proper, independent termination hearing. Consideration of written reports, prior court orders, and the attorney's oral arguments was proper; however, in addition the trial court needed some oral testimony. *See* N.C. Gen. Stat. § 1A-1, Rule 43(a). However, this opinion should not be construed as requiring extensive oral testimony. We note that the trial courts may continue to rely upon properly admitted reports or other documentary evidence and prior orders, as long as a witness or witnesses are sworn or affirmed and tendered to give testimony. Accordingly, the order of the trial court must be reversed and the matter remanded for further proceedings consistent with this opinion. As we remand for a new hearing, we need not address respondents' remaining issues on appeal.

REVERSED AND REMANDED.

Judges McGEE and HUNTER concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 2 SEPTEMBER 2008

ACTON v. LOWES No. 07-1436	Ind. Comm. (I.C. No. 217415) (I.C. No. 916514)	Reversed and remanded
CARROLL v. FERRO No. 07-1417	Mecklenburg (02CVS17941)	Reversed
DISCOVER BANK v. CALHOUN No. 08-69	Wake (06CVD16182)	Affirmed
FELTS v. FELTS No. 07-967	Cabarrus (01CVD2117)	Affirmed
IN RE E.H., Jr., T.H., T.H., K.H., K.H. No. 08-362	Durham (07J39-43)	Affirmed
IN RE L.O. No. 08-323	Alleghany (07JA45)	Reversed and remanded
IN RE TR.D., JU.D., TA.D., JO.D. No. 08-483	Iredell (06JA195) (07JA173-75)	Affirmed
LATTER v. LA PETITE ACADEMY No. 07-652	Ind. Comm. (I.C. No. 372867)	Affirmed
STATE v. BUTLER No. 08-66	Iredell (05CRS61528) (05CRS14401-02)	Affirmed in part and no error in part
STATE v. ELLIOTT No. 07-626	Durham (05CRS48754)	No error
STATE v. HAMPTON No. 07-1270	Forsyth (96CRS40352) (96CRS40508) (96CRS40510)	Affirmed
STATE v. JIMENEZ No. 07-400	Henderson (06CRS51922) (06CRS51959) (06CRS51924) (06CRS51958)	No error
STATE v. MEDLIN No. 07-1328	Wake (06CRS430-32) (06CRS435) (06CRS4172)	No error
STATE v. SPENCER No. 08-112	Nash (06CRS54781-82)	No error

LINDA CARL AND CHARLES R. EILBER, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS v. THE STATE OF NORTH CAROLINA, THE N.C. TEACHERS' AND STATE EMPLOYEES' COMPREHENSIVE MAJOR MEDICAL PLAN, A/K/A THE STATE HEALTH PLAN, AND MEDAMERICA INSURANCE CO., DEFENDANTS

No. COA07-1288

(Filed 2 September 2008)

1. Appeal and Error— appealability—sovereign immunity—*Corum* claim intertwined

The denial of the State's motion to dismiss causes of action was interlocutory, but immediately appealable, where the motion was based on sovereign immunity. Certiorari was granted to consider the denial of a Rule 12(b)(6) motion to dismiss a *Corum* claim that was inextricably intertwined with the issue before the court as of right.

2. Immunity— sovereign—third-party beneficiary claims

Sovereign immunity did not bar state employees' third-party beneficiary claims against the State arising from changes to their long term care plan. The plan conferred long term benefits directly on state employees as consideration for employment.

3. Immunity— sovereign—ultra vires contract

Sovereign immunity did not bar breach of contract claims against the State arising from changes to the long term care plan offered to state employees on the theory that the contractual terms were beyond the scope of the State Health Plan's legislatively conferred powers. An ultra vires contract is not enforceable and sovereign immunity is not applicable.

4. Constitutional Law— takings claim—sovereign immunity

Sovereign immunity did not bar plaintiffs' takings claim under the North Carolina Constitution, Article I, Section 19, arising from changes in the long term care plan offered to state employees. It was concluded elsewhere in the opinion that sovereign immunity did not bar plaintiffs' breach of contract claim, and the State is not entitled to the defense of sovereign immunity against the takings claim.

5. Constitutional Law— takings claim—adequate state remedy

The trial court erred by denying the State's Rule 12(b)(6) motion to dismiss state constitutional takings claims arising

from changes in the long term care plan offered to state employees. There were adequate state remedies through breach of contract claims.

6. Immunity— sovereign—ultra vires contract

A crossclaim arising from changes in the long term care plan offered to state employees was not barred by sovereign immunity on an allegation that it was ultra vires. An ultra vires contract is itself void and unenforceable.

7. Immunity— sovereign—implied indemnity claim

The trial court erred by denying the State's motion to dismiss an insurance provider's implied-in-law indemnity crossclaim based on sovereign immunity in an action arising from changes in the long term care plan offered to state employees. The insurer's claim was based only on indemnity implied-in-law, but the State waives sovereign immunity only when it expressly enters into a valid contract.

Appeal by Defendants the State of North Carolina and the North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan, a/k/a The State Health Plan, from order entered 5 September 2007 by Judge Catherine C. Eagles in Wake County Superior Court. Heard in the Court of Appeals 19 March 2008.

Attorney General Roy Cooper, by Special Deputy Attorney General Buren R. Shields, III and Assistant Attorney General Thomas M. Woodward, for the State-Defendants-Appellants.

Billet and Connor, P.C., by J. Martin Futrell; Twiggs, Beskind, Strickland & Rabenau, P.A., by Donald H. Beskind; and Marcus Auerback & Zylstra, L.L.C., by Jerome M. Marcus and Jonathan Auerbach, for Plaintiffs-Appellees.

Poyner & Spruill, LLP, by Edwin M. Speas, Jr., David Dreifus, and Thomas K. Lindgren, for Defendant/Crossclaim-Plaintiff-Appellee.

STEPHENS, Judge.

I. Procedure

The State of North Carolina, through the North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan, a/k/a The State Health Plan ("SHP") (collectively the "State"), offered

certain current and retired North Carolina employees Long Term Care ("LTC") Benefits under a contract of insurance with MedAmerica Insurance Company ("MedAmerica"). Plaintiffs are two North Carolina State employees who seek to represent a class of state employees, retired state employees, and retired local government employees who contend that certain representations by SHP and MedAmerica constituted contractual obligations that Plaintiffs' insurance premiums would remain "level," *i.e.*, that there would be no increases unless justified by the claims experience for the group, approved by the Department of Insurance, and applied to the entire group as opposed to any one individual. Plaintiffs brought claims against the State and MedAmerica because Plaintiffs' premiums for LTC Benefits increased beyond that which was level when SHP selected Prudential Insurance Company ("Prudential") to replace MedAmerica at the termination of MedAmerica's contract with SHP.

Plaintiffs filed a Complaint on 14 September 2006, and a Corrected Third Amended Complaint on 18 May 2007, in Wake County Superior Court setting forth the following four claims: (1) SHP breached its contract with MedAmerica, made for Plaintiffs' intended benefit, that SHP would maintain Plaintiffs and other class members as a group and move them into any new group for LTC Benefits following the termination of the MedAmerica contract; (2) SHP breached its contract with Plaintiffs by and through the increase in Plaintiffs' premiums for their LTC Benefits beyond that which was "level;" (3) Plaintiffs had a contractual right to "level" premiums for LTC Benefits, and this contractual right was a property right that was taken without just compensation, in violation of N.C. Constitution Article I, Section 19; and (4) MedAmerica breached its contract with Plaintiffs to maintain a "level" premium for LTC Benefits. On 18 June 2007, the State moved to dismiss Plaintiffs' Complaint.

On 18 June 2007, MedAmerica filed amended crossclaims against the State seeking indemnity for any liability MedAmerica may have to Plaintiffs or the class. On 9 July 2007, the State moved to dismiss MedAmerica's crossclaims.

The State raised a sovereign immunity defense to each claim and crossclaim, pursuant to North Carolina Rules of Civil Procedure 12(b)(1) and (b)(2). The State also moved to dismiss Plaintiffs' constitutional claim ("*Corum* claim"), pursuant to Rule 12(b)(6), arguing that alternative adequate remedies existed. By order entered 5 September 2007, the trial court denied the State's motions.

On 6 September 2007, the State filed timely Notice of Appeal from the trial court's order denying their claims of sovereign immunity. By order entered 28 September 2007, the trial court denied the State's Motion for Stay pending appeal. On 19 October 2007, this Court granted the State's Petition for Supersedeas, staying all proceedings pending appeal. On 21 November 2007, MedAmerica filed a Motion to Dissolve Writ of Supersedeas and Dismiss the State's Interlocutory Appeal. On 30 November 2007, the State filed a Petition for Writ of Certiorari with this Court, seeking review of the trial court's denial of their Rule 12(b)(6) defense to Plaintiffs' *Corum* claim. On 17 December 2007, Plaintiffs filed a Motion to Dismiss the State's Interlocutory Appeal.

II. Facts

In 1997, the General Assembly authorized SHP to offer LTC Benefits to State employees, retirees, and retired local government workers, and their qualified dependents, on a voluntary, self-pay basis. 1997 N.C. Sess. Laws 468 (codified as amended N.C. Gen. Stat. § 135-41). SHP's Executive Administrator and Board of Trustees were given the sole authority to implement and administer LTC Benefits as fiduciaries of SHP. N.C. Gen. Stat. §§ 135-39.5(22), 135-40(a), and 135-41 (2005). The enabling legislation gave SHP discretion to make such benefits available through a contract of insurance with an insurance carrier selected on a competitive bid basis or by the establishment of a self-insured program administered by SHP. N.C. Gen. Stat. § 135-41. SHP chose to make benefits available through a contract of insurance.

SHP issued a request for proposal ("RFP") from insurance carriers to which MedAmerica responded and was the successful bidder. Upon acceptance, MedAmerica's response to the RFP became part of MedAmerica's LTC Contract with SHP. Under that contract, MedAmerica was to provide LTC Benefits coverage from 1 March 1998 through 31 December 2003, with two options for one-year extensions. One provision of the MedAmerica policy gave enrollees the option of paying their lifetime premium in the first ten years, resulting in a paid-in-full policy at the end of ten years. The contract also contained the following language: "At the termination of this Contract, all enrollees will remain members of the group and move with the group to new group coverage unless group coverage is no longer offered by the Plan." North Carolina Department of Insurance regulations required that upon moving the group from one group coverage to another, SHP's replacement coverage must offer substan-

tially similar benefits with a premium calculated on the age of enrollment in the group being replaced. 11 N.C.A.C. 12.1005 (2005).[1]

Long-term care insurance policies with a level premium are required to maintain, and by necessity create, contract reserves from the excess of premiums over claims in the early years of the policy, when claims are lower, so as to offset excess claims over premiums in the later years when claims are higher. 11 N.C.A.C. 11F.0201(10) and 11F.0205(a)(1)(A) (2005). Accordingly, SHP's contract with MedAmerica created such reserves. MedAmerica agreed to transfer these reserves to the next carrier at the end of its contract.

SHP gave information packets on the LTC Benefits to potential enrollees. The cover letter contained in the packets stated that the premium rates "are offered to you at group rates which are substantially less than comparable individual plans." Information in the packets stated that the "[p]remiums are based upon age at the time coverage is purchased, so the younger you are, the less expensive your premiums will be" and "when you enroll, you lock in your lower premium." Information in the packet also stated the following:

> Your premiums are designed to remain level over your lifetime. They will only be changed if a change is justified based on the claims experience and if approval is obtained from the North Carolina Department of Insurance. Any change of premiums must be made for everyone with similar coverage so you will never be singled out for a rate increase.

With the MedAmerica contract scheduled to expire on 31 December 2003, SHP issued an RFP on 14 August 2003 for another contract to continue LTC Benefits starting 1 January 2004. While SHP received several responses to this 2003 RFP, none provided coverage for enrollees who had elected the ten-year, paid-in-full option. SHP withdrew its 2003 RFP and exercised one of its one-year renewal options with MedAmerica, extending coverage through 31 December 2004.

On 9 March 2004, SHP issued another RFP. The 2004 RFP required the replacement carrier to accept transfer of the existing group, including those who had purchased the ten-year, paid-in-full option. The 2004 RFP also provided for a transfer of reserves "as part of [the] carrier's acceptance of the risk associated with the group." The 2004 RFP required that bidders offer coverage consistent with 11 N.C.A.C.

---

1. Plaintiffs' incorrectly cite 11 N.C.A.C. 12.1015 throughout their brief when discussing this rule.

12.1005,[2] which required that the premium be based upon the age of enrollment in the MedAmerica group and that the coverage offer substantially similar benefits. An addendum to the 2004 RFP stated that it was SHP's "preference that all current insureds transfer to the new carrier with no change in rates of [sic] benefits."

SHP subsequently contracted with Prudential to continue LTC Benefits beginning 1 January 2005. However, after the termination of the MedAmerica contract, SHP did not transfer the group in its entirety to Prudential as existing enrollees who wanted to maintain their LTC Benefits had to enroll in the new Prudential policy at rates based on their age in 2005, rather than when they were first enrolled in LTC Benefits with MedAmerica. According to Plaintiffs, more than 70% of MedAmerica policyholders were 60 or older when they first enrolled in LTC Benefits with MedAmerica and the resulting loss of credit for the years of enrollment caused substantial premium increases.

Because SHP did not transfer the group in its entirety to Prudential, MedAmerica offered an individual conversion policy to existing enrollees. The MedAmerica conversion policy offered similar benefits and calculated premiums using the age of enrollment in the MedAmerica group policy, but based the premiums on an individual rather than a group rate. The resulting MedAmerica individual conversion policy premium was typically lower than that offered by the Prudential group policy, but higher than the former MedAmerica group policy. Plaintiffs contend that approximately 80% of the enrollees in LTC Benefits through the MedAmerica group policy chose the MedAmerica individual conversion policy.

MedAmerica did not transfer the $13,542,304 it held in reserves to Prudential, contending it was not required to do so because SHP did not transfer the group from MedAmerica to Prudential.

III. Discussion

On appeal, the State contends the trial court erred in denying its motion to dismiss Plaintiffs' three asserted causes of action and MedAmerica's two crossclaims, pursuant to North Carolina Rules of Civil Procedure 12(b)(1) and (b)(2), as enforcement of each claim is barred by sovereign immunity. The State also argues that the trial court erred in denying its motion to dismiss Plaintiffs' *Corum* claim pursuant to North Carolina Rule of Civil Procedure 12(b)(6) because adequate alternative remedies existed.

---

2. The RFP incorrectly refers to 11 N.C.A.C. 12.1015.

[1] The denial of a motion to dismiss is an interlocutory order which is not immediately appealable unless that denial affects a substantial right of the appellant. *RPR & Assocs. v. State*, 139 N.C. App. 525, 534 S.E.2d 247 (2000), *aff'd per curiam*, 353 N.C. 362, 543 S.E.2d 480 (2001); N.C. Gen. Stat. § 7A-27(d) (2005). "[T]he denial of a motion to dismiss based upon the defense of sovereign immunity affects a substantial right and is thus immediately appealable." *RPR & Assocs.*, 139 N.C. App. at 527, 534 S.E.2d at 250. Accordingly, we deny Plaintiffs' and MedAmerica's Motions to Dismiss the State's Interlocutory Appeal and address the State's sovereign immunity arguments on appeal.

A trial court's denial of a Rule 12(b)(6) motion to dismiss generally does not affect a substantial right. *Bolton Corp. v. T. A. Loving Co.*, 317 N.C. 623, 347 S.E.2d 369 (1986). However, the State has moved this Court to grant its "Petition for Writ of Certiorari" to review the trial court's denial of their Rule 12(b)(6) defense to Plaintiffs' *Corum* claim. Although the denial of their Rule 12(b)(6) defense is interlocutory, we agree with the State that the issue is inextricably intertwined with the issues before this Court as of right. Accordingly, we grant the Writ of Certiorari and address the State's argument in this appeal.

"Sovereign immunity protects the State and its agencies from suit absent waiver or consent." *Wood v. N.C. State Univ.*, 147 N.C. App. 336, 338, 556 S.E.2d 38, 40 (2001), *appeal dismissed and disc. review denied*, 355 N.C. 292, 561 S.E.2d 887 (2002). Sovereign immunity can be waived when the State, through its authorized officers and agencies, enters into a valid contract. *Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976). The State "implicitly consents to be sued for damages on [a] contract in the event it breaches the contract." *Id.* at 320, 222 S.E.2d at 424. "When a State . . . waives its governmental immunity, it occupies the same position as any other litigant, and a plaintiff has the same right that he would have to sue an ordinary person. The State in such circumstances is not entitled to special privileges." *Lyon & Sons, Inc. v. N.C. State Bd. of Educ.*, 238 N.C. 24, 27-28, 76 S.E.2d 553, 556 (1953) (citations omitted).

A. Plaintiffs' Claims

1. Third-Party Beneficiaries

[2] The State first argues that sovereign immunity bars Plaintiffs' third-party beneficiary claim as "[s]overeign immunity bars enforce-

ment of a contract against the State by any person other than a signatory and actual party to the contract." Plaintiffs contend that, as intended third-party beneficiaries of the contract between SHP and MedAmerica, they were entitled to sue the State for breach of that contract as "no North Carolina decision has held that sovereign immunity bars third-party beneficiary contract claims against the State." Thus, in what appears to be a case of first impression, we must determine whether sovereign immunity bars third-party beneficiary contract claims against the State. We hold that it does not.

"The practice of allowing third-party beneficiaries not in privity of contract to bring an action in their own name to enforce the contract made for their benefit was recognized in North Carolina as early as 1842." *Vogel v. Reed Supply Co.*, 277 N.C. 119, 126, 177 S.E.2d 273, 278 (1970) (citation omitted). "The rule is well established in this jurisdiction that a third person may sue to enforce a binding contract or promise made for his benefit even though he is a stranger both to the contract and to the consideration." *Am. Trust Co. v. Catawba Sales & Processing Co.*, 242 N.C. 370, 379, 88 S.E.2d 233, 239 (1955) (quotation marks and citation omitted). However, "[n]ot every such contract made by one with another, the performance of which would be of benefit to a third person, gives a right of action to such third person." *Id.* "Before a stranger can avail himself of the exceptional privilege of suing for a breach of an agreement, to which he is not a party, he must at least show that it was intended for his direct benefit." *Id.* at 379, 88 S.E.2d at 239-40. (quotation marks and citations omitted).

While the State may be correct that "[t]his Court has consistently enforced the bar of sovereign immunity against any theory used by third-parties attempting to enforce others' contracts with the State[,]" this Court has not been faced with the "theory" that sovereign immunity bars third-party beneficiary claims. In the cases cited by the State to support its argument that sovereign immunity bars third-party beneficiary claims, none of the plaintiffs were intended third-party beneficiaries of a contract with the State or attempted to assert third-party beneficiary contract claims. For example, in *Rifenburg Constr., Inc. v. Brier Creek Assocs.*, 160 N.C. App. 626, 586 S.E.2d 812 (2003), *aff'd per curiam*, 358 N.C. 218, 593 S.E.2d 585 (2004), the North Carolina Department of Transportation ("DOT") and a developer entered into a construction contract. The developer then entered into a separate contract with a subcontractor. The subcontractor later filed suit against DOT, alleging DOT breached its contract with the developer.

The subcontractor alleged that the contract between DOT and the contractor formed a joint venture or partnership between DOT and the developer, whereby DOT became liable to the subcontractor for the wrongful acts of the contractor. The subcontractor did not claim that the contract between DOT and the developer was made for its intended benefit, nor did it attempt to assert a third-party beneficiary claim against the State. The State contended that sovereign immunity barred the subcontractor's claim. Upon review, this Court held that DOT was neither a joint venturer nor a partner with the developer and, thus, had not waived its sovereign immunity as to the subcontractor. This Court explained that "[w]hen a state agency . . . enters into an agreement with a developer, who then alone enters into a contract with a contractor, the state agency waives its sovereign immunity only to the original party to their agreement not to others." *Id.* at 631, 586 S.E.2d at 816.

Following *Rifenburg*, this Court in *Welch Constr., Inc. v. N.C. DOT*, 175 N.C. App. 45, 622 S.E.2d 691 (2005), held that the State did not waive sovereign immunity as to the subcontractor of a developer who had entered into a construction contract with DOT. Likewise, in *Bolton Corp. v. State*, 95 N.C. App. 596, 383 S.E.2d 671 (1989), *disc. review denied*, 326 N.C. 47, 389 S.E.2d 85 (1990), this Court held that sovereign immunity barred the plaintiff, who had entered into a construction contract with the State, from bringing a breach of contract action against the State on behalf of the plaintiff's subcontractor, since no contractual relationship existed between the State and the subcontractor.

As none of the plaintiffs in the above cases were intended third-party beneficiaries of contracts with the State and none attempted to assert third-party beneficiary contract claims, this Court did not address the issue of whether sovereign immunity bars third-party beneficiary claims. Accordingly, the cases are factually distinguishable and the holdings in those cases are inapplicable to the case at bar.

Unlike the construction contracts in the above-cited cases which were entered into to satisfy needs of the State, the contract between SHP and MedAmerica in this case was made to confer LTC Benefits directly upon state employees as consideration for their employment. Although the question of whether Plaintiffs were, in fact, intended third-party beneficiaries of the contract between SHP and MedAmerica is not properly before us, reading the above-stated laws of sovereign immunity and contracts together, we conclude: (1) sov-

ereign immunity may be waived when the State enters into a valid contract; (2) when the State waives sovereign immunity, it occupies the same position as any other litigant; (3) when the State occupies the same position as any other litigant, it may be sued by a third party to enforce a contract made for the direct benefit of that third party; and (4) sovereign immunity does not bar third-party beneficiary contract claims against the State.

2. *Ultra Vires* Contract

[3] The State next argues that sovereign immunity bars Plaintiffs' claims because SHP had no express authority to set the terms of the 2005 State contract in a commitment to Plaintiffs or MedAmerica and, thus, the alleged contractual promises are *ultra vires* to SHP. SHP is an agency of the State created by N.C. Gen. Stat. §§ 135.40-135.40.14. As a creature of the Legislature, an agency of the State

> can only exercise (1) the powers granted in express terms; (2) those necessarily or fairly implied in or incident to the powers expressly granted; and (3) those essential to the accomplishment of the declared objects of the [agency].

Madry v. Scotland Neck, 214 N.C. 461, 462, 199 S.E. 618, 619 (1938) (citations omitted). Thus, SHP "may exercise only such authority as is vested in it by statute[,]" *State ex rel. Utilities Comm'n. v. Thurston Motor Lines, Inc.*, 240 N.C. 166, 168, 81 S.E.2d 404, 406 (1954), and its agents or officers may not bind it by any contract which is beyond the scope of its powers. *Madry*, 214 N.C. 461, 199 S.E. 618. When a State agency attempts to enter into a contract which does not come within the scope of its powers, the contract thereby formed is *ultra vires*. *Id.* "If a contract is *ultra vires*[,] it is wholly void and (1) no recovery can be had against the [State]; (2) there can be no ratification except by the Legislature; (3) the [State] cannot be estopped to deny the validity of the contract." *Id.* at 463, 199 S.E. at 619 (quotation marks and citations omitted).

The State argues here that sovereign immunity bars Plaintiffs' breach of contract claim because the contractual terms at issue are beyond the scope of its legislatively conferred powers, and, thus, are *ultra vires*. In support of this argument, the State asserts that the Court in *Whitfield v. Gilchrest*, 348 N.C. 39, 497 S.E.2d 412 (1998), confirmed the "long-standing law that *ultra vires* contracts against the State remain barred by sovereign immunity." However, the Court in *Whitfield* determined only that sovereign immunity bars an action seeking recovery in *quantum meruit* based on an implied-in-law con-

tract theory. The Court did not address the issue of whether sovereign immunity bars an action seeking to recover for the breach of an express contract which was allegedly *ultra vires*. Accordingly, *Whitfield* is inapposite.

A contract which is *ultra vires* is, in itself, void and unenforceable against the State. It thus follows that where there is no valid contract to enforce against the State, the defense of sovereign immunity is inapplicable.

Whether the alleged contractual promises in this case were *ultra vires* and whether Plaintiffs are "ultimately entitled to relief are questions not properly before us[,]" *Archer v. Rockingham Cty.*, 144 N.C. App. 550, 558, 548 S.E.2d 788, 793 (2001), *disc. review denied*, 355 N.C. 210, 559 S.E.2d 796 (2002), as "[w]e are not now concerned with the merits of the controversy[.]" *Smith*, 289 N.C. at 322, 222 S.E.2d at 424. By this opinion, we conclude only that sovereign immunity cannot and does not bar the enforcement of an *ultra vires* contract against the State because an *ultra vires* contract is, in itself, unenforceable.

3. *Corum* Claim

[4] Next, the State argues that sovereign immunity bars Plaintiffs' "takings" claim brought under North Carolina Constitution Article I, Section 19.

In *Corum v. Univ. of N.C.*, 330 N.C. 761, 413 S.E.2d 276, *reh'g denied*, 331 N.C. 558, 418 S.E.2d 664, *cert. denied sub nom. Durham v. Corum*, 506 U.S. 985, 121 L. Ed. 2d 431 (1992), our Supreme Court held that "[t]he doctrine of sovereign immunity cannot stand as a barrier to North Carolina citizens who seek to remedy violations of their rights guaranteed by the Declaration of Rights." *Id.* at 785-86, 413 S.E.2d at 291. The Court explained that "when there is a clash between these constitutional rights and sovereign immunity, the constitutional rights must prevail." *Id.* at 786, 413 S.E.2d at 292. Following *Corum*, this Court held in *Sanders v. State Pers. Comm'n*, 183 N.C. App. 15, 644 S.E.2d 10, *disc. review denied*, 361 N.C. 696, 652 S.E.2d 653 (2007), that "sovereign immunity is not available as a defense to a claim brought directly under the state constitution." *Id.* at 18, 644 S.E.2d at 12.

Here, Plaintiffs allege that they

> had a contractual right to level premiums for their Long-Term Care Benefits provided under the State Health Plan through the

> MedAmerica Group Policy and subsequent group policies for Long-Term Care Benefits provided under the State Health Plan following the termination of the MedAmerica contract with the State Health Plan, and this contractual right was and is a property right that could not be taken without just compensation under N.C. Constitution Article I, Section 19.

The State argues that since sovereign immunity bars Plaintiffs' underlying contract claim, "the contract cannot give rise to an enforceable 'property right' and sovereign immunity bars Plaintiffs' 'takings' claim." However, as discussed above, we have concluded that sovereign immunity does not bar Plaintiffs' breach of contract claim. Furthermore, as Plaintiffs brought their takings claim pursuant to Article I, Section 19 of the North Carolina Constitution, the State is not entitled to the defense of sovereign immunity against this claim. *See also Peverall v. Cty. of Alamance*, 154 N.C. App. 426, 430, 573 S.E.2d 517, 519 (2002) ("It is well established that sovereign immunity does not protect the state or its counties against claims brought against them directly under the North Carolina Constitution."), *disc. review denied*, 356 N.C. 676, 577 S.E.2d 632 (2003).

[5] The State next argues that the trial court erred in denying its motion to dismiss Plaintiffs' *Corum* claim under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) because adequate alternative remedies exist. We agree.

"In reviewing a trial court's Rule 12(b)(6) dismissal, the appellate court must inquire whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory." *Newberne v. Dep't of Crime Control & Pub. Safety*, 359 N.C. 782, 784, 618 S.E.2d 201, 203 (2005) (quotation marks and citations omitted).

A claim under our state constitution is available only "in the absence of an adequate state remedy." *Corum*, 330 N.C. at 782, 413 S.E.2d at 289. "[T]he term 'adequate' in *Corum* is not used to mean 'potentially successful[,]' " *Craig v. New Hanover Cty. Bd. of Educ.*, 185 N.C. App. 651, 656, 648 S.E.2d 923, 927 (2007), but rather "the Court is using 'adequate remedy' to mean [an] 'available, existing, applicable remedy.' " *Id.* On the other hand, a plaintiff must be allowed to pursue claims for the same alleged wrong under both the constitution and state law where one could produce only equitable

relief and the other could produce only monetary damages, thus "complet[ing] [the plaintiff's] remedies[.]" *Corum*, 330 N.C. at 789, 413 S.E.2d at 294.

In *Craig*, the plaintiff claimed that the State had denied him his constitutional right to and liberty interest in an education that was free from harm, and that the State was "negligent in failing to provide adequate protection for him from a fellow student, a claim that, under state law, is a common law negligence claim." *Craig*, 185 N.C. App. at 655, 648 S.E.2d at 926. Because the negligence "claim would vindicate the same rights as the constitutional argument put forth by [the] plaintiff—namely, his right to attend school without being harmed by classmates[,]" *id.*, this Court determined that the plaintiff had an adequate remedy under state law and, thus, could not bring his constitutional claim.

Here, Plaintiffs' complaint alleges that they

> had a contractual right to level premiums for their Long-Term Care Benefits provided under the State Health Plan through the MedAmerica Group Policy and subsequent group policies for Long-Term Care Benefits provided under the State Health Plan following the termination of the MedAmerica contract with the State Health Plan, and this contractual right was and is a property right that could not be taken without just compensation under N.C. Constitution Article I, Section 19.

As a result of this alleged "taking," Plaintiffs allege they "have suffered damages in excess of $10,000" and seek "damages as against Defendants State Health Plan and the State of North Carolina . . . in an amount in excess of $10,000 . . . ." By their breach of contract claims against the State, Plaintiffs also allege that they "have suffered damages in an amount in excess of $10,000" and seek "damages as against Defendants State Health Plan and the State of North Carolina . . . in an amount in excess of $10,000 . . . ." Because Plaintiffs' breach of contract claim would not "complete[] [Plaintiff's] remedies," *Corum*, 330 N.C. at 789, 413 S.E.2d at 294, but would instead "vindicate the same rights as the[ir] constitutional argument[,]" *Craig*, 185 N.C. App. at 358, 648 S.E.2d at 926, namely, monetary damages in excess of $10,000, Plaintiffs have an adequate alternative remedy under state law and, thus, their "takings" claim under N.C. Constitution Article I, Section 19 should have been dismissed.[3]

3. It is also of note that this Court in *Archer*, citing *Smith*, *supra*, explained that one rationale for a state implicitly consenting to being sued upon any valid contract

Accordingly, we reverse the trial court's denial of the State's Rule 12(b)(6) motion.

2. MedAmerica's Crossclaims

A. *Ultra Vires* Contract

[6] The State next argues that "[s]overeign immunity bars MedAmerica's breach of contract claim because the alleged contractual promises are *ultra vires* to the State Health Plan."

As discussed above, a contract which is *ultra vires* is, in itself, void and unenforceable. Where there is no valid contract to enforce, the defense of sovereign immunity is inapplicable. Whether the alleged promises were, in fact, *ultra vires* is a matter for the trial court as "[w]e are not now concerned with the merits of the controversy[.]" *Smith*, 289 N.C. at 322, 222 S.E.2d at 424. We reiterate that sovereign immunity cannot and does not bar the enforcement of an *ultra vires* contract against the State because such a contract is unenforceable in any event, and we overrule the State's argument.

2. Indemnity

[7] Finally, the State asserts that sovereign immunity bars MedAmerica's implied-in-law indemnity crossclaim. We agree.

"[A] right to indemnity exists whenever one party is exposed to liability by the action of another who, in law or equity, should make good the loss of the other." *McDonald v. Scarboro*, 91 N.C. App. 13, 22, 370 S.E.2d 680, 686 (quotation marks and citation omitted), *disc. review denied*, 323 N.C. 476, 373 S.E.2d 864 (1988). "In North Carolina, a party's rights to indemnity can rest on three bases: (1) an express contract; (2) a contract implied-in-fact; or (3) . . . a contract implied-in-law." *Kaleel Builders, Inc. v. Ashby*, 161 N.C. App. 34, 38, 587 S.E.2d 470, 474 (2003).

A party's right to indemnity based on an express contract arises out of an indemnity clause specifically set out in a contract as part of the bargained-for exchange. *Kaleel Builders*, 161 N.C. App. 34, 587 S.E.2d 470. Here, MedAmerica does not assert that there was an

---

into which it enters, thus waiving sovereign immunity, is that to deny a party who has performed his obligation under a contract the right to sue the state when it defaults is to take his property without compensation and thus to deny him due process. *Archer*, 144 N.C. App. 550, 548 S.E.2d 788 (2001). Accordingly, this Court in *Archer* and *Smith* implicitly recognized that a suit against the State for breach of contract could essentially be a "takings" claim.

indemnity clause in their contract with the State, instead seeking indemnity based on implication.

> A right of indemnity implied-in-fact stems from the existence of a binding contract between two parties that necessarily implies the right. The implication is derived from the relationship between the parties, circumstances of the parties' conduct, and that the creation of the indemnitor/indemnitee relationship is derivative of the contracting parties' intended agreement.

Id. at 38, 587 S.E.2d at 474. In order to establish such a right to indemnity, this Court has required a plaintiff to show special circumstances from which such an agreement might be implied. *See*, *e.g.*, *McDonald*, 91 N.C. App. 13, 370 S.E.2d 680 (holding that a defendant had submitted sufficient evidence to establish the existence of an implied-in-fact contract for indemnity with respect to attorney's fees where another defendant had orally agreed to provide him with an attorney in the event he was sued by plaintiff for breach of contract).

> Indemnity implied-in-law
>
> is a *quasi* contract, which may result either from a tortious wrong . . . or from one that is contractual. A quasi-contractual obligation is one that is created by the law for reasons of justice, without any expression of assent and sometimes even against a clear expression of dissent[.]

Cox v. Shaw, 263 N.C. 361, 367, 139 S.E.2d 676, 681 (1965) (quotation marks and citations omitted). Although implied-in-law indemnity is most frequently utilized in the tort context as a means of resolving liability among defendants, a particular quasi-contract can also be of a contractual origin. *Cox*, 263 N.C. 361, 139 S.E.2d 676. "[T]he primary distinction between [implied-in-fact and implied-in-law indemnity] is that [implied-in-fact] indemnity involves a true contract based on implied consent while [implied-in-law] indemnity is a legal fiction used to avoid unfairness." *Northeast Solite Corp. v. Unicon Concrete, LLC*, 102 F. Supp. 2d 637, 641 (M.D.N.C. 1999). Here, MedAmerica has neither alleged nor shown the existence of a relationship with the State nor special circumstances from which a contractual right of indemnity may be implied-in-fact. Accordingly, MedAmerica's claim for indemnity may only be based upon a contract of indemnity implied-in-law.

In North Carolina, the State waives sovereign immunity only when it expressly enters into a valid contract. *Smith*, 289 N.C. 303, 222 S.E.2d 412. In *Whitfield*, our Supreme Court stated:

> we will not first imply a contract in law where none exists in fact, then use that implication to support the further implication that the State has intentionally waived its sovereign immunity and consented to be sued for damages for breach of the contract it never entered in fact. Only when the State has implicitly waived sovereign immunity by *expressly* entering into a *valid* contract through an agent of the State expressly authorized by law to enter into such contract may a plaintiff proceed with a claim against the State upon the State's breach.

Whitfield, 348 N.C. at 42-43, 497 S.E.2d at 415 (emphasis original). Accordingly, the law is clear that the State's sovereign immunity bars MedAmerica's claim for indemnification based on a contract for indemnity implied-in-law.[4] Accordingly, we reverse the trial court's denial of the State's motion to dismiss as to this issue.

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

AFFIRMED IN PART, REVERSED IN PART.

Chief Judge MARTIN and Judge TYSON concur.

IN RE: LADY KITCHIN BY AND FOR HODGE KITCHIN AND JEAN KITCHIN, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED, PLAINTIFFS v. HALIFAX COUNTY, ET AL., DEFENDANTS

No. COA07-965

(Filed 2 September 2008)

1. Appeal and Error— mootness-quarantine dog released

An appeal from a decision of the Halifax County Board of Health to quarantine a dog was moot and there was no need to decide whether the district court had exclusive jurisdiction over appeals from decisions by local boards of health where the dog had been returned home by the time the case was transferred to superior court.

---

4. MedAmerica entered into an express contractual relationship with the State to provide insurance. MedAmerica could have freely negotiated the inclusion of an express indemnity clause, whereby the State's sovereign immunity would have been waived.

2. Courts— transfer from district to superior court—no prejudice

The trial court did not err by transferring a class action arising from the quarantine of a dog from district to superior court. Assuming arguendo that defendants waived objection to the case pending in the district court, plaintiffs cannot demonstrate prejudice because the proper division is superior court where plaintiffs sought damages in excess of $10,000.00.

3. Injunctions— mootness—quarantine of dog

The trial court did not err by dismissing as moot claims for injunctive and declaratory relief arising from the quarantine of a dog where the dog had been returned to plaintiffs and the local board of health's rabies exposure policy had been rescinded.

4. Class Actions— dismissal—notice requirement—not applicable to dismissal by court

The trial court did not err by dismissing plaintiffs class action, arising from the quarantine of a dog, where plaintiffs argued that the Rule 23(c) notice requirement applies to dismissals by the trial court as well as to voluntary dismissals. It does not.

5. Class Actions— dismissal—denied—notice not given

The trial court did not err by denying plaintiffs' motion to voluntarily dismiss two of their claims in a class action arising from the quarantine of a dog. Plaintiffs did not have the power to voluntarily dismiss any claims without notice to class members.

6. Counties— quarantine of dog—official capacity defendants—waiver of immunity not alleged—summary judgment

The trial court did not err by granting summary judgment for defendant county and others in an action arising from a dog quarantine where plaintiffs failed to allege waiver of immunity for the defendants sued in their official capacities. A complaint that does not allege waiver of immunity does not state a cause of action.

7. Immunity— governmental—quarantine of dog—officials—summary judgment

The trial court did not err by granting summary judgment for two of the defendants in their individual capacities based on governmental immunity in an action rising from the quarantine of a dog. One was the director of the county health department, the other the Animal Control Lead Officer; both positions were

created by statute, exercised a portion of sovereign power, and exercised discretion. The allegations pertained to the performance of their official duties and did not allege corruption or actions beyond the scope of their duties.

8. Immunity— governmental—quarantine of dog—employees—summary judgment

The trial court did not err by granting summary judgment for the director of an animal control facility and an employee of the county health department in their individual capacities in an action arising from the quarantine of a dog. Although these two defendants were public employees rather than officers because neither position was created expressly by statute, and neither position appears to involve the exercise of sovereign power or significant amounts of discretion, there were no issues of material fact, plaintiffs offered only cursory legal support for the arguments, and plaintiffs did not address how the evidence supports the elements of each of their claims.

9. Appeal and Error— preservation of issue—question not raised at trial

Plaintiffs did not preserve for appellate review the question of whether they were entitled to attorney fees where the contention was not raised at trial.

Appeal by plaintiffs from order entered 6 March 2007 by Judge Alma L. Hinton in Halifax County Superior Court. Heard in the Court of Appeals 4 March 2008.

J.W. Bryant, Law Firm, P.L.L.C., by John Walter Bryant, for plaintiff-appellants.

Womble Carlyle Sandridge & Rice, by James R. Morgan, Jr. and Robert T. Numbers, II, for defendant-appellees.

BRYANT, Judge.

Hodge and Jean Kitchin (plaintiffs) appeal from an order entered 6 March 2007 granting Halifax County's, et. al. (defendants) motion to dismiss, denying plaintiffs' motion to reconsider, and denying plaintiffs' motion for voluntary dismissal.

Facts

On 11 December 2005, plaintiff Hodge Kitchin was walking the family dog, Lady, when Lady attacked a raccoon that crossed her

path. After Lady dropped the raccoon, Hodge and Lady returned to the family home. Over three days later, Jean Kitchin, Hodge's wife, read an article about rabid raccoons and became concerned that Lady may have been exposed on 11 December. After Jean contacted local authorities, an animal control officer was eventually sent to the Kitchin's home on 16 December 2005. The officer was unable to locate the raccoon Lady encountered on 11 December and, instead, took Lady into custody for testing. Over the next few days, through contact with the Halifax County Board of Health (HCBH), the Kitchins learned that Lady could not be returned home because of her potential exposure to rabies and that Lady would be euthanized. The Kitchins took immediate action and appealed the decision of the HCBH. On 4 January 2006, the HCBH held a meeting to review the plaintiffs' appeal. On 10 January 2006, plaintiffs' appeal was denied. However, on 10 January, plaintiffs entered into a quarantine agreement with the HCBH allowing Lady to be quarantined outside of the county for six months until 11 June 2006.

Procedural History

On 30 January 2006, plaintiffs filed a complaint against defendants which contained motions for preliminary and permanent injunctions to prevent Lady's quarantine and for class certification. In the complaint, plaintiffs alleged eight claims for relief: negligence; intentional infliction of emotional distress; negligent infliction of emotional distress; negligent training, supervision, and retention; negligent misrepresentation; breach of fiduciary duty; punitive damages; and declaratory judgment. Plaintiffs also requested to recover from defendants an amount in excess of $10,000.00 for each alleged claim.

On 25 September 2006, defendants made a motion to transfer the case to Halifax County Superior Court. Defendants' motion was granted 30 November 2006. On 7 February 2007, defendants filed a motion to dismiss, motion for summary judgment, and motion to decertify the class. On 10 February 2007, plaintiffs entered notice of voluntary dismissal of two claims—negligent infliction of emotional distress and intentional infliction of emotional distress. Plaintiffs' and defendants' motions were heard on 19 February 2007. In an order entered 6 March 2007, the trial court struck as improper plaintiffs' voluntary dismissal and granted defendants' motions to dismiss and for summary judgment. Plaintiffs appeal.

Rule Violations

As an initial matter, defendants have filed with this Court a motion to dismiss plaintiffs' appeal based on rule violations. Specifically, defendants argue plaintiffs' assignments of error violate N.C. R. App. P. Rule 10(c)(1). After reviewing plaintiffs' assignments of error, we do agree plaintiffs did not comply with the North Carolina Rules of Appellate Procedure. However, we decline to dismiss the appeal for rule violations and will address the merits of the appeal. *See Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 198, 657 S.E.2d 361, 365 (2008) ("[A] party's failure to comply with nonjurisdictional rule requirements [i.e. N.C. R. App. P. 10(c)(1)] normally should not lead to dismissal of the appeal.").

The issues presented on appeal are: (I) whether the district court has exclusive jurisdiction pursuant to N.C. Gen. Stat. § 130A-24; (II) whether transfer to superior court was waived pursuant to N.C. Gen. Stat. § 7A-258; and (III) whether the trial court erred by (a) dismissing the certified class action lawsuit and (b) granting defendants' motions to dismiss.

I

[1] Plaintiffs argue the district court has exclusive jurisdiction over an appeal from a local board of health's decision pursuant to N.C. Gen. Stat. § 130A-24. Because we hold plaintiffs' appeal of the Board's decision to quarantine Lady should be dismissed as moot, we need not address this argument.

"Generally, an appeal should be dismissed as moot '[w]hen events occur during the pendency of [the] appeal which cause the underlying controversy to cease to exist.' " *Smith v. Smith*, 145 N.C. App. 434, 436, 549 S.E.2d 912, 914 (2001) (quoting *In re Hatley*, 291 N.C. 693, 694, 231 S.E.2d 633, 634 (1977)). "Whenever 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[.]" *Simeon v. Hardin*, 339 N.C. 358, 370, 451 S.E.2d 858, 866 (1994).

In this case, plaintiffs' dog, Lady, was placed under quarantine for six months by the HCBH. During the quarantine period, plaintiffs filed this action on 30 January 2006, which included their individual appeal from the HCBH's decision and the class action claims against defendants. The quarantine period ended 11 June 2006, and Lady was released to plaintiffs' care. Plaintiffs' case, including the class action

claims and the appeal from the HCBH decision, was transferred to Superior Court on 30 November 2006. At the time the case was transferred to Superior Court, plaintiffs' dog had been released from quarantine and returned home. Therefore, plaintiffs' appeal of the HCBH's decision to quarantine Lady was moot at the time the case was transferred and the question whether the district court has exclusive jurisdiction over appeals from decisions by local boards of health need not be decided. As our Supreme Court has stated, "courts will not entertain an action merely to determine abstract propositions of law." *Simeon*, 339 N.C. at 370, 451 S.E.2d at 866. This assignment of error is dismissed.

II

[2] Plaintiffs argue the trial court erred by transferring jurisdiction to Superior Court because defendants waived any objection to the case pending in District Court. We disagree.

Because we have determined that plaintiffs' appeal from the decision of the Board of Health was moot, we address plaintiffs' argument as it applies to the remaining class action claims. Pursuant to N.C. Gen. Stat. § 7A-258(c), "[a] motion to transfer by any party other than the plaintiff must be filed within 30 days after the moving party is served with a copy of the pleading which justifies transfer." *Id.* An order transferring or refusing to transfer is not immediately appealable, but is reviewable only on appeal from a final judgment. N.C. Gen. Stat. § 7A-260 (2007). "If on review, such an order is found erroneous, reversal or remand is not granted unless prejudice is shown." *Id.*

Assuming *arguendo* defendants waived any objection to the case pending in district court as plaintiffs contend, plaintiffs have not and cannot demonstrate they have suffered prejudice as required by N.C.G.S. § 7A-260. Plaintiffs' claim for damages was in excess of $10,000.00. The proper division for the trial of plaintiffs' claims is the Superior Court. N.C. Gen. Stat. § 7A-243 (2007) ("[T]he superior court division is the proper division for the trial of all civil actions in which the amount in controversy exceeds ten thousand dollars ($10,000)."). Therefore, this assignment of error is overruled.

III

Plaintiffs argue the trial court erred by dismissing the motions for injunctive and declaratory relief, denying their motion to voluntarily dismiss two claims, dismissing the class action, granting summary

judgment on the state law claims, and decertifying the class action. Plaintiffs also argue they are entitled to attorney's fees. We disagree.

A. Motions for Injunctive and Declaratory Relief

[3] Plaintiffs argue the trial court erred by dismissing the motions for injunctive and declaratory relief as moot. We disagree.

As stated previously, a case should be dismissed "[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[.]" *Simeon*, 339 N.C. at 370, 451 S.E.2d at 866. Here, plaintiffs' requests for preliminary and permanent injunctions became moot when Lady was returned to plaintiffs' care on 11 June 2006.

Additionally, plaintiffs' request for a declaratory judgment finding the HCBH's Rabies Exposure Policy [r.p. 49, 51] in conflict with the North Carolina General Statutes became moot when the HCBH rescinded the policy on 10 July 2006 [r.p. 329-30]. "Repeal of a challenged law generally renders moot the issue of the law's interpretation or constitutionality." *Property Rights Advocacy Grp. v. Town of Long Beach*, 173 N.C. App. 180, 183, 617 S.E.2d 715, 718 (2005). Therefore, the trial court did not err by dismissing plaintiffs' motions for injunctive and declaratory relief as moot.

B. Dismissal of Class Action

[4] Plaintiffs argue the trial court erred by dismissing their class action lawsuit because notice was not given to members of the class prior to dismissal.[1] We disagree.

Pursuant to N.C. Gen. Stat. § 1A-1, Rule 23(c), notice of dismissal is required to be given to class members prior to a dismissal. N.C.G.S. § 1A-1, Rule 23 (c) (2007). Plaintiffs argue Rule 23(c) not only applies to voluntary dismissals, but also dismissals granted by the trial court. Our Rule 23 is closely patterned after Rule 23 of the Rules of Federal Procedure. Because our state appellate courts have not considered plaintiffs' question before, we may consider federal class action lawsuits that have addressed this question. *Scarvey v. First Fed. Savings & Loan Ass'n*, 146 N.C. App. 33, 41, 552 S.E.2d 655, 660 (2001) ("[W]hile federal class action cases are not binding on this

1. Although plaintiffs also argue the trial court erred by decertifying the class, the trial court declined to address defendants' motion to decertify by determining the dismissal and summary judgment rendered defendants' motion moot.

Court, we have held in the past that the reasoning in such cases can be instructive.").

In *Hutchinson v. Fidelity Inv. Ass'n*, 106 F.2d 431 (4th Cir. 1939), the Fourth Circuit addressed an argument identical to plaintiffs'. In construing Rule 23(c) of the Federal Rules of Procedure, the Fourth Circuit reasoned the notice requirement "was never intended . . . [to] be a condition precedent to dismissal by the court after hearing on the merits." *Id.* at 436. The purpose of Rule 23(c) is to ensure that the named plaintiff does not terminate the class action without providing proper notice to other members of the class. *Id. See also Pelelas v. Caterpillar Tractor Co.*, 113 F.2d 629 (7th Cir. 1940). Thus, while Rule 23(c) applies in cases of *voluntary* dismissals, it is not applicable in cases such as the one before us, where the dismissal is by a court. Plaintiffs' assignment of error is overruled.

C. Plaintiffs' Voluntary Dismissal

[5] Plaintiffs argue the trial court erred by striking their Rule 41 voluntary dismissal of two claims. We disagree.

Plaintiffs' reliance on Rule 41 as allowing voluntary dismissals of claims after a class action has been certified is misplaced. Pursuant to N.C. Gen. Stat. § 1A-1, Rule 41, a plaintiff may dismiss an action "[s]ubject to the provisions of Rule 23(c) and of any statute of this State . . . ." N.C.G.S. § 1A-1, Rule 41 (2007). As noted previously, Rule 23(c) requires "[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* . . . ." N.C.G.S. § 1A-1, Rule 23(c) (emphasis supplied). *See also Hutchinson*, 106 F.2d at 436 (Rule 23(c) ensures named plaintiff does not dismiss class action without notice to members of the class). Because plaintiffs' case was certified as a class action, plaintiffs did not have the power to voluntarily dismiss any claims without notice to class members as required by Rule 23(c). The trial court did not err in denying plaintiffs' motion to dismiss their claims of intentional and negligent infliction of emotional distress. This assignment of error is overruled.

D. Summary Judgment

Governmental Immunity

[6] Plaintiffs argue the trial court erred by granting summary judgment in favor of defendants. Defendants argue the trial court was cor-

rect in granting summary judgment because plaintiffs' complaint failed to allege a waiver of governmental immunity.

"It [is] well-settled that when an action is brought against individual officers in their official capacities the action is one against the state for the purposes of applying the doctrine of sovereign immunity." *Whitaker v. Clark*, 109 N.C. App. 379, 381-82, 427 S.E.2d 142, 143-44 (1993). This doctrine applies where an entity is being sued for the performance of a governmental function. *Tabor v. County of Orange*, 156 N.C. App. 88, 90, 575 S.E.2d 540, 542 (2003). "It is inapplicable, however, where the state has consented to suit or has waived its immunity through the purchase of liability insurance." *Id.* "Absent consent or waiver, the immunity provided by the doctrine is absolute and unqualified." *Id.*

Where a complaint fails to allege that immunity has been waived, the complaint fails to state a cause of action. *Clark v. Burke County*, 117 N.C. App. 85, 88, 450 S.E.2d 747, 748 (1994). Here, plaintiffs failed to allege waiver of immunity as to the defendants sued in their official capacity. Therefore, the trial court did not err by granting summary judgment in favor of defendants.

Individual Capacity

[7] Plaintiffs also sued defendants Lynda Smith, Robert Richardson, Jeff Dillard, and Terrell Stallings in their individual capacities. Therefore, we must consider whether the trial court erred by granting summary judgment to them in their individual capacities.

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. *See Block v. County of Person*, 141 N.C. App. 273, 540 S.E.2d 415 (2000). "A public officer is shielded from liability unless he engaged in discretionary actions which were allegedly: (1) corrupt; (2) malicious; (3) outside of and beyond the scope of his duties; (4) in bad faith; or (5) willful and deliberate." *Meyer v. Walls*, 122 N.C. App. 507, 516, 471 S.E.2d 422, 428-29 (1996), *overruled on other grounds*, 347 N.C. 97, 489 S.E.2d 880 (1997) (internal citations omitted). A public employee, on the other hand, "is personally liable for negligence in the performance of his or her duties proximately causing an injury." *Block*, 141 N.C. App. at 281, 540 S.E.2d at 421 (citations omitted).

In determining whether a person is a public officer or a public employee, our Courts have recognized several distinctions.

> A public officer is someone whose position is created by the constitution or statutes of the sovereign. An essential difference between a public office and mere employment is the fact that the duties of the incumbent of an office shall involve the exercise of some portion of sovereign power. Officers exercise a certain amount of discretion, while employees perform ministerial duties. Discretionary acts are those requiring personal deliberation, decision and judgment; duties are ministerial when they are absolute, certain, and imperative, involving merely the execution of a specific duty arising from fixed and designated facts.

Id. (citations omitted); *Meyer*, 122 N.C. App. at 516, 471 S.E.2d at 429.

Applying this analysis, we conclude that Smith, as director of the Halifax County Health Department, is a public officer. Her position is created by statute, many of her duties are imposed by law and she clearly exercises substantial discretionary authority. *See* N.C. Gen. Stat. § 130A-45.4 (2007). Normally, where a public officer's alleged negligence "is related solely to his or her official duties," the officer is immune from suit in his individual capacity, and any action must be brought against the officer in his official capacity. *Robinette v. Barriger*, 116 N.C. App. 197, 203, 447 S.E.2d 498, 502 (1994), *overruled on other grounds*, *Meyers v. Walls*, 347 N.C. 97, 489 S.E.2d 880 (1997). Here, each of plaintiffs' allegations against Smith pertain to the performance of duties that were discretionary in nature and thus within the scope of her official duties. Additionally, plaintiffs do not allege that Smith's actions were "corrupt or malicious" or that she "acted outside of and beyond the scope of [her] duties." *Block*, 141 N.C. App. at 280, 540 S.E.2d at 421. Therefore, the trial court did not err by granting summary judgment in favor of Smith in her individual capacity.

Likewise, we conclude that Richardson, as the Halifax County Animal Control Lead Officer, is a public officer. The position of animal control officer is created by statute, N.C. Gen. Stat. § 67-30, and is given authority to, *inter alia*, impound and euthanize dogs or cats, N.C. Gen. Stat. § 130A-192 and destroy stray dogs or cats in quarantine districts, N.C. Gen. Stat. § 130A-195. An animal control officer is a position created by statute, exercises a portion of sovereign power, and exercises discretion. *See Block*, 141 N.C. App. at 281, 540 S.E.2d at 421 (distinguishing public official from public employee). Plaintiffs' allegations against Richardson pertain to the performance of his duties as an animal control officer and not as an individual. Additionally, plaintiffs do not allege that Richardson's actions were

"corrupt or malicious" or that he "acted outside of and beyond the scope of his duties." *Id.* at 280, 540 S.E.2d at 421. Therefore, the trial court did not err by granting summary judgment in favor of Richardson in his individual capacity.

[8] As to defendants Dillard and Stallings, defendant Dillard is the Director of the Halifax County Animal Control Facility and defendant Stallings is an employee of the Halifax County Health Department. Neither position appears to have been created expressly by statute, and neither position appears to involve the exercise of sovereign power or significant amounts of discretion. Accordingly, we conclude that defendants Dillard and Stallings are public employees, not public officers.

Having concluded that defendants Dillard and Stallings are public employees, we must consider whether summary judgment was properly granted in their favor. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2007). We must determine "whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law." *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998). We review the evidence in the light most favorable to the nonmoving party. *Id.* "On appeal, an order allowing summary judgment is reviewed *de novo*." *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004) (citation omitted).

Viewing the evidence in the light most favorable to plaintiffs, we conclude there are no issues of material fact regarding plaintiffs' claims for negligence, negligent infliction of emotional distress, intentional infliction of emotional distress, negligent training, supervision or retention, negligent misrepresentation or breach of fiduciary duty as it applied to Dillard and Stallings. In addition, plaintiffs offer only cursory legal support for the arguments but do not address how the evidence supports the elements of each of their claims. Therefore, we hold the trial court did not err by granting summary judgment in favor of defendants Dillard and Stallings.

E. Prevailing Parties

[9] Lastly, plaintiffs argue they are entitled to recover reasonable attorney's fees pursuant to N.C. Gen. Stat. § 6-19.1 (2007). However,

plaintiffs have failed to properly preserve this argument. Therefore, pursuant to N.C. R. App. P. 10(b)(1), this assignment of error is dismissed. *See* N.C. R. App. P. 10(b)(1) (2007); *Town of Chapel Hill v. Burchette*, 100 N.C. App. 157, 159-60, 394 S.E.2d 698, 700 (1990) ("A contention not raised in the trial court may not be raised for the first time on appeal.").

For the foregoing reasons, we affirm in part and dismiss in part.

Affirmed in part; dismissed in part.

Judges WYNN and JACKSON concur.

BEULAH R. HEINITSH, PLAINTIFF v. WACHOVIA BANK, NATIONAL ASSOCIATION F/K/A FIRST UNION NATIONAL BANK, N.A., AGNES H. WILLCOX, JOHN S. HEINITSH, ISABEL H. NICHOLS, AND REGINALD D. HEINITSH, JR., DEFENDANTS

No. COA07-1198

(Filed 2 September 2008)

Trusts— fiduciary duty—pending litigation—holding funds in money market

The trial court correctly granted summary judgment for defendant in an action against a trustee for holding trust funds in a money market account during litigation. Defendant was not faced with deciding how to invest the retained funds, but with deciding whether the retained funds should be dispersed as income or invested as principal. Litigation ensued after plaintiff objected to the funds being characterized as principal, and defendant focused on keeping the retained funds in a liquid investment vehicle and preventing any dimunition of the funds.

Appeal by plaintiff from order entered 14 July 2007 by Judge Ben F. Tennille in Henderson County Superior Court. Heard in the Court of Appeals 1 April 2008.

Smith Moore LLP, by Larry B. Sitton and Manning A. Connors, for plaintiff-appellant.

Bell, Davis, and Pitt, P.A., by William K. Davis and Kevin G. Williams, for defendant-appellee.

BRYANT, Judge.

Beulah R. Heinitsh (plaintiff) appeals from an order denying her motion for summary judgment and granting summary judgment in favor of Wachovia Bank, National Association f/k/a First Union National Bank, N.A. (defendant). We affirm.

Facts and Procedural History

Reginald Heinitsh, Sr. (Mr. Heinitsh) executed a will creating a testamentary trust (the Trust) and designating plaintiff as the income beneficiary and Mr. Heinitsh's four adult children—Agnes H. Willcox, Reginald D. Heinitsh, Jr., John S. Heinitsh and Isabel H. Nichols—as the contingent remainder beneficiaries (the remainder beneficiaries). After Mr. Heinitsh's death on 27 September 1992, controversies arose between plaintiff and the remainder beneficiaries. Pursuant to a settlement and release agreement executed by plaintiff and Reginald D. Heinitsh, Jr., Mr. Heinitsh's estate was closed and the Trust was funded with eighty percent (80%) of Mr. Heinitsh's residual estate as directed by his will. The remaining twenty percent (20%) of his estate was paid directly to plaintiff.

Mr. Heinitsh's will appointed defendant as trustee for the Trust. Mr. Heinitsh's will also provided that the net income of the Trust was to be paid directly to plaintiff. The relevant portions of Mr. Heinitsh's will are as follows:

> 9.06 (h)(4) In the exercise of its discretion, my trustee is directed to maximize the income of the Trust, by allocating, wherever possible, receipts, income, and gains to income, and by allocating payments, expenses, and losses to principal.
>
> . . .
>
> 9.12 TRUSTEE'S INVESTMENT OBJECTIVES: In the administration of the [Trust], the trustee is directed to maximize the income of the Trust, notwithstanding a lack of growth in the principal thereof. It shall be the duty of the Trustee to maximize the benefit under such Trust available to my wife, and the Trustee shall subordinate growth and protection of principal to such objective. It is my understanding that an increased risk of diminution in principal may result from such investment objectives.

The principal asset of the Trust was an approximately 48% interest in the issued and outstanding shares of Lake Toxaway Company (LTC), a company Mr. Heinitsh formed in 1960 as a real estate devel-

opment company in Lake Toxaway, Translyvania County, North Carolina. Each year, LTC paid a portion of its net income to its shareholders, including defendant as trustee of the Trust. Defendant would then disperse the dividends from LTC to plaintiff as income from the Trust.

In 2002, defendant discovered that LTC began liquidating the majority of its real estate inventory during 2001 without notice to defendant. LTC informed defendant that it would no longer operate as a real estate development company but as a retail real estate brokerage business. Because of its structural change, LTC generated capital gains income that far exceeded historical or projected income. After seeking advice from legal and accounting professionals, defendant concluded that portions of the distributions from LTC to the Trust for tax years 2000 and 2001, as well as most of the projected distributions for tax years 2002 and 2003, should be allocated to principal. Due to defendant's conclusions, a dispute regarding classification of the distributions for tax years 2000 through 2003 arose between plaintiff and the remainder beneficiaries. Plaintiff contended that the distributions were income; the remainder beneficiaries contended the distributions were principal.

The amount of the distributions paid by LTC to the Trust for tax years 2001 and 2002 totaled $6,886,491.00 (the disputed funds). Defendant paid plaintiff $2,021,660.00 from the 2001 distributions and retained $4,864,831.00 (the retained funds). On 6 February 2003, plaintiff filed an action against defendant and the remainder beneficiaries seeking a declaratory judgment that the disputed funds be classified as income. Plaintiff also alleged defendant breached its fiduciary duties by, among other things, failing to invest the retained funds in a more productive income producing asset. During the time the classification of the funds was disputed, defendant placed the retained funds into a single money market fund.

On 30 January 2004, plaintiff filed a motion to enforce the trust provisions and compel defendant to maximize the income from the retained funds. On 30 March 2004, plaintiff's motion to maximize the income from the retained funds was granted and defendant was ordered to invest the disputed funds as principal pending the outcome of the litigation. Defendant complied with the court order on 14 April 2004.

On 24 December 2004, plaintiff and the remainder beneficiaries reached a settlement agreement. The agreement provided that all but

$2,000,000.00 of the disputed funds should be treated as income for trust accounting purposes and paid to plaintiff. A partial consent judgment approving of the parties' settlement agreement was entered on 20 June 2005. Plaintiff's breach of fiduciary duty claim against defendant was still pending.

On 28 February 2006, plaintiff and defendant filed motions for summary judgment on the remaining breach of fiduciary duty claim. On 14 June 2007, the trial court granted defendant's motion for summary judgment and denied plaintiff's motion. Plaintiff appeals.

The main issue on appeal is whether the trial court erred by concluding there was no genuine issue of material fact regarding plaintiff's claim that defendant breached its fiduciary duty by investing the retained funds in a money market fund.

Standard of Review

The standard of review on appeal from a summary judgment order is *de novo*. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004). The question 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. *Gattis v. Scotland County Bd. of Educ.*, 173 N.C. App. 638, 639, 622 S.E.2d 630, 631 (2005) (citation omitted).

Fiduciary Duties

The trustee of an irrevocable testamentary trust is a fiduciary. N.C. Gen. Stat. § 32-2 (2007) ("fiduciary" includes a trustee under any trust); *see also In Re Testamentary Tr. of Charnock*, 158 N.C. App. 35, 41, 579 S.E.2d 887, 891 (2003). As a fiduciary, the trustee is required by statute to "observe the standard of judgment and care under the circumstances then prevailing, which an ordinarily prudent person of discretion and intelligence, who is a fiduciary of the property of others, would observe as such fiduciary[.]" N.C. Gen. Stat. § 32-71 (2007). More specifically, "[a] trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust." N.C. Gen. Stat. § 36C-9-902(a) (2007). Indeed, this statutory standard aligns with the fundamental rule that courts must give effect to the intent of the testator or settlor when interpreting trust instruments. *Wachovia Bank of North Carolina, N.A. v. Willis*, 118 N.C. App. 144, 147, 454 S.E.2d 293, 295 (1995). A trustee may consider needs for liquidity, regularity of income, and preservation or appreci-

ation of capital in investing and managing trust assets. N.C. Gen. Stat. § 36C-9-902(c)(7) (2007). However, "the trustee shall exercise reasonable care, skill, and caution." N.C.G.S. § 36C-9-902(a).

In exercising reasonable care, a trustee must use "sound judgment and prudence, and in the discharge of his or her duties, he or she must exercise due diligence . . . ." 90A C.J.S. Trusts § 323 (2002). If the acts of a trustee are questioned, "the court must look at the facts as they existed at the time of their occurrence" and "the acts of the trustee must be judged in light of the circumstances affecting his or her action." *Id.* Courts will defer to a trustee's judgment when it is shown that the trustee has been faithful and diligent. *Id.*

As noted by the trial court, there is surprisingly little guidance regarding situations such as the one before us. Looking to general principles of the law of trusts for guidance, our research has revealed the law of trusts allows trustees to retain funds during pending litigation. *See* 90A C.J.S. Trusts § 515 (2002) (A trustee is not chargeable with interest where funds are retained without using them during a contest between rival claimants, or until the court determines to whom the money is to be paid.); *see also Id.* § 482 ("A trustee who has a reasonable expectation that he or she may be called on to make a distribution at an early date may hold cash uninvested for a reasonable time for the purpose of making such distributions."); Bogert, *The Law of Trusts and Trustees*, § 863 (Rev. 2d ed.) ("Occasionally the trustee has a good reason for holding the trust property in an unproductive condition and he will not be liable to pay to the beneficiary either interest or the value of the use measured in any other way. . . . [W]here the trustee is holding the money to await the determination of conflicting claims to it, . . . there may be no liability to pay interest.").

A similar situation to the case before us was addressed in *Liberty Title & Trust Co. v. Plews*, 61 A.2d 297 (N.J. Ch. 1948), *modified on other grounds*, 70 A.2d 784 (N.J. Super. Ct. App. Div. 1950), *aff'd in part and rev'd in part on other grounds*, 77 A.2d 219 (N.J. 1950). In *Plews*, a trustee retained funds received after the death of the life tenant of a trust. *Id.* The parties assumed a distribution could be made rather quickly. *Id.* However, after litigation consumed more time than originally anticipated, the beneficiaries attempted to collect interest from the trustee for failing to invest the funds. *Id.* at 298. The court, in denying the beneficiaries request, stated "[a] fiduciary who has a reasonable expectation that he may be called upon at an early date to make distribution may, for a reasonable time, hold

the cash he has in hand uninvested for the purpose of making such distribution." *Id.*

I

Plaintiff argues defendant's duties under the will required it to maximize the income in favor of plaintiff, and defendant breached its duties by investing the retained funds in a money market fund because the fund produced a low rate of return.

We are not persuaded that defendant breached its fiduciary duty by investing the retained funds in a money market account while awaiting the resolution of the parties' litigation. We agree with plaintiff that the specific objectives of the will required defendant to make investment decisions that would benefit plaintiff, even if the very same decisions would result in a diminution of the principal. However, we do not agree that this mandate applied to the situation at hand.

Here, defendant was not faced with a decision regarding how to invest the retained funds. Rather, defendant was faced with deciding whether the retained funds should be dispersed to the plaintiff as income or whether the retained funds should be invested as principal. Because defendant, in the course of carrying out its trustee duties, discovered that a significant amount of LTC's assets were liquidated, it was required to inform plaintiff and the remainder beneficiaries of its discovery and its chosen course of action. Had plaintiff not objected to defendant's characterization of the funds, defendant would have invested the funds in a manner consistent with the trust principal and the will's mandate. However, plaintiff objected to the funds being characterized as principal and litigation ensued. Here, as in *Plews*, defendant was faced with the possibility that the litigation could be short-lived. Defendant focused on keeping the retained funds in a liquid investment vehicle and preventing any dimunition of the funds. In doing so, defendant chose to invest the funds in a liquid and virtually risk-free money market account.

In this case, defendant demonstrated reasonable care by taking precautionary steps to protect the retained funds and investing the funds in a liquid and risk-free money market account until the pending litigation was resolved.[1] Holding the retained funds during the

1. As an aside, plaintiff also argues defendant attempted to abdicate its fiduciary obligations by submitting a letter to the parties seeking indemnification for any diminution in the retained funds if invested in other investment vehicles. However, a trustee may seek release from the beneficiaries for acts performed that may be a breach of the trust agreement. *See* 90A C.J.S. Trusts § 329 (2002).

pending litigation was reasonable in light of the circumstances and defendant did not breach its fiduciary duty to plaintiff. We note, however, while we recognize that *Plews* suggests a fiduciary may hold the funds during a pending litigation, the better practice may be to interplead the funds during the pendency of the litigation.[2]

Viewing the evidence in the light most favorable to the nonmoving party, we conclude no genuine issue of material fact exists regarding whether defendant breached its fiduciary duty. Therefore, the order of the trial court is affirmed. This assignment of error is overruled.

Because of our holding, we need not address plaintiff's remaining assignments of error.

AFFIRMED.

Judges WYNN and JACKSON concur.

ROBERT H. ALPHIN, EMPLOYEE, PLAINTIFF v. TART L.P. GAS COMPANY, EMPLOYER, AETNA LIFE & CASUALTY COMPANY, CARRIER, DEFENDANTS

No. COA07-731

(Filed 16 September 2008)

1. Workers' Compensation— continuing disability—total or partial disability—medical evaluation

The Industrial Commission did not err in a workers' compensation case by concluding the issue of whether plaintiff employee was totally or partially disabled was properly before the Commission for decision because the issue was consistently before the Commission including evidence that: (1) the Commission ordered an independent medical evaluation not only to determine the extent of plaintiff's continued disability, if any, but also to assess whether plaintiff would benefit from a resumption of vocational rehabilitation; (2) plaintiff's own Form 44 application for review raised the issue as well as the relevance of the parties' Form 21 to

2. We note defendant suggested interpleading the funds in a letter to the parties dated 29 July 2003.

that issue; (3) inasmuch as the Commission decides claims without formal pleadings, it is the duty of the Commission to consider every aspect of plaintiff's claim whether before a hearing officer or on appeal to the full Commission; and (4) the Commission was entitled to seek out additional evidence, such as the medical evaluation, in order to address the issues before it.

2. Workers' Compensation— rebuttable presumption—continuing total disability

The Industrial Commission erred in a workers' compensation case by concluding that plaintiff's presumption of continuing total disability had ended, and the case is remanded for a determination of whether defendants have rebutted plaintiff's presumption, because: (1) the final Form 26 provided for payment of total disability benefits for necessary weeks; (2) the Court of Appeals has previously held that an agreement for the payment of compensation, when approved by the Commission, is as binding on the parties as an order, decision, or award of the Commission unappealed from or an award of the Commission affirmed on appeal; (3) the Commission and defendants identified no waiver by plaintiff of the presumption of disability arising from the Form 26; (4) the Commission made no finding that it conducted a hearing at which defendants bore the burden set out in *Kennedy*, 101 N.C. App. 24 (1990), and the record contained no finding by the Commission in any of its opinions and awards that suitable jobs were available for plaintiff and that he was capable of getting one taking into account both his physical and vocational limitations; (5) the Commission's finding that plaintiff reached maximum medical improvement was not the equivalent of a finding that the employee was able to earn the same wage earned prior to injury and does not satisfy defendant's burden of rebutting the presumption; (6) the fact that defendant was capable of earning wages in sedentary work does not rebut the presumption since it relates only to plaintiff's physical limitations and does not establish that suitable jobs exist and that plaintiff was capable of getting one taking into account both his physical limitations, the sedentary work limitation, and his vocational limitations; (7) an employee's release to return to work was not the equivalent of a finding that the employee was able to earn the same wage earned prior to the injury, nor did it automatically deprive an employee of the Form 21/26 presumption; and (8) while an employee cannot recover under N.C.G.S. §§ 97-29 and 97-31 simultaneously, the

employee has the option of choosing the most favorable recovery, and plaintiff did not elect his remedy when he accepted compensation for his rating under N.C.G.S. § 97-31.

3. Workers' Compensation— unjustified refusal to cooperate in vocational rehabilitation—sufficiency of evidence

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff employee did not make a proper showing that his unjustified refusal to cooperate in vocational rehabilitation had ceased because: (1) plaintiff's willingness to cooperate was based almost entirely on oral and written expressions of intent unsupported by current conduct corroborating those statements; (2) the lone step undertaken by plaintiff, seeking assistance from the State, occurred only four days before the hearing in front of the deputy commissioner; (3) in assessing the sincerity of plaintiff's representations, the Commission could appropriately consider, as it did, plaintiff's lack of recent conduct suggesting a willingness to cooperate and any recent conduct inconsistent with his expressed intent; (4) the Commission referred to plaintiff's pre-1995 conduct only in reference to plaintiff's testimony at the hearing that he believed that he had, during that time frame, fully cooperated; and (5) the Commission made ample findings of fact explaining its reasoning and the basis for its credibility determination in refusing to reinstate plaintiff's benefits terminated under N.C.G.S. § 97-25.

Appeal by plaintiff from opinion and award entered 22 March 2007 by the North Carolina Industrial Commission. Heard in the Court of Appeals 12 December 2007.

Brent Adams & Associates, by Robin K. Martinek, for plaintiff-appellant.

Hedrick Gardner Kincheloe & Garofalo, L.L.P., by Jeffrey A. Doyle and Susan J. Vanderweert, for defendants-appellees.

GEER, Judge.

Plaintiff Robert H. Alphin appeals from an opinion and award of the North Carolina Industrial Commission denying his motion to reinstate benefits and determining that he failed to prove that he has been totally disabled or had diminished wage-earning capacity. Based upon our review of controlling precedents regarding the presumption of continuing disability arising from Form 21 and Form 26 agreements,

we hold that the Commission erred in concluding that the presumption in this case had "ended." Instead, the burden of rebutting the presumption of continuing disability remained on defendants, and the Commission was required to determine whether defendants had met their burden before deciding that plaintiff was not entitled to indemnity compensation. With respect to plaintiff's motion to reinstate benefits, our standard of review requires that we uphold the Commission's determination that plaintiff did not show that his unjustified refusal to cooperate had ceased. Accordingly, we affirm in part and reverse and remand in part.

Facts

Plaintiff suffered a compensable injury on 8 March 1990 resulting in low back pain radiating into his right leg. The parties executed a Form 21 pursuant to which defendants agreed to pay temporary total disability compensation to plaintiff for "necessary weeks"; the agreement was approved by the Commission on 2 April 1990. Subsequently, plaintiff returned to work on at least two occasions. The record indicates, however, that on 28 June 1990, the parties entered into a Form 26 agreement to reinstate temporary total disability compensation for "necessary weeks." On 13 July 1990, defendants filed, and the Commission approved, a Form 24 application to terminate compensation.

In October 1990, defendants filed another Form 26, stating that plaintiff had reached maximum medical improvement and agreeing to pay plaintiff compensation for a 10% permanent partial impairment to his back. The Commission approved the agreement on 1 November 1990, and defendants filed a Form 28B on 11 December 1990, stating that the case was being closed by the defendant carrier.

The parties executed a third Form 26 agreeing that plaintiff had again became totally disabled as of 23 July 1991 and agreeing to reinstate temporary total disability for "necessary weeks." On 16 December 1991, the parties entered into a fourth Form 26 agreeing that plaintiff had reached maximum medical improvement, that he had a 15% permanent partial impairment rating, and that defendants would pay plaintiff for the 5% increase in his rating. The Commission approved the fourth Form 26 agreement on 7 January 1992, and the defendant carrier filed another Form 28B closing the case.

A fifth Form 26 agreement was executed with the parties agreeing to payment of continuing temporary total disability compensation

beginning 4 March 1993 and continuing "for necessary weeks." The Commission approved this agreement on 11 May 1993.

In the opinion and award on appeal, the Commission found, that as of 11 November 1993, plaintiff was capable of earning wages in sedentary work with no bending and twisting, although if plaintiff was sitting, he would need a couple of minutes every half hour to stand. Plaintiff had a 25% permanent partial impairment rating to the back. These findings were based on the evaluation of Kenneth J. Rich, M.D. reflected in a note dictated on 11 November 1993. Defendants paid plaintiff the increase of 10% in his permanent partial impairment rating.

On 10 May 1994, the Commission ordered plaintiff to cooperate with vocational rehabilitation efforts. On 25 May 1994 and again on 30 November 1994, the Commission denied defendants' Form 24 applications to stop payment of compensation. Defendants filed another Form 24 on 17 May 1995, alleging that plaintiff had failed to comply with vocational rehabilitation. The Executive Secretary's Office approved this Form 24 on 5 July 1995 effective 5 May 1995.

Plaintiff filed a Form 33 request for a hearing on 17 April 1996, alleging that defendants refused to pay permanent and total disability compensation. Plaintiff also filed a motion for reinstatement of benefits on 24 June 1996 claiming that he had fully complied with defendants' rehabilitation efforts, but adding that if the Commission found he had failed to comply, he was at that point ready, willing, and able to fully and completely cooperate.

Following a hearing before the deputy commissioner on 19 December 1996, the deputy determined that plaintiff had participated in vocational rehabilitation in a reasonable fashion and that temporary total disability payments should be reinstated. The deputy, however, also found that plaintiff's entitlement to temporary total disability benefits ended when he reached maximum medical improvement on 7 November 1996, and after that date, plaintiff was entitled only to his rating.

Both parties appealed to the Full Commission. In an opinion and award filed 17 March 1999, the Commission reversed the deputy commissioner's decision concluding that plaintiff had failed to cooperate with vocational rehabilitation after being ordered to do so; defendants were entitled to terminate plaintiff's compensation for failure to cooperate; and plaintiff reached the end of his vocational rehabilita-

tion period on 5 May 1995 when he refused to cooperate. In addition to addressing the failure to cooperate, the Commission found that "[a]s of November 11, 1993, plaintiff was capable of earning wages in sedentary work with no bending and twisting and with sitting and standing and if sitting, being provided a couple of minutes every half hour to stand."

Plaintiff appealed to this Court, and on 16 May 2000, this Court issued an opinion affirming in part, reversing in part, and remanding to the Full Commission. *Alphin v. Tart L.P. Gas Co.*, 138 N.C. App. 167, 535 S.E.2d 117 (May 16, 2000) (unpublished). The Court affirmed the Commission's determination that plaintiff had not complied with vocational rehabilitation, but held that the Commission was only authorized to suspend—and not terminate—benefits until plaintiff's unjustified refusal to cooperate ceased. The Court directed that the Commission's opinion and award on remand specify that plaintiff might be entitled to weekly compensation benefits upon a proper showing that plaintiff was willing to cooperate with defendants' rehabilitative efforts.

On 8 December 2000, the Full Commission entered an order denying plaintiff's motion for resumption of benefits on the grounds that "plaintiff has not made a proper showing nor has he affirmatively established that he is willing to cooperate with defendants' rehabilitative efforts." On the same date, based on this Court's decision, the Commission amended its opinion and award to provide that plaintiff's benefits were only suspended. The Commission, however, repeated its earlier finding that plaintiff was capable of earning wages in sedentary work with restrictions and awarded plaintiff compensation for his 25% permanent partial rating to his back subject to an offset for compensation already paid by defendants. Plaintiff filed notice of appeal to this Court on 3 January 2001, but never perfected the appeal.

On 5 April 2001, plaintiff filed a motion to resume payment of temporary total workers' compensation benefits, alleging that defendants refused to provide vocational rehabilitation despite plaintiff's expressed willingness to cooperate. On 20 April 2001, the Executive Secretary entered an order, stating: "Due to the fact that the issues contained in the Opinion and Award filed on March 17, 1999 are currently on appeal to the North Carolina Court of Appeals, IT IS HEREBY ORDERED that the plaintiff's Motion is denied in the administrative forum."

On 13 June 2001, plaintiff filed a Form 33 request for hearing, stating: "I have not received any temporary total benefits since May 5, 1995 and have not returned to gainful employment." The deputy commissioner issued an opinion and award finding that "[p]laintiff's verbal assurances of cooperation have not been accepted as credible, not only because of his previous problems with the rehabilitation providers but also because of his appearance and demeanor at the hearing."

Plaintiff appealed the deputy commissioner's decision to the Full Commission. On 9 May 2003, the Full Commission entered an order finding that "[t]he record indicates that the most recent medical evaluation of plaintiff's condition occurred on 11 November 1993, when Dr. Rich released plaintiff to return to work with restrictions and rated him with a 25% permanent partial disability to his back. The Full Commission finds as a fact that an updated independent medical evaluation is necessary to determine the extent of plaintiff's continuing disability, if any, and whether he would benefit from a resumption of vocational rehabilitation." The Commission ordered plaintiff to submit to an independent medical examination and held the record in the case open until the Commission received the results of the evaluation. The issue of reinstatement of plaintiff's benefits was held in abeyance pending receipt of the results of the evaluation and the closing of the record. Dr. Rich performed the independent medical examination on plaintiff, and the Commission received his deposition testimony in September 2004.

On 22 March 2007, the Full Commission filed an opinion and award affirming the holding, but entirely modifying, the opinion and award of the deputy commissioner. The Commission concluded that plaintiff had failed to make a proper showing that his unjustified refusal to cooperate with vocational rehabilitation had ceased and that plaintiff was not, therefore, entitled to have his compensation reinstated. It further determined that plaintiff's presumption of total disability had "ended," that plaintiff was required to prove continuing disability, and that plaintiff had not proven that he was totally disabled or had diminished wage-earning capacity after 5 May 1995. The Commission, therefore, denied plaintiff's claim for additional indemnity compensation. Plaintiff timely appealed the opinion and award to this Court.

Discussion

Our review of a decision of the Industrial Commission is limited to a determination "whether there is any competent evidence to sup-

port the findings of fact, and whether the findings of fact justify the conclusions of law." *Cross v. Blue Cross/Blue Shield*, 104 N.C. App. 284, 285-86, 409 S.E.2d 103, 104 (1991). The findings of the Commission are conclusive on appeal when there is competent evidence to support them, even if there is evidence to the contrary. *Hardin v. Motor Panels, Inc.*, 136 N.C. App. 351, 353, 524 S.E.2d 368, 371, *disc. review denied*, 351 N.C. 473, 543 S.E.2d 488 (2000). " 'The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony.' " *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965)). This Court, however, reviews the Commission's conclusions of law de novo. *Deseth v. LensCrafters, Inc.*, 160 N.C. App. 180, 184, 585 S.E.2d 264, 267 (2003).

I

[1] As an initial matter, plaintiff contends that the issue whether he was totally or partially disabled was not properly before the Commission for decision. According to plaintiff, the Commission's 9 May 2003 order requiring plaintiff to submit to an independent medical examination was improper because the Commission did not have the authority to review his disability status pursuant to N.C. Gen. Stat. § 97-83 (2007).

N.C. Gen. Stat. § 97-83 provides that "upon the arising of a dispute under this Article, either party may make application to the Commission for a hearing in regard to the matters at issue, and for a ruling thereon." Plaintiff points to the fact that defendants never applied to the Commission for a hearing on the issue of plaintiff's ongoing disability, but rather solely filed Form 24 applications seeking to terminate compensation for failure to cooperate with vocational rehabilitation efforts. Plaintiff further notes that this Court's prior decision in this case addressed only whether the Commission could terminate, as opposed to suspend, benefits under N.C. Gen. Stat. § 97-25 (2007) and, therefore, did not mandate that plaintiff prove his continuing disability.

It is well established that when a party appeals to the Full Commission, it is the "duty and responsibility of the full Commission to decide all of the matters in controversy between the parties." *Joyner v. Rocky Mount Mills*, 92 N.C. App. 478, 482, 374 S.E.2d 610, 613 (1988). Our review of the record in this case indicates that the issue of plaintiff's total or partial disability has consistently been identified as an issue before the Commission.

In plaintiff's 1996 motion to reinstate benefits, plaintiff asserted as one of his grounds that he "continues to be totally and permanently impaired and is unable to work in any capacity whatsoever" and, therefore, that he "is entitled to continue to receive benefits for his total disability pursuant to N.C.G.S. §97-29." In his Form 44 application for review of the deputy commissioner's decision denying reinstatement, plaintiff asserted that the deputy commissioner erred "on the grounds that the defendant did not carry its burden of proving that the claimant was capable of earning the same or greater wages that he earned at the time he was injured . . . ." Subsequently, after the Full Commission's opinion and award following remand by this Court, plaintiff filed a motion with the Executive Secretary for resumption of payment of benefits in support of which he asserted that he "has been totally and permanently impaired and disabled since his original on the job injury" and that he "has not been able to work in any capacity or earn any income whatsoever since March 8, 1990."

Plaintiff's Form 33 request for a hearing, dated 13 June 2001, stated that the parties had been unable to agree because plaintiff had "not received any temporary total benefits since May 5, 1995 and [had] not returned to gainful employ[.]" Defendants' response to the request asserted that the parties had been unable to agree because, in part, "[p]laintiff has not made a proper showing that he is entitled to any further [temporary total disability] compensation." In the pre-trial agreement, defendants contended that the issues to be heard included whether plaintiff had met his burden of proving that he is disabled as a result of his injury. Following the hearing and the deputy commissioner's decision, plaintiff's Form 44 application for review by the Full Commission assigned as error:

> 7. Paragraph Number 1 and 2 of the Award in that it finds that the plaintiff's claim for additional compensation is denied and orders each party to pay its own cost on the grounds that such "Award" ignores the plaintiff's status as a disabled and impaired employee, unable to work pursuant to the terms of the order of the North Carolina Industrial Commission issued on its Form 21 . . . .

Upon review, the Commission ordered an independent medical evaluation not only to determine "the extent of plaintiff's continuing disability, if any," but also to assess whether plaintiff "would benefit from a resumption of vocational rehabilitation."

Thus, the issue whether plaintiff has an ongoing disability from his admittedly compensable workplace injury has consistently been

before the Commission. Nothing in this Court's first decision precluded the Commission from addressing the issue. Further, plaintiff's own Form 44 application for review raised the issue, as well as the relevance of the parties' Form 21 to that issue. As this Court observed in *Joyner*, "[i]nasmuch as the Industrial Commission decides claims without formal pleadings, it is the duty of the Commission to consider every aspect of plaintiff's claim whether before a hearing officer or on appeal to the full Commission." *Id.* The Commission was entitled to seek out additional evidence—such as the evaluation—in order to address the issues before it. *Id.* Thus, we hold that the Commission did not err either in ordering the independent medical evaluation or in addressing the issue of plaintiff's continuing disability.

II

[2] Plaintiff contends that the Industrial Commission incorrectly applied the law regarding presumptions when it stated:

> 18. Plaintiff's acceptance of the Commission's determination that plaintiff was capable of earning wages and the Commission's award of compensation for his rating under N.C. Gen. Stat. § 97-31 ended his presumption of continuing total disability.
>
> . . . .
>
> 36. The final decision by the Full Commission that plaintiff had reached maximum medical improvement, was capable of sedentary work and was entitled to payment for permanent partial disability based on his twenty-five percent (25%) rating ended plaintiff's presumption of continuing total disability.

Although these statements were each denominated a "finding of fact," they actually present conclusions of law that we review de novo.

In this case, the parties entered into an initial Form 21 and subsequent Forms 26 that gave rise to a rebuttable presumption of continuing disability. *See Clark v. Wal-Mart*, 360 N.C. 41, 44, 619 S.E.2d 491, 493 (2005) (holding that presumption of disability in favor of employee arises in "limited circumstances," including "(1) when there has been an executed Form 21 . . .; (2) when there has been an executed Form 26 . . .; or (3) when there has been a prior disability award from the Industrial Commission"). As this Court has explained, "when a Form 26 supplemental agreement is executed, the nature of the disability is determined according to what is specified in the Form 26 supplemental agreement." *Foster v. U.S. Airways, Inc.*, 149 N.C. App.

913, 918, 563 S.E.2d 235, 239, *disc. review denied*, 356 N.C. 299, 570 S.E.2d 505 (2002).

The Supreme Court instructed in *Saunders v. Edenton Ob/Gyn Ctr.*, 352 N.C. 136, 140, 530 S.E.2d 62, 65 (2000), that we must look to the terms of the last agreement of the parties.[1] Therefore, the terms of the final Form 26, "entered into by the parties and approved by the Commission, are the final terms which became binding between the parties." *Id.* In this case, as the Commission found, "[t]he parties executed a fifth Form 26 agreement for payment of continuing temporary total disability compensation beginning March 4, 1993. The Commission approved this Form 26 agreement on May 11, 1993. Plaintiff again had a presumption of continuing temporary total disability under this agreement." Nothing in the Commission's opinion and award and nothing in the record itself indicates that the parties ever entered into another agreement.

Thus, by virtue of the final Form 26, plaintiff had a presumption of continuing total disability. The Commission, however, concluded that this presumption "ended" with the Commission's "final decision" that plaintiff had reached maximum medical improvement, that he was capable of sedentary work, and that he was entitled to compensation for his rating. As support for this conclusion, the Commission cited only *Dancy v. Abbott Labs.*, 139 N.C. App. 553, 534 S.E.2d 601 (2000), *aff'd per curiam*, 353 N.C. 446, 545 S.E.2d 211 (2001). Nothing in *Dancy*, however, appears to justify the conclusion reached by the Commission.

In *Dancy*, the Form 21 agreement providing for total disability benefits for an indefinite period was followed by a Form 26 agreement specifying that the employee would be paid temporary partial disability for two weeks. *Id.* at 559, 534 S.E.2d at 605. This Court held, based on *Saunders*, that the Form 26 "superseded the earlier agreement," and the plaintiff had only a presumption of continuing partial disability. *Id.* Since, in this case, the final Form 26 provided for payment of total disability benefits for "necessary weeks," there was still a presumption of continuing total disability.

The only part of *Dancy* that can be viewed as addressing when the presumption has "ended"—the basis for the Commission's conclusion in this case—is the opinion's general discussion of the pre-

1. In *Saunders*, the Court concluded that the plaintiff was entitled only to a presumption of continuing *partial* disability because the final Form 26 was an agreement to pay partial disability for "necessary" weeks. 352 N.C. at 139-40, 530 S.E.2d at 64.

sumption. This Court observed that "[w]e have held that '[u]nless the presumption [in favor of disability] is waived by the employee, no change in disability compensation may occur absent the opportunity for a hearing. . . . [O]ne such way a waiver might occur is when an employee and employer settle their compensation dispute in a manner consistent with N.C. Gen. Stat. § 97-17 [(1999)], and that settlement is subsequently approved by the Commission.' " *Id.* at 558, 534 S.E.2d at 604 (quoting *Kisiah v. W.R. Kisiah Plumbing, Inc.*, 124 N.C. App. 72, 81, 476 S.E.2d 434, 439 (1996), *disc. review denied*, 345 N.C. 343, 483 S.E.2d 169 (1997)). The Court stressed, however, that if there has been no subsequent Form 26, it " 'has been uniformly held that an agreement for the payment of compensation, when approved by the Commission, is as binding on the parties as an order, decision or award of the Commission unappealed from, or an award of the Commission affirmed upon appeal.' " *Id.* (quoting *Pruitt v. Knight Publ'g Co.*, 289 N.C. 254, 258, 221 S.E.2d 355, 358 (1976)).

Thus, under *Dancy*, the Form 26, as approved by the Commission, was binding on the parties as if it were an award affirmed on appeal. The Commission and defendants have identified no waiver by plaintiff of the presumption of disability arising from the Form 26. In that event, *Kisiah* specifies that "absent a settlement with the employee, an award of temporary total disability cannot be undone without resort to a lawful determination by the Commission that the employee's disability no longer exists—which will require the application of law to fact and, therefore, a hearing." *Kisiah*, 124 N.C. App. at 80, 476 S.E.2d at 438. At that hearing, the employee may rely upon the presumption and "need not present evidence . . . unless and until the employer 'claim[ing] that the plaintiff *is* capable of earning wages . . . come[s] forward with evidence to show not only that suitable jobs are available, but also that the plaintiff is *capable* of getting one, taking into account both physical and vocational limitations.' " *Id.* at 81, 476 S.E.2d at 439 (quoting *Kennedy v. Duke Univ. Med. Ctr.*, 101 N.C. App. 24, 33, 398 S.E.2d 677, 682 (1990)).

In this case, the Commission made no finding that it conducted a hearing at which defendants bore the burden set out in *Kennedy*, and the record contains no finding by the Commission in any of its opinions and awards that suitable jobs are available for plaintiff and that plaintiff is capable of getting one, taking into account both his physical and vocational limitations. "[O]nly the Commission can ascertain whether an employer has presented evidence rebutting a Form 21 presumption of disability." *Id. See also Saums v. Raleigh Cmty.*

Hosp., 346 N.C. 760, 763-65, 487 S.E.2d 746, 749-50 (1997) (applying tests in *Kisiah* and *Kennedy*); *Rice v. City of Winston-Salem*, 154 N.C. App. 680, 683, 572 S.E.2d 794, 797 (2002) ("Thus, absent waiver of the presumption by the employee or a hearing by the Commission, no change in disability benefits owed may occur.").[2]

The Commission based its conclusion that the presumption had "ended" on three facts found in prior opinions and awards: (1) plaintiff's reaching maximum medical improvement, (2) the Commission's determination that plaintiff was capable of sedentary work, and (3) the Commission's award of permanent partial disability based on a 25% rating and plaintiff's acceptance of that compensation. The Commission's conclusion cannot be reconciled with established law on the presumption of continuing disability.

In *Brown v. S & N Commc'ns, Inc.*, 124 N.C. App. 320, 330, 477 S.E.2d 197, 203 (1996), this Court held unambiguously: "A finding of maximum medical improvement is not the equivalent of a finding that the employee is able to earn the same wage earned prior to injury and does not satisfy the defendant's burden [of rebutting the presumption]." In addition, the fact that plaintiff is capable of earning wages in sedentary work does not rebut the presumption because it relates only to plaintiff's physical limitations and does not establish that suitable jobs exist and that plaintiff is capable of getting one, taking into account both his physical limitations—the sedentary work limitation—and his vocational limitations. *See Outerbridge v. Perdue Farms, Inc.*, 181 N.C. App. 50, 56, 638 S.E.2d 564, 569 (holding that when Commission found an employee capable of sedentary work, it "determined the *existence* of Plaintiff's disability: that his work capacity since [the specified date] is *sedentary*," but it did not determine extent of plaintiff's disability), *aff'd per curiam*, 361 N.C. 583, 650 S.E.2d 594 (2007).[3]

---

2. The approval of a Form 24 request to terminate benefits is not sufficient to "end" the presumption of disability. *King v. Yeargin Const. Co.*, 124 N.C. App. 396, 399-400, 476 S.E.2d 898, 901 (1996) (holding that Rule 21 presumption applied even when Commission had approved Form 24 request to terminate benefits because plaintiff had been released to return to work), *disc. review denied*, 345 N.C. 343, 483 S.E.2d 169 (1997).

3. For the same reason, defendants' argument that plaintiff is precluded from challenging the Full Commission's 8 December 2000 opinion and award—in which the Commission found plaintiff was capable of sedentary work—under the principles of *res judicata* and collateral estoppel is beside the point. We agree that since plaintiff did not appeal the finding that he is capable of sedentary work, that ruling is now the law of the case. *See Bicket v. McLean Secs., Inc.*, 138 N.C. App. 353, 359, 532 S.E.2d 183,

The Commission essentially concluded that the presumption had ended because plaintiff was released by Dr. Rich to return to work in a sedentary position with restrictions. Yet, it has long been the law that "[a]n employee's release to return to work is not the equivalent of a finding that the employee is able to earn the same wage earned prior to the injury, nor does it automatically deprive an employee of the [Form 21/26] presumption." *Radica v. Carolina Mills*, 113 N.C. App. 440, 447, 439 S.E.2d 185, 190 (1994).

The Commission's final consideration—that it had found plaintiff to be entitled to his rating—appears to be based on a mistaken belief that plaintiff's entitlement to or receipt of benefits under N.C. Gen. Stat. § 97-31 (2007) precluded the receipt of benefits under N.C. Gen. Stat. § 97-29 (2007) for temporary total disability. While an employee cannot recover under N.C. Gen. Stat. §§ 97-29 and 97-31 simultaneously, the employee has the option of choosing the most favorable recovery. *Franklin v. Broyhill Furniture Indus.*, 123 N.C. App. 200, 205, 472 S.E.2d 382, 385-86, *cert. denied*, 344 N.C. 629, 477 S.E.2d 39 (1996).

Defendants contend that plaintiff's acceptance of payment for his permanent partial disability rating pursuant to N.C. Gen. Stat. § 97-31 constituted plaintiff's election. The Commission and defendants have overlooked *Gupton v. Builders Transp.*, 320 N.C. 38, 40, 357 S.E.2d 674, 676 (1987), in which our Supreme Court pointed out that this Court had "overlooked case law from [the Supreme] Court indicating that an award under N.C.G.S. § 97-31 does not necessarily foreclose the award of additional benefits to which a claimant might be entitled." The Court explained that the focus of N.C. Gen. Stat. § 97-31 is on "the prevention of double recovery, not exclusivity of remedy" and, therefore, "a plaintiff entitled to select a remedy under either N.C.G.S. § 97-31 or N.C.G.S. § 97-30 may receive benefits under the provisions offering the more generous benefits, *less* the amount he or she has already received." *Gupton*, 320 N.C. at 43, 357 S.E.2d at 677.

---

186 (" 'As a general rule, when an appellate court passes on questions and remands the case for further proceedings to the trial court, the questions therein actually presented and necessarily involved in determining the case, and the decision on those questions become the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal, provided the same facts and the same questions, which were determined in the previous appeal, are involved in the second appeal.' " (quoting *Tennessee-Carolina Transp., Inc. v. Strick Corp.*, 286 N.C. 235, 239, 210 S.E.2d 181, 183 (1974)), *disc. review denied*, 352 N.C. 587, 544 S.E.2d 777 (2000). Nevertheless, it does not resolve the question whether plaintiff is no longer entitled to a continuing presumption of total disability.

Given the holding in *Gupton*, plaintiff did not, in this case, elect his remedy when he accepted compensation for his rating under N.C. Gen. Stat. § 97-31. If he should ultimately succeed on his claim under N.C. Gen. Stat. § 97-29 or N.C. Gen. Stat. § 97-30 (2007), then plaintiff would be entitled to choose the more favorable remedy with defendants receiving a credit for previous payments made to plaintiff. *See Guerrero v. Brodie Contrs., Inc.*, 158 N.C. App. 678, 685, 582 S.E.2d 346, 350 (2003) (remanding to Commission for failing to award "credit to defendants for payment of the lump sum permanent partial disability award" after plaintiff sought ongoing temporary total disability benefits).

In sum, none of the Commission's "findings" support its conclusion that plaintiff's presumption of continuing disability had "ended." To the contrary, as a result of the parties' final Form 26, plaintiff had the benefit of a continuing presumption of total disability. He was not required to produce any evidence of disability, and, instead, the burden rested with defendants to prove plaintiff's employability. We must, therefore, reverse the Commission's conclusion that plaintiff "has not proven that he has been totally disabled or had diminished wage-earning capacity after May 5, 1995." We remand for a determination by the Commission whether defendants have rebutted plaintiff's presumption of continuing total disability.[4]

III

[3] Plaintiff also challenges the Commission's decision that plaintiff did not make "a proper showing that plaintiff's unjustified refusal to cooperate [in vocational rehabilitation] had ceased." Plaintiff contends that the Commission failed to make appropriate findings of fact and conclusions of law supported by competent evidence on this issue.[5]

The Commission found that in the hearing before the deputy commissioner, plaintiff presented the following testimony to support his claim that he has shown that he is ready, willing, and able to cooperate with rehabilitation:

---

4. Because of our resolution of this issue, we do not address plaintiff's challenges to various findings of fact made under the Commission's misapprehension of the law.

5. Plaintiff asserts various contentions regarding the Commission's opinion and award dated 8 December 2000. While plaintiff filed a notice of appeal from that decision, he did not perfect that appeal and, therefore, those contentions are not properly before us.

(a) His condition has not improved since his injury and he continued to be treated by Dr. Rick [sic] and his family physician for pain control.

(b) Defendants had not provided him with any vocational rehabilitation services since the Form 24 application was approved [May 5, 1995].

(c) He had expressed his willingness to fully cooperate with any vocational rehabilitation efforts that defendants provided. Plaintiff testified that he authorized his attorney to write numerous letters expressing his willingness to cooperate with vocational rehabilitation, to defendants, defendants' attorney, the Industrial Commission and his previous rehabilitation provider; that he had submitted a motion for reinstatement of compensation and an affidavit both expressing his willingness to fully cooperate with any vocational rehabilitation offered by defendants.

(d) He has at all times since June 26, 1996, been willing to fully cooperate with any vocational rehabilitation offered by defendants.

(e) He believed that he had fully cooperated with vocational rehabilitation prior to the suspension of his compensation in 1995.

(f) Since June 26, 1996, defendants have not offered him any medical services, despite his requests for services.

(g) He has not been able to work since June 26, 1996.

(h) He talked to and filed an application for services with the North Carolina Division of Vocational Rehabilitation Services (State Vocational Rehabilitation Services). Plaintiff's application was dated February 14, 2002.

(Alteration original.) The Commission then found that defendants had, on cross-examination of plaintiff, established that plaintiff was receiving social security disability, had not applied for unemployment compensation, had not looked for work since 1 June 1996, had not made efforts to return to school or seek vocational retraining, and did know that he could obtain help from the Division of Vocational Rehabilitation Services until four days prior to the hearing, at which time he immediately applied for assistance. Plaintiff has not assigned error to this description of his testimony.

The Commission acknowledged that plaintiff has "repeatedly expressed his willingness to cooperate with vocational rehabilitation offered by defendants." It then found that "[s]imultaneously with his assurances at the hearing that he was ready and willing to cooperate, plaintiff also testified that he has not been able to work since June 26, 1996, and believed he had fully cooperated with vocational rehabilitation." The Commission then summarized plaintiff's prior conduct resisting vocational rehabilitation, explaining that in light of that conduct, it could not accept plaintiff's testimony as credible.

The Commission reasoned: "Considering his past conduct, the Full Commission finds that if plaintiff is of the opinion that he fully cooperated with previous vocational rehabilitation, his current written assurances of willingness to cooperate are probably a forecast of more of the same conduct." The Commission, therefore, found: "Even though a Plaintiff's written assurance of intent to cooperate with vocational rehabilitation may be sufficient, based on the greater weight of the evidence the plaintiff in this case did not make a proper showing that he was willing to cooperate with vocational rehabilitation through his written declarations of willingness to cooperate or through his application for vocational assistance through the State Vocational Rehabilitation Program several days prior to the hearing before the Deputy Commissioner."

"Before making findings of fact, the Industrial Commission must consider *all* of the evidence. The Industrial Commission may not discount or disregard any evidence, but may choose not to believe the evidence *after* considering it." *Weaver v. Am. Nat'l Can Corp.*, 123 N.C. App. 507, 510, 473 S.E.2d 10, 12 (1996). "In weighing the evidence, the Commission is the sole judge of the credibility of the witnesses and the weight to be given to their testimony, and may reject a witness' testimony entirely if warranted by disbelief of that witness." *Lineback v. Wake County Bd. of Comm'rs*, 126 N.C. App. 678, 680, 486 S.E.2d 252, 254 (1997).

Plaintiff argues on appeal, however, that "[b]y finding that the Plaintiff can never be determined to be credible based on his pre-1995 hearing activities, the Industrial Commission denies Plaintiff the second chance clearly anticipated in the Court's [prior] opinion and § 97-25." We do not read the Commission's credibility findings as being based solely on plaintiff's prior conduct. Instead, the Commission pointed out that plaintiff's showing of a willingness to cooperate was based almost entirely on oral and written expressions

of intent unsupported by current conduct corroborating those statements. The lone step undertaken by plaintiff—seeking assistance from the State—occurred only four days before the hearing in front of the deputy commissioner.

In assessing the sincerity of plaintiff's representations, the Commission could appropriately consider, as it did, plaintiff's lack of recent conduct suggesting a willingness to cooperate and any recent conduct inconsistent with his expressed intent. The Commission referred to plaintiff's pre-1995 conduct only in reference to plaintiff's testimony at the hearing that he believed that he had, during that time frame, fully cooperated. The Commission could reasonably determine that if plaintiff believed that his prior conduct constituted full cooperation—when the Commission had since ruled otherwise—then plaintiff's bare representation that he is now willing to cooperate was not entitled to much weight.

The Commission made ample findings of fact explaining its reasoning—and the basis for its credibility determination—in refusing to reinstate plaintiff's benefits terminated under N.C. Gen. Stat. § 97-25. It is not the role of this Court to revisit the Commission's decision regarding plaintiff's credibility. *See Pitman v. Feldspar Corp.*, 87 N.C. App. 208, 216, 360 S.E.2d 696, 700 (1987) (holding that the Commission may refuse to believe certain evidence, controverted or not, and may accept or reject the testimony of any witness), *disc. review denied*, 321 N.C. 474, 364 S.E.2d 924 (1988). We, therefore, affirm the Commission's opinion and award to the extent it concluded that plaintiff had not made a proper showing that his unjustified refusal to cooperate with vocational rehabilitation had ceased.

Affirmed in part; reversed and remanded in part.

Judges McCULLOUGH and STEELMAN concur.

STATE OF NORTH CAROLINA v. PATRICIA DAWN ABSHIRE, DEFENDANT

No. COA07-1185

(Filed 16 September 2008)

1. Sexual Offenders— sex offender registration—date of offense—indictment sufficient

An indictment for failing to comply with the sex offender registration statute was not fatally deficient as to the time during which the offense occurred where it alleged that defendant moved "on or about August 30 to September 4, 2006," and that the offense occurred "on or about September 14 to 18, 2006."

2. Sexual Offenders— registration—temporary move

The State did not present sufficient evidence that a registered sex offender had changed her address without notice in violation of the registration statute where she temporarily stayed with her father, but continued to receive her mail at the registered address and did not present any other indicia that she had changed her residence, such as moving her belongings and pets, or not holding out the registered address to the public as her address. The only address defendant was required to register was her home address, which is not synonymous with domicile.

Judge HUNTER dissenting.

Appeal by defendant from judgment entered 28 February 2007 by Judge Nathaniel J. Poovey in Caldwell County Superior Court. Heard in the Court of Appeals 19 March 2008.

Attorney General Roy Cooper, by Assistant Attorney General J. Joy Strickland, for the State.

James N. Freeman, Jr., for defendant.

ELMORE, Judge.

On 28 February 2007, Patricia Dawn Abshire (defendant) was convicted by a jury of failing to comply with sex offender registration in violation of N.C. Gen. Stat. § 14-208.11. Defendant received a sentence of thirteen to sixteen months' imprisonment. Her sentence was suspended for eighteen months and she was placed on supervised probation. Defendant now appeals. For the reasons stated below, we vacate her conviction.

I. Background

Defendant was convicted of indecent liberties with a child in 1995.[1] As a result, she must comply with the requirements of the North Carolina Sex Offender and Public Protection Registration Programs (the Registration Program). Under the Registration Program, she must "maintain registration with the sheriff of the county where [she] resides." N.C. Gen. Stat. § 14-208.79(a) (2005). Each sheriff has "forms for registering person as required . . . ." N.C. Gen. Stat. § 14-208.7(b) (2005). These forms require a registering person to provide, among other things, her "home address." N.C. Gen. Stat. § 14-208.7(b)(1) (2005). "If a person required to register changes address, the person shall provide written notice of the new address not later than the tenth day after the change to the sheriff of the county with whom the person had last registered." N.C. Gen. Stat. § 14-208.9(a) (2005).[2]

On 19 July 2006, defendant submitted a change of address form to the Caldwell County Sheriff's Office. She listed her old address as 2155 White Pine Dr. #9, Granite Falls, NC, in Caldwell County. She listed her new address as 3410 Gragg Price Lane, Hudson, NC, also in Caldwell County. This was the thirteenth change of address form that defendant had submitted since becoming subject to the Registration Program requirements.

Ross Lee Price, the father of defendant's then-boyfriend, owned and lived in the house at 3410 Gragg Price Lane. Defendant's then-boyfriend was incarcerated at the time. On or about 19 August 2006, someone broke into the house at Gragg Price Lane and stole defendant's daughter's computer. Approximately ten days later, defendant and her two children began spending the night at defendant's parents' house, located on Poovey Drive in Granite Falls, also in Caldwell County. She slept at Gragg Price Lane on 9 September and 14 September 2006 and received her mail there. According to defendant's testimony, she also maintained a personal telephone number at Gragg Price Lane and returned "almost everyday" to do

1. Although judgments from defendant's indecent liberties with a child case appear to have been entered as State's exhibits during the trial, the judgments were not a part of the record on appeal and we rely solely on testimony for information about her conviction.

2. The General Assembly amended several sections of the Registration Program effective 1 December 2006 and 1 June 2007. However, defendant's alleged crimes occurred before these amendments took effect, so we evaluate her conviction under the 2005 statutes.

laundry, pick up fresh clothes, "hang out," and to feed her dog, fish, and three cats. She and her father both testified that she never brought a suitcase to Poovey Drive. Defendant also testified that she "never planned on moving [to Poovey Drive], living there, anything like that. Gragg Price Lane was mine and my children's home. My father's was just a getaway."

On 13 September 2006, defendant's brother attacked her. According to the criminal complaint she filed on 18 September 2006, her brother punched her "in the face, head, ribs, and stomach," and "threatened to kill [her] and make [her] daughters watch [her die.]" On the criminal complaint, defendant listed her address as Poovey Drive.

On 18 September 2006, Detective Aaron S. Barlowe of the Caldwell County Sheriff's Office began an investigation into defendant's whereabouts after receiving a report from a social worker that defendant could not be found at Gragg Price Lane. Detective Barlowe spoke with Price on 18 September 2006. Detective Barlowe testified that Price told him that defendant "was not living there at the residence" and had gone to "stay with her father." Detective Barlowe testified that Price felt "that she ha[d] been gone for more than ten days," but "at the same time indicated, 'She is planning on moving back to the house at some point,' but did not know when." Detective Barlowe asked what day defendant "actually moved out and he said he wasn't very good with dates and couldn't remember that, but did indicate that she had been gone for two to three weeks, but might have stayed a night." Price testified that he might have said those things to Detective Barlowe, but could not remember clearly because of the passage of time.

Detective Barlowe arrested defendant and she signed the following statement on 19 September 2006:

> About 10 days after I filed the breaking and entering report when my house was broken into and my daughter's computer was stolen I went to stay with my father at 5739 Poovey Drive. I decided that if I went to stay with my dad for a week or two, I could get my emotions together. I told Ross that I was going to stay with my dad so I could get my self emotionally stable and I would come back home. I was planning on going back home this past weekend but I was attacked by my brother and I decided to stay with my dad for a little bit longer. I am moving back into the house on Friday after her [*sic*] girls are out of school. I still

> received my mail at 3410 Gragg Price Lane[.] I would pick the mail up or Ross would bring me my mail about twice a week. I went back and stayed the night on the 9th and 14th of September. I was not planning n [*sic*] moving from the house but only staying for a week or two with my father.

Detective Barlowe also received the following note from defendant's father, Robert Abshire: "To Whom it may Concern, Patricia has staye [*sic*] at my home for the past 5-6 weeks. During that time she would go to Ross's Houses [*sic*] and stay once every 7-10 days[.]"

II. Subject Matter Jurisdiction

[1] Defendant first argues that the trial court lacked subject matter jurisdiction because the indictment was fatally deficient. The indictment alleged, "On or about August 30 to September 4, 2006[;] the defendant moved to a residence at 5739 Poovey Drive, Granite Falls, NC 28630 and the defendant had not contacted the Caldwell County Sheriff's Office to change her address within 10 days of that move) [*sic*]." The indictment stated that the offense had occurred "ON OR ABOUT September 14 to 18, 2006."

> An indictment must include
>
> > A statement or cross reference in each count indicating that the offense charged was committed on, or on or about, a designated date, or during a designated period of time. Error as to a date or its omission is not ground for dismissal of the charges or for reversal of a conviction if time was not of the essence with respect to the charge and the error or omission did not mislead the defendant to his prejudice.

N.C. Gen. Stat. § 15A-924(a)(4) (2005).

Defendant argues that "the vagueness and inexactness of the dates alleged for the violation in the indictment are fatal . . . ." Specifically, she argues that by alleging a range of dates during which the offense occurred, "the violation is so broad as to subject [defendant] to the possibility of being subjected to double jeopardy under the same facts." We disagree.

N.C. Gen. Stat. § 15A-924(a)(4) allows indictments to designate a "period of time" during which "the offense charged was committed." Here, the indictment alleged a four-day period of time during which the offense could have occurred. "[A] variance as to time . . . becomes material and of the essence when it deprives a defendant of an oppor-

tunity to adequately present his defense." *State v. Stewart*, 353 N.C. 516, 518, 546 S.E.2d 568, 569 (2001) (quotations and citation omitted). "When . . . the defendant relies on the date set forth in the indictment to prepare his defense, and the evidence produced by the State substantially varies to the prejudice of the defendant," an indictment does not meet the requirements of N.C. Gen. Stat. § 15A-924(a)(4). *Id.* (citations omitted). In *Stewart*, the indictment listed the date of the offense as "7-01-1991 to 7-31-1991," and the "defendant prepared and presented alibi evidence in direct reliance on those dates." *Id.* However, the State "presented no evidence of a specific act occurring during July 1991." *Id.* at 519, 546 S.E.2d at 570. Our Supreme Court held that "[u]nder the unique facts and circumstances of this case, . . . the dramatic variance between the date set forth in the indictment and the evidence presented by the State prejudiced defendant by depriving him of an opportunity to adequately present his defense." *Id.* (quotations and citation omitted).

Here, the State's evidence focused on events that occurred between 30 August 2006 and 19 September 2006. The State presented evidence of defendant's whereabouts between 30 August 2006 and 4 September 2006 in the form of defendant's signed statement from 19 September 2006. In that statement, she stated, "About 10 days after I filed the breaking and entering report when my house was broken into and my daughter's computer was stolen I went to stay with my father at 5739 Poovey Drive." Defendant testified that she filed the breaking and entering report on 20 August 2006. It follows from that evidence that defendant "went to stay" at her father's home between 30 August 2006 and 4 September 2006. Whether that evidence was sufficient to support every element of the crime charged is the subject of defendant's next argument.

III. Insufficiency of the Evidence

[2] Defendant next argues that the trial court erred by denying her motion to dismiss for insufficiency of the evidence. Defendant moved to dismiss at the close of the State's evidence and the close of all evidence. The trial court verbally denied the motion in both instances. Defendant argues that the State failed to present sufficient evidence that defendant changed her address, and therefore the trial court should have granted her motion to dismiss. We agree.

> Our review of the trial court's denial of a motion to dismiss is well understood. [W]here the sufficiency of the evidence . . . is challenged, we consider the evidence in the light most favorable to

> the State, with all favorable inferences. We disregard defendant's evidence except to the extent it favors or clarifies the State's case. When a defendant moves for dismissal, the trial court must determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense. Substantial evidence is that evidence which a reasonable mind might accept as adequate to support a conclusion.

State v. Hinkle, 189 N.C. App. 762, 766, 659 S.E.2d 34, 36-37 (2008) (quotations and citation omitted; alteration in original).

The crime in question, failing to register a "change of address" pursuant to N.C. Gen. Stat. § 14-208.11, has three essential elements: (1) the defendant is "a person required to register," (2) the defendant "changes address," and (3) the defendant fails to "provide written notice of the new address not later than the tenth day after the change to the sheriff of the county with whom the person had last registered." N.C. Gen. Stat. §§ 14-208.9, 14-208.11 (2005). Defendant does not dispute that she is "a person required to register." She does dispute, however, that she changed her address.

The term "change of address" is not defined in the statute or the case law. The statute includes a list of definitions, but neither "change" nor "address" is among them. N.C. Gen. Stat. § 14-208.6 (2005). We have previously addressed whether defendants violated N.C. Gen. Stat. § 14-208.11 by failing to register a change of address, but in each of those cases, the "change of address" in question was obvious or was not at issue on appeal. *See*, *e.g.*, *State v. Wise*, 178 N.C. App. 154, 164, 630 S.E.2d 732, 738 (2006) (noting that the "defendant's problems with his father's girlfriend began soon after he began living at th[e registered] address [in June 2003], and caused defendant to move out soon thereafter," which supported the State's position that the defendant was no longer living at the registered address in June 2004); *State v. Harrison*, 165 N.C. App. 332, 333, 598 S.E.2d 261, 261 (2004) (noting that when a sheriff's deputy visited the defendant's registered address in March 2002, the "occupant informed the deputy that she had been residing in the house since May 2001 and did not know defendant"); *State v. Holmes*, 149 N.C. App. 572, 578, 562 S.E.2d 26, 31 (2002) (noting that the defendant notified the sheriff's office by telephone "when he moved from Fifth Street to East Raleigh Avenue on 18 August 1998," but failed to fill out a change of address form until 6 November 1998); *State v. Parks*, 147 N.C. App. 485, 487, 556 S.E.2d 20, 22 (2001) (noting that the defendant had sub-

mitted Registration Program information under false pretenses when he registered his ex-wife's address even after she "informed him by letter that she was obtaining a divorce, and that her home in Concord would no longer be his residence," "installed new locks on the doors to her house and transported defendant's personal property to his sister's home" while the defendant was still incarcerated). Accordingly, we find the existing case law uninstructive on this point.

"When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required." *In re R.L.C.*, 361 N.C. 287, 292, 643 S.E.2d 920, 923 (2007) (quotations and citations omitted). Here, however, we are confronted with language that is not clear and unambiguous. At trial, both the jury and the judge questioned the statute's meaning. During jury deliberations, the jury sent a note to the trial judge requesting "a copy of law stating what constitutes a residence in regards to sex offenders . . . ." The trial judge read the note in open court to the attorneys and commented, "I looked in the statute yesterday to see whether or not there was any definition for change of address, because that is—that's the term of art that's used in this statute and is definitely ambiguous . . . ." After some discussion, the prosecutor recommended "just to read the instruction again, so they can hear the law as to the elements." The trial judge replied, "It's a bad law or a poorly worded law; poorly worded instruction." The judge then brought the jury back to the courtroom and re-read portions of the jury instructions. Addressing the jury's request for a definition, he stated:

> Members of the jury, the words I have used in these instructions are to be given their ordinary meaning. There is no extra special meaning or different meaning than these words are used commonly in the English language. I'm not going to define any words for you, but I'm simply going to instruct you that you are to use the ordinary meanings that these words have as commonly used in the English language.

We agree with Judge Poovey that the term "change of address" is ambiguous.

"[W]hen the language of a statute is ambiguous, this Court will determine the purpose of the statute and the intent of the legislature in its enactment." *Id.* (quotations and citations omitted). "In discerning the intent of the General Assembly, statutes *in pari materia* should be construed together and harmonized whenever pos-

sible." *State v. Jones*, 359 N.C. 832, 836, 616 S.E.2d 496, 498 (2005) (citation omitted).

> The purpose of the Registration Program is
>
> to assist law enforcement agencies' efforts to protect communities by requiring persons who are convicted of sex offenses or of certain other offenses committed against minors to register with law enforcement agencies, to require the exchange of relevant information about those offenders among law enforcement agencies, and to authorize the access to necessary and relevant information about those offenders to others . . . .

N.C. Gen. Stat. § 14-208.5 (2005). In reaching this conclusion, the General Assembly specifically recognized that "law enforcement officers' efforts to protect communities, conduct investigations, and quickly apprehend offenders who commit sex offenses or certain offenses against minors are impaired by the lack of information available to law enforcement agencies about convicted offenders who live within the agency's jurisdiction." *Id.*

The section that follows the registration requirement, N.C. Gen. Stat. § 14-208.9A, sets out how law enforcement agencies verify each registrant's "address":

> (1) Every year on the anniversary of a person's initial registration date, the Division shall mail a nonforwardable verification form to the last reported address of the person.
>
> (2) The person shall return the verification form to the sheriff within 10 days after the receipt of the form.
>
> (3) The verification form shall be signed by the person and shall indicate whether the person still resides at the address last reported to the sheriff. If the person has a new address then the person shall indicate that fact and the new address.
>
> (4) If the person fails to return the verification form to the sheriff within 10 days after receipt of the form, the person is subject to the penalties provided in G.S. 14-208.11. If the verification form is returned to the sheriff as undeliverable, the sheriff shall make a reasonable attempt to verify that the person is residing at the registered address. . . .

N.C. Gen. Stat. § 14-208.9A (2005). A reasonable reading of § 14-208.9A indicates that one sends mail to an "address" and a per-

son can reside at an "address." Section 14-208.7 sets out the information that a registrant must register with the sheriff and it specifies that a registrant must list her "home address." N.C. Gen. Stat. § 14-208.7(b)(1) (2005). The penalty provisions in § 14-208.11 refer to a registrant's "address," rather than a registrant's "home address," but this may be explained by the separate obligation of certain nonresident registrants who are "employed or expect[] to be employed at an institution of higher education" to register the "address of the educational institution at which the person is or expects to be employed." N.C. Gen. Stat. § 14-208.7(a1), (b)(6) (2005). Such nonresident registrants must register both their home addresses and their work addresses. Defendant does not fall into this category of registrants and the only address that the Registration Program required her to register in 2006 was her "home address." Therefore, with respect to her appeal, we read the terms "address" and "home address" interchangeably. Accordingly, reading § 14-208.9A with §§ 14-208.5, 14-208.7, and 14-208.9, we define a "home address," as it applies to the Registration Program, as a place where a registrant resides and where that registrant receives mail or other communication.

We caution that this definition of "home address" is not synonymous with "domicile," just as "*residence* and *domicile* are not convertible terms." *Hall v. Board of Elections*, 280 N.C. 600, 605, 187 S.E.2d 52, 55 (1972). "Domicile" is a term of art and has a more fixed meaning in the law than "home address" or "residence." *See, e.g.*, *id.* at 605, 187 S.E.2d at 55 ("Domicile denotes one's permanent, established home as distinguished from a temporary, although actual, place of residence. When absent therefrom, it is the place to which he intends to return (*animus revertendi*); it is the place where he intends to remain permanently, or for an indefinite length of time, or until some unexpected event shall occur to induce him to leave (*animus manendi*)."). The General Assembly chose to use the terms "home address" and "residence" rather than "domicile," and we would be overstepping our bounds by reading "domicile" into the statute.

We note that the State urges us to read "address" as "location," which we decline to do because such a reading is inconsistent with §§ 14-208.7 and 14-208.9A, is inconsistent with the statute's purpose, and is logistically impossible. The State explains in its brief that "even a person who is temporarily at a location with a different address from the one at which he or she is registered is required to notify the sheriff of that change no later than the tenth day after the address change." If any change in location triggered an address change, then

every registrant would be under a continuing obligation to re-register her address every ten days unless she never left her registered address. Each time a registrant left her address to go to work or to the post office or to the grocery store, she would trigger an address change, which in turn would trigger a new registration requirement. A prudent registrant would register her address as the sheriff's office and return every ten days to submit a new registration form stating her address as the sheriff's office. Registering a registrant's location every ten days does not further the statute's purpose of increasing the reliability of information about registered sex offenders because the only information available is a series of snapshots of a registrant's location every ten days.[3] Furthermore, it appears from the limited cases previously before this Court that law enforcement agencies do not enforce the Registration Program in this manner and instead expect registrants to register their "home address" as stated in N.C. Gen. Stat. § 14-208.7(b)(1). The General Assembly has resolved these problems for certain registrants by requiring them to wear Global Positioning System monitors, which use satellites to track registrants' locations through time and space. *See* N.C. Gen. Stat. §§ 14-208.40, 14-208.40A (2007) (establishing a satellite-based monitoring system for registrants who are sexually violent predators, recidivists, convicted of aggravated offenses, or have "committed an offense involving the physical, mental, or sexual abuse of a minor" and "require[] the highest possible level of supervision and monitoring").

Returning to the case at bar, with a definition of "home address" in hand, we hold that the State did not present substantial evidence that defendant changed her address between 30 August 2006 and 4 September 2006 as alleged in the indictment. We view the evidence "in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn therefrom." *State v. Denny*, 361 N.C. 662, 665, 652 S.E.2d 212, 213 (2007) (quotations and citations omitted). Nevertheless, the State presented no evidence that defendant stopped receiving mail or other communications at Gragg Price Lane between 30 August 2006 and 4 September 2006. According to defendant's statement, she still received her mail at Gragg Price Lane and either picked up the mail herself or had Price bring her the mail. During direct examination by the State, Price testified that defendant received her mail at Gragg Price Lane during that time, and that defendant came by the house to collect it.

3. See *People v. North*, 112 Cal. App. 4th 621 (2003), for a more complete discussion of the logistical problems posed by requiring registrants to register their "locations."

The State also did not present substantial evidence that defendant had stopped residing at Gragg Price Lane between 30 August 2006 and 4 September 2006 and started residing at Poovey Drive. The only evidence that the State offered on this matter was Officer Barlowe's testimony about what Price and defendant's father had told him. Officer Barlowe testified that, on 18 September 2006, Price told him that defendant went to stay with her father two or three weeks earlier. Officer Barlowe also testified that, on 18 September 2006, Robert Abshire told him that defendant had been staying at Poovey Drive for about two weeks. The State offered an undated note written by Robert Abshire saying that defendant had stayed at Poovey Drive "for the past 5-6 weeks," but never established when the note was written or that defendant began her stay at Poovey Drive between 30 August 2006 and 4 September 2006. The State also offered defendant's criminal complaint in which she listed her address as Poovey Drive. However, the complaint is dated 18 September 2006 and does not support a finding that defendant resided at Poovey Drive before 18 September 2006 or took up a residence there between 30 August 2006 and 4 September 2006.

The State did not present evidence of any other indicia that defendant had changed her residence. It did not show, for example, that defendant had removed her personal belongings from Gragg Price Lane to Poovey Drive. Instead, defendant testified that she left all of her personal belongings at Gragg Price Lane, including her pets, and that she returned each day to retrieve new clothing for herself and her children and to feed her animals. She testified that she never packed a suitcase. The State did not show that defendant stopped sleeping at Gragg Price Lane. According to the State's evidence, defendant slept at Gragg Price Lane twice after the alleged address change. The State did not show that defendant stopped holding out Gragg Price Lane to the public as her address. The State's only evidence that defendant held out a different address to the public was her criminal complaint, which was dated and filed well after the alleged change of address occurred. To present substantial evidence that a defendant has changed her address within the meaning of N.C. Gen. Stat. § 14-208.11, the State need not necessarily show that the defendant removed her personal belongings from a particular address, stopped sleeping at a particular address, or stopped holding out to the public a particular address as her own; however, in this case, something more was needed.

IV. Conclusion

For the reasons stated above, we hold that the trial court erred by denying defendant's motion to dismiss and we vacate defendant's conviction.

Vacated.

Judge STROUD concurs.

Judge HUNTER dissents by separate opinion.

HUNTER, Judge, dissenting.

I agree with the majority that the trial court had subject matter jurisdiction to hear the case. I disagree, however, with the majority's conclusion that the trial court erred in denying Patricia Dawn Abshire's ("defendant") motion to dismiss. Instead, I would hold that there was sufficient evidence to convict defendant under N.C. Gen. Stat. § 14-208.11 (2005), requiring registration of sex offenders, and would therefore find no error.

As the majority correctly notes, in considering a trial court's denial of a motion to dismiss on the basis of insufficient evidence, " 'we consider the evidence in the light most favorable to the State, with all favorable inferences. We disregard defendant's evidence except to the extent it favors or clarifies the State's case.' " *State v. Hinkle*, 189 N.C. App. 762, 766, 659 S.E.2d 34, 36 (2008) (citation omitted). In ruling on a motion to dismiss, " 'the trial court must determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense.' " *Id.* at ——, 659 S.E.2d at 36-37 (citation omitted). Substantial evidence is defined as " 'evidence which a reasonable mind might accept as adequate to support a conclusion.' " *Id.* at 766, 659 S.E.2d at 37 (citation omitted).

I agree with the majority that there are three essential elements for the crime of failing to register a "change of address" under N.C. Gen. Stat. § 14-208.11. Those elements are that (1) the defendant is a "[a] person required . . . to register," (2) the defendant "change[s his or her] address," N.C. Gen. Stat. § 14-208.11, and (3) the defendant fails to "provide written notice of the new address not later than the tenth day after the change to the sheriff of the county with whom

the person had last registered." N.C. Gen. Stat. § 14-208.9(a) (2005). In the instant case, defendant only argues that she did not "change [her] address" in order to trigger a violation.

The majority defines "address" for purposes of the Registration Program, "as a place where a registrant resides and where that registrant receives mail or other communication."[4] I do not read the statute so narrowly.

"The purpose of the Article is to prevent recidivism because 'sex offenders often pose a high risk of engaging in sex offenses even after being released from incarceration or commitment and . . . protection of the public from sex offenders is of paramount governmental interest.' " *State v. Sakobie*, 165 N.C. App. 447, 450, 598 S.E.2d 615, 617 (2004) (quoting N.C. Gen. Stat. § 14-208.5 (2003)). An additional purpose of the registry requirement is to assist "law enforcement officers' efforts to protect communities, conduct investigations, and quickly apprehend offenders who commit [a] sex offense[]" by providing information as to where the registrant resides. N.C. Gen. Stat. § 14.208.5 (2005). Under the majority's definition, a person required to register could easily thwart these purposes by receiving his or her mail at a post office box. Instead, I would define "address" as the place where the person is actually living, whether temporary or permanent.

This definition of "address" is consistent with our Supreme Court's definition of residence. *Hall v. Board of Elections*, 280 N.C. 600, 187 S.E.2d 52 (1972). When distinguishing domicile and residence, the Court held:

> Residence simply indicates a person's actual place of abode, whether permanent or temporary. Domicile denotes one's permanent, established home as distinguished from a temporary, although actual, place of residence. When absent therefrom, it is the place to which he intends to return (*animus revertendi*); it is the place where he intends to remain permanently, or for an indefinite length of time, or until some unexpected event shall occur to induce him to leave (*animus manendi*).

---

4. In determining that the State had not presented sufficient evidence, the majority relies, in part, on defendant's testimony. As the majority quotes in its opinion and as I have quoted here, defendant's evidence is disregarded " 'except to the extent it favors or clarifies the State's case.' " *Hinkle*, —— N.C. App. at ——, 659 S.E.2d at 36 (citation omitted). Accordingly, the majority has incorrectly applied the standard of review in this case.

Id. at 605, 187 S.E.2d at 55. Thus, to serve the purpose intended by the sex offender registration statute, when a person required to register changes residence, even temporarily, that new address is the person's official "address" which must be registered with the State. Even if defendant in the case at bar was not changing her domicile permanently to her parents' home, there was sufficient evidence that she changed her residence such that a reasonable jury could find she was required to change her address in accordance with the statute.

Furthermore, I find support for such a definition in the Act's treatment of non-resident students and for non-resident workers. These classifications of offenders are defined as persons who are not residents of North Carolina and are here for a specific purpose, yet they must register pursuant to N.C. Gen. Stat. § 14-208.7(a)(1). In either situation, it is immaterial as to where the registrant is receiving mail or other communications. Instead, registration is required because the individual will be living in North Carolina for at least some period of time. Thus, the question is whether defendant in this case, was living at her parents' home and failed to register this change. I would hold that the State provided sufficient evidence that defendant had in fact began living at her parents' home and failed to register.

The State presented evidence tending to show that defendant was living at her parents' home in Granite Falls, North Carolina, and not at her registered address in Hudson, North Carolina. Indeed, Ross Price, with whom defendant had been living prior to her move to the unregistered address, indicated that defendant had not been living with him for three weeks and he did not know where she was. Mr. Price also informed Detective Barlowe that as of 18 September 2006, defendant had been gone from his residence for approximately two to three weeks but may have stayed there a night. Although defendant testified that she kept her own phone line at the Price residence, Mr. Price testified that he suspected defendant had visited his place after she began living with her parents to help him with his phone bill.

Moreover, defendant's father, Robert Abshire, provided a note on defendant's behalf that defendant gave to Detective Barlowe when she was arrested. The note indicated that defendant had been staying at Mr. Abshire's home for five to six weeks prior to her arrest. Additionally, there was evidence defendant completed an affidavit on 18 September 2006 to have charges taken out against her brother for an assault in which she listed her parents' address in Granite Falls as her residence.

This evidence, and the fact that defendant admitted she had only spent two nights at the residence of Mr. Price, support a reasonable inference that defendant changed her address thereby triggering the requirement to notify the sheriff of her new address. Accordingly, I would hold that the trial court did not err in denying defendant's motion to dismiss and would reject defendant's assignments of error.

SHIRLEY HARDY LAWRENCE, PLAINTIFF v. SOPHIA MINDY SULLIVAN, DEFENDANT

No. COA07-1496

(Filed 16 September 2008)

1. Appeal and Error— appellate rules violations—failure to arrange for transcription of proceedings—failure to have transcript within sixty days—failure to seek extension of time

The trial court abused its discretion in a negligence case arising out of an automobile accident by granting defendant's motion to dismiss based on a violation of N.C. R. App. P. 7 for plaintiff's failure to arrange for the transcription of the proceedings, failure to have the transcript produced within sixty days following documentation of the transcript arrangement, and subsequent failure to seek an extension of time in which to produce the transcript, because: (1) these grounds were not presented to the trial court in defendant's motion to dismiss plaintiff's appeal, but the motion was instead based on N.C. R. App. P. 11 regarding the time for filing the record on appeal; (2) the grounds upon which the trial court dismissed plaintiff's appeal are contrary to existing law when our Supreme Court has stressed that a party's failure to comply with nonjurisdictional rule requirements normally should not lead to dismissal of the appeal and only the most egregious violations of nonjurisdictional rules will require dismissal; (3) there was no evidence in the record to support a finding that plaintiff altogether failed to arrange for the transcription of the proceeding; (4) there was no evidence that the failure to have the transcript produced within sixty days was the fault of plaintiff, and the court reporter's failures cannot automatically be attributed to plaintiff; and (5) failing to seek an extension of time in which to produce the transcript was not a valid reason to dismiss plaintiff's appeal.

2. Appeal and Error— appellate rules violations—failure to serve proposed record on appeal within thirty-five days of filing notice of appeal

The trial court abused its discretion in a negligence case arising out of an automobile accident by granting defendant's motion to dismiss based on a violation of N.C. R. App. P. 11 for plaintiff's failure to serve a proposed record on appeal on appellee within thirty-five days of filing a notice of appeal, and the order is vacated, because: (1) the thirty-five day period does not begin to run until the court reporter certifies delivery of the transcript; (2) plaintiff's thirty-five days did not expire until 16 August 2007, as delivery was not certified until 12 July 2007; and (3) defendant's motion was untimely as to the requested grounds for dismissal since it stated defendant had not been served with plaintiff's proposed record on appeal on or about 13 June 2007, which was prior to the court reporter's certification of delivery of the transcript.

3. Statutes of Limitation and Repose— tolling—automobile accident—rebuttable presumption of valid service

The trial court did not err in a negligence case arising out of an automobile accident by dismissing plaintiff's claims because: (1) the pertinent automobile accident occurred on 16 February 2002, and thus plaintiff had until 17 February 2005 to file her complaint; (2) defendant rebutted plaintiff's presumption of valid service, and plaintiff thereafter failed to bring forth any evidence to show that her cause of action accrued within the limitations period; (3) plaintiff's voluntary dismissal without prejudice did not toll the statute of limitations since defendant was never properly served with the first complaint; and (4) plaintiff did not refile her action until 29 September 2006, which was after the statute of limitations expired.

Appeal by plaintiff from orders entered on 2 March 2007 by Judge Henry W. Hight, Jr. in Superior Court, Durham County and on 20 August 2007 by Judge Orlando F. Hudson, Jr. in Superior Court, Durham County. Heard in the Court of Appeals 9 June 2008.

William L. Davis, III, for plaintiff-appellant.

Teague Rotenstreich Stanaland Fox & Holt, LLP by Paul A. Daniels, for defendant-appellee.

STROUD, Judge.

Plaintiff appeals from trial court orders granting defendant's motion to dismiss plaintiff's appeal and granting defendant's motion to dismiss plaintiff's claims. The issues before this Court are whether the trial court erred in (1) granting defendant's motion to dismiss plaintiff's appeal and (2) granting defendant's motion to dismiss plaintiff's claims. For the following reasons, we vacate the trial court order dismissing plaintiff's appeal and affirm the trial court order dismissing plaintiff's claims.

I. Background

This action arises out of an automobile accident which occurred on or about 16 February 2002 when defendant's vehicle hit the rear of plaintiff's vehicle. On 8 February 2005, plaintiff filed her first complaint which alleged that defendant's negligence caused the automobile accident and plaintiff's resulting personal injury. On or about 8 February 2005, a civil summons was issued addressed to defendant at "10200 Jefferson Davis Hwy, Lot 52, Richmond, VA 23237[.]" On or about 29 March 2005, plaintiff's attorney filed an affidavit which read in pertinent part, "The process was returned unserved[.]" Attached to the affidavit was a copy of the returned receipt. The envelope was stamped, "ATTEMPTED NOT KNOWN[.]"

On or about 7 April 2005, plaintiff had an alias and pluries summons issued to defendant at the same address. On 5 October 2005 at 1:51 p.m., plaintiff's attorney filed a second affidavit which asserted that the process was in fact received. Attached to the second affidavit was a return receipt signed by James Holt. On the same day, at 1:57 p.m. plaintiff filed a motion to voluntarily dismiss the action without prejudice.

On 29 September 2006, plaintiff re-filed her complaint alleging the same claims as in the original complaint. On 13 November 2006, defendant filed an answer, alleging several defenses. On 4 January 2007, defendant filed a motion to dismiss plaintiff's action for "lack of jurisdiction over the Defendant, insufficiency of process and insufficiency of service of process pursuant to Rules 12(b)(2), 12(b)(4) and 12(b)(5) of the North Carolina Rules of Civil Procedure[.]" Defendant also filed an affidavit which read in pertinent part,

> SOPHIA MINDY SULLIVAN, after first being duly sworn, deposes and says:
>
> . . . .

3. That James Holt signed the certified mail containing the Civil Summons and Complaint;

4. That she did not reside at the 10200 Jefferson Davis Highway, Lot 52, Richmond VA 23237 address on May 20, 2005;

5. That she did not receive a copy of the Civil Summons and Complaint that was signed by James Holt on May 20, 2005.

On 2 March 2007, the trial court granted defendant's motion to dismiss plaintiff's action with prejudice for "lack of jurisdiction over the Defendant, insufficiency of process and insufficiency of service of process pursuant to Rules 12(b)(2), 12(b)(4) and 12 (b)(5) of the North Carolina Rules of Civil Procedure, and time barred pursuant to North Carolina General Statute § 1-52(5)[.]"

On 29 March 2007, plaintiff filed a notice of appeal from the order of dismissal. On or about 13 June 2007, defendant made a motion to dismiss plaintiff's appeal pursuant to Rules 11 and 25 of the North Carolina Rules of Appellate Procedure because

3. Rule 11 of the North Carolina Rules of Appellate Procedure provides that an appealing party must service [sic] a proposed record on appeal on the appellee within 35 days of filing a notice of appeal. In this case, 35 days from the filing of Notice of Appeal was May 3, [2007,]

4. As of close of business on June 13, 2007, counsel for the Defendant had not been served with the Plaintiff's proposed record on appeal . . .;

5. Owing to the Plaintiff's failure to take any action to perfect her appeal, the Defendant respectfully requests that the Court dismiss the Plaintiff's appeal, as it is authorized to do under Appellate Rule 25.

The 13 June 2007 motion to dismiss was accompanied by an affidavit of defendant's attorney attesting to the facts in the motion requesting plaintiff's appeal be dismissed.

On 13 August 2007, plaintiff filed a response to defendant's motion to dismiss plaintiff's appeal which read in pertinent part,

3. That Rule 7 of the North Carolina Rules of Appellate Procedure provides that in civil actions the Appellant shall within fourteen (14) [days] after filing notice of appeal arrange for transcripts and other proceeding or of such parts from the proceed-

ing not already filed as the Appellant deems necessary. Pursuant to Rule 7 of the North Carolina Rules of Appellate Procedure the Plaintiff-Appellant in compliance with Rule 14 attempted to arrange for the transcription of the hearing that was held on February 27, 2007 before the Henry W. Hight, Jr.; in support thereof shows as follows, attachments hereto:

a. On April 10, 2007, the attorney for the Plaintiff in compliance with the Rule tried to make arrangements for transcription of the hearing on the Defendant's Motion to Dismiss the Plaintiff's claim for February 27, 2007; (attachment A and B-1)

b. On April 10, 2007, the undersigned counsel for the Plaintiff was provided the email address of the Court Reporter, Kim Horstman at khorstman@nc.rr.com, sent a email requesting in a letter to make arrangements for transcription of the hearing; (attachment B)

c. On April 23, 2007, I contacted the Clerk's Office and spoke with Cathy Shuart in reference to attempting to make arrangements for the transcript of the hearing; (attachment D)

d. On April 24, 2007, Cathy Shuart, Trial Court Administrator of Durham County emailed Kim Horstman advising her of my attempts to make arrangement with her regarding the transcription and asking her to respond; (attachment D)

e. On April 24, 2007, the Court Reporter, Kim Horstman emailed Cathy Shuart, Trial Court Administrator that she was in receipt of my transcript request and that she would be contacting me separately to make arrangements; (attachment E)

f. On April 29, 2007, I again contacted the Trial Court Administrator, Cathy Shuart informing her that I had not heard from Kim Horstman, Court Reporter regarding the transcript request; (attachment F)

g. On April 30, 2007, Cathy Shuart, Trial Court Administrator emailed Kim Horstman informing her of my attempts to contact her and asking her was there a problem. (attachment G)

h. On April 30, 2007, Kim Horstman, Court Reporter by fax informed me of the fee arrangements for transcription and minimum deposit and that I needed to send her a short letter requesting such transcript with a deposit of $100.00 and she would have

sixty (60) days from receipt of the request to produce the transcript and may request an extension; (attachment H)

i. On May 1, 2007, the Plaintiff's attorney sent a letter to the Court Report[er], Kim Horstman requesting the transcript and included a check in the amount of $100.00 as per her request. I also requested that Ms. Horstman remit a contract agreement to prepare the transcript, as per Rule of Appellate Procedure, for my records; (attachment I)

j. That the Court Reporter, Kim Horstman did not provide a written contract for the preparation of the transcript as requested in my letter.

k. On June 21, 2007, Kim Horstman, Court Reporter emailed the undersigned counsel informing him that she would need an extension to prepare the transcript in the above referenced case; (attachment J)

4. Rule 7(b)(1) provides in civil cases from the date of the requesting party serves written documentation of transcript arrangements on the person designated to prepare the transcription that the person shall have sixty (60) days to prepare and deliver the transcript. That the Court Reporter, Kim Horstman did not deliver the typed transcription of the hearing that was held February 12, 2007, until July 12, 2007. (attachment K)

5. Rule 11 of the North Carolina Rules of Appellate Procedure provides sub-paragraph (a) that within thirty-five (35) days after the reporters transcription certification or delivery of the transcript, if such was ordered or thirty-five (35) [days] after the filing the notice of appeal, if [sic] not transcript was ordered the party may by agreement entered in the record on appeal and settle a proposed [record] on appeal[.]

6. That the undersigned counsel has requested a transcription of the hearing and did so and attempted to make arrangements and did without the Court Reporter providing any written contract, paid the $100.00 deposit as per her instructions. That pursuant to Rule 11(a) that the undersigned counsel for the Plaintiff has thirty-five (35) days from the date of certification of the delivery of the transcript of the hearing. (attachment B-1; I)

7. Based upon the Rule 11 of the North Carolina Rules of Appellate Procedure, the Plaintiff's time to prepare the proposed

> record on appeal did not begin to run until July 12, 2007 and the time for preparing the proposed record on appeal has not expired as the date of this responses to the Plaintiff's Motion and that said thirty-five (35) days does not expire [sic] August 16, 2007, which would be thirty-five (35) days from the date of certification of the delivery of the transcript by the official court reporter, Kim Horstman.
>
> 8. Therefore, the Plaintiff has not failed to perfect the appeal and the time for perfecting the appeal has not expired and therefore the Court should dismiss the Defendant's Motion requesting the court to dismiss the Plaintiff's Appeal.

Attached to plaintiff's response to defendant's motion to dismiss plaintiff's appeal were several documents including letters and emails that substantiated the facts asserted in plaintiff's response.

On 20 August 2007, the trial court granted defendant's motion to dismiss plaintiff's appeal because plaintiff

> fail[ed] to arrange for the transcription of the proceedings, and fail[ed] to have the transcript produced within sixty (60) days following documentation of the transcript arrangement pursuant to Rule 7 of the North Carolina Rules of Appellate Procedure, and subsequently fail[ed] to seek an extension of time in which to produce this transcript.

Plaintiff appeals.

II. Dismissal of Appeal

Plaintiff argues

> the trial court committed reversible error when it granted the defendant's motion to dismiss plaintiff's appeal based on alleged violation of Appellate Rules 7, and 11 of the North Carolina Rule of Appeal Procedures [sic] even though plaintiff's counsel substantially complied with the appellate rules by attempting to make arrangements for the transcription of the proceedings.

A motion to dismiss an appeal is a matter within the discretion of the trial court. *Harvey v. Stokes*, 137 N.C. App. 119, 124, 527 S.E.2d 336, 339 (2000). "It is well established that where matters are left to the discretion of the trial court, appellate review is limited to a determination of whether there was a clear abuse of discre-

tion." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) (citation omitted).[1]

A. North Carolina Rule of Appellate Procedure 7—Grounds Upon which Defendant's Motion to Dismiss Was Granted

[1] In this case, the trial court granted defendant's motion to dismiss plaintiff's appeal because plaintiff

> fail[ed] to arrange for the transcription of the proceedings, and fail[ed] to have the transcript produced within sixty (60) days following documentation of the transcript arrangement pursuant to Rule 7 of the North Carolina Rules of Appellate Procedure, and subsequently fail[ed] to seek an extension of time in which to produce this transcript.

However, these grounds were not presented to the trial court in defendant's motion to dismiss plaintiff's appeal; defendant instead based her motion on Rule 11 of the North Carolina Rules of Appellate Procedure, regarding the time in which to file the record on appeal. *See Viar v. N.C. Dep't. of Transp.*, 359 N.C. 400, 402 610 S.E.2d 360, 361 (2005) (noting that it is problematic to hear an appeal on issues not directly presented before the Court as it leaves an appellee "without notice of the basis upon which an appellate court might rule." (citation omitted)). Furthermore, the grounds upon which the trial court dismissed plaintiff's appeal are contrary to existing law. *See Harvey* at 123, 527 S.E.2d at 338-39; *Lockert v. Lockert*, 116 N.C. App. 73, 81, 446 S.E.2d 606, 609-10, *disc. review allowed in part and denied in part*, 338 N.C. 311, 450 S.E.2d 487 (1994).

Rule 7 of the North Carolina Rules of Appellate Procedure reads in pertinent part,

> (a) *Ordering the transcript.*
>
> (1) *Civil cases.* Within 14 days after filing the notice of appeal the appellant shall arrange for the transcription of the proceedings or of such parts of the proceedings not already on file,

1. In *Lockert v. Lockert*, a decision of this Court predating *Harvey*, this Court appears to afford no deference to the trial court and to use a *de novo* standard of review to determine whether a trial court erred in dismissing an appeal because "defendant's time to perfect his appeal had expired", *see Lockert v. Lockert*, 116 N.C. App. 73, 79-82, 446 S.E.2d 606, *disc. review allowed in part and denied in part*, 338 N.C. 311, 450 S.E.2d 487 (1994); however, we note that under either an abuse of discretion or *de novo* standard of review the outcome of the present case would be the same.

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 arrangement 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 file with the record on appeal a transcript of all evidence relevant to such finding or conclusion.

. . . .

(b) *Production and delivery of transcript.*

(1) In civil cases: from the date the requesting party serves the written documentation of the transcript arrangement on the person designated to prepare the transcript, that person shall have 60 days to prepare and deliver the transcript. . . .

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, (t)he trial tribunal, in its discretion, and for good cause shown by the appellant may extend the time to produce the transcript for an additional 30 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. . . .

(2) The court reporter, or person designated to prepare the transcript, shall deliver the completed transcript to the parties, 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 parties' copies have been so delivered, and shall send a copy of such certification to the appellate court to which the appeal is taken. The appealing party shall retain custody of the original transcript and shall transmit

> the original transcript to the appellate court upon settlement of the record on appeal.

N.C.R. App. P. 7(a)(1), (b)(1)-(2).

In *Harvey*, the plaintiff "requested in writing that the court reporter furnish him a copy of the trial transcript." *Harvey* at 120, 527 S.E.2d at 337. The court reporter mailed the trial transcript to the plaintiff almost six full months after the written request had been made. *See id.* Defendant made a motion to dismiss plaintiff's appeal, which the trial court denied "finding good cause to excuse plaintiff's failure to move for an extension of time and good cause for the court reporter's failure to deliver the transcript in a timely fashion." *Id.* Defendant appealed. *Id.* The Court in *Harvey* noted,

> There is no explanation of the reporter's delay in the record. Plaintiff did not seek an extension of time from either the trial court or from this Court, and the record does not contain reasons for his failure to do so.

See id. at 122, 527 S.E.2d at 338.

Though not necessary to resolve the merits of the case, this Court addressed the defendant's appeal on the merits

> because it presents a recurring question of concern to the appellate bar of this state: what action, if any, must an appellant take to preserve the right of appeal when the court reporter does not transmit a copy of the trial transcript within the time mandated by the appellate rules?

Id.

In resolving the issue this Court quoted *Lockert v. Lockert* which determined that

> [i]f the court reporter fails to certify that the transcript has been delivered within the sixty-day period permitted by Appellate Rule 7(b), the thirty-five day period within which an appellant must serve the proposed record on appeal does not begin to run until the court reporter does certify delivery of the transcript. To hold otherwise would allow a delay by a court reporter, whether with or without good excuse, to determine the rights of litigants to appellate review. In this case, we hold that since Ms. Rorie[,] the court reporter[,] had not certified delivery of her portion of the transcript prior to the hearing on plaintiff's motion to dismiss the

> appeal, the defendant's thirty[-]five day period to serve the record on appeal never began to run, and the trial court erred when it concluded that the defendant's time for serving his proposed record on appeal, and time for filing and docketing the record on appeal with this Court, had expired.

See id. at 123, 527 S.E.2d at 338-39 (brackets omitted) (quoting *Lockert v. Lockert*, 116 N.C. App. 73, 81, 446 S.E.2d 606, 610 (1994)).

"Both this Court and our Supreme Court have stated that the Rules of Appellate Procedure are 'mandatory' and that failure to take timely action as required by the Rules may subject an appeal to dismissal." *See id.* at 123, 527 S.E.2d at 339 (citation omitted). However, the North Carolina Supreme Court has also recently stressed that a party's failure to comply with nonjurisdictional rule requirements normally should not lead to dismissal of the appeal. *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 198, 657 S.E.2d 361, 365 (2008) (citation omitted). Thus, only in cases of the most egregious violations of nonjurisdictional rules will dismissal of the appeal be appropriate. *Id.* at 198-201, 657 S.E.2d at 365-67.

In the present case, plaintiff's attorney appears to have failed to "file the written documentation of this transcript arrangement with the clerk of the trial tribunal, and serve a copy of it upon all other parties of record[.]" *See* N.C.R. App. P. 7(a)(1). The record also contains no explanation of the court reporter's delay in producing the transcript. Plaintiff did not seek an extension of time from either the trial court or from this Court, and the record does not contain reasons for his failure to do so. However, we do not deem these nonjurisdictional failures on the part of plaintiff to be so egregious that they warrant dismissal of plaintiff's appeal, particularly in light of *Harvey*. *See Dogwood Dev. & Mgmt. Co., LLC* at 198-201, 657 S.E.2d at 365-67; *Harvey v. Stokes*, 137 N.C. App. 119, 527 S.E.2d 336. Therefore, we turn to the plain language of *Lockert*,

> [I]f the court reporter fails to certify that the transcript has been delivered within the sixty-day period permitted by Appellate Rule 7(b), the thirty-five day period within which an appellant must serve the proposed record on appeal does not begin to run until the court reporter does certify delivery of the transcript.

See Lockert at 81, 446 S.E.2d at 610. We therefore conclude that though the plaintiff failed in some respects to abide by the North Carolina Rules of Appellate Procedure, the trial court did abuse its

discretion in granting defendant's motion to dismiss because (1) there is no evidence in the record to support that plaintiff altogether "failed to arrange for the transcription of the proceedings[;]" (2) there is no evidence that the "fail[ure] to have the transcript produced within sixty (60) days" was the fault of the plaintiff and pursuant to *Harvey* and *Lockert* the court reporter's failures cannot automatically be attributed to the plaintiff, *see Harvey* at 123, 527 S.E.2d at 338-39; *Lockert* at 81, 446 S.E.2d at 610, and (3) "fail[ing] to seek an extension of time in which to produce [the] transcript" is not a valid reason to dismiss plaintiff's appeal. *See Harvey* at 122-23, 527 S.E.2d at 338-39; *Lockert* at 80-81, 446 S.E.2d at 609-10. Therefore, the trial court erred in granting defendant's motion to dismiss based upon the legal grounds stated in its own order.

However, we again strongly stress to plaintiff's attorney the importance of following the appellate rules and urge him to remember that "when a court reporter fails to deliver a transcript within the time allowed by the appellate rules, the better practice is that appellant request an extension of time from the appropriate court." *See Harvey* at 124, 527 S.E.2d at 339.

B. North Carolina Rule of Appellate Procedure 11—Grounds Upon Which Defendant's Motion to Dismiss was Based

[2] Defendant's 13 June 2007 motion to dismiss was actually based upon Rule 11 of the North Carolina Rules of Appellate Procedure, but under Rule 11, the trial court also could not have properly dismissed the appeal. *See Harvey* at 123, 527 S.E.2d at 338-39; *Lockert* at 81, 446 S.E.2d at 610. Defendant argued plaintiff had committed a rule violation by not "serv[ing] a proposed record on appeal on the appellee within 35 days of filing a notice of appeal" pursuant to North Carolina Rule of Appellate Procedure 11. However, *Lockert* is clear in stating that "the thirty-five day period within which an appellant must serve the proposed record on appeal does not begin to run until the court reporter does certify delivery of the transcript." *See Lockert* at 81, 446 S.E.2d at 610. Plaintiff's thirty-five days within which she had to serve the proposed record on appeal did not expire until 16 August 2007 as delivery was not certified until 12 July 2007. *See* N.C.R. App. P. 11. Defendant filed her motion to dismiss plaintiff's appeal because "[d]efendant had not been served with the [p]laintiff's proposed record on appeal" on or about 13 June 2007, which was prior to the court reporter's certification of delivery of the transcript. Plaintiff had until 16 August 2007 to file the proposed record on appeal, so

defendant's motion was untimely. As the trial court abused its discretion on the grounds upon which it granted defendant's motion to dismiss and as defendant's motion was untimely as to the requested grounds for dismissal, we vacate the trial court order dismissing plaintiff's appeal.

III. Dismissal of Claims

[3] As we have determined that plaintiff's appeal is properly before this Court, we will examine the merits of plaintiff's original appeal regarding the trial court's dismissal of plaintiff's claims. Plaintiff argues,

> The trial judge committed reversible error when he granted the defendant's motion to dismiss all of plaintiff's claims in an action re-filed within one year after the plaintiff had taken a voluntary dismissal in the first action after she had submitted her affidavit of service of the summons and complaint on the defendant by certified mail.

We disagree.

> We review a trial court's decision to dismiss an action based on the statute of limitations *de novo*. Ordinarily, a dismissal predicated upon the statute of limitations is a mixed question of law and fact. But where the relevant facts are not in dispute, all that remains is the question of limitations which is a matter of law. The statute of limitations having been pled, the burden is on the plaintiff to show that his cause of action accrued within the limitations period.

Reece v. Smith, 188 N.C. App. 605, 607, 655 S.E.2d 911, 913 (2008) (internal citations and internal quotation marks omitted).

Rule 4 of the North Carolina Rules of Civil Procedure provides, in pertinent part,

> (j) Process—Manner of service to exercise personal jurisdiction.—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.

In *Camara v. Gbarbera*, plaintiffs issued an alias and pluries summons that defendant never received. *Camara v. Gbarbera*, 191 N.C. App. 394, 395, 662 S.E.2d 920, 921 (2008). "[P]laintiffs [then] voluntarily dismissed their action against defendant without prejudice." *Id.* at 395, 662 S.E.2d at 921. Plaintiffs later re-filed their complaint outside of the statute of limitations, and "defendant filed a motion to dismiss for insufficiency of process, insufficiency of service of process, and because the statute of limitations had expired." *Id.* at 395, 662 S.E.2d at 921-22. The trial court granted defendant's motion to dismiss, and the plaintiffs appealed. *Id.* at 395, 662 S.E.2d at 921.

This Court affirmed the decision of the trial court to dismiss plaintiff's action noting that

> [t]he statute of limitations for a personal injury allegedly due to negligence is three years. . . . If an action is commenced within the statute of limitations, and a plaintiff voluntarily dismisses the action without prejudice, a new action on the same claim may be commenced within one year. However, a plaintiff must obtain proper service prior to dismissal in order to toll the statute of limitations for a year. 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 395, 662 S.E.2d at 922. (internal citations omitted). As the plaintiffs in *Camara* had never properly served defendant, the statute of limitations was not tolled, and as of the re-filing of their complaint, the statute of limitations had expired. *Id.* at 395, 662 S.E.2d at 922.

"A showing on the face of the record of compliance with the statute providing for service of process raises a rebuttable presumption of valid service." *Granville Med. Ctr. v. Tipton*, 160 N.C. App. 484, 491, 586 S.E.2d 791, 796 (2003) (citation omitted) (discussing default judgments pursuant to N.C. Gen. Stat. § 1A-1, Rule 4(j2)). Further, "a defendant who seeks to rebut the presumption of regular service generally must present evidence that service of process failed

to accomplish its goal of providing defendant with notice of the suit." *Id.* at 493, 586 S.E.2d at 797 (citation omitted). However, once the defendant has pled the statute of limitations, "the burden is on the plaintiff to show that his cause of action accrued within the limitations period." *Reece* at 607, 655 S.E.2d at 913 (citation and quotation marks omitted).

Here the automobile accident giving rise to this action occurred on 16 February 2002. Therefore, plaintiff had until 17 February 2005 to file her complaint. *See Camara* at 396, 662 S.E.2d at 922. Plaintiff's first complaint was filed before expiration of the statute of limitations, but defendant was not served with the original summons and the envelope was returned stamped, "ATTEMPTED NOT KNOWN[.]" On 7 April 2005, plaintiff had an alias and pluries summons issued to defendant at the same address as the original summons. *See* N.C. Gen. Stat. § 1A-1, Rule 4(d) ("When any defendant in a civil action is not served within the time allowed for service, the action may be continued[.]"). On 5 October 2005 at 1:51 p.m., plaintiff's attorney filed an affidavit which read in pertinent part, "The process was in fact received[.]" Attached to the affidavit was a return receipt signed by James Holt. This same date at 1:57 p.m., plaintiff filed a voluntary dismissal of the action without prejudice.

On 29 September 2006, plaintiff re-filed her complaint. On 4 January 2007, defendant filed a motion to dismiss plaintiff's action "for lack of jurisdiction over the Defendant, insufficiency of process and insufficiency of service of process pursuant to Rules 12(b)(2), 12(b)(4) and 12(b)(5) of the North Carolina Rules of Civil Procedure." Defendant's affidavit read in pertinent part,

> SOPHIA MINDY SULLIVAN, after first being duly sworn, deposes and says:
>
> . . . .
>
> 3. That James Holt signed the certified mail containing the Civil Summons and Complaint;
>
> 4. That she did not reside at the 10200 Jefferson Davis Highway, Lot 52, Richmond VA 23237 address on May 20, 2005;
>
> 5. That she did not receive a copy of the Civil Summons and Complaint that was signed by James Holt on May 20, 2005.

Defendant therefore rebutted plaintiff's presumption of valid service, and plaintiff thereafter failed to bring forth any evidence "to

show that [her] cause of action accrued within the limitations period." *Reece* at 607, 655 S.E.2d at 913 (citation and quotation marks omitted); *see Granville Med. Ctr.* at 491-93, 586 S.E.2d at 796-97. As defendant was never properly served with the first complaint, plaintiff's voluntary dismissal without prejudice did not toll the statute of limitations. *See Camara* at 397, 662 S.E.2d at 922. Plaintiff did not refile her action until 29 September 2006 and as the statute of limitations was not tolled, it had expired on 17 February 2005. *See Camara* at 397, 662 S.E.2d at 922. We therefore affirm the order of the trial court dismissing plaintiff's claims.

IV. Conclusion

For the foregoing reasons, we vacate the order of the trial court granting defendant's motion to dismiss plaintiff's appeal and affirm the order of the trial court dismissing plaintiff's claims.

VACATED in part; affirmed in part.

Chief Judge MARTIN and Judge CALABRIA concur.

UNITED LEASING CORPORATION AND SHIELD FAMILY PARTNERSHIP, III, PLAINTIFFS v. JOSEPH F. GUTHRIE AND KELLY PITTMAN, DEFENDANTS

No. COA08-169

(Filed 16 September 2008)

1. Evidence— lay opinion—value of converted inventory

The trial court did not abuse its discretion in a conversion claim by admitting lay opinion testimony about the value of the inventory of a closed business. The deposition testimony of one witness tended to show knowledge of the property and some basis for his opinion, and the testimony of another was specifically disregarded in the court's determination of damages.

2. Damages and Remedies— default judgment—assertions about damages—disregarded

Defendant's assertions about damages in a fraud and conversion claim were disregarded where a default judgment had been entered and the assertions went to the merits and not the amount of recovery.

3. Damages and Remedies— evidence—admitted allegations

Competent evidence in the record (including admitted allegations in the complaint) supported the trial court's findings as to damages in a conversion and fraud action, and those findings supported the trial court's conclusion of law and the ensuing judgment.

4. Judgments— findings and conclusion—adoption of party's proposal

The trial court in a conversion and fraud action did not err by adopting plaintiffs' proposed findings and conclusions that were supported by competent evidence.

5. Pleadings— acting in concert not alleged—joint and several liability not found

The trial court did not err by failing to hold defendant Pittman jointly and severally liable for conversion of inventory during the closing of a business, and properly concluded that plaintiffs were entitled to only nominal damages from Pittman, where plaintiffs did not allege that Pittman acted in concert with others while converting the inventory.

Appeal by defendant Joseph F. Guthrie and cross-appeal by plaintiffs from order and judgment entered on or after 28 August 2007 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 27 August 2008.

Lewis & Roberts, P.L.L.C., by John S. Austin, for plaintiffs.

Nicholls & Crampton, P.A., by Kevin L. Sink, and Steven S. Bliss, for defendant Joseph F. Guthrie.

TYSON, Judge.

Joseph F. Guthrie ("Joseph Guthrie") appeals judgment entered on remand from this Court, which awarded United Leasing Corporation and Shield Family Partnership, III (collectively, "plaintiffs") treble damages based upon their unanswered allegations of conversion, fraud, and unfair or deceptive acts or practices. Plaintiffs cross-appeal an order entered, which awarded plaintiffs nominal damages against Kelly Pittman. We affirm.

I. Background

Plaintiffs filed a complaint against Joseph Guthrie, Tami Guthrie, Judy Guthrie, Kelly Pittman, Lance Pittman, Joseph Guthrie Family Trust, Growth Opportunities Inc., and Showcase America Inc. (collectively, "defendants") based upon a series of allegedly improper business transactions. Plaintiffs alleged claims for conversion, fraud, unfair or deceptive acts or practices, and civil conspiracy. Plaintiffs also sought contribution and indemnity.

The facts leading to this action are as follows: on 8 October 1998, United Leasing Corporation ("ULC") loaned $500,000.00 to United American Company ("American"), a company under the operation and control of Joseph Guthrie. In exchange, ULC received a promissory note and a security interest in American's inventory. In November 1998, Joseph Guthrie used Kelsie Properties, LLC to obtain a lease with Parker-Raleigh Development XX ("Parker-Raleigh") for a storefront location for American. The lease granted Parker-Raleigh a security interest in the inventory already subject to the security interest in favor of ULC. Although Kelsie Properties, LLC was owned in equal portions by Shield Family Partnership, III and Joseph Guthrie Family Trust, Joseph Guthrie failed to inform Shield Family Partnership, III of this transaction. During the course of the lease, Joseph Guthrie failed to pay the rent due in a timely manner and often paid with checks drawn on accounts with insufficient funds.

On 24 November 1999, ULC and American entered into an agreement for the peaceful repossession of the collateral. Within this agreement, Joseph Guthrie, on behalf of American, admitted that it had defaulted on its promissory note dated 8 October 1998. The parties agreed that the value of the inventory would be maximized if American continued "to conduct business and make sales in the ordinary course of business." ULC further agreed to "allow such a continuation of the conduct of business and sales . . . on the condition that [American] pay only its necessary operating expenses from the proceeds of such sales and, thereafter, on a weekly basis, turn over to [ULC] all net proceeds of such sales." Joseph Guthrie admittedly failed to comply with this agreement.

On 23 May 2000, ULC "purchased" American's entire inventory pursuant to its interest under the promissory note and security agreement. At that time, Joseph Guthrie "absconded with [the] valuable inventory, converting such inventory to his own use or to the use of Growth Opportunities, Inc. and/or Showcase America, Inc." Joseph

Guthrie authorized his agents to transport portions of the inventory from Raleigh to his other stores in Richmond, Virginia and Wilmington, North Carolina in order to "shield, hide and launder the inventory and proceeds from the inventory's sale."

On 26 May 2000, Parker-Raleigh enforced a lockout provision contained in their lease with Kelsie Properties d/b/a American. Parker-Raleigh subsequently demanded ULC pay $37,499.37 in back rent prior to the release of its inventory. ULC filed suit to recover its inventory and Parker-Raleigh responded by filing counterclaims against ULC and third-party actions against Joseph Guthrie, Kelsie Properties, and Edward Shield, the President of ULC, alleging fraud, negligent misrepresentation, and unfair or deceptive acts or practices. Parker-Raleigh sought to obtain a judgment in an amount in excess of $1,000,000.00. To settle the matter, ULC agreed to pay Parker-Raleigh $360,000.00 on behalf of Kelsie Properties and themselves.

On 16 April 2003, plaintiffs filed their complaint against defendants. On 17 November 2003, the trial court granted defendants' motion to dismiss for lack of personal jurisdiction over defendants Tami Guthrie, Judy Guthrie, and the Joseph F. Guthrie Family Trust, but denied it as to Joseph Guthrie, Kelly Pittman, and Lance Pittman.

On 16 March 2004, the clerk of court filed an entry of default against the remaining defendants for failure to file a responsive pleading within the time allotted pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(a). On 2 April 2004, defendants filed a motion to set aside the entry of default. On 30 April 2004, the trial court entered an order denying defendants' motion and granting plaintiffs' motion for default judgment in the amount of $515,000.00 plus court costs. Defendants appealed to this Court. *See United Leasing Corp. v. Guthrie*, 179 N.C. App. 656, 635 S.E.2d 75 (2006) (unpublished).

Defendants argued the trial court erred by failing to set aside the entry of default and entering default judgment against them. This Court affirmed the entry of default, but held the trial court abused its discretion by entering default judgment in the amount of $515,000.00 because it "relied exclusively on allegations made in plaintiff[s'] complaint in determining the amount of damages." On 3 October 2006, this Court remanded this case to the trial court for a hearing on damages. After the initial appeal, plaintiffs settled their claims against Lance Pittman, leaving Joseph Guthrie and Kelly Pittman as the active defendants.

On 16 July 2007, Joseph Guthrie and Kelly Pittman filed a motion *in limine* to exclude documents and information not disclosed in discovery and to exclude lay opinion testimony regarding the value of the inventory. The trial court took this motion under advisement. On 23 July 2007, the trial court conducted a hearing on damages in accordance with this Court's previous opinion. Based upon the evidence submitted, the trial court found: (1) plaintiffs failed to show they suffered any injury or damage to which they would be entitled to contribution; (2) Joseph Guthrie had converted $150,000.00 of plaintiffs' inventory; (3) Joseph Guthrie's fraudulent misrepresentations damaged plaintiffs in the amount of $500,000.00; and (4) Joseph Guthrie's actions constituted unfair or deceptive acts or practices pursuant to N.C. Gen. Stat. § 75-1.1.

The trial court concluded that the damages of $150,000.00 for conversion and $500,000.00 for fraud were "overlapping" and declared the total judgment to be $500,000.00. The trial court then trebled plaintiffs' damages. Judgment was entered against Joseph Guthrie in the amount of $1,500,000.00. The trial court entered a separate order regarding Kelly Pittman, which concluded that plaintiffs were entitled to recover nominal damages from her in the amount of $25.00. Joseph Guthrie appeals and plaintiffs cross-appeal.

II. Issues

Joseph Guthrie argues the trial court erred by: (1) admitting the lay opinion testimony of Lance Pittman and Marcus Barnes to establish plaintiffs' damages for conversion and fraud and (2) adopting verbatim the proposed findings of fact and conclusions of law forwarded by plaintiffs' counsel. Joseph Guthrie further argues plaintiffs failed to prove the amount of their damages with reasonable certainty and that the judgment entered against him is excessive and bears no relationship to plaintiffs' evidence.

On cross-appeal, plaintiffs argue the trial court erred by failing to hold Kelly Pittman jointly and severely liable for the conversion of plaintiffs' inventory.

III. Joseph Guthrie's Appeal

A. Motion *in Limine* to Exclude Lay Opinion Testimony

Joseph Guthrie argues the trial court abused its discretion in admitting lay opinion testimony from Lance Pittman ("Pittman") and Marcus Barnes ("Barnes") regarding the value of the converted inventory.

1. Standard of Review

"We review a trial court's rulings on motions *in limine* and on the admission of evidence for an abuse of discretion." *State v. Hernendez*, 184 N.C. App. 344, 348, 646 S.E.2d 579, 582 (2007) (citations omitted). Under an abuse of discretion standard, we reverse a trial court's decision "only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *Gibbs v. Mayo*, 162 N.C. App. 549, 561, 591 S.E.2d 905, 913 (citation and quotation omitted), *disc. rev. denied*, 358 N.C. 543, 599 S.E.2d 45 (2004).

2. Analysis

i. Pittman's Testimony

[1] Joseph Guthrie argues that Pittman's testimony was inadmissible because (1) he was not qualified as an expert witness; (2) he was merely a "project manager" and not the "owner" of the inventory; and (3) he did not know the year, make or model of any of the inventory. We disagree.

The measure of damages for wrongful conversion is the fair market value of the chattel at the time and place of conversion, plus interest. *Russell v. Taylor*, 37 N.C. App. 520, 524, 246 S.E.2d 569, 573 (1978) (citations omitted). This Court has held that "[l]ay opinions as to the value of [] property are admissible if the witness can show that he has knowledge of the property and some basis for his opinion." *Whitman v. Forbes*, 55 N.C. App. 706, 711, 286 S.E.2d 889, 892 (1982) (citing *Wyatt v. Railroad*, 156 N.C. 307, 315, 72 S.E. 383 (1911); *Power & Light Co. v. Merritt*, 50 N.C. App. 269, 273, 273 S.E.2d 727, 731, *disc. rev. denied*, 302 N.C. 220, 276 S.E.2d 914 (1981)).

Here, Pittman testified by videotaped deposition that he had worked for various companies owned by Joseph Guthrie, including American. Pittman held the position of "project manager" and "helped set up new stores whenever [Joseph Guthrie] acquired a company, or [found] a new building, or moved inventory around to the stores for sales, helped hire managers, sales people, [and] set up dumpster companies." Pittman also testified to his familiarity with the inventory at the various store locations and its pricing.

In mid 2000, part of Pittman's job duties was to assist with the "shutdown" of American's Raleigh location. Pittman loaded inventory from the Raleigh store into a twenty-four foot box truck approximately five to six times. One truck load of inventory was taken to

Wilmington, North Carolina and the remaining truck loads to Richmond, Virginia. Based on his experience working for American, Pittman estimated the aggregate value of the inventory moved from the Raleigh store amounted to $150,000.00.

Pittman's deposition testimony tended to "show that he ha[d] knowledge of the property and some basis for his opinion" regarding the value of said property at the time of its conversion. *Id.* at 711, 286 S.E.2d at 892. Joseph Guthrie has failed to show the trial court abused its discretion in admitting Pittman's lay opinion testimony. Joseph Guthrie also failed to produce any evidence tending to vary or contradict Pittman's valuation of the converted inventory.

ii. Barnes's Testimony

Joseph Guthrie also argues the trial court abused its discretion by admitting Barnes's lay opinion testimony regarding the value of the converted inventory. We disagree.

Barnes was contracted by Joseph Guthrie to appraise the inventory of the American stores in February 2000. Barnes requested American provide him with an aging report, cost data, and retail values. Barnes was to "make a physical inspection of the Norfolk store, spot-check the inventory and then provide a force-liquidation value on all of the locations based on this inventory which they were to provide." Based on Barnes's inspection, the estimated value of the inventory located at American's Raleigh store was $770,315.85 as of 17 February 2000. Barnes's appraisal reports were submitted to the trial court.

At the hearing, Joseph Guthrie's counsel specifically objected to this testimony as irrelevant and further argues this assertion on appeal. Presuming *arguendo* Barnes's testimony is irrelevant, Joseph Guthrie has failed to show its admittance constituted prejudicial error. *See Steely v. Lumber Co.*, 165 N.C. 27, 31, 80 S.E. 963, 965 (1914) ("Verdicts and judgments should not be lightly set aside upon grounds which show the alleged error to be harmless or where the appellant could have sustained no injury from it.").

Here, the trial court disregarded Barnes's testimony in its determination of damages. In its order, the trial court specifically concluded:

> Joseph Guthrie represented to Marcus [Barnes], as of February 17, 2000, that the inventory in the Raleigh store had a value of

> $770,315.85. This value closely resembles the sum of the two values shown on the inventory lists for Raleigh and Durham that were attached to the UCC-1s filed on November 3, 1998. *This Court finds it improbable, even under the best circumstances, that the inventory ever had such a value; instead, Joseph Guthrie used these figures to entice financing.*

(Emphasis supplied). The trial court then concluded, based on Pittman's deposition testimony, that value of the converted inventory amounted to $150,000.00. Because Barnes's testimony and appraisal value was specifically disregarded in the trial court's determination of damages, Joseph Guthrie has failed to show the admittance of Barnes's testimony was prejudicial. *Id.* This assignment of error is overruled.

B. Damages

Joseph Guthrie argues plaintiffs failed to prove the amount of any damage with reasonable certainty. We disagree.

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 (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 reviewable *de novo* on appeal. *Humphries v. City of Jacksonville*, 300 N.C. 186, 187, 265 S.E.2d 189, 190 (1980).

2. Analysis

[2] At the outset, we note that "[t]he effect of an entry of default is that the defendant against whom entry of default is made is deemed to have admitted the allegations in plaintiff's complaint, and is prohibited from defending on the merits of the case." *Hartwell v. Mahan*, 153 N.C. App. 788, 791, 571 S.E.2d 252, 253-54 (2002) (citation and quotation omitted), *disc. rev. denied*, 356 N.C. 671, 577 S.E.2d 118 (2003). A defendant's "only recourse is to show good cause for setting aside the default and, failing that, *to contest the amount of the recovery*." *Id.* at 790-91, 571 S.E.2d at 253 (citation and quotation omitted) (emphasis supplied). "It is a well-established principle of law that proof of damages must be made with reasonable certainty." *Olivetti Corp. v. Ames Business Systems, Inc.*, 319 N.C. 534, 546, 356 S.E.2d

578, 585 (1987) (citation omitted). However, "proof of an absolute mathematical certainty is not required." *CDC Pineville, LLC v. UDRT of N.C., LLC*, 174 N.C. App. 644, 655, 622 S.E.2d 512, 520 (2005) (citation and quotation omitted), *disc. rev. denied*, 360 N.C. 478, 630 S.E.2d 925 (2006).

Here, Joseph Guthrie asserts "six (6) independent reasons why plaintiffs' evidence failed to prove damages with reasonable certainty[,]" including the following:

> if Pittman retrieved the "inventory" from Raleigh prior to 23 May 2000, plaintiffs suffered no harm because ULC did not own the "inventory" until 23 May 2000.
>
> . . . .
>
> [O]n December 15, 1999, ULC/Shield directed Joseph Guthrie to retrieve the inventory from [American's] stores and transport it to Richmond, Virginia. Plaintiffs could not have suffered any harm from retrieval and transportation of the "inventory" because Joseph Guthrie was acting with authority and at the direction of Shield. . . .
>
> [P]laintiffs' failure to prove *when* the "inventory" was converted also dooms their damage claim because the documentary and unchallenged evidence establishes that ULC abandoned any and all interest in any "inventory" in "July or August 2000." . . .
>
> [A]lthough the superior court found that "Joseph Guthrie, contrary to his representations in the Peaceful Repossession Letter, sold the inventory for his own benefit", [sic] plaintiffs offered no evidence of a single sale of any "inventory" after November 24, 1999—the date of the Peaceful Repossession Letter—in support of their claim of damages.

Because these assertions attempt to contest the merits of the case and not the amount of recovery, they are not properly before us and we do not address them. *Hartwell*, 153 N.C. App. at 791, 571 S.E.2d at 253-54.

[3] Joseph Guthrie's remaining contentions are as follows: first, he argues that because it was "stipulated" that the inventory shipped to Wilmington was not converted, the trial court was left to guess the value of the converted inventory versus the non-converted inventory. However, the record contains no such stipulation. Pittman's lay opin-

ion testimony was sufficient to establish the aggregate value of the converted inventory.

Second, Joseph Guthrie argues "the superior court's judgment of fraud is 100% predicated upon a series of bizarre *non sequitors* and speculations[.]" Joseph Guthrie asserts the record is devoid of any evidence to support the trial court's conclusion of law that plaintiffs were entitled to $500,000.00 in damages based upon Joseph Guthrie's fraudulent misrepresentations. We disagree.

In its order, the trial court made the following findings of fact:

> In this case, [ULC] had provided Joseph Guthrie and his company, [American], a loan of $500,000 to purchase inventory located in Durham, Raleigh and Wilmington, North Carolina. There is no dispute that [ULC] wired money and that [American] received the inventory. On November 24, 1999, Joseph Guthrie signed a Peaceful Repossession Letter. In that letter, Joseph Guthrie admitted that [American] defaulted on the $500,000 promissory note. He further agreed to personally guarantee its payment. Joseph Guthrie also made a number of misrepresentations in which he promised, both individually and on behalf of [American], to sell the inventory and provide the proceeds to [ULC] on a weekly basis. He did not. . . .
>
> But for Joseph Guthrie's misrepresentations, [ULC] would have had the opportunity to secure all of the inventory, to avoid a default with the landlord and to sell the inventory in a more orderly fashion. As stated above, although the Court does not find it credible that the inventory had a value of $770,315.85, it does find competent evidence that [ULC] lent $500,000 to [American] and that [American] defaulted on that note.

The trial court concluded that based on the foregoing findings, plaintiffs were damaged in the amount of $500,000.00. Competent evidence in the record, including the admitted allegations in plaintiffs' complaint, support the trial court's findings of fact. These findings support the trial court's conclusion of law and ensuing judgment. *Cartin*, 151 N.C. App. at 699, 567 S.E.2d at 176. This assignment of error is overruled.

C. Excessive Judgment

Joseph Guthrie argues the trial court erred by entering a judgment against him that was "excessive," "unfounded," and bears no

relationship to plaintiffs' damages. Joseph Guthrie reiterates the same argument as we decided immediately preceding this section. For the reasons stated above, this assignment of error is overruled.

D. Judgment Entered

[4] Joseph Guthrie argues the trial court committed reversible error when it adopted verbatim the findings of fact and conclusions of law proposed by plaintiffs' counsel. We disagree.

This Court has repeatedly held that "[w]here the trial court adopts verbatim a party's proposed findings of fact, those findings will be set aside on appeal only where there is no competent evidence in the record to support them." *Weston v. Carolina Medicorp, Inc.*, 102 N.C. App. 370, 381, 402 S.E.2d 653, 660 (citations omitted), *disc. rev. denied*, 330 N.C. 123, 409 S.E.2d 611 (1991); *see also Rierson v. Commercial Service, Inc.*, 116 N.C. App. 420, 422, 448 S.E.2d 285, 287 (1994). Here, competent evidence in the record supports the trial court's findings of fact and its findings of fact support its conclusions of law. This assignment of error is overruled.

IV. Plaintiffs' Cross-Appeal

[5] On cross-appeal, plaintiffs argue the trial court erred by failing to hold Kelly Pittman jointly and severally liable for the conversion of plaintiffs' inventory. We disagree.

The trial court found that Kelly Pittman converted the property of ULC as a matter of law. The trial court's finding of fact was predicated upon the following allegation contained in plaintiffs' complaint deemed admitted after default:

> 41. Upon information and belief, since 23 May 2000, Joseph Guthrie, Judy Guthrie, Tami Guthrie, Kelly Pittman and Lance Pittman have converted the inventory to their own use. The Guthries and the Pittmans employed the use of their companies, Growth Opportunities, Inc., Showcase America, Inc. and the Pittman's company, Etc., in order to shield, hide and launder the inventory and proceeds from the inventory's sales.

The trial court further found the allegation in the complaint insufficient to establish Kelly Pittman "acted in concert" in committing the conversion and only awarded plaintiffs nominal damages. Plaintiffs have failed to show any error in the trial court's analysis.

"It is a generally accepted rule that where two or more persons unite or *intentionally act in concert in committing a wrongful act, or participate therein with common intent*, they are jointly and severally liable for the resulting injuries." *Garrett v. Garrett*, 228 N.C. 530, 531, 46 S.E.2d 302, 302 (1948) (citations omitted) (emphasis supplied). However, no allegations in plaintiffs' complaint tend to show Kelly Pittman acted in concert with others while converting the property of ULC. *Id.* The preceding allegation is only sufficient to establish Kelly Pittman converted ULC's inventory. Plaintiffs' complaint does contain the following allegations in their fourth cause of action, civil conspiracy:

> 53. Joseph Guthrie, Tami Guthrie, Judy Guthrie and the Joseph Guthrie Family Trust engaged in conspiracy to defraud [ULC] and Kelsie Properties.
>
> 54. Joseph Guthrie, Tami Guthrie, Judy Guthrie employed the use of the Joseph Guthrie Family Trust, Growth Opportunities, Inc. and Showcase America, Inc. to further their plan to defraud and convert goods belonging to [ULC].
>
> 55. As co-conspirators, Joseph Guthrie, Tami Guthrie, Jud[y] Guthrie and the corporate defendants Growth Opportunities, Inc. and Showcase America, Inc. are jointly and severally liable for the damages herein stated.
>
> 56. As a direct cause of the conspiracy between Joseph Guthrie, Tami Guthrie, Jud[y] Guthrie, Growth Opportunities, Inc. and Showcase America, Inc., [ULC] was damaged in an amount in excess of $440,000.

Noticeably absent from these allegations is any reference to Kelly Pittman. Plaintiffs have failed to show the trial court erred when it concluded plaintiffs were only entitled to recover nominal damages against Kelly Pittman. This assignment of error is overruled.

V. Conclusion

Joseph Guthrie failed to show the trial court abused its discretion in admitting lay opinion testimony from Lance Pittman and Marcus Barnes regarding the converted inventory's value. Competent evidence in the record, including the admitted allegations in plaintiffs' complaint, supports the trial court's conclusion of law that plaintiffs were entitled to $500,000.00 in damages based upon Joseph Guthrie's fraudulent misrepresentations. This evidence supports the findings of

fact and conclusions of law proposed by plaintiffs' counsel in its order and adopted by the trial court.

Plaintiffs failed to allege Kelly Pittman acted in concert in converting the inventory of ULC. The trial court properly concluded plaintiffs were entitled to recover only nominal damages against Kelly Pittman. The trial court's judgment entered against Joseph Guthrie and order regarding Kelly Pittman are affirmed.

Affirmed.

Judges CALABRIA and ELMORE concur.

MARCIA ALYCE MUCHMORE, PLAINTIFF v. TALLMAN H. TRASK, DEFENDANT

No. COA07-995

(Filed 16 September 2008)

1. Husband and Wife— prenuptial agreement—alimony—waiver of spousal support—lex loci contractus

The trial court did not err by concluding that the waiver of spousal support in the parties' prenuptial agreement was enforceable because: (1) our Supreme Court has stated that unless the premarital agreement appears to have been intended to be performed elsewhere, the construction is to be governed by the law of the place where it was intended to be performed; (2) the waivers of spousal support were agreed to on 14 March 1986 in California where such agreements were sanctioned by the California legislature; (3) alimony waivers were valid in this State when the parties relocated here in 1995; (4) the waivers are presumed valid under the doctrine of lex loci contractus and are not void as against North Carolina public policy; and (5) the record indicated that the parties intended their premarital agreement to be governed by California law when it was entered into in Pasadena, California and failed to provide that the law of another state should govern, the calculation for determining the value of defendant's separate property contribution specifically called for the utilization of the cost of living index for Southern California cities, and the arbitration provision in the agreement called for the application of the California Arbitration Act.

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

Defendant's assignment of error regarding the Full Faith and Credit Clause of the United States Constitution was waived based on a failure to raise it at trial.

3. Husband and Wife— prenuptial agreement—alimony—physical revocation immaterial

The trial court did not err by concluding that a signed writing revoking the parties' premarital agreement entered in California was required and by declining to find whether the alleged tearing of the premarital agreement occurred because: (1) California's UPAA requires that a premarital agreement may be amended or revoked only by a written agreement signed by the parties; and (2) in this case, neither party claimed that a subsequent writing to rescind or revoke the agreement was executed, and thus allegations surrounding the purported physical revocation were immaterial.

4. Estoppel— equitable estoppel—enforcement of premarital agreement

The trial court did not err by concluding that defendant was not equitably estopped from seeking enforcement of the parties' premarital agreement because, although plaintiff contends the alleged tearing of the agreement was instrumental to her decision to move with defendant to North Carolina, and consequently caused her to incur a $195,000 credit line with defendant in the purchase of real property, there was competent evidence in the record supporting the trial court's finding that plaintiff did not rely on defendant's alleged revocation.

5. Specific Performance— premarital agreement—valid contract

The trial court did not err by granting specific performance of the parties' premarital agreement because: (1) the parties' agreement was a valid contract guided by California law and enforceable in this State; and (2) the remedy of specific performance is available to compel a party to do precisely what he ought to have done without being coerced by the court.

Appeal by defendant from judgment entered 29 December 2006 by Judge Donna S. Stroud in Wake County District Court. Appeal by plaintiff from order and judgment entered 8 March 2007 by Judge Jane P. Gray. Heard in the Court of Appeals 20 February 2008.

Wyrick Robbins Yates & Ponton, LLP, by K. Edward Greene and Tobias S. Hampson, for plaintiff-appellant/cross-appellee.

Manning, Fulton & Skinner, P.A., by Michael S. Harrell, for defendant-appellee/cross-appellant.

BRYANT, Judge.

Tallman H. Trask (defendant) appeals the trial court's order voiding provisions within the parties' prenuptial agreement waiving spousal support. Marcia Alyce Muchmore (plaintiff) appeals the trial court's refusal to find (1) that the agreement was mutually rescinded or (2) that defendant is equitably estopped from asserting the agreement was not rescinded. For the reasons stated below, we affirm in part and reverse in part.

Facts

In 1984, plaintiff and defendant began dating while living in California. The parties executed a premarital agreement on 14 March 1986 and were married the next day. The premarital agreement was recorded in Los Angeles County, California and contained detailed provisions entitling each party to their premarital assets upon a dissolution of the marriage, as well as an explicit waiver of spousal support. Shortly after their wedding, defendant obtained employment with the University of Washington and the parties moved to Seattle, Washington. The marriage became strained in the early 1990's, but defendant did not want a divorce while their two children were young.

Plaintiff claims an altercation occurred in Washington between January and March 1994 during which defendant became intoxicated and sexually assaulted her. Plaintiff maintains that the next day defendant approached her to make amends and tore up a copy of the premarital agreement. Plaintiff asserts that she thanked defendant for tearing up the agreement and, as a result, continued to make efforts to save the marriage, including moving to North Carolina in 1995. However, ten years later, the parties separated on 21 April 2005.

On 15 September 2005, plaintiff filed a complaint for (1) child custody, (2) child support, (3) attorney's fees with respect to the child custody and support claims, (4) postseparation support and alimony, (5) attorneys fees with respect to the spousal support claims, and (6) equitable distribution. On 29 November 2005, defendant filed an

answer (1) raising the premarital agreement as an affirmative defense, and (2) counterclaiming for specific performance of the premarital agreement. On 27 January 2006, in response to defendant's counterclaim, plaintiff alleged that the premarital agreement had been terminated by agreement after the parties' dispute in 1994 or, in the alternative, that it was legally invalid and unenforceable. On 9 May 2006, plaintiff's responsive pleading was amended by consent, and plaintiff further claimed the agreement was void as against North Carolina public policy, and asserted affirmative defenses of: (1) rescission, (2) vagueness, (3) estoppel, (4) unconscionability, and (5) undue influence. Plaintiff moved for summary judgment on 4 August 2006 claiming that the premarital agreement was invalid, and on 8 August 2006, defendant moved for summary judgment to enforce the agreement.

On 29 December 2006, the Honorable Donna S. Stroud entered an order granting partial summary judgment for both parties, and concluded: (1) the premarital agreement was formed under California law and was valid in California; (2) North Carolina law controls enforcement of the agreement; (3) the waiver of alimony provision was void as against public policy when the agreement was executed and plaintiff was entitled to summary judgment on that issue; (4) defendant was entitled to summary judgment as to plaintiff's defenses of undue influence, unconscionability, and vagueness; and (5) that genuine issues of material fact remained as to plaintiff's defenses of rescission, abandonment, and estoppel.

Judge Stroud's order left undecided the remaining issues of postseparation support, alimony, attorneys fees, recission of the agreement, and equitable distribution. Judge Stroud also denied defendant's Rule 54(b) motion requesting immediate certification of the order for appeal on the grounds that such a motion would be more appropriate before the judge assigned to hear the pending issues on the case. Plaintiff's claims for postseparation support and attorney fees were later heard before the Honorable Vinston Rozier, Jr., who entered an order on 25 February 2007 granting postseparation support and attorneys fees in favor of plaintiff. Defendant's claim for specific performance and plaintiff's correlating defenses were then heard 9 January 2007 by the Honorable Jane P. Gray.

By order filed 5 March 2007, Judge Gray (1) granted defendant's claim for specific performance of the premarital agreement; (2) denied plaintiff's defenses of rescission, abandonment, and estoppel;

and (3) certified the claims for immediate appeal pursuant to Rule 54(b), because all issues concerning the parties' prenuptial agreement were decided. As a result, plaintiff appeals from the 5 March 2007 order, and defendant appeals from the 29 December 2006 order.

Standard of Review

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2006). 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) (citation omitted). If there is any 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). We review an order allowing summary judgment de novo. *Id.* at 470, 597 S.E.2d at 693 (citation omitted).

DEFENDANT'S APPEAL

Defendant raises three issues on appeal: whether the trial court erred in (I) refusing to enforce the spousal support waiver; (II) ruling that the spousal support waiver violated North Carolina public policy; and (III) whether the application of North Carolina law to the premarital agreement violates the Full Faith and Credit clause of the United States Constitution.

I & II

[1] Defendant argues that the waiver of spousal support in the prenuptial agreement is enforceable. We agree.

"The general rule is that things done in one sovereignty in pursuance of the laws of that sovereignty are regarded as valid and binding everywhere . . . ." *Davis v. Davis*, 269 N.C. 120, 125, 152 S.E.2d 306, 310 (1967) (citation and quotations omitted). "North Carolina has long adhered to the general rule that '*lex loci contractus*,' the law of the place where the contract is executed governs the validity of the contract." *Morton v. Morton*, 76 N.C. App. 295, 299, 332 S.E.2d 736, 738 (1985) (citations omitted). "[P]rinciples of construction applicable to contracts also apply to premarital agreements . . . ." *Howell v. Landry*, 96 N.C. App. 516, 525, 386 S.E.2d 610, 615 (1989) (citation omitted). However, "foreign law or rights based thereon will not be

given effect or enforced if opposed to the settled public policy of the forum." *Davis*, 269 N.C. at 125, 152 S.E.2d at 310 (citations and quotations omitted).

In California, the Uniform Premarital Agreement Act (UPAA) became effective 1 January 1986 and applicable to any premarital agreement executed on or after that date. *In re Marriage of Bellio*, 105 Cal. App. 4th 630, 633, 129 Cal. Rptr. 2d 556, 558 n.1 (Cal. App. 2d Dist. 2003). Under Calfornia's Family Code, "[p]arties to a premarital agreement may contract with respect to . . . their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty." Cal. Fam. Code § 1612(a)(7) (2008) (continuing Cal. Civ. Code § 5312) *reviewed by In re Marriage of Pendleton & Fireman*, 24 Cal. 4th 39, 53, 5 P.3d 839, 848 (2000) ("a premarital waiver of spousal support does not offend contemporary public policy").

The North Carolina General Assembly adopted the UPAA such that it became effective in North Carolina on 1 July 1987. N.C. Gen. Stat. §§ 52B-1 et seq.; *Huntley v. Huntley*, 140 N.C. App. 749, 752, 538 S.E.2d 239, 241 (2000). Under the UPAA, as adopted in North Carolina, "[p]arties to a premarital agreement may contract with respect to . . . [t]he modification or elimination of spousal support." N.C. Gen. Stat. 52B-4(a)(4) (2007); *See also Stewart v. Stewart*, 141 N.C. App. 236, 240, 541 S.E.2d 209, 212 (2000). However, prior to the adoption of the UPAA, a waiver of spousal support or alimony in a premarital agreement was held to be against North Carolina's public policy. *See Motley v. Motley*, 255 N.C. 190, 120 S.E.2d 422 (1961).

In *Motley*, the parties executed a premarital agreement which purported to release and bar the right of the plaintiff spouse from having the court award her alimony. *Id.* at 192, 120 S.E.2d at 423. Our Supreme Court held that the prenuptial agreement was in violation of North Carolina public policy and, to the extent the agreement purported to relieve the husband from the duty of supporting his wife, the agreement was null and void. *Id.* at 193, 120 S.E.2d at 424 ("It is the public policy of the State that a husband shall provide support for himself and his family. This duty he may not shirk, contract away, or transfer to another.") (internal citations omitted).

In *Howell*, the parties entered into a prenuptial agreement in North Carolina in 1979 before getting married in Las Vegas. 96 N.C. App. at 519, 386 S.E.2d at 612. The agreement "attempt[ed] to preclude the parties' right to receive alimony if otherwise eligible under

the laws of North Carolina." *Id.* at 520, 386 S.E.2d at 613. In an opinion issued by this Court stemming from a divorce action instituted in 1985, we noted that the UPAA did not apply to the premarital agreement and that premarital agreements concerning alimony were void as against public policy. *Id.* at 531, 386 S.E.2d at 619.

In *Prevatte v. Prevatte*, 104 N.C. App. 777, 411 S.E.2d 386 (1991), the parties entered into a prenuptial agreement in Virginia in 1968 and sought a divorce in North Carolina apparently after 1 July 1987. *Id.* In the prenuptial agreement, "[the] wife did purport to release her claims to alimony." *Id.* at 782, 411 S.E.2d at 389 n.1. In a *footnote*, this Court noted that the UPAA became effective 1 July 1987 and is applicable to premarital agreements *executed* on or after that date. *Id.* The Court concluded that the UPAA was not applicable to the parties' agreement and the agreement did not bar the wife's claim for alimony. *Id.* (citing *Howell*, 96 N.C. App. 516, 386 S.E.2d 610).

Here, plaintiff argued before the trial court, and asserts on appeal, that the parties' waiver of spousal support was void as against North Carolina's public policy when the prenuptial agreement was executed in 1986, and therefore, such a waiver is unenforceable in the instant case. This argument relies on our common law which barred the enforcement of such waivers prior to codification of the UPAA.

Plaintiff asserts the trial court correctly held, in reliance on the footnote in *Prevatte*, 104 N.C. App. at 782, 411 S.E.2d 389 n.1, that the spousal support waiver provision in the parties' premarital agreement was unenforceable due to its violation of North Carolina public policy. However, the application of North Carolina law to invalidate the Virginia alimony waiver was not one of the issues or assigned errors before the *Prevatte* Court.[1] "Language in an opinion not necessary to the decision is *obiter dictum* and later decisions are not bound thereby." *Trustees of Rowan Technical College v. J. Hyatt Hammond Associates, Inc.*, 313 N.C. 230, 242, 328 S.E.2d 274, 281 (1985). Thus, we hold that plaintiff's reliance on *Prevatte* is misplaced.

Furthermore, the facts of *Howell* and *Motley* are distinguishable from those of the instant case. In both *Howell* and *Motley*, there is

1. This Court noted that since the trial court found the antenuptial agreement to be valid in Virginia and thus enforceable in North Carolina, it was error for the trial court to allow equitable distribution of property acquired during the marriage: "We hold that the antenuptial agreement was a valid bar to wife's claim and the trial court erred in concluding the property acquired during the marriage was subject to equitable distribution." *Id.* at 782, 411 S.E.2d at 389.

no indication the premarital agreements were executed somewhere other than in North Carolina and no indication the parties intended to live anywhere other than North Carolina when they executed their agreements. *See Howell*, 96 N.C. App. 516, 386 S.E.2d 610 (contemplating North Carolina law to apply), and *Motley*, 255 N.C. 190, 120 S.E.2d 422 (executed and entered in North Carolina). Moreover, at the time the *Howell* and *Motley* agreements were executed or entered into in North Carolina, our existing public policy clearly forbade waiving alimony in a premarital agreement. *See Motley*, 255 N.C. 193, 120 S.E.2d 424; and *Howell*, 96 N.C. App. at 531, 386 S.E.2d at 619. Therefore, from the moment they were executed, they were in violation of North Carolina public policy.

The long-standing precedent of our Supreme Court as stated in *Hicks v. Skinner*, 71 N.C. 539 (1874), is that unless the premarital agreement at issue "appears clearly to have been intended to be performed elsewhere, the construction is to be governed by the law of the place where it is *intended* to be performed." *Id.* at 545 (original emphasis). This Court has held that marital contracts, which include premarital agreements, shall be "viewed today like any other bargained-for exchange," *see Hill v. Hill*, 94 N.C. App. 474, 480, 380 S.E.2d 540, 545 (1989) (citations and internal quotations omitted), and that the law of the state where a contract is formed should govern its validity, *Morton*, 76 N.C. App. at 299, 332 S.E.2d at 738. In order "[t]o render foreign law unenforceable as contrary to public policy, it must violate some prevalent conception of good morals or fundamental principle of natural justice or involve injustice to the people of the forum state." *Boudreau v. Baughman*, 322 N.C. 331, 342, 368 S.E.2d 849, 857-58 (1988) (citations omitted).

In this case, the waivers of spousal support were agreed to on 14 March 1986 in California, where such agreements were sanctioned by the California legislature. *In re Marriage of Bellio*, 105 Cal. App. 4th at 633, 129 Cal. Rptr. 2d at 558 n.1 (UPAA effective as of 1 January 1986 in California). Moreover, alimony waivers were valid in this State when plaintiff and defendant relocated here in 1995. *See* N.C.G.S. § 52B-4(a)(4) (1995). Thus, under our doctrine of *lex loci contractus*, the waivers in issue are presumed valid per California law. Therefore, we hold that the waivers of alimony and spousal support in the current action are not void as against North Carolina's public policy.

Additionally, the record indicates that the parties intended their premarital agreement to be governed by California law. The agree-

ment was entered into in Pasadena, California and fails to provide that the law of a state other than California law should govern. Moreover, the calculation for determining the value of defendant's separate property contribution specifically calls for the utilization of the cost of living index for Southern California cities such as Los Angeles, Long Beach, and Anaheim. And, the arbitration provision in the agreement calls for the application of the California Arbitration Act. Consequently, "in the absence of circumstances indicating a different intention," we find sufficient prima facie evidence in the parties' agreement to support the exclusive application of California law. *Tanglewood Land Co. v. Wood*, 40 N.C. App. 133, 137, 252 S.E.2d 546, 550 (1979) (citing *Fast v. Gulley*, 271 N.C. 208, 155 S.E.2d 507 (1967); and *Roomy v. Allstate Ins. Co.*, 256 N.C. 318, 123 S.E.2d 817 (1962)). Accordingly, we hold that the waiver of spousal support is valid and enforceable in North Carolina pursuant to California law.

III

[2] Defendant's assignment of error regarding the Full Faith and Credit Clause of the United States Constitution was not raised at trial. Accordingly, this assignment of error is waived on appeal. *State v. Fernandez*, 346 N.C. 1, 18, 484 S.E.2d 350, 361 (1997) (citing *State v. Jaynes*, 342 N.C. 249, 263, 464 S.E.2d 448, 457 (1995) ("[e]ven alleged errors arising under the Constitution of the United States are waived if defendant does not raise them in the trial court")).

PLAINTIFF'S APPEAL

Plaintiff raises three issues on appeal: (I) whether the trial court erred in determining that a rescission or abandonment of the premarital agreement was required to be in writing; (II) whether the trial court erred in finding that defendant was not estopped from enforcing the premarital agreement; and (III) whether the trial court erred in ordering specific performance of the premarital agreement.

I

[3] Plaintiff contends that a signed writing revoking the premarital agreement was not required, and that the trial court erred by declining to find whether the alleged tearing of the premarital agreement occurred. We disagree.

California's UPAA requires that a premarital agreement "may be amended or revoked only by a written agreement signed by the parties." Cal. Fam. Code § 1614 (2007). In this case, neither party claims that a subsequent writing to rescind or revoke the agreement was

executed; therefore, allegations surrounding the purported physical revocation are immaterial. Accordingly, the trial court did not err in not making findings of fact regarding the alleged tearing of the agreement, and this assignment of error is overruled.

II

[4] Plaintiff also argues that defendant should be equitably estopped from seeking enforcement of the premarital agreement. We disagree.

"[E]quitable estoppel . . . arises when an individual, by acts, representations, admissions, or by silence when he or she has a duty to speak . . . induces another to believe that certain facts exist, and such other person rightfully relies and acts upon that belief to his or her detriment." *Amick v. Amick*, 80 N.C. App. 291, 294, 341 S.E.2d 613, 614 (1986) (citing *Thompson v. Soles*, 299 N.C. 484, 263 S.E.2d 599 (1980)). However, in this case, the trial court found:

> 12. Assuming for the sake of argument that the defendant did destroy a copy of the Agreement before the plaintiff and communicated his intention to rescind or cancel the Agreement, the plaintiff [did not rely upon that act] to her detriment[.] . . . She continued to acquire properties and sign notes with the defendant after the alleged act just as she had done before the alleged act. She was able to complete a doctorate she was working on at the University of Washington, although the relocation to North Carolina did delay her in obtaining this doctorate. She also claims to have advised her mother to make certain provisions in her mother's estate and gift planning based upon her claimed belief that the Agreement had been revoked by the defendant. These decisions made by the plaintiff's mother were totally within the mother's discretion in any event.
>
> 13. The plaintiff's testimony is contradicted by her testimony in her deposition, when she could not point to one action she had taken or not taken after the alleged destruction of the Agreement that would have been different if the Agreement had not supposedly been cancelled/rescinded by the defendant. The plaintiff's deposition testimony is also equivocal as to whether she would have left the marriage if the defendant had not supposedly destroyed the Agreement. The court finds as a fact that assuming the Agreement was destroyed as testified to by the plaintiff that the plaintiff continued in the marriage just as she would have done if the Agreement was not supposedly destroyed[.]

We are bound by the trial court's findings even if contrary evidence exists so long as there is some evidence to support those findings. *Nationsbank of North Carolina, N.A. v. Baines*, 116 N.C. App. 263, 269, 447 S.E.2d 812, 815 (1994) (citation omitted). Moreover, it is well established that "[q]uestions of credibility and the weight to be accorded the evidence remain in the province of the finder of facts." *Scott v. Scott*, 336 N.C. 284, 291, 442 S.E.2d 493, 497 (1994) (citation omitted).

Though plaintiff argues that the alleged tearing of the agreement was instrumental to her decision to move with defendant to North Carolina, and consequently caused her to incur a $195,000 credit line with defendant in the purchase of real property, we nevertheless find competent evidence in the record supporting the trial court's finding that plaintiff did not rely on defendant's alleged revocation. We affirm the trial court's order finding that defendant is not equitably estopped from enforcing the premarital agreement, and accordingly, plaintiff's assignment of error is overruled.

III

[5] Last, plaintiff claims that the trial court erred in granting specific performance of the agreement. We disagree.

We have already concluded that the parties' premarital agreement is a valid contract guided by California law and enforceable in this State. During the course of this litigation, defendant has asked for the enforcement of the agreement, while plaintiff has actively litigated to avoid performance according to the express terms of the bargain. Because "[t]he remedy of specific performance is available to compel a party to do precisely what he ought to have done without being coerced by the court," we hold that the order of specific performance by the trial court was appropriate. *Munchak Corp. v. Caldwell*, 301 N.C. 689, 694, 273 S.E.2d 281, 285 (1981) (citation and internal quotations omitted). Accordingly, plaintiff's assignment of error is overruled.

The 29 December 2006 order of the trial court is affirmed in part and reversed in part; the 8 March 2007 order is affirmed.

Affirmed in part; reversed in part.

Chief Judge MARTIN and Judge ELMORE concur.

IN RE K.W.

[192 N.C. App. 646 (2008)]

IN THE MATTER OF: K.W.

No. COA08-535

(Filed 16 September 2008)

1. Evidence— prior sexual activity—civil case—excluded

It is permissible in a civil case to exclude a respondent's prior sexual history based N.C.G.S. § 8C-1, Rule 412. Evidence of the prior sexual history of a victim (here a child) is irrelevant in most instances; however, upon finding that evidence falls under an exception to Rule 412 or is outside the rule, a balancing of probative value versus prejudicial effect should be used in the court's discretion.

2. Evidence— prior sexual activity—false accusation—police report

False accusations do not fall under N.C.G.S. § 8C-1, Rule 412 and are admissible if relevant, but a police report of a prior sexual assault here was not the equivalent of a false accusation that could be used to impeach, and was properly excluded.

3. Evidence— child sexual abuse—Myspace page—impeachment

A Myspace page was admissible as impeachment as to prior sexual history in a child abuse and neglect proceeding because Rule 412 does not apply to inconsistent statements. Its exclusion here was not prejudicial because no persuasive argument for a different outcome was presented.

4. Child Abuse and Neglect— findings—supported by evidence

Findings of sexual abuse in a child neglect and abuse proceeding were supported by clear and convincing evidence.

5. Child Abuse and Neglect— conclusions—sexual activity as discipline—supported by evidence

In a child abuse and neglect proceeding, conclusions of law about the use of forced sexual activity as discipline were supported by clear and convincing evidence.

6. Child Abuse and Neglect— sexual abuse—supported by testimony of victim and physician

Conclusions that a child was abused were supported by clear and convincing evidence in testimony from the victim and findings from her physician. The medical evidence was presented as

a report of clinical findings rather than an endorsement of the victim's testimony.

7. Child Abuse and Neglect— sexual abuse—conclusion of neglect and dependency

The trial court properly concluded that a child was neglected because she was raped by her father and dependent because her parents refused to adhere to a Youth and Family Services safety plan.

Appeal by respondent-father from an order entered 20 December 2007 by Judge Hugh B. Lewis in Mecklenburg County District Court. Heard in the Court of Appeals 25 August 2008.

Mecklenburg County Attorney's Office, by Tyrone C. Wade, for petitioner-appellee Mecklenburg County Youth and Family Services.

Brannon Burroughs for appellee Guardian ad Litem.

Christian Hoel for respondent-appellee mother.

Rebekah W. Davis for respondent-appellant.

HUNTER, Judge.

Respondent-father ("respondent") appeals from the order adjudicating his minor child abused, neglected, and dependent. After careful review, we affirm.

K.W., a thirteen-year-old minor, notified her school counselor on 27 September 2006 that she was being raped by her father, A.W. The counselor called the police, and K.W. provided a statement in which she accused her father of raping her multiple times since 20 September 2005. K.W. stated that she was unsure whether her mother was aware of the rape. Mecklenburg County Youth and Family Services ("YFS") became involved with this case on 27 September 2006. On that same date, A.W. signed a Safety Assessment Plan whereby he agreed to cease all contact with his daughter. K.W. testified that her father moved back into the family home approximately one week after the rape allegation, which was a violation of the Safety Assessment Plan. On 3 October 2006, K.W. was examined by a physician who later testified that K.W.'s physical condition was consistent with child sexual abuse. YFS filed a Juvenile Petition on 14 December 2006 alleging K.W. to be an abused, neglected, and dependent juvenile

and obtained an immediate Non-Secure Custody Order. After a hearing, the trial court entered an Adjudicatory and Disposition Hearing Order, adjudicating K.W. abused, neglected, and dependent on 20 December 2007. Respondent appealed the trial court's adjudication.

I.

[1] Respondent first argues that the trial court erred in refusing to admit into evidence a Concord police report and portions of K.W.'s Myspace website. Respondent intended to introduce this evidence to impeach K.W.'s credibility. The trial court excluded the evidence pursuant to N.C. Gen. Stat. § 8C-1, Rule 412 (2007). To determine if the evidence was properly excluded, we must first ascertain the applicability of Rule 412 in a civil hearing.

On its face, Rule 412 applies only to criminal trials where a defendant is charged with rape, a sex offense, or a lesser included offense of rape or a sex offense. The rule is one of relevancy and it holds that:

> (b) Notwithstanding any other provision of law, the sexual behavior of the complainant is irrelevant to any issue in the prosecution unless such behavior:
>
> (1) Was between the complainant and the defendant; or
>
> (2) Is evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant; or
>
> (3) Is evidence of a pattern of sexual behavior so distinctive and so closely resembling the defendant's version of the alleged encounter with the complainant as to tend to prove that such complainant consented to the act or acts charged or behaved in such a manner as to lead the defendant reasonably to believe that the complainant consented; or
>
> (4) Is evidence of sexual behavior offered as the basis of expert psychological or psychiatric opinion that the complainant fantasized or invented the act or acts charged.

N.C. Gen. Stat. § 8C-1, Rule 412(b).

The purpose of Rule 412 is " 'to protect the witness from unnecessary humiliation and embarrassment while shielding the jury from unwanted prejudice that might result from evidence of sexual con-

duct which has little relevance to the case and has a low probative value.' " *State v. Ginyard*, 122 N.C. App. 25, 31, 468 S.E.2d 525, 529 (1996) (quoting *State v. Younger*, 306 N.C. 692, 696, 295 S.E.2d 453, 456 (1982)).

While this rule was promulgated for use in criminal prosecution trials, this Court has found the rule to be applicable in civil cases. *Wilson v. Bellamy*, 105 N.C. App. 446, 414 S.E.2d 347 (1992). In *Bellamy*, the plaintiff was suing members of a fraternity for raping her at a party. *Id.* at 450, 414 S.E.2d at 349. By applying Rule 412 this Court found in *Bellamy* that the trial court erred in requiring the plaintiff to answer defense questions regarding her prior sexual activity and questions pertaining to her intoxicated condition after the party where she was allegedly raped. *Id.* at 460, 414 S.E.2d at 355. In justifying its reliance on Rule 412, this Court stated:

> We also note that our research reveals that, to date, Rule 412 has only been applied in criminal cases. However, the logic applied behind the law . . . is of similar import in the civil arena. Nothing elicited by the defense through the objected to questions above would tend to indicate that the plaintiff gave her consent to the acts allegedly performed by the individual defendants.

Id.

Therefore, we find that it is permissible for a trial judge in a civil case to use Rule 412 as a basis for excluding irrelevant evidence about a plaintiff's prior sexual behavior. Pursuant to Rule 412, evidence of the prior sexual history of the victim is irrelevant in most instances. However, upon a finding by the trial court that certain evidence is relevant because it falls into one of the exceptions under Rule 412, or if the evidence falls outside of the rule, a Rule 403 balancing of probative value versus unfair prejudice should be utilized in the court's discretion. *See* N.C. Gen. Stat. § 8C-1, Rule 403 (2007).

[2] We would first like to address the admissibility of the Concord police report. The report is dated 23 February 2001 and was filed by K.W.'s mother. K.W. was eight at the time. The incident is listed as a sexual assault, but there is no further description. In the narrative portion, the officer states that there is doubt as to whether the victim, K.W., is telling the truth, but there is no indication as to who possessed the doubt or why. The report lists the case status as "[f]urther [i]nvestigation," but the supplemental investigation report lists the status as "[i]nactive."

At the in-camera hearing to determine admissibility of this report, respondent's attorney informed the judge that K.W. alleged she was raped while the attorney for YFS said that K.W. claimed that a boy inappropriately touched her on the school bus. In making his determination, the judge relied on YSF's explanation of the alleged assault. K.W. did not testify at the in-camera hearing as the judge did not want K.W. to feel intimidated; therefore, the record does not contain her version of the incident cited in the police report.

At the adjudication hearing, respondent sought to introduce the report as a false accusation used to impeach, and on appeal he argues that it should have been admitted as such. Respondent is correct in asserting that a false accusation is not excluded under Rule 412. This Court has held that the "rape shield statute . . . is only concerned with the *sexual activity* of the complainant. Accordingly, the rule only excludes evidence of the actual sexual history of the complainant; it does not apply to false accusations, or to language or conversations whose topic might be sexual behavior[.]" *State v. Thompson*, 139 N.C. App. 299, 309, 533 S.E.2d 834, 841 (2000) (citations omitted). Therefore, false accusations do not fall under the ambit of Rule 412 and are admissible if relevant.

We find that the police report is not equivalent to a false accusation by complainant. The fact that the report mentions some doubt by an unnamed party as to the truthfulness of the allegation, and the fact that no one was charged with an offense does not mean that K.W. made a false accusation. Seeing as there is no evidence other than the police report itself, we cannot say that the report qualifies as a false accusation.

In sum, we agree with respondent that the report is not evidence of prior sexual history. However, since we have determined that it is not a false accusation that could be used to impeach, the report has no probative value. A claim made by K.W., in an unrelated matter, approximately five years prior to the rape allegations against her father does not bear on any material issue in the case. We find that the police report was properly excluded by the trial court.

[3] Next, we will address the admissibility of the Myspace website. The record shows that YFS objected under Rule 412 when respondent attempted to introduce the Myspace page. Respondent argues that Rule 412 does not apply to impeachment via use of an inconsistent statement. We agree and find that the Myspace page was admis-

sible as impeachment evidence, but conclude that the exclusion was harmless error.

In her statement to police and in her hearing testimony, K.W. claimed she was a virgin prior to the rape. She also asserted at the hearing that during the time her father was raping her, she did not have any boyfriends with whom she was intimate nor had she ever been on a date.

The Myspace page contains suggestive photos of K.W. to which she captions, " '[I] may not be a virgin but I still gotta innocent face.' " Also, she answers in the affirmative to the question " 'had sex?' " During the in-camera questioning, K.W. testified that the website was hers, but that her friend filled in the answers. Based on the record, the content of the Myspace page is inconsistent with K.W.'s hearing testimony and statement to police.

Our Supreme Court stated in *State v. Younger*, 306 N.C. 692, 295 S.E.2d 453, "[w]e have repeatedly held that prior inconsistent statements made by a prosecuting witness may be used to impeach his or her testimony when such statements bear directly on issues in the case." *Id.* at 697, 295 S.E.2d at 456 (defense counsel was entitled to impeach a rape victim because a statement she made to her examining physician concerning her prior sexual activity was inconsistent with her trial testimony). K.W.'s inconsistent statements bear directly on the case as her veracity is at issue. She is the only person with direct knowledge of the alleged rape.

Respondent asserts that the Myspace page serves as evidence that someone else could have caused the hymeneal transection found by the examining physician, which supported the physician's conclusion that K.W. had been forcibly penetrated. We do not agree. We find that the Myspace page serves as impeachment evidence, but not as substantive evidence that someone else caused the trauma. Admitting the evidence for that purpose would place it under the purview of Rule 412, and there is no evidence in the Myspace page of *specific instances* of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by respondent.

Despite the fact that Rule 412 does not apply to inconsistent statements and therefore the Myspace page should have been admitted for impeachment purposes, we find that the error was harmless as respondent has not offered a persuasive argument that the outcome of the hearing would have been different had the website been admit-

ted. A general statement by K.W. that she is sexually active does not negate the physician's findings that the trauma she observed in K.W.'s exam "is more likely to be seen in young children who are penetrated pre-puberty and is more likely to be seen where there is forced penetration." Statements that may or may not have been written by K.W. regarding general sexual behavior may have impacted her veracity, but it would not have changed the outcome of the case. Therefore, the error in failing to admit the Myspace page was harmless.

II.

[4] Respondent next assigns as error the trial court's findings of fact eight through twelve and fifteen as they are not supported by clear and convincing evidence. These findings are as follows:

> 8. K.W.'s father regularly punished K.W. and her brother C.B. by whipping them on their buttocks with a belt. K.W.'s father would have her strip naked prior to whipping her with the belt. On or about September 20, 2005, [A.W.] was about to punish K.W. and had her remove all of her clothing. Instead of whipping her, he had sexual intercourse with her. A.W. kept promising K.W. that that [sic] particular incident would be the last time he would have sex with her and it would not happen again.
>
> 9. A.W. continued to forcibly have sexual intercourse with K.W. intermittently, between 7-15 times over the course of the year. On one occasion, he utilized a vibrator to "get her wet."
>
> 10. K.W. was twelve years of age at the time of the first sexual assault. She had never had sexual relations with any other individual. A.W. kept pornographic materials in a suitcase under his bed. C.B. was punished on one occasion for removing pornographic materials from the suitcase. K.W. assumed that is where her father kept the vibrator that he utilized on her.
>
> 11. K.W. told her brother, C.B., of her father's sexual assault, but he did not initially believe her. K.W. described one occasion where her father sent C.B. out to rake the lawn and then sexually assaulted her. C.B. recalled his father sending him out to rake and recalled that K.W. appeared sad following the incident. He noticed that K.W. spent a lot of time alone with [A.W.] and she would appear sad afterwards.

12. Stanley County Department of Social Services substantiated physical abuse and inappropriate discipline of the children with a belt in the past. C.B. has scars on his back from where A.W. has whipped him with a belt in the past. There was also a history of domestic violence between the parents. [A.W.] has criminal convictions for assault on a female.

In reviewing the findings of fact of the trial court, this Court has held:

> "A proper review of a trial court's finding of [abuse and] neglect entails a determination of (1) whether the findings of fact are supported by 'clear and convincing evidence,' and (2) whether the legal conclusions are supported by the findings of fact." "In a non-jury [abuse and] neglect adjudication, the trial court's findings of fact supported by clear and convincing competent evidence are deemed conclusive, even where some evidence supports contrary findings."

In re Pittman, 149 N.C. App. 756, 763-64, 561 S.E.2d 560, 566 (2002) (alterations in original; citations omitted).

We hold that these findings of fact are supported by clear and convincing evidence. Respondent's only argument with regard to findings eight through twelve is that they are based solely on K.W.'s allegations and testimony and respondent was denied the opportunity to impeach K.W. through use of the police report and the Myspace page. We find that K.W.'s testimony supported each finding of fact and her testimony was not incompetent because respondent was unable to question her regarding testimony that was either properly excluded (the police report) or harmlessly excluded (the Myspace website).

We have held that with regard to a judge's discretion in a juvenile adjudication hearing, "it is that judge's duty to weigh and consider all competent evidence, and pass upon the credibility of the witnesses, the weight to be given their testimony and the reasonable inferences to be drawn therefrom." *In re Whisnant*, 71 N.C. App. 439, 441, 322 S.E.2d 434, 435 (1984) (citation omitted). We find that the trial court adhered to that principle in these findings of fact and made no error.

With regard to finding fifteen, respondent argues that the trial court misinterpreted the physician's testimony. The trial court found, "[t]he findings were not consistent with masturbation and are not

customarily observed with consensual sex." The physician did say on cross-examination that the trauma could have been caused by a vibrator and that another teenager could have caused K.W. to lose her virginity. However, the physician clearly believed that the full hymeneal transection was the result of forced penetration. On redirect, she also stated that she would not expect to see that type of trauma due to the use of a vibrator.

Respondent contends that use of the word "forced" does not necessarily mean that the sex was nonconsensual. Respondent also argues that, in effect, the physician's testimony was that K.W.'s hymeneal transection could have been caused by consensual sex. Respondent has misconstrued the testimony. According to the physician, the exam results showed that forced penetration likely caused K.W.'s trauma, not consensual sex. The trial court's finding of fact fifteen is supported by clear and convincing evidence.

III.

[5] Respondent makes the exact same argument with regard to conclusions of law three through six and nine that he made to findings of fact eight through twelve above. These conclusions are as follows:

3. The father's acts over the years of excessive corporal punishment, multiple sex partners outside of the marriage and failure to abide by YFS safety plans demonstrate the power and control of a domestic violence perpetrator.

4. The father's continual promise of a "last time" he would perpetrate against his daughter also demonstrates the acute manipulation of a domestic violence perpetrator.

5. Using forced sexual intercourse as discipline also placed the child in an injurious environment such that the child is a neglected child as defined in North Carolina Statute 7B-101(15).

6. The forced sexual intercourse by the father on his daughter in lieu of disciplinary actions is also a demonstration of the power and control of a domestic violence perpetrator.

. . .

9. A.W. subjected K.W. to "aggravated circumstances" as defined in North Carolina General Statutes § 7B-101(2) in that he sexually abused her for a period of over a year.

Again, as discussed above, there was clear and convincing evidence for the trial court to make these conclusions based on testimony and evidence presented. The fact that respondent was not able to use the police report and the Myspace page as evidence does not constitute prejudicial error.

IV.

[6] Respondent next argues that the trial court's conclusion that the minor child was abused is not supported by sufficient, clear, and convincing evidence. We disagree.

N.C. Gen. Stat. § 7B-101(1)(d) (2007) defines an abused juvenile as one who has been raped or subject to other sexual offenses. The trial court found K.W. to be an abused juvenile as she was being raped by her father. We have found that a child's allegations, along with a physician's exam and testimony provide sufficient evidence for the trial court to make a finding of abuse. *See In re Mashburn*, 162 N.C. App. 386, 388-89, 591 S.E.2d 584, 587 (2004) (the trial court found as a matter of law that a minor female was sexually abused and neglected based on the child's allegations and a physician who testified that the minor had a vagina bacterial infection that was likely caused by a sexual act).

Furthermore, the trial court properly evaluated the physician's testimony. Unless an appellant provides evidence to the contrary, this Court has determined that there is a presumption that a trial court judge is aware of the "distinction between an expert witness' testifying (a) that sexual abuse in fact occurred or (b) that a victim has symptoms consistent with sexual abuse . . . ." *In re Morales*, 159 N.C. App. 429, 433, 583 S.E.2d 692, 695 (2003). Here, K.W. testified that her father raped her repeatedly over the course of a year, and her testimony was corroborated by a physician who found that her vaginal trauma was consistent with forced penetration. The physician was not presented to endorse K.W.'s testimony but to report clinical findings that were consistent with K.W.'s allegations. K.W.'s testimony, along with the physician's findings were sufficient for the trial judge to find that K.W. was abused pursuant to N.C. Gen. Stat. § 7B-101(1)(d).

V.

[7] Finally, respondent claims that the trial court's conclusions that the minor child is neglected and dependent are not supported by sufficient, clear, and convincing evidence. We disagree.

A neglected juvenile is one "who lives in an environment injurious to the juvenile's welfare[.]" N.C. Gen. Stat. § 7B-101(15). The trial court believed K.W.'s testimony that she was raped by her father, and thus, the rape constituted sufficient evidence to find the child neglected as she was living in an environment injurious to her welfare.

A juvenile is dependent if he or she is "in need of assistance or placement because the juvenile has no parent, guardian, or custodian responsible for the juvenile's care or supervision or whose parent, guardian, or custodian is unable to provide for the care or supervision and lacks an appropriate alternative child care arrangement." N.C. Gen. Stat. § 7B-101(9). The trial court found that K.W. was dependent because her parents refused to adhere to the Safety Plan put in place by YFS. This conclusion was supported by K.W.'s testimony that A.W. agreed to cease all contact with K.W. in the Safety Plan, but moved back into the home about one week later. The trial court concluded as a matter of law that K.W. should remain in the legal custody of YFS, but to be placed with her mother on a trial basis.

There was no error in the court's decision. K.W. was in an injurious environment where her father continued to be present despite his agreement to stay away. K.W.'s mother was not seeking to enforce the Safety Plan, and therefore, YFS found it necessary to obtain a Non-Secure Custody Order to protect the child.

Based on the facts presented, there was clear and convincing evidence for the trial court to find K.W. abused, neglected and dependent.

For the foregoing reasons, we find no reversible error.

Affirmed.

Chief Judge MARTIN and Judge WYNN concur.

STATE OF NORTH CAROLINA v. ROBERT COLTER HINCHMAN

No. COA07-1549

(Filed 16 September 2008)

1. Appeal and Error— DWI appeal—driver's license revocation—not contested by statutory means

A driver's license revocation was beyond the scope of a criminal appeal where defendant did not contest the validity of the revocation order through the means prescribed by statute. N.C.G.S. § 20-16.5(c) and (g).

2. Courts— dismissal in district court—appeal to superior court—legal basis specified

There was no merit in a DWI prosecution to defendant's argument that the State failed to specify the legal basis of the motion to appeal from district to superior court. N.C.G.S. § 15A-1432(b).

3. Courts— appeal from district to superior court—caption in motion

Defendant did not show prejudice from an incorrect listing of the court division in the caption of a motion to appeal a DWI dismissal in the district court to the superior court, even assuming that the caption was incorrect.

4. Witnesses— qualification of person drawing blood—testimony of highway patrol trooper—sufficiency

A highway patrol trooper's testimony in a DWI prosecution that the person who drew defendant's blood worked in a hospital blood laboratory was sufficient to show that the person was qualified under N.C.G.S. § 20-139.1(c).

5. Appeal and Error— preservation of issues—assignment of error—argument and citation of authority—requirements

The question of whether a lab tech's absence at trial violated defendant's right to confrontation was beyond the scope of the review where defendant did not assign error to the issue. Moreover, defendant's argument that a trooper's testimony about a lab tech's qualifications was hearsay was not supported by argument or citation of authority.

6. Constitutional Law— right to confrontation—laboratory report and chemical analyst's permit—nontestimonial

A laboratory report and a chemical analyst's permit in a DWI prosecution were nontestimonial. The lab report was limited to chain of custody and blood alcohol concentration, and the permit to perform blood chemical analysis was neutral evidence created to serve a number of purposes other than evidence at trial.

7. Constitutional Law— double jeopardy—driver's license revocation after DWI arrest—civil penalty

A driver's license revocation after a DWI arrest was a civil remedy and did not violate double jeopardy even though defendant argued that the time between arrest and revocation did not serve the intended purpose of the revocation statute.

Appeal by defendant from judgment entered 27 July 2007 by Judge Thomas D. Haigwood in Pitt County Superior Court. Heard in the Court of Appeals 18 August 2008.

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

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

MARTIN, Chief Judge.

Robert Colter Hinchman ("defendant") was charged with driving while impaired ("DWI"), driving after consuming alcohol by a person under age twenty-one, and reckless driving. Defendant was convicted by a jury of DWI and was sentenced to sixty days' imprisonment, suspended for a period of twelve months subject to terms of probation. Defendant appeals from his conviction and sentence.

The evidence at trial tended to show that on 23 June 2004 defendant, who was then under the age of twenty-one, and some of his friends had been drinking alcohol at defendant's parents' house before setting out in defendant's vehicle. While driving, defendant lost control of the vehicle, which struck a guardrail and overturned. Within minutes, Trooper William Brown arrived at the scene. Defendant identified himself as the driver of the car and stated that he was unhurt. Trooper Brown detected an odor of alcohol on defendant's breath, noticing also that his eyes were red and glassy and that he appeared to be under the age of twenty-one. After asking defend-

ant to take a seat in his patrol car, Trooper Brown administered an Alco-sensor to defendant to establish probable cause that defendant had been drinking. Based upon his observations, Trooper Brown opined that defendant was appreciably impaired by some substance. Trooper Brown then arrested and charged defendant with DWI in violation of N.C.G.S. § 20-138.1, driving after consuming by a person under age twenty-one in violation of N.C.G.S. § 20-138.3, and reckless driving in violation of N.C.G.S. § 20-140.

Trooper Brown possessed a permit, issued by the North Carolina Department of Health and Human Services ("DHHS"), allowing him to administer chemical analyses of the blood, and he transported defendant to Pitt County Memorial Hospital (the "hospital") to obtain a blood sample. Trooper Brown read defendant his implied consent rights twice because defendant had difficulty comprehending them the first time. Defendant was allowed up to thirty minutes to contact an attorney or witness to view the testing procedures, but he was unable to reach an attorney. Defendant then submitted to the blood test. June Anderson, who worked in the blood laboratory at the hospital, withdrew defendant's blood sample, and Trooper Brown submitted it to the State Bureau of Investigations ("SBI") for chemical analysis. SBI chemical analyst Richard Waggoner, who held a permit, issued by DHHS, to perform chemical analyses of blood, later analyzed the blood sample and completed a laboratory report on 30 August 2004 indicating a blood alcohol concentration of 0.10.

On 16 September 2004, the laboratory report was served on defendant. Trooper Brown filed an affidavit and revocation report with the district court on 2 November 2004. The district court entered a revocation order on 5 November 2004 in defendant's absence, ordering him to surrender his driver's license and revoking his license for a minimum of thirty days, pursuant to N.C.G.S. § 20-16.5. Defendant surrendered his license on 10 November 2004.

On 18 November 2004, defendant filed a motion to dismiss the criminal charge of driving while impaired, arguing that the revocation of his license constituted criminal punishment and that further prosecution would subject him to double jeopardy. On 11 April 2005, the district court granted defendant's motion and later entered a written order dismissing all charges, upon a finding:

> [T]he revocation of Defendant's drivers license, approximately 140 days after the date of offense, does not constitute the necessary prompt legal action to remove Defendant from the high-

> ways of North Carolina in order to protect the public and therefore, is a punishment which prohibits further prosecution of the Defendant for these charges which would subject him to double jeopardy.

On 19 April 2005, the State appealed the order to superior court, pursuant to N.C.G.S. § 15A-1432. Defendant moved to dismiss the State's appeal on 30 September 2005. The same day, the superior court heard the appeal, vacated the order which had dismissed the charges, and remanded the case to the district court for disposition. Defendant submitted a proposed order seeking an interlocutory appeal, but the court instead entered an order finding that the issues were not appropriately justiciable and that such an appeal would be for the purpose of delay.

On 25 January 2007, the district court found defendant guilty of DWI. He was sentenced at the minimum Level 5 to sixty days' imprisonment suspended for twelve months subject to defendant's completion of twenty-four hours of community service, payment of fine and court costs, and compliance with the other regular conditions of probation. Defendant appealed to superior court.

On 2 April 2007, defendant again filed a motion to dismiss based upon double jeopardy. The superior court denied the motion to dismiss, concluding that its previous order was the law of the case and the circumstances of defendant's case did not constitute double jeopardy.

On 26 and 27 July 2007, defendant was tried before a jury for DWI. The jury found defendant guilty, and the superior court imposed the same sentence as the district court had imposed. The defendant appealed his conviction and sentence to this Court.

---

[1] Defendant first argues that the revocation report was not properly executed and was not "expeditiously filed" with the court, as required by N.C.G.S. § 20-16.5(c), because it was filed on 2 November 2004, 132 days after his arrest on 23 June 2004. In light of these errors, defendant argues, the trial court erred in entering the revocation order.

The statute that was applicable at the time defendant was charged states:

> If a person's driver's license is subject to revocation under this section, the charging officer and the chemical analyst must exe-

> cute a revocation report. . . . It is the specific duty of the charging officer to make sure that the report is expeditiously filed with a judicial official as required by this section.

N.C. Gen. Stat. § 20-16.5(c) (2005). This section also provides: "A person whose license is revoked under this section may request in writing a hearing to contest the validity of the revocation. The request may be made at the time of the person's initial appearance, or within 10 days of the effective date of the revocation . . . ." N.C. Gen. Stat. § 20-16.5(g).

Defendant did not contest the validity of the revocation order through the means prescribed in the statute. "In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion . . . ." N.C.R. App. P. 10(b)(1) (2008). Since defendant did not request a hearing to challenge the validity of the civil revocation order, the issue is not properly preserved and is outside the scope of our review in his criminal appeal.

[2] Next, defendant argues the trial court erred in denying his motion to dismiss the State's motion to appeal because the State's motion (1) was filed in the wrong division of the court and (2) failed to specify the legal basis of its appeal, as required by N.C.G.S. § 15A-1432. The applicable statute states:

> (a) Unless the rule against double jeopardy prohibits further prosecution, the State may appeal from the district court judge *to the superior court*:
>
> (1) When there has been a decision or judgment dismissing criminal charges as to one or more counts.
>
> . . . .
>
> (b) When the State appeals pursuant to subsection (a) the appeal is by written motion *specifying the basis of the appeal* made within 10 days after the entry of the judgment in the district court. The motion must be filed with the clerk and a copy served upon the defendant.

N.C. Gen. Stat. § 15A-1432(a)-(b) (2007) (emphasis added).

First, we conclude that defendant's argument that the motion to appeal failed to specify the legal basis of appeal is clearly without merit. The State's motion to appeal plainly asserted "no competent

evidence was presented to support the motion and order to dismiss" and the "[d]ismissal of the charges was contrary to law." This Court has found that the State properly stated the basis of appeal where the basis was stated in similar detail. *State v. Ward*, 127 N.C. App. 115, 117, 120-21, 487 S.E.2d 798, 800, 802 (1997) (holding that the State properly made a motion to appeal where it alleged that no written findings of fact supported the trial court's decision and the reasons for dismissal of the charges were "not legally proper reasons for dismissal of criminal charges without a finding of fact"). Accordingly, defendant's assignment of error on this point is overruled.

[3] Defendant also argues that the State's motion to appeal is captioned as having been filed in the district court division, while N.C.G.S. § 15A-1432 provides that "the State may appeal . . . to the *superior court*." N.C. Gen. Stat. § 15A-1432(a) (emphasis added). Defendant argues, therefore, that the superior court lacked jurisdiction to hear the motion and that its subsequent entry of the order vacating the district court's dismissal of the charges was error.

Even assuming the caption to have been incorrect, defendant has shown no prejudice. *See Ward*, 127 N.C. App. at 120-21, 487 S.E.2d at 802 (superior court did not lose jurisdiction to hear appeal where the State deviated from the technical requirements of N.C.G.S. § 15A-1432 by captioning the appeal "Notice of Appeal" rather than "Motion to Appeal"). Therefore, we overrule this assignment of error.

[4] Next, defendant contends that the trial court erred in admitting certain evidence related to the chemical analysis of his blood. First, defendant argues that the trial court erred in admitting the chemical analysis because the State failed to show that the person who withdrew the blood, June Anderson, was a qualified person as defined in N.C.G.S. § 20-139.1(c). The applicable statute states: "When a blood test is specified as the type of chemical analysis by the charging officer, only a physician, registered nurse, or other qualified person may withdraw the blood sample." N.C. Gen. Stat. § 20-139.1(c) (2005). Defendant argues that because Ms. Anderson did not testify as to her own qualifications the State could not establish that she was a "qualified person." This argument ignores the governing statute and decisions of this Court. N.C.G.S. § 20-139.1(c) specifically provides: "Evidence regarding the qualifications of the person who withdrew the blood sample may be provided at trial by testimony of the charging officer or by an affidavit of the person who withdrew the blood sample and shall be sufficient to constitute prima facie evidence

regarding the person's qualifications." This Court has held that where a law enforcement officer "testified that the sample was drawn by a blood technician at [the h]ospital[, t]his is evidence that the sample was drawn by a qualified person." *State v. Watts*, 72 N.C. App. 661, 664, 325 S.E.2d 505, 507, *disc. review denied*, 313 N.C. 611, 332 S.E.2d 83 (1985). Furthermore, where "the only evidence before the trial court was that a nurse was present to withdraw the blood[, and t]here was no evidence to support the trial court's finding to the contrary," this Court held the State carried its burden of proof to show compliance with N.C.G.S. § 20-139.1(c). *Richardson v. Hiatt*, 95 N.C. App. 196, 199-200, 381 S.E.2d 866, 868, *reh'g granted and modified on other grounds*, 95 N.C. App. 780, 384 S.E.2d 62 (1989).

In the case before us, Trooper Brown testified:

Q. And the person who drew the blood samples, Ms. Anderson, where did you get this person from?

A. The blood lab at the hospital.

Q. And . . . what did you see this person doing?

A. She was working in the blood lab and had on a lab tech I uniform—

. . . .

A. —which was pink pants and a white shirt and her name tag, and I observed her draw the blood.

Q. And this particular area where Ms. Anderson was working, is that an area that everyone would just have access to?

A. No, ma'am.

Here, Trooper Brown's testimony that Ms. Anderson worked at the blood laboratory at the hospital was sufficient to show that she was a qualified person under N.C.G.S. § 20-139.1(c).

[5] Defendant further suggests Ms. Anderson's absence at trial "denied defendant his rights of confrontation and cross examination." Defendant did not assign this issue as error; thus, it is outside the scope of our review. 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 . . . ."). Defendant's further allegation that Trooper Brown's testimony about Ms. Anderson's qualifications was hearsay is unsupported by argument or cited

authority in the brief; therefore, we take it as abandoned. N.C.R. App. P. 28(b)(6) (2008).

[6] Defendant also argues that the trial court erred in admitting the laboratory report and the chemical analyst's permit because they were inadmissible testimonial evidence under *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004). However, this Court has held that the affidavit of a chemical analyst is nontestimonial evidence under *Crawford* when the "affidavit [i]s limited to his objective analysis of the evidence and routine chain of custody information." *State v. Heinricy*, 183 N.C. App. 585, 591, 645 S.E.2d 147, 151, *disc. review denied*, 362 N.C. 90, 656 S.E.2d 593 (2007). As in *Heinricy*, the laboratory report in the present case was limited to chain of custody information and the chemical analyst's affidavit that the blood alcohol concentration in the sample was found to be "0.10 grams of alcohol per 100 milliliters of whole blood" upon analysis of the sample "in accordance with methods approved by the Commission for Health Services." Because the results of the chemical analysis were admissible as part of the laboratory report, we need not consider defendant's further argument that the trial court should have sustained defendant's objection to SBI Agent Aaron Joncich's testimony of defendant's blood alcohol concentration, where he simply read the information from the report.

Seemingly as an afterthought, defendant states: "For these same reasons, Mr. Waggoner's permit should not have been admitted by and through Agent Joncich." Assuming that defendant purports to characterize Mr. Waggoner's permit as testimonial evidence inadmissible pursuant to *Crawford*, this argument is without merit. As our Supreme Court has noted:

> [T]he [United States] Supreme Court in *Crawford* indicated in dicta that business records are not testimonial. [*Crawford*, 541 U.S.] at 56, 158 L. Ed. 2d at 195-96 ("Most of the hearsay exceptions covered statements that by their nature were not testimonial—for example, business records or statements in furtherance of a conspiracy."). The distinction between business records and testimonial evidence is readily seen. Among other attributes, business records are neutral, are created to serve a number of purposes important to the creating organization, and are not inherently subject to manipulation or abuse.

State v. Forte, 360 N.C. 427, 435, 629 S.E.2d 137, 143, *cert. denied*, —— U.S. ——, 166 L. Ed. 2d 413 (2006). Clearly, Mr. Waggoner's permit to

perform chemical analyses of blood issued by the DHHS was neutral evidence and was created to serve a number of purposes other than to be used as evidence at trial, and it is not the type of testimonial evidence described in *Crawford*.

[7] Lastly, defendant argues that his driver's license revocation under N.C.G.S. § 20-16.5 constituted criminal punishment, and therefore, his later conviction of DWI violates the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and Article I, Sections 19 and 23 of the North Carolina Constitution. This Court has already addressed the issue of whether license revocation constitutes a civil remedy or a criminal punishment. In *State v. Evans*, 145 N.C. App. 324, 334, 550 S.E.2d 853, 860 (2001), this Court held:

> Having examined N.C.G.S. § 20-16.5 in light of the two-part analysis established by *Hudson*, we reject defendant's argument that *Hudson* requires a conclusion that the driver's license revocation found in N.C.G.S. § 20-16.5 constitutes punishment for purposes of double jeopardy analysis under both the Double Jeopardy Clause of the United States Constitution and the Law of the Land Clause of the North Carolina Constitution.

Defendant argues that the rationale applied by this Court in *Evans* is inapplicable under the circumstances of his particular case because the delay of 135 days between his arrest and the license revocation did not serve the intended purposes of the statute. Nevertheless, we find dispositive additional language from *Hudson v. United States*, 522 U.S. 93, 139 L. Ed. 2d 450 (1997), overruling its earlier decision in *United States v. Halper*, 490 U.S. 435, 104 L. Ed. 2d 487 (1989). The *Halper* Court stated: "Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction *as applied in the individual case* serves the goals of punishment." *Halper*, 490 U.S. at 448, 104 L. Ed. 2d at 501 (emphasis added). In abrogation of this statement, the *Hudson* Court held:

> The analysis applied by the *Halper* Court deviated from our traditional double jeopardy doctrine in two key respects. . . . The second significant departure in *Halper* was the Court's decision to "asses[s] the character of the actual sanctions imposed," 490 U.S., at 447, rather than, as *Kennedy* demanded, evaluating the "statute on its face" to determine whether it provided for what amounted to a criminal sanction, 372 U.S., at 169.
>
> We believe that *Halper's* deviation from longstanding double jeopardy principles was ill considered. As subsequent cases have

> demonstrated, *Halper's* test for determining whether a particular sanction is "punitive," and thus subject to the strictures of the Double Jeopardy Clause, has proved unworkable. . . . Under *Halper's* method of analysis, a court must also look at the "sanction actually imposed" to determine whether the Double Jeopardy Clause is implicated. Thus, it will not be possible to determine whether the Double Jeopardy Clause is violated until a defendant has proceeded through a trial to judgment. But in those cases where the civil proceeding follows the criminal proceeding, this approach flies in the face of the notion that the Double Jeopardy Clause forbids the government from even "*attempting* a second time to punish criminally." *Helvering*, 303 U.S., at 399 (emphasis added).

Hudson, 522 U.S. at 101-02, 139 L. Ed. 2d at 460-61 (alteration in original) (footnote omitted). Accordingly, the characterization of a sanction as either civil or criminal is determined on the face of the statute and is not determined on an individual basis.

Although N.C.G.S. § 20-16.5 has been amended five times between the arrest at issue in *Evans*, which occurred in 1998, *Evans*, 145 N.C. App. at 325, 550 S.E.2d at 855, and defendant's arrest in this case, which occurred in 2004, the changes are minor and have little effect on the substance of the law. Defendant does not argue that any of the changes to the face of the statute transform the character of the sanction from civil to criminal, but rather, argues only that the length of time between his arrest and the license revocation counters the recognized principle behind the law that "[t]he safety of the impaired driver and other people using the state's highways depends upon *immediately* denying the impaired driver access to the public roads." *Henry v. Edmisten*, 315 N.C. 474, 494, 340 S.E.2d 720, 733 (1986) (emphasis added). In the absence of any argument that N.C.G.S. § 20-16.5 as written in 2004 differed in any material way from § 20-16.5 as written in 1998, we are not persuaded that this Court's reasoning in *Evans* should not be equally convincing in determining whether § 20-16.5 as amended in 2004 created a civil or criminal sanction. Accordingly, for the reasons stated in *Evans*, we conclude that defendant's license revocation in 2004 pursuant to N.C.G.S. § 20-16.5 was a civil remedy. Defendant's argument that his rights under the Double Jeopardy Clause of the United States Constitution were violated is overruled.

No error.

Judges WYNN and HUNTER concur.

CECELIA L. FORD, ADMINISTRATOR OF THE ESTATE OF WILLIE LEE FORD, JR., DECEASED, PLAINTIFF v. TRENT W. McCAIN, M.D., FORSYTH MEDICAL CENTER, INC., AND NOVANT HEALTH, INC., DEFENDANTS

No. COA07-2

(Filed 16 September 2008)

Medical Malpractice— wrongful death—Rule 9(j) certification—motion to dismiss—first action facially complied

The trial court erred by granting defendant's motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6), Rule 9(j), and the statute of limitations, plaintiff's refiled action in a wrongful death action alleging medical negligence after plaintiff took a voluntary dismissal under N.C.G.S. § 1A-1, Rule 41(a)(1), because: (1) the initial complaint facially complied with Rule 9(j) when it was filed prior to the expiration of the statute of limitations and contained a Rule 9(j) certification that precisely tracked the language in Rule 9(j)(2), including the requirement that plaintiff move for qualification of her expert under Rule 702(e); (2) there was no evidence that plaintiff's Rule 9(j) certification was factually insufficient when plaintiff's voluntary dismissal took place prior to any discovery establishing that this statement did not substantively comply with the rule and the trial court granted defendant's Rule 12(b)(6) motion with no evidence before the court at that time; (3) the question under Rule 9(j) is whether it was reasonably expected that the witness would qualify under Rule 702; (4) requiring a plaintiff to obtain a ruling on a Rule 9(j)(2) motion prior to taking a voluntary dismissal would impose an additional limitation on Rule 41(a)(1) not supported by the plain language of Rule 9(j) or any authority; (5) Rule 9(j)(2), by its terms, requires only that plaintiff file the motion, which plaintiff did in this case; and (6) plaintiff is not excused from the requirement that she demonstrate that she complied with Rule 9(j) when she included the certification in her initial complaint, and defendant may move for summary judgment dismissing plaintiff's claims under Rule

9(j) and expiration of the statute of limitations if discovery establishes that plaintiff's first certification had no factual basis.

Appeal by plaintiff from order entered 8 August 2006 by Judge Michael E. Helms in Forsyth County Superior Court. Heard in the Court of Appeals 20 September 2007.

Robert E. Probst for plaintiff-appellant.

Bennett & Guthrie, P.L.L.C., by Richard V. Bennett, Roberta B. King, and Jason P. Burton, for defendant-appellee Trent W. McCain, M.D.

GEER, Judge.

Plaintiff Cecelia L. Ford appeals from the grant of defendant Trent W. McCain's motion to dismiss pursuant to Rules 12(b)(6) and 9(j) of the North Carolina Rules of Civil Procedure and the statute of limitations. Defendants Forsyth Medical Center, Inc. and Novant Health, Inc. are not parties to this appeal. Plaintiff filed her initial complaint, including the certification required by Rule 9(j), prior to the running of the statute of limitations; subsequently filed a voluntary dismissal without prejudice under N.C.R. Civ. P. 41(a)(1); and then re-filed the action. Because the Rule 9(j) certification in the first complaint was facially valid, and defendant has not, therefore, at this stage in the proceedings established a violation of Rule 9(j), we reverse the order granting defendant's motion to dismiss.

Facts

After treatment at Forsyth Medical Center, Willie Lee Ford, Jr. died on 17 September 2002. On 16 September 2004, plaintiff, the administratrix of Mr. Ford's estate, filed a wrongful death action alleging medical negligence by four physicians, including defendant Dr. McCain; four nurses; Forsyth Medical Center; and Novant Health. The complaint included the following statement pursuant to Rule 9(j) of the Rules of Civil Procedure:

> 36. The medical care in this case has been reviewed by a person who is reasonably expected to qualify as a medical expert witness under the provisions of Rule 702 of the North Carolina Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care.
>
> However, since PLAINTIFF'S current medical expert witnesses may not be generally qualified under Rule 702 in that the

> PLAINTIFF'S expert witnesses are in a different specialty from the DEFENDANT physicians, PLAINTIFF will seek to have the expert qualified pursuant to a motion under Rule 702(e) of the North Carolina Rules of Evidence, and that such expert is willing to testify that the medical care received by PLAINTIFF'S INTESTATE did not comply with applicable standard of care.

At the conclusion of the complaint, counsel for plaintiff attached a motion asking that plaintiff's medical expert witnesses be qualified as medical expert witnesses under Rule 702(e) of the North Carolina Rules of Evidence "in that he or she may have a different medical specialty other than that of the individual defendant physicians." On 25 January 2005, plaintiff voluntarily dismissed her claims against all defendants other than Dr. McCain without prejudice. She voluntarily dismissed the claims against Dr. McCain without prejudice on 7 February 2005. At the time of the dismissals, each of the defendants had filed an answer, but the trial court had not ruled upon plaintiff's motion to have her expert witnesses qualified under Rule 702(e).

On 25 January 2006, represented by new counsel, plaintiff re-filed her claims naming only three defendants: Dr. McCain, Forsyth Medical Center, and Novant Health. In addition to answering the complaint, each of the defendants moved to dismiss the complaint under Rule 12(b)(6) on the grounds that plaintiff had failed to satisfy the requirements of Rule 9(j) in her first complaint and that the statute of limitations had since expired.

The trial court granted the motions to dismiss pursuant to Rules 9(j) and 12(b)(6) of the North Carolina Rules of Civil Procedure and N.C. Gen. Stat. § 1-53(4) (2005). The trial court noted that although plaintiff had indicated her intent to have her expert witness qualified under Rule 702(e) of the North Carolina Rules of Evidence, she did not calendar her motion prior to voluntarily dismissing her action without prejudice. The trial court then determined:

> At the time that she filed her Notices of Voluntary Dismissal Without Prejudice, dismissing all of the Defendant Physicians in the First Action, the Plaintiff had failed to properly certify that the medical care of the physician Defendants had been reviewed by a person reasonably expected to qualify as a medical expert witness, pursuant to Rule 9(j)(1), or to obtain a favorable ruling from the Court on her Rule 702(e) motion, as required by Rule 9(j)(2).

Since the second action with its Rule 9(j) certification was filed after the expiration of all applicable statutes of limitations, the trial court concluded that the action should be dismissed as to all defendants.

Plaintiff timely appealed this order. This Court has since allowed plaintiff's motion to dismiss the appeal as to Forsyth Medical Center and Novant Health. Dr. McCain is the sole remaining defendant.

Discussion

This appeal requires us to consider the interplay of Rules 9(j), 12(b)(6), and 41 of the Rules of Civil Procedure. The North Carolina appellate courts have not previously addressed the precise procedural scenario presented by this case.

Rule 9(j) provides:

> Any complaint alleging medical malpractice by a health care provider as defined in G.S. 90-21.11 in failing to comply with the applicable standard of care under G.S. 90-21.12 shall be dismissed unless:
>
> (1) The pleading specifically asserts that the medical care has been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care;
>
> (2) The pleading specifically asserts that the medical care has been reviewed by a person that the complainant will seek to have qualified as an expert witness by motion under Rule 702(e) of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care, and the motion is filed with the complaint; or
>
> (3) The pleading alleges facts establishing negligence under the existing common-law doctrine of res ipsa loquitur.

The rule allows a plaintiff to seek a 120-day extension of time to comply with its provisions. It further specifies that "[t]he plaintiff shall provide, at the request of the defendant, proof of compliance with this subsection through up to ten written interrogatories, the answers to which shall be verified by the expert required under this subsection." N.C.R. Civ. P. 9(j).

Under Rule 41(a)(1), a plaintiff may voluntarily dismiss an action without order of the court "at any time before the plaintiff rests his case." Further, "[i]f an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal . . . ." N.C.R. Civ. P. 41(a)(1). " '[I]n order for a timely filed complaint to toll the statute of limitations and provide the basis for a one-year "extension" by way of a Rule 41(a)(1) voluntary dismissal without prejudice, the complaint must conform in all respects to the rules of pleading.' " *Robinson v. Entwistle*, 132 N.C. App. 519, 522, 512 S.E.2d 438, 441 (quoting *Estrada v. Burnham*, 316 N.C. 318, 323, 341 S.E.2d 538, 542 (1986), *superseded by statute on other grounds as stated in Turner v. Duke Univ.*, 325 N.C. 152, 163, 381 S.E.2d 706, 712 (1989)), *disc. review denied*, 350 N.C. 595, 537 S.E.2d 482 (1999). Consequently, Rule 41(a)(1) is only available in an action where the original complaint complied with the "rules which govern its form and content prior to the expiration of the statute of limitations." *Robinson*, 132 N.C. App. at 523, 512 S.E.2d at 441.

It is well established that if a complaint is filed without a Rule 9(j) certification, Rule 9(j) mandates that the trial court grant a defendant's motion to dismiss. *Thigpen v. Ngo*, 355 N.C. 198, 203, 558 S.E.2d 162, 166 (2002). An amended complaint filed after the expiration of the statute of limitations cannot cure the omission if it does not specifically allege that the expert review occurred prior to the expiration of the statute of limitations. *Id.* at 204, 558 S.E.2d at 166.

Our appellate courts have also addressed the situation in which a Rule 41(a)(1) voluntary dismissal was taken after the filing of a complaint lacking any Rule 9(j) certification. The courts have held that if (1) the initial complaint does not contain a Rule 9(j) certification; (2) the required certification is not filed prior to the expiration of the statute of limitations and the 120-day extension permitted by Rule 9(j); and (3) the plaintiff takes a voluntary dismissal under Rule 41, then a re-filed complaint—even though containing a Rule 9(j) certification—must be dismissed for failure to state a claim for relief. *See Bass v. Durham County Hosp. Corp.*, 358 N.C. 144, 592 S.E.2d 687 (2004), *rev'g per curiam for reasons in dissenting opinion*, 158 N.C. App. 217, 223, 580 S.E.2d 738, 742 (2003) (holding trial court properly granted motion to dismiss when first complaint, filed on last day of 120-day extension granted under Rule 9(j), did not include Rule 9(j) certification; plaintiff filed amended complaint containing Rule 9(j)

certification after statute of limitations expired; plaintiff took voluntary dismissal pursuant to Rule 41(a)(1); and plaintiff re-filed action with Rule 9(j) certification within one year of dismissal); *Estate of Barksdale v. Duke Univ. Med. Ctr.*, 175 N.C. App. 102, 109, 623 S.E.2d 51, 56 (2005) (holding trial court properly granted motion to dismiss when first-filed complaint did not contain a Rule 9(j) certification, subsequent amended complaints did not include a Rule 9(j) certification, plaintiff dismissed action pursuant to Rule 41(a)(1), and plaintiff re-filed the action with Rule 9(j) certification within one year of dismissal, but after expiration of statute of limitations).[1]

Neither of these scenarios applies to this case. Here, the initial complaint filed prior to the expiration of the statute of limitations contained a Rule 9(j) certification that precisely tracked the language in Rule 9(j)(2), including the requirement that the plaintiff move for qualification of her expert under Rule 702(e). Defendant does not dispute that the initial complaint facially complied with Rule 9(j).

Nonetheless, it is also now well established that even when a complaint facially complies with Rule 9(j) by including a statement pursuant to Rule 9(j), if discovery subsequently establishes that the statement is not supported by the facts, then dismissal is likewise appropriate. Most recently, in *McGuire v. Riedle*, 190 N.C. App. 785, 788, 661 S.E.2d 754, 756 (2008), the plaintiff included a Rule 9(j) certification in his complaint identifying his treating surgeon as his Rule 9(j) expert, but, subsequently, plaintiff acknowledged in response to interrogatories that the surgeon's opinions were unknown, and the surgeon, during his deposition, stated that he had never reviewed the plaintiff's prior care, was not willing to testify about any alleged breach of the standard of care, and had never spoken with the plaintiff's attorneys about serving as an expert witness. Based on this evidence, this Court affirmed the trial court's dismissal pursuant to Rule 9(j) based on the rule's requirement that the expert be willing to tes-

1. We note that our Supreme Court, in *Brisson v. Santoriello*, 351 N.C. 589, 593, 528 S.E.2d 568, 570 (2000), initially held "plaintiffs' voluntary dismissal pursuant to N.C. R. Civ. P. 41(a)(1) effectively extended the statute of limitations by allowing plaintiffs to refile their complaint against defendants within one year, even though the original complaint lacked a Rule 9(j) certification." The Court subsequently, in *Bass*, 358 N.C. at 144, 592 S.E.2d at 687, reversed this Court for the reasons in the dissenting opinion. The dissenting opinion adopted by the Supreme Court concluded that *Brisson* was limited to cases in which a "proposed amended complaint with 9(j) certification . . . was filed within 120 days after the statute of limitations expired, and would have been timely filed if plaintiffs had requested and received the 120-day extension." 158 N.C. App. at 224, 580 S.E.2d at 743.

tify and the record being "equally clear that [the surgeon] was not willing to do so." *Id.* at 788, 661 S.E.2d at 757.

This analysis has also been applied when the original action was voluntarily dismissed under Rule 41(a). In *Robinson*, 132 N.C. App. at 520, 512 S.E.2d at 439, although the initial complaint did not contain a Rule 9(j) certification, the plaintiff amended her complaint to add the certification prior to the defendants' filing responsive pleadings and then voluntarily dismissed the action pursuant to Rule 41(a)(1). After she re-filed the action, the trial court denied defendants' motions to dismiss "finding that the second complaint complied with the requirements set out in [Rule 9(j)]." *Robinson*, 132 N.C. App. at 520, 512 S.E.2d at 439. The trial court, however, granted the defendants' motions for summary judgment based on the plaintiff's failure to comply with Rule 9(j) prior to the running of the statute of limitations. *Id.*

This Court affirmed the grant of summary judgment, explaining:

> In this case, although the original complaint was timely filed, both the original complaint and the amendment failed to comply with Rule 9(j). The amendment contained an allegation that Dr. Read had reviewed the records and was prepared to testify; however, plaintiff later admitted in discovery that Dr. Read would not qualify as an expert under Rule 702(b)(2) because he had not practiced as an emergency physician during the year prior to the occurrence which is the basis of this action. Because plaintiff admitted the allegation in the amendment was ineffective to meet the requirements set out in Rule 9(j), that amendment cannot relate back to the time of the original filing to toll the statute of limitations. Thus, a voluntary dismissal without prejudice which ordinarily would allow for another year for re-filing was unavailable to plaintiff in this case.
>
> For these reasons, we must affirm the trial court's granting of summary judgment in favor of the defendants in that this action was not properly filed before the statute of limitations expired.

Id. at 523, 512 S.E.2d at 441 (internal citation omitted). *See also Winebarger v. Peterson*, 182 N.C. App. 510, 514, 642 S.E.2d 544, 547 (2007) (holding trial court properly granted summary judgment in action re-filed after Rule 41(a)(1) voluntary dismissal when, although plaintiff's initial complaint included required Rule 9(j) certification, discovery established that plaintiff had not contacted Rule 9(j) expert until after complaint was filed and after statute of limitations expired).

This appeal also does not fall within this category of cases. The initial complaint, filed within the statute of limitations, facially complied with Rule 9(j) by containing a statement and motion consistent with Rule 9(j)(2). Plaintiff's voluntary dismissal took place prior to any discovery establishing that this statement did not substantively comply with the Rule. Further, because the trial court granted defendant's Rule 12(b)(6) motion, no evidence was before the court, at that time, demonstrating that the Rule 9(j) statement in the first complaint lacked evidence to support it. Thus, the record before this Court contains no evidence that plaintiff's Rule 9(j) certification was factually insufficient.

Defendant points to the fact that plaintiff's re-filed action did not rely upon Rule 9(j)(2) and qualification under Rule 702(e), but rather referenced the standard in Rule 9(j)(1). Defendant contends that the second certification indicated that plaintiff did not reasonably expect her witness for the first certification to qualify as an expert under Rule 702(e). We do not believe that such an inference necessarily arises from the second certification. The proposed inference is, therefore, contrary to the standard of review for Rule 12(b)(6) orders: "A motion to dismiss for failure to state a claim upon which relief may be granted under G.S. 1A-1, Rule 12(b)(6) is addressed to whether the facts alleged in the complaint, *when viewed in the light most favorable to the plaintiffs*, give rise to a claim for relief on any theory." *Ford v. Peaches Entm't Corp.*, 83 N.C. App. 155, 156, 349 S.E.2d 82, 83 (1986) (emphasis added), *disc. review denied*, 318 N.C. 694, 351 S.E.2d 746 (1987). *See also Trapp v. Maccioli*, 129 N.C. App. 237, 241, 497 S.E.2d 708, 711 ("The disqualification of a Rule 9(j) witness under Rule 702 does not necessarily require the dismissal of the pleadings. The question under Rule 9(j) instead is whether it was 'reasonably expected' that the witness would qualify under Rule 702. In other words, were the facts and circumstances known or those which should have been known to the pleader such as to cause a reasonable person to believe that the witness would qualify as an expert under Rule 702."), *disc. review denied*, 348 N.C. 509, 510 S.E.2d 672 (1998).

Finally, the trial court, in support of its order dismissing the action pursuant to Rule 12(b)(6), reasoned:

> At the time that she filed her Notices of Voluntary Dismissal Without Prejudice, dismissing all of the Defendant Physicians in the First Action, the Plaintiff had failed to properly certify that the medical care of the physician Defendants had been reviewed by a person reasonably expected to qualify as a medical expert

> witness, pursuant to Rule 9(j)(1), *or to obtain a favorable ruling from the Court on her Rule 702(e) motion, as required by Rule 9(j)(2).*

(Emphasis added.) According to the trial court and defendant, plaintiff cannot be deemed to have complied with Rule 9(j) unless she obtained a favorable ruling on her Rule 702(e) motion prior to taking a voluntary dismissal under Rule 41(a)(1). This approach cannot be reconciled with Rule 41(a)(1).

Our Supreme Court held in *Brisson*, 351 N.C. at 595, 528 S.E.2d at 571, that "we must look to our Rules of Civil Procedure and construe Rule 9(j) along with Rule 41." The Court observed further:

> Although Rule 9(j) clearly requires a complainant of a medical malpractice action to attach to the complaint specific verifications regarding an expert witness, the rule does not expressly preclude such complainant's right to utilize a Rule 41(a)(1) voluntary dismissal. Had the legislature intended to prohibit plaintiffs in medical malpractice actions from taking voluntary dismissals where their complaint did not include a Rule 9(j) certification, then it could have made such intention explicit.

Id. The Court then explained the purpose of Rule 41(a)(1):

> The purpose of our long-standing rule allowing a plaintiff to take a voluntary dismissal and refile the claim within one year even though the statute of limitations has run subsequent to a plaintiff's filing of the original complaint is to provide a one-time opportunity where the plaintiff, for whatever reason, does not want to continue the suit. . . . *The only limitations are that the dismissal not be done in bad faith and that it be done prior to a trial court's ruling dismissing plaintiff's claim or otherwise ruling against plaintiff at any time prior to plaintiff resting his or her case at trial.*

Id. at 597, 528 S.E.2d at 573 (emphasis added).[2]

Requiring a plaintiff to obtain a ruling on a Rule 9(j)(2) motion prior to taking a voluntary dismissal would impose an additional lim-

2. *Brisson* has not been overruled by the Supreme Court, although it has been distinguished on grounds not pertinent to this analysis. *See Bass*, 158 N.C. App. at 224, 580 S.E.2d at 743 (Tyson, J., dissenting) (reconciling *Thigpen* and *Brisson* and distinguishing *Brisson*), *adopted per curiam*, 358 N.C. 144, 592 S.E.2d 687 (2004); *Thigpen*, 355 N.C. at 201, 558 S.E.2d at 164 ("We find the facts in *Brisson* distinguishable from those in the present case.").

itation on Rule 41(a)(1) not supported by the plain language of 9(j) or any authority. *See Brandenburg Land Co. v. Champion Int'l Corp.*, 107 N.C. App. 102, 103, 418 S.E.2d 526, 527 (1992) ("A plaintiff may take a voluntary dismissal at any time prior to resting his or her case."); *Whitehurst v. Virginia Dare Transp. Co.*, 19 N.C. App. 352, 355, 198 S.E.2d 741, 743 (1973) ("The major thrust of Rule 41(a)(1) is to limit the time within which a plaintiff has *the absolute right* to dismiss his action without prejudice, which period is now any time before he rests his case." (emphasis added)). Rule 9(j)(2), by its terms, requires only that the plaintiff file the motion, which, in this case, plaintiff did. We cannot reconcile the trial court's requirement that plaintiff also obtain a ruling on her Rule 702(e) motion with the "absolute right" to voluntarily dismiss an action at any time before a plaintiff rests his or her case. *Whitehurst*, 19 N.C. App. at 355, 198 S.E.2d at 743.

Permitting such a voluntary dismissal does not interfere with the policies underlying Rule 9(j). Plaintiff is not excused from the requirement that she demonstrate she complied with Rule 9(j) when she included the certification in her initial complaint. If discovery establishes that plaintiff's first certification had no factual basis, then defendant may move for summary judgment dismissing plaintiff's claims under Rule 9(j) and expiration of the statute of limitations, as was done in *Robinson*, 132 N.C. App. at 523, 512 S.E.2d at 441. *See also Staley v. Lingerfelt*, 134 N.C. App. 294, 298, 517 S.E.2d 392, 395 (affirming grant of summary judgment on statute of limitations grounds in action re-filed after voluntary dismissal, noting that Rule 41(a)(1) "may not be used to avoid the statute of limitations by taking a dismissal in situations where the initial action was already barred by the statute of limitations"), *disc. review denied*, 351 N.C. 109, 540 S.E.2d 367 (1999).

In sum, we hold that plaintiff's certification in the first action facially complied with Rule 9(j), and she was, therefore, entitled to take a voluntary dismissal under Rule 41(a)(1) and re-file her claims. No basis exists for dismissal of the re-filed action pursuant to Rule 12(b)(6). While defendant may be able to show on a motion for summary judgment that he is entitled to dismissal of plaintiff's claims for failure to comply with Rule 9(j), the record at the Rule 12(b)(6) stage does not support an order of dismissal. We, therefore, reverse.

Reversed.

Judges BRYANT and STEELMAN concur.

STATE OF NORTH CAROLINA v. TOMMY WAYNE MILLIGAN

No. COA08-151

(Filed 16 September 2008)

1. Evidence— prosecutor's notes—informal conversation with victim—not allowed for impeachment of victim—cross-examination on substance allowed

The trial court did not err by prohibiting defendant from impeaching a breaking and entering victim with the prosecutor's notes of an informal discussion that were not signed or adopted in any way by the victim. A document is not a statement for purpose of examination, cross-examination, or admissions at trial simply because it is a statement and discoverable under N.C.G.S. § 15A-903. The court here allowed cross-examination of the victim about statements she made to the prosecutor, but did not allow the prosecutor's notes to be placed before the jury and did not allow the prosecutor to be called as a witness to verify the notes.

2. Burglary and Unlawful Breaking or Entering— sufficiency of evidence—tool shed

There was sufficient evidence of breaking or entering and larceny by the former employee of a siding company who was accused of breaking into a shed where equipment was stored and taking equipment therefrom.

3. Motor Vehicles— unauthorized use—sufficiency of evidence

There was sufficient evidence of unauthorized use of a motor vehicle by the former employee of a siding company who refused to return a truck after the business closed. N.C.G.S. § 14-72.2

Appeal by defendant from judgment entered 15 August 2007 by Judge Ola M. Lewis in Brunswick County Superior Court. Heard in the Court of Appeals 21 August 2008.

Attorney General Roy A. Cooper III, by Assistant Attorney General Harriet F. Worley, for the State.

Michelle FormyDuval Lynch, withdrew as counsel and the Office of Appellate Defender appointed substitute counsel, Kristen L. Todd for defendant-appellant.

STEELMAN, Judge.

The trial court's refusal to allow the prosecutor's notes into evidence was not an abuse of discretion and did not constitute error. The trial court properly denied defendant's motions to dismiss each of the charges.

I. Factual and Procedural Background

Tommy Wayne Milligan (defendant) was employed by Cameo Vaughn (Vaughn) as the *de facto* foreman of her vinyl siding business ("the company"). The company owned a burgundy Chevy Silverado truck with black ladder racks installed on top and a distinctive "Speak Up For Jesus" sticker on the rear bumper. Defendant was allowed for a period to drive the company truck home in order to provide rides for workers to and from job sites.

On 13 January 2006, Vaughn decided to shut down the business and so informed the company's employees. At the request of defendant, he was allowed to keep the truck and a few pieces of equipment for a limited time in order to finish a side job. After the agreed upon time period had elapsed, Vaughn repeatedly contacted defendant requesting the return of the truck and equipment. In March 2006, defendant informed Vaughn that he did not intend to return the truck or equipment because he felt she owed him money. Vaughn denied that she owed defendant any money.

On 29 March 2006, Vaughn was driving on Highway 17 towards her home when she observed the company truck being driven in the opposite direction. She identified the truck by its make, color, and distinctive ladder rack and bumper sticker. Upon arriving home, she discovered the door to her storage shed was open and several pieces of equipment used in the siding business were missing. Two of Vaughn's neighbors had seen a truck matching the description of the company truck in Vaughn's driveway earlier that day. One of these witnesses saw a man matching defendant's description leaning against the truck. Vaughn called the police who responded and took a report.

Several days later, on 4 April 2006, Detectives Marty Folding and Steve Mason went to defendant's home to serve the defendant with a warrant for unauthorized use of the company truck and to retrieve the truck. When they arrived at defendant's home, they observed a car in the driveway, the license plate of which was registered to the com-

pany truck. The company truck was located elsewhere on the property and had no license tag.

On 23 October 2006, Assistant District Attorney Brooke Leland (Leland) met with Vaughn and informally discussed the history and facts of the case. During this meeting, Leland took some handwritten notes which were never reviewed or adopted by Vaughn. Responding to defendant's requests for discovery of witness statements, Leland typed her handwritten notes into a narrative form and provided them to defense counsel with a notation that they may contain factual inaccuracies.

On 7 June 2006, defendant was indicted on charges of unauthorized use of a motor vehicle, felonious breaking or entering, and felonious larceny. The case was tried at the 14 August 2007 criminal session of Superior Court of Brunswick County, and the jury found defendant guilty of all charges. Defendant received consecutive active sentences of 10 to 12 months for the two felony charges, and a concurrent sentence of 120 days for the unauthorized use of a motor vehicle charge. Defendant appeals.

II. Leland's Notes

[1] In his first argument, defendant contends that the trial court erred in prohibiting defendant from using Leland's notes to impeach Vaughn. We disagree.

During the trial, counsel for defendant began a line of questioning during his cross-examination of Vaughn based on Leland's notes. Defense counsel attempted to approach the witness to show her Leland's notes. At that point the State objected. The court then heard arguments from both sides regarding the use of the notes to impeach the witness. The court ruled as follows:

> "With regard to the statement; sir, I am of the opinion that you [defense counsel] can ask the prosecuting witness what, if anything, she told the prosecutor with regards to this case. This statement has not been attested to by the witness, nor was it made in the presence of any law enforcement officer; but I am of the opinion that you can ask her, 'Did you tell Ms. Leland you were on Highway 87? Did you tell Ms. Leland, you know, that you looked in the rearview mirror? As opposed to turning around and seeing the bumper sticker?' But with regard to being able to approach her, have her read the statement and things like that; I don't think that that is appropriate. But you can certainly cross

> examine her, sir; as to anything she may have said to the D.A. and then Ms. Leland will have the opportunity on redirect to clarify anything she wants to clarify."

Effective 1 October 2004, the General Assembly amended the provisions of N.C. Gen. Stat. § 15A-903.[1] This version of the statute was interpreted in the case of *State v. Shannon*, 182 N.C. App. 350, 642 S.E.2d 516 (2007), as follows:

> The plain, unambiguous meaning of this requirement is that "statements" need not be signed or adopted by a witness before being *subject to discovery*.

Id. at 359, 642 S.E.2d at 523 (emphasis added). Leland's notes of her conversation with Vaughn thus constituted a "statement" of Vaughn, discoverable under N.C. Gen. Stat. § 15A-903.

Defendant argues, without citation of authority, that since Leland's notes constituted a "statement" for discovery purposes under N.C. Gen. Stat. § 15A-903, he was entitled to use them to cross-examine the witness and to introduce them at trial. We hold that simply because a document is a statement and discoverable under N.C. Gen. Stat. § 15A-903 does not mean that it is a statement of a witness for purposes of examination, cross-examination, or admissibility at trial. *See State v. Jackson*, 340 N.C. 301, 315-16, 457 S.E.2d 862, 870-71 (1995) (exclusion of pipe did not affect defendant's right of confrontation because thorough cross-examination was allowed).

Defendant then argues that under the cases of *State v. Whitley*, 311 N.C. 656, 319 S.E.2d 584 (1984), and *State v. Larrimore*, 340 N.C. 110, 456 S.E.2d 789 (1995), he was entitled to use Leland's notes as extrinsic evidence to impeach Vaughn's testimony. We hold that these cases are not controlling. In *Whitley*, a witness, Betty Whitley, testified at trial for the defendant. On rebuttal, the State was permitted to call an officer, over the objection of defendant, who read into evidence Betty Whitley's prior statement to the officer. On appeal, defendant contended that the prior statement dealt with a collateral matter and should not have been admitted. The Supreme Court disagreed. The Court held that the prior statement was corroborative of Whitley's earlier testimony, and not collateral. The Court further held

---

1. On 28 July 2007, Session Law 2007-377 was enacted amending N.C. Gen. Stat. § 15A-903 "to clarify that a witness's oral statements to a prosecuting attorney do not need to be recorded unless the statement contains significantly new or different information from a prior statement. . . ." 2007 Session Law 377. This amendment was effective on 19 August 2007, and does not apply to this case.

that even if the testimony was collateral in nature, defendant failed to demonstrate prejudice under N.C. Gen. Stat. § 15A-1443(a).

In *Larrimore*, the State sought to introduce a defense witness' testimony at a prior trial as part of its evidence on rebuttal. On appeal, defendant contended that his confrontation rights were violated by the State not recalling the witness. Relying upon *Whitley*, the Supreme Court held that the trial court did not err in allowing the extrinsic evidence of the prior testimony to impeach the witness for the defendant.

In the instant case, the issues presented are whether the trial court erred in denying defendant's request to place the prosecutor's actual notes before the jury and in refusing to allow defendant to call the prosecutor as a witness to verify the contents of the notes. Neither of these issues was before the Supreme Court in *Whitley* or *Larrimore*. Rather, in those cases, the Supreme Court held that the trial court did not err in allowing the prior statements into evidence.

Since the prosecutor's notes were not signed or adopted in any other manner by the witness, the trial court did not err in its rulings. Further, we hold that Judge Lewis' ruling, set forth in its entirety above, afforded defendant a full, fair, and comprehensive opportunity to cross-examine Vaughn concerning any statements that she made to Leland. The control of the examination of witnesses at trial rests in the sound discretion of the trial court. *State v. Goldman*, 311 N.C. 338, 350, 317 S.E.2d 361, 368 (1984). We discern no abuse of that discretion by the trial court in this case.

Finally, defendant's assignments of error assert that the trial court committed constitutional error. However, we note that defendant makes no argument in his brief asserting that any error was constitutional. Such assignment of error is deemed abandoned. N.C.R. App. P. 28(b)(6). Further, there was no assertion of any violation of constitutional rights at trial, and as such, it was not preserved for our review. N.C.R. App. P. 10(b)(1).

This argument is without merit.

III. Motion to Dismiss

In his second argument, defendant contends that the trial court erred in denying his motions to dismiss. We disagree.

A. Standard of Review

Upon a motion to dismiss in a criminal trial, the 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. If so, the motion is properly denied." *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993) (*quoting State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980) (citations omitted)). The court must consider all "the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Morgan*, 359 N.C. 131, 161, 604 S.E.2d 886, 904 (2004), *cert. denied*, 546 U.S. 830, 163 L. Ed. 2d 79 (2005) (*citing State v. Gladden*, 315 N.C. 398, 430, 340 S.E.2d 673, 693 (1986) (citations omitted)). "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. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988) (citing *State v. Stephens*, 244 N.C. 380, 384, 93 S.E.2d 431, 433 (1956)).

B. Breaking or Entering and Larceny

[2] With respect to the instant case, in order for the charge of breaking or entering to be submitted to the jury, the State must present substantial evidence that defendant either broke into or entered into Vaughn's storage building with the intent to commit a felony. N.C. Gen. Stat. § 14-54. The charge of felonious larceny requires that the State prove that the defendant took property from the victim either with a value of more than $1,000 or after a breaking or entering. N.C. Gen. Stat. § 14-72.

In cases of breaking or entering and larceny, the doctrine of recent possession can be applied when it is shown that stolen property was found in the defendant's possession soon after it was stolen and under circumstances that make it unlikely that the defendant obtained possession honestly. "When the doctrine of recent possession applies in a particular case, it suffices to repel a motion for nonsuit and defendant's guilt or innocence becomes a jury question." *State v. Maines*, 301 N.C. 669, 674, 273 S.E.2d 289, 293 (1981).

Evidence was presented, which, in the light most favorable to the State, showed that the shed was kept locked to prevent unauthorized access and theft. A man matching defendant's description was seen leaning against the company truck, which was known to be in defendant's possession on the date of the larceny. The truck and the man

were seen outside the shed while the shed door was partway open. Later that same evening Vaughn discovered and reported that the storage shed had been broken into and equipment was stolen. The company truck and at least some of the equipment stolen from the storage building were recovered a few days later at defendant's residence. The trial court did not err in denying defendant's motion to dismiss the charges of breaking or entering and larceny.

C. Unauthorized Use of a Motor Vehicle

[3] In the instant case, the charge of unauthorized use of a motor vehicle required that the state show that the defendant willfully took or operated the company truck without the owner's consent and knowing he did not have the owner's consent. N.C. Gen. Stat. § 14-72.2 (2007).

The defendant was the last person to have possession and control of the truck. He had the truck in his sole possession for nearly a month between the time he last refused to return the truck to Vaughn and the events of 29 March 2006. On the day of the larceny, the company truck was observed at Vaughn's shed accompanied by a man matching defendant's description. The same truck was recovered several days later at defendant's residence. Taken in the light most favorable to the State, a jury could reasonably conclude that the man who drove the truck to Vaughn's shed and removed her property was the defendant. The trial court did not err in denying defendant's motion to dismiss.

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 GEER and STEPHENS concur.

STATE OF NORTH CAROLINA v. BORN MURRAY

No. COA07-1555

(Filed 16 September 2008)

Search and Seizure— traffic stop—investigatory—no particularized suspicion

Evidence of cocaine found after an investigatory traffic stop should have been suppressed where the stop was based only on the officer's unparticularized suspicion or hunch and did not meet the minimal level of objective justification necessary for an investigatory traffic stop.

Appeal by defendant from judgment entered 13 September 2007 by Judge Susan C. Taylor in Superior Court, Cabarrus County. Heard in the Court of Appeals 18 August 2008.

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

Roderick M. Wright, Jr., for defendant-appellant.

WYNN, Judge.

As held by our Supreme Court, "[a]n investigatory stop must be justified by a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity."[1] In the instant case, the law enforcement officer who initiated the investigatory stop of Defendant Born Murray testified during *voir dire* examination that he had no reason to believe that Defendant was engaged in any unlawful activity at the time of the stop. Accordingly, we must conclude that the trial court erred in denying Defendant's motion to suppress evidence gathered pursuant to the unlawful stop.

At approximately 3:41 a.m. on the morning of 26 October 2006, Officer Todd Arthur of the Concord Police Department was performing a property check in the area of the Motorsports Industrial Park. This activity entailed patrolling the main road and checking the buildings and parking lots in the area as part of a "problem oriented policing project" begun in January 2006 following reports of break-ins of vehicles and businesses in the Park. As Officer Arthur came around a

1. *State v. Campbell*, 359 N.C. 644, 664, 617 S.E.2d 1, 14 (2005) (internal quotations omitted).

curve on the main road, he "passed a vehicle coming out of the area," which he thought was "kind of weird," as he "hadn't seen the vehicle in any of [his] earlier property checks around the businesses." He decided to turn around and pull behind the vehicle to "run its license plate and just see if maybe it was a local vehicle."

Officer Arthur conceded that the vehicle was not violating any traffic laws, was not trespassing, speeding, or making any erratic movements, and was on a public street. Moreover, his check of the license plate showed that the vehicle was not stolen and was in fact a rental vehicle from nearby Charlotte. Nevertheless, at that point, Officer Arthur "decided to go ahead and do an investigatory traffic stop on [the vehicle] to find out what they were doing in that location."

When Officer Arthur approached the vehicle, he "immediately detected a strong odor of burnt marijuana coming from inside." He then informed the driver why he had stopped the vehicle and asked for his driver's license and the rental agreement. The driver responded that he and Defendant, the passenger, were actually lost and were trying to get back to Highway 49. Officer Arthur gave them directions to get back to the highway before returning to his own vehicle to check the license and rental agreement. Due to the smell of marijuana, he then called for additional officers to come to the scene. He also learned that the driver's license had been suspended for his failure to appear on several different charges in Mecklenburg County courts. Additionally, the vehicle was rented to a female, with her name listed as the only authorized driver on the agreement, but no female was in the vehicle. When Officer Arthur contacted the rental company to advise them that he had stopped one of their vehicles without the renter herself in the vehicle, they requested that Officer Arthur have the vehicle towed.

After two more officers, including a canine officer, arrived on the scene, Officer Arthur approached the vehicle again and asked the driver if he was aware that his license had been suspended. He informed the driver that the rental company wanted to have the vehicle towed and further advised him that he had smelled marijuana coming from the vehicle. Officer Arthur asked the driver to step outside the vehicle; after getting consent to search the driver, he found nothing on him, although the driver admitted to smoking a marijuana cigarette prior to being stopped by Officer Arthur. At the same time, Officer Michael Fitzgerald went to the passenger side of the vehicle and asked Defendant to step out; when he consented to a search of

his person, Officer Fitzgerald found "a small off-white chunk of white material which [he] believed to be crack cocaine or cocaine base" in Defendant's right rear pocket. Officer Fitzgerald testified that Defendant then "made the spontaneous statement that, 'S—, I forgot I had that.' " A field test kit showed that the substance found in Defendant's pocket was cocaine base, and Defendant was arrested for felony possession of cocaine.

At trial, Defendant moved to suppress the evidence gathered by the police, namely, the cocaine found in his pocket, on the grounds that Officer Arthur did not have a reasonable suspicion sufficient to stop the vehicle, and the subsequent search was therefore unlawful. However, the trial court found that Officer Arthur did have the requisite "minimal level of objective justification" to form a reasonable suspicion of unlawful activity, based on the totality of the circumstances, including the prior break-ins of automobiles and businesses in the Motorsports Industrial Park, the late hour of the stop, the fact that the businesses were closed at that time and there were no residences located there, and Officer Arthur's observation that the vehicle had not previously been parked at one of the businesses.

Following the denial of Defendant's motion to suppress, he pled guilty to felony possession of cocaine and received a suspended sentence of six to eight months in prison, as well as supervised probation for thirty months. Defendant now appeals the denial of his motion to suppress, specifically arguing that the police lacked a reasonable suspicion sufficient to stop the vehicle in question, such that any subsequent search of the driver or Defendant was unlawful. We agree.

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

Our federal and state constitutions protect individuals "against unreasonable searches and seizures." U.S. Const. amend. IV; N.C.

Const. art. I, § 20. A traffic stop is a seizure "even though the purpose of the stop is limited and the resulting detention quite brief." *Delaware v. Prouse*, 440 U.S. 648, 653, 59 L. Ed. 2d 660, 667 (1979). Nevertheless, a traffic stop is generally constitutional if the police officer has a "reasonable, articulable suspicion that criminal activity is afoot." *Illinois v. Wardlow*, 528 U.S. 119, 123, 145 L. Ed. 2d 570, 576 (2000) (citing *Terry v. Ohio*, 392 U.S. 1, 30, 20 L. Ed. 2d 889, 911 (1968); *see also State v. Barnard*, 362 N.C. 244, 246, 658 S.E.2d 643, 645 (2008); *State v. Wilson*, 155 N.C. App. 89, 94-95, 574 S.E.2d 93, 97-98 (2002) (outlining the different standard for a stop based on an observed traffic violation, governed by probable cause, and that for a stop based on the "suspicion that a traffic violation is being committed, but which can only be verified by stopping the vehicle," which must be based on a reasonable suspicion), *disc. review denied*, 356 N.C. 693, 579 S.E.2d 98, *cert. denied*, 540 U.S. 843, 157 L. Ed. 2d 78 (2003).

As held by our state Supreme Court:

> Only unreasonable investigatory stops are unconstitutional. An investigatory stop must be justified by a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity. A court must consider the totality of the circumstances—the whole picture—in determining whether a reasonable suspicion to make an investigatory stop exists. The stop must be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training. The only requirement is a minimal level of objective justification, something more than an unparticularized suspicion or hunch.

State v. Campbell, 359 N.C. 644, 664, 617 S.E.2d 1, 14 (2005) (internal citations and quotations omitted). Thus, "[r]easonable suspicion is a 'less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence.' " *Barnard*, 362 N.C. at 247, 658 S.E.2d at 645 (quoting *Wardlow*, 528 U.S. at 123, 145 L. Ed. 2d at 576) (citation omitted). Nevertheless, the requisite degree of suspicion must be high enough "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." *See Brown v. Texas*, 443 U.S. 47, 51, 61 L. Ed. 2d 357, 362 (1979).

Here, Defendant does not challenge any of the trial court's findings of fact, but only the conclusion of law that the totality of the circumstances showed that Officer Arthur had a reasonable suspicion of criminal activity sufficient to justify his investigatory stop of the vehicle in which Defendant was a passenger. As such, we are bound by the trial court's findings of fact. *State v. Roberson*, 163 N.C. App. 129, 132, 592 S.E.2d 733, 735-36, *disc. review denied*, 358 N.C. 240, 594 S.E.2d 199 (2004). However, we agree with Defendant that the trial court's findings do not support its conclusion of law that Officer Arthur had a reasonable suspicion sufficient to justify stopping the vehicle in question.

As Officer Arthur testified at trial, the vehicle in which Defendant was a passenger was not violating any traffic laws at the time that Officer Arthur observed it on Motorsports Drive. Although his patrol of the area was part of increased policing due to past break-ins, Officer Arthur had seen no indication that night of any damage to vehicles or businesses in the Park; he stated on cross examination that he "hadn't checked all the businesses yet" and stopped the vehicle because he "wanted to make sure there wasn't anything illegal that had tooken [sic] place prior to [his] observing the vehicle."

When asked if the vehicle was acting any differently than other cars Officer Arthur had stopped in the past, which he had determined were not engaged in any unlawful activity, Officer Arthur answered that the vehicle "was just leaving the area" and was not doing anything different. More significantly, the following exchange took place during Officer Arthur's cross examination:

> [Defense counsel] But you had no reason to believe that this vehicle or any of the occupants in this vehicle had been engaged in any unlawful activity.
>
> [Officer Arthur] No, sir. *Not at that time.*
>
> [Defense counsel] You were basically—You were stopping them to find out if that was a possibility?
>
> [Officer Arthur] Yes, sir.

(Emphasis added). Officer Arthur confirmed that he had not seen the vehicle leaving one of the business's parking lots, that the vehicle was not trespassing but was on a public street, obeying all traffic laws, and that his check of the license plate showed no irregularities.

Thus, by his own admission, at the time Officer Arthur stopped the vehicle, he had "no reason to believe" that its occupants were engaged in any unlawful activity. Likewise, the trial court noted in its findings of fact that Officer Arthur "had no suspicion that illegal activity had occurred" at the time of the stop. Officer Arthur never articulated any specific facts about the vehicle itself to justify the stop; instead, all of the facts relied on by the trial court in its conclusions of law were general to the area, namely, the "break-ins of property at Motorsports Industrial Park . . . the businesses were closed at this hour . . . no residences were located there . . . this was in the early hours of the morning," and would justify the stop of *any* vehicle there. *Cf. State v. Watkins*, 337 N.C. 437, 442-43, 446 S.E.2d 67, 70-71 (1994) (finding reasonable suspicion based on the late-night hour of the stop, a car moving without lights in the parking lot of a closed business, the generally rural nature of the area, and a tip that a "suspicious vehicle" had been seen in that location); *State v. Fox*, 58 N.C. App. 692, 695, 294 S.E.2d 410, 412-13 (1982) (reasonable suspicion based on the very early morning hour, the location on a dead-end street with locked businesses in an area with a high incidence of property crime, the appearance of the driver contrasted with the nature of the vehicle, the driver's apparent attempt to avoid the officer's gaze, and the officer's belief that one of the businesses had been broken into that same night), *aff'd per curiam*, 307 N.C. 460, 298 S.E.2d 388 (1983); *State v. Tillett*, 50 N.C. App. 520, 521-24, 274 S.E.2d 361, 362-64 (reasonable suspicion based on late hour and bad weather at time of stop, location on one-lane dirt road in "heavily wooded, seasonably unoccupied" area, reports of "firelighting" deer, and the fact that officer did not observe an inspection sticker on the vehicle), *appeal dismissed*, 302 N.C. 633, 280 S.E.2d 448 (1981). Indeed, the trial court found that Officer Arthur "had found no broken glass, lights on or other suspicious circumstances at any" of the businesses he had checked, to suggest that there had been a break-in that night.

Accordingly, we hold that the trial court's conclusion of law that Officer Arthur's stop of the vehicle in question "was justified by a reasonable suspicion based on objective facts" was erroneous, given that it was based in part on a finding that Officer Arthur "had *no suspicion* that illegal activity had occurred" when he stopped the vehicle. (Emphasis added). Officer Arthur's stop of the vehicle was based only on his "unparticularized suspicion or hunch" and does not meet the minimal level of objective justification necessary for an investigatory traffic stop. *See Campbell*, 359 N.C. at 664, 617 S.E.2d at 14 (internal citations and quotations omitted). To hold otherwise

would make any individual in the Motorsports Industrial Park "subject to arbitrary invasions solely at the unfettered discretion of officers in the field." *Brown*, 443 U.S. at 51, 61 L. Ed. 2d at 362. Therefore, we reverse the denial of Defendant's motion to suppress and remand this case to the trial court for further proceedings.

Reversed and remanded.

Chief Judge MARTIN and Judge HUNTER concur.

STATE OF NORTH CAROLINA v. CARLOS FITZGERALD SMITH

No. COA08-21

(Filed 16 September 2008)

1. Search and Seizure— traffic stop—warrantless search—motion to suppress—sufficiency of evidence—odor of marijuana

The trial court did not err in a possession of a firearm by a felon case by denying defendant's motion to suppress evidence obtained following a stop of his vehicle because: (1) reasonable suspicion is the necessary standard for traffic stops regardless of whether the traffic violation was readily observed or merely suspected; (2) based on the objective facts and the totality of circumstances, an officer possessed reasonable suspicion to believe that defendant was operating his vehicle with an improper registration tag; and (3) probable cause existed for a warrantless search of the vehicle when the officer detected the odor of marijuana emanating from defendant's vehicle as he approached it.

2. Firearms and Other Weapons— possession of firearm by felon—sufficiency of evidence—constructive possession

The trial court did not err by denying defendant's motion to dismiss the charge of possession of a firearm by a felon, even though defendant contends there was insufficient evidence of defendant's constructive possession of the handgun, because the State presented sufficient evidence tending to show that: (1) the handgun was found wrapped in a man's jacket in the cargo area of a truck driven and owned by defendant; (2) defendant had exclusive control of the vehicle; (3) the cargo area of the vehicle

contained other objects owned by defendant; and (4) defendant stated everything in the cargo area belonged to him.

Appeal by defendant from judgments entered on or after 6 September 2007 by Judge James U. Downs in Buncombe County Superior Court. Heard in the Court of Appeals 21 May 2008.

Attorney General Roy Cooper, by Special Deputy Attorney General Richard E. Slipsky, for the State.

Devereux & Banzhoff, P.L.L.C., by Andrew B. Banzhoff, for defendant-appellant.

HUNTER, Judge.

Carlos Fitzgerald Smith ("defendant") appeals from judgments entered after: (1) a jury found him to be guilty of possession of a firearm by a felon pursuant to N.C. Gen. Stat. § 14-415.1 and (2) he pleaded guilty to habitual felon status pursuant to N.C. Gen. Stat. § 14-7.1. We affirm in part and hold there is no error in part.

I. Background

On 13 January 2007, at approximately 1:50 a.m., Officer Nathan Anderson ("Officer Anderson") of the Asheville Police Department observed that "the registration plate on [a blue Ford F-150 pick-up truck] wasn't to the standards of North Carolina." Officer Anderson stopped the vehicle, approached the driver's side window, received defendant's license and registration, and returned to his cruiser to verify the information. After Officer Anderson reviewed defendant's documentation, he returned to defendant's vehicle and issued him a warning ticket for failing to display a proper registration tag. The tag was a temporary tag, issued by the State of Georgia. The warning ticket stated that defendant's tag was improper and that "he needed to get it taken care of as soon as he could."

Two additional officers arrived on the scene and Officer Anderson informed defendant that he had smelled an odor of marijuana coming from the vehicle. Officer Anderson requested and defendant denied consent to search defendant's vehicle. Officer Anderson informed defendant that probable cause existed to search his vehicle without consent. The other two officers conducted a search and recovered a handgun in the bed of defendant's vehicle. The bed was fitted with a lift-up cover. The officers did not locate any marijuana. At this point, defendant, who had prior felony convictions,

was arrested for possession of a firearm by a convicted felon. Defendant was indicted for possession of a firearm by a convicted felon and also for having attained habitual felon status.

At a 4 September 2007 suppression hearing, defendant argued the initial stop of his vehicle was improper and all evidence obtained as a result of that stop should be suppressed. The trial court denied defendant's motion to suppress. On 6 September 2007, the jury found defendant to be guilty of possession of a firearm by a felon. Defendant pleaded guilty to attaining habitual felon status, reserving his right to appeal the underlying conviction. Defendant was sentenced to a minimum term of 70 and a maximum term of 183 months imprisonment. Defendant appeals.

II. Issues

Defendant argues the trial court erred when it denied his motions to suppress and to dismiss.

III. Motion to Suppress

[1] Defendant argues the trial court should have granted his motion to suppress evidence "obtained following an unlawful stop of . . . defendant's vehicle." We disagree.

A. Standard of Review

> The trial court's findings of fact regarding a motion to suppress are conclusive and binding on appeal if supported by competent evidence. This Court determines if the trial court's findings of fact support its conclusions of law. Our review of a trial court's conclusions of law on a motion to suppress is *de novo*.

State v. Edwards, 185 N.C. App. 701, 702, 649 S.E.2d 646, 648 (internal citations and quotation omitted), *disc. rev. denied*, 362 N.C. 89, 656 S.E.2d 281 (2007).

B. Validity of the Traffic Stop

Defendant argues the validity of Officer Anderson's traffic stop is governed by a probable cause standard. Recently however, our Supreme Court, in *State v. Styles*, held that "reasonable suspicion is the necessary standard for traffic stops, regardless of whether the traffic violation was readily observed or merely suspected." 362 N.C. 412, 415, ––– S.E.2d –––, ––– (2008) (citations and footnote omitted). Our Supreme Court stated:

> The Fourth Amendment protects individuals against unreasonable searches and seizures and the North Carolina Constitution provides similar protection. A traffic stop is a seizure even though the purpose of the stop is limited and the resulting detention quite brief. Traffic stops have been historically reviewed under the investigatory detention framework first articulated in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Under *Terry* and subsequent cases, a traffic stop is permitted if the officer has a reasonable, articulable suspicion that criminal activity is afoot.
>
> Reasonable suspicion is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence. The standard is satisfied by some minimal level of objective justification. This Court requires that the stop be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training. Moreover, a court must consider the totality of the circumstances—the whole picture in determining whether a reasonable suspicion exists.

Id. at 414, —— S.E.2d at —— (internal citations and quotations omitted).

To determine whether Officer Anderson had a reasonable suspicion to stop defendant, this Court must review the alleged violations of North Carolina traffic laws. N.C. Gen. Stat. § 20-50(a) (2007) requires "[a] vehicle intended to be operated upon any highway of this State [to] be registered with the Division [of Motor Vehicles of the Department of Transportation] . . . ." N.C. Gen. Stat. § 20-79.1(e) (2007) requires the face of a temporary registration plate to state "clearly and indelibly . . .[:] (1) [t]he dates of issuance and expiration; (2) [t]he make, motor number, and serial numbers of the vehicle; and (3) [a]ny other information that the Division may require." A violation of either N.C. Gen. Stat. § 20-50 or N.C. Gen. Stat. § 20-79.1 is a misdemeanor offense. N.C. Gen. Stat. § 20-176(a) (2007).

Here, the objective facts establish: (1) it was 1:50 a.m. and dark when Officer Anderson noticed defendant's "registration tag[;]" (2) defendant's registration tag "was just a piece of paper with 'February '07' written on it[;]" and (3) the tag "wasn't a piece of cardboard that North Carolina [automobile] dealers normally hand out when a vehicle is purchased[.]" Based on the objective facts and the "totality of

the circumstances[,]" Officer Anderson possessed reasonable suspicion to believe that defendant was operating his vehicle with an improper registration tag. *Styles*, 362 N.C. at 414, ––– S.E.2d at –––; *see also United States v. Chanthasouxat*, 342 F.3d 1271, 1276 (11th Cir. 2003) ("A traffic stop based on an officer's incorrect but reasonable assessment of facts does not violate the Fourth Amendment." (Citations omitted)).

C. Validity of Search

Having determined that Officer Anderson's traffic stop was justified, we must determine whether the warrantless search of defendant's vehicle after the stop was supported by probable cause.

When an officer detects the odor of marijuana emanating from a vehicle, probable cause exists for a warrantless search of the vehicle for marijuana. *See State v. Greenwood*, 301 N.C. 705, 708, 273 S.E.2d 438, 441 (1981) ("[The Court of Appeals] correctly concluded that the smell of marijuana gave the officer probable cause to search the automobile for the contraband drug.").

Here, Officer Anderson testified that "[w]hen I made my initial approach to the vehicle I got an odor of marijuana coming from the interior of the vehicle." Based on our Supreme Court's holding in *Greenwood*, once Officer Anderson detected the "odor of marijuana" as he approached defendant's vehicle, probable cause existed for Officer Anderson and the other officers to conduct a warrantless search of defendant's vehicle. 301 N.C. at 708, 273 S.E.2d at 441. The trial court properly denied defendant's motion to suppress.

IV. Motion to Dismiss

[2] Defendant argues the trial court erred when it failed to grant defendant's motion to dismiss "where the State failed to present substantial evidence of . . . defendant's constructive possession[]" of the handgun. We disagree.

A. Standard of Review

> The standard for ruling on a motion to dismiss is whether there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense. Substantial evidence is relevant evidence which a reasonable mind might accept as adequate to support a conclusion. In ruling on a motion to dismiss, the trial court must consider all of the evidence in the light most favorable to the State, and the State is

> entitled to all reasonable inferences which may be drawn from the evidence. Any contradictions or discrepancies arising from the evidence are properly left for the jury to resolve and do not warrant dismissal.

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

B. Analysis

"Possession may either be actual or constructive. When the defendant, while not having actual possession, . . . has the intent and capability to maintain control and dominion over the property, he has constructive possession of the item." *State v. Glasco*, 160 N.C. App. 150, 156, 585 S.E.2d 257, 262 (internal quotation omitted), *disc. rev. denied*, 357 N.C. 580, 589 S.E.2d 356 (2003). "This Court has previously emphasized that constructive possession depends on the totality of the circumstances in each case. No single factor controls, but ordinarily the questions will be for the jury." *Id.* at 156-57, 585 S.E.2d at 262 (citations and quotations omitted).

"As with other questions of intent, proof of constructive possession usually involves proof by circumstantial evidence." *State v. Beaver*, 317 N.C. 643, 648, 346 S.E.2d 476, 479 (1986). In testing the sufficiency of the evidence, the test to be used "is the same whether the evidence is direct, circumstantial or both." *State v. Earnhardt*, 307 N.C. 62, 68, 296 S.E.2d 649, 653 (1982). Evidence favorable to the State is to be considered as a whole in determining its sufficiency. *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980).

Here, the State presented evidence which tended to show: (1) defendant was the owner and driver of the vehicle; (2) defendant had exclusive control of the vehicle; (3) the cargo area of the vehicle contained other objects owned by defendant; (4) defendant stated everything in the cargo area belonged to him; and (5) the handgun was found in the cargo area wrapped in a man's jacket.

The State presented sufficient evidence for the jury to determine whether defendant possessed the handgun. *Wood*, 174 N.C. App. at 795, 622 S.E.2d at 123. The trial court properly denied defendant's motion to dismiss. *Id.* This assignment of error is overruled.

V. Conclusion

Based on the "totality of the circumstances[,]" Officer Anderson possessed "a reasonable, articulable suspicion that" defendant was

operating his vehicle with an improper registration tag. *Styles*, 362 N.C. at 414, —— S.E.2d at ——. Officer Anderson's traffic stop was justified and the seizure of the handgun discovered during the search was lawful. *Id.* Competent evidence supports the trial court's findings of fact, which support its conclusions of law. *Edwards*, 185 N.C. App. at 702, 649 S.E.2d at 648. The trial court's denial of defendant's motion to suppress is affirmed.

The State presented sufficient evidence for the jury to determine whether defendant had actual or constructive possession of the handgun found in the cargo area of defendant's vehicle. The trial court properly denied defendant's motion to dismiss. Defendant received a fair trial, free from prejudicial errors he preserved, assigned, and argued. We hold there is no error in the jury's verdict or the judgment entered thereon.

Affirmed in part and no error in part.

Judges TYSON and JACKSON concur.

IN RE: LINDA S. SCHIPHOF, WIDOWED FORECLOSURE OF DEED OF TRUST DATED NOVEMBER 29, 2000, RECORDED IN BOOK 0442, AT PAGE 1914, IN THE STOKES COUNTY REGISTRY BY BROCK & SCOTT, PLLC, SUBSTITUTE TRUSTEE; BRANCH BANKING AND TRUST COMPANY F/K/A FIRST FINANCIAL SAVINGS AND LOAN ASSOCIATION, INC., PETITIONER v. LINDA S. SCHIPHOF, CHRISTINA SCHIPHOF TURNER (NOW PRINE), CITIBANK SOUTH DAKOTA, N.A. AND WASHINGTON MUTUAL BANK, SUCCESSOR BY MERGER WITH PROVIDIAN NATIONAL BANK, RESPONDENTS

No. COA08-159

(Filed 16 September 2008)

Mortgages and Deeds of Trust— surplus foreclosure proceeds—certificate of satisfaction—funds of mortgagors

The trial court properly ruled that surplus foreclosure proceeds constituted general funds of the mortagors and should be paid to one mortgagor and to the other mortgagor's judgment creditors where the mortgagee bank mistakenly recorded a certificate of satisfaction of the deed of trust prior to the foreclosure sale and did not file a rescission of mistaken satisfaction until the day after the upset bid period ended. The surplus pro-

ceeds did not retain the character of the foreclosed real property and the reinstated deed of trust did not attach to the surplus foreclosure proceeds.

Appeal by petitioner from judgment entered 3 December 2007 by Judge Richard W. Stone in Stokes County Superior Court. Heard in the Court of Appeals 27 August 2008.

Alan B. Powell and Christopher C. Finan, for petitioner-appellant.

J. Tyrone Browder, for respondent-appellees Linda S. Schiphof and Christinia Schiphof Turner.

No brief filed for respondents Citibank South Dakota, N.A. or Washington Mutual Bank.

TYSON, Judge.

Branch Banking and Trust Company f/k/a First Financial Savings and Loan Association, Inc. ("BB&T") appeals from judgment entered, which ordered surplus foreclosure proceeds to be distributed to Linda S. Schiphof's ("Schiphof") judgment lien creditors and to Christina Schiphof Turner ("Turner"). We affirm.

I. Background

On 23 February 2007, BB&T filed a Petition for Surplus Proceeds of Foreclosure Sale and alleged it was entitled to all surplus proceeds derived from the foreclosure sale to Todd Leinback ("Leinback") of property owned by Schiphof and Turner. On 22 May 2007, Schiphof and Turner filed an Answer and Counterclaim and alleged that one-half the surplus proceeds should be distributed to the judgment lien creditors of Schiphof and one-half to Turner. On 30 July 2007, BB&T, Schiphof, and Turner stipulated to the facts as follows:

> 1. Brock & Scott, PLLC, as Substitute Trustee in place of Jerone C. Herring, Trustee, instituted foreclosure of [a] Deed of Trust from . . . Schiphof[] to [BB&T] . . . .
>
> 2. Pursuant to an Order of the Clerk of Superior Court for Stokes County, North Carolina, the real property described in the Deed of Trust was sold on July 28, 2006 and . . . Leinback became the last and highest bidder by virtue of an upset bid filed on October 12, 2006. The upset bid period expired on October 23,

2006. The Final Report and Account of Sale was filed with the Clerk of Superior Court on December 7, 2006. . . .

. . . .

4. . . . Schiphof and . . . Turner were the record owners of the Subject Real Property at the time of the sale conducted in connection with the Foreclosure.

5. The Subject Real Property was advertised for sale by the Substitute Trustee in the Foreclosure subject to any and all superior liens as set forth in the posted notice of sale and affidavit of publication. . . .

6. The Subject Real Property was in fact sold subject to any and all superior liens as set forth in the substitute trustee's deed recorded on November 26, 2006 . . ., conveying the Subject Real Property to . . . Leinback. . . .

7. In accordance with N.C. Gen. Stat. §45-21.31, the surplus proceeds of the sale, which totaled $42,837.61, were deposited in the Office of the Clerk of Superior Court for Stokes County, North Carolina, as surplus proceeds of the sale arising out of the Foreclosure identified above.

8. [BB&T] is the owner and holder of a note . . . and deed of trust dated April 4, 1985 from [Schiphof and her deceased husband], to J. Marshall Tetterton, Trustee, recorded on April 4, 1985 . . . .

9. The obligation evidenced by the BB&T Note has never been paid and fully satisfied. As of July 24, 2007, the amount due and owing to [BB&T] was $41,399.55, excluding attorneys' fees and additional interest and costs accruing thereon. The per diem interest accruing on the BB&T Note is $6.72 per day.

10. On August 17, 2006, [BB&T] recorded a certificate of satisfaction of the BB&T Deed of Trust in the Stokes County Public Registry . . . . The Mistaken Satisfaction was recorded in error. At no time did [BB&T] intend to cancel the BB&T Deed of Trust of record in Stokes County. . . .

11. Following [BB&T]'s discovery of its error in the recording of the Mistaken Cancellation in the Stokes County public land records, on October 24, 2006, [BB&T] filed a Rescission of the Mistaken Satisfaction in . . . the Stokes County Public Registry . . . .

12. A search of title to the Subject Real Property conducted on October 23, 2006 for the period from the date of the sale in the Foreclosure, July 28, 2006, through and including the last day of the upset bid period in the Foreclosure, October 23, 2006, would have indicated that the BB&T Deed of Trust had been cancelled of record in Stokes County on August 17, 2006 and, therefore, for the period from August 17, 2006 until October 23, 2006, would not have constituted a prior outstanding recorded lien against the same as of the last day of the upset bid period in the Foreclosure.

13. [Schiphof and Turner] are each one-half owners of the equity of redemption in the Subject Real Property following the Foreclosure by virtue of a certain deed recorded on October 16, 2002 . . . .

14. The one-half interest of . . . Schiphof in the equity of redemption in the Subject Real Property is encumbered by the following judgments . . .:

a) Judgment in favor of Citibank SD against . . . Schiphof, in the amount of $6,668.33 plus interest and costs. Docketed 3/31/03 . . . .

b) Judgment in favor of Providian National Bank against . . . Schiphof, in the amount of $4,011.61 plus interest and costs. Docketed 4/29/03 . . . .

c) Judgment in favor of BB&T against . . . Schiphof in the amount of $13,513.80 plus interest and costs. Docketed 10/28/03 . . . .

d) Judgment in favor of Citibank SD against . . . Schiphof in the amount of $4,483.54 plus interest and costs. Docketed 4/27/04 . . . .

15. All of the Judgments first became liens against [Schiphof]'s interest in the Subject Real Property after the recording of the BB&T Deed of Trust on April 4, 1985, after the recording of the deed of trust that was the subject of the Foreclosure and after the deed to [Schiphof and Turner], such deed being recorded on October 16, 2002.

16. From and after the recordation of the Rescission October 24, 2006, the BB&T Deed of Trust presently constituted a record lien upon the Subject Real Property.

On 3 December 2007, the trial court filed its second amended judgment, which ordered the surplus foreclosure proceeds to be distributed one-half to Schiphof's judgment lien creditors and the remaining one-half to Turner. BB&T appeals.

II. Issue

BB&T argues the trial court erred when it failed to find BB&T had priority in the surplus foreclosure proceeds and was entitled to disbursement of those proceeds.

III. Standard of Review

" '[T]he applicable standard of review on appeal where, as here, the trial court sits without a jury, is whether competent evidence exists to support its findings of fact and whether the conclusions reached were proper in light of the findings.' " *In re Foreclosure of Aal-Anubiaimhotepokorohamz*, 123 N.C. App. 133, 135, 472 S.E.2d 369, 370 (quoting *Walker v. First Federal Savings and Loan*, 93 N.C. App. 528, 532, 378 S.E.2d 583, 585, *disc. rev. denied*, 325 N.C. 230, 381 S.E.2d 791 (1989)), *disc. rev. denied*, 345 N.C. 179, 479 S.E.2d 203 (1996). The trial court's "conclusions of law are reviewable *de novo* on appeal." *Starco, Inc. v. AMG Bonding and Ins. Services*, 124 N.C. App. 332, 336, 477 S.E.2d 211, 215 (1996) (citation omitted).

IV. Surplus Foreclosure Proceeds

BB&T argues the trial court erred in its disbursement of the surplus foreclosure proceeds because BB&T has "a valid, first priority lien upon the Subject Real Property, enforceable against the Surplus Proceeds and enforceable against all but the new owner of the Subject Real Property, . . . Leinback." We disagree.

BB&T failed to challenge or assign error to any of the trial court's findings of fact. Unchallenged findings of fact are presumed correct and are binding on appeal. *See Keeter v. Lake Lure*, 264 N.C. 252, 257, 141 S.E.2d 634, 638 (1965) ("Plaintiff has no exception to the judge's findings of fact. Consequently, the judge's findings of fact are presumed to be supported by competent evidence, and are binding on appeal." (Citation omitted)); *see also Nationwide Homes v. Trust Co.*, 267 N.C. 528, 148 S.E.2d 693 (1966).

We turn to whether the trial court's conclusions of law "were proper in light of the findings." *In re Foreclosure of Aal-Anubiaimhotepokorohamz*, 123 N.C. App. at 135, 472 S.E.2d at 370 (quotation omitted).

N.C. Gen. Stat. § 45-36.6 (2007) states:

> (b) If a person records a satisfaction or affidavit of satisfaction of a security instrument in error or if a security instrument is satisfied of record erroneously by any other means, the person or the secured creditor may execute and record a document of rescission. The document of rescission must be duly acknowledged before an officer authorized to make acknowledgments. Upon recording, the document rescinds an erroneously recorded satisfaction or affidavit and the erroneous satisfaction of record of the security instrument and reinstates the security instrument.
>
> (c) A recorded document of rescission has no effect on the rights of a person that:
>
> > (1) Records an interest in the real property described in a security instrument after the recording of the satisfaction or affidavit of satisfaction of the security instrument or the erroneous satisfaction of record of the security instrument by other means and before the recording of the document of rescission; and
> >
> > (2) Would otherwise have priority over or take free of the lien created by the security instrument as reinstated under Chapter 47 of the General Statutes.

Here, BB&T's Rescission of the Mistaken Satisfaction filed on 24 October 2007 has no effect on the rights of Leinback pursuant to N.C. Gen. Stat. § 45-36.6(c)(1). Leinback took the real property free from the encumbrance of BB&T's 4 April 1985 Deed of Trust. *Id.* BB&T's 4 April 1985 Deed of Trust does not attach to any real property. BB&T concedes this point, but cites our Supreme Court's opinion in *In re Castillian Apartments, Inc.* for the proposition that surplus proceeds retain the character of the real property foreclosed and that its Deed of Trust should take priority and attach to the surplus foreclosure proceeds. 281 N.C. 709, 190 S.E.2d 161 (1972). This Court, in *Smith v. Clerk of Superior Court*, rejected a similar argument on the basis that it relied upon language taken from a case which involved junior liens. 5 N.C. App. 67, 73, 168 S.E.2d 1, 5 (1969).

In re Castillian Apartment, Inc. involved the rights of a second lien deed of trust holder that instituted proceedings to recover surplus funds from a foreclosure of the first lien deed of trust. 281 N.C. at 714, 190 S.E.2d at 164. Our Supreme Court held "[the] [m]ortgage

[c]orporation's *second lien* deed of trust attached to the surplus arising from the foreclosure sale under the first lien deed of trust." *Id.* at 711, 190 S.E.2d at 162 (citations omitted).

Like the case at bar, *Smith* involved the rights of a senior lien holder that instituted proceedings to recover surplus funds from a foreclosure sale. 5 N.C. App. at 73, 168 S.E.2d at 5. This Court stated that, "the surplus funds . . . did not constitute real estate. The surplus funds represented the general funds of the plaintiffs, the owners of the premises and the grantors in the deed of trust which was foreclosed." *Id.* at 73-74, 168 S.E.2d at 5-6.

Based on this Court's holding in *Smith*, the surplus foreclosure funds at issue here, are the general funds of Schiphof and Turner, and subject to their creditor's liens. 5 N.C. App. at 73-74, 168 S.E.2d at 5-6. BB&T's 4 April 1985 Deed of Trust is reinstated pursuant to N.C. Gen. Stat. § 45-36.6(b), but does not attach to any real property. The trial court's unchallenged findings of fact support its conclusion of law that Schiphof and Turner were one-half owners of the equity of redemption and entitled to one-half the surplus proceeds, with Schiphof's one-half subject to payment of her judgment lien creditors. This assignment of error is overruled.

V. Conclusion

The trial court's conclusions of law are supported by its unchallenged findings of fact. *In re Foreclosure of Aal-Anubiaimhotepokorohamz*, 123 N.C. App. at 135, 472 S.E.2d at 370. The trial court's judgment, which ordered surplus foreclosure proceeds to be distributed to Schiphof's judgment lien creditors and to Turner, is affirmed.

Affirmed.

Judges CALABRIA and ELMORE concur.

REGINALD NEWBERNE, PLAINTIFF v. NORTH CAROLINA DEPARTMENT OF CRIME CONTROL AND PUBLIC SAFETY, AN AGENCY OF THE STATE OF NORTH CAROLINA, DIVISION OF STATE HIGHWAY PATROL, A PRINCIPAL SUBUNIT OF AN AGENCY OF THE STATE OF NORTH CAROLINA, BRYAN E. BEATTY, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE DEPARTMENT OF CRIME CONTROL AND PUBLIC SAFETY, W. FLETCHER CLAY, IN HIS OFFICIAL CAPACITY AS COMMANDING OFFICER OF THE DIVISION OF STATE HIGHWAY PATROL, C.E. MOODY, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF INTERNAL AFFAIRS FOR DIVISION OF STATE HIGHWAY PATROL, AND A.C. COMBS, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY AS FIRST SERGEANT WITH THE DIVISION OF STATE HIGHWAY PATROL, DEFENDANTS

No. COA07-1570

(Filed 16 September 2008)

Public Officers and Employees— Whistleblower claims—prior administrative settlement

Summary judgment for defendants on a Whistleblower claim was reversed where plaintiff, a Highway Patrol trooper, had accepted the benefits of a settlement of a prior administrative action. Plaintiff did not allege Whistleblower claims in the administrative proceeding, the settlement did not contain a release, and Whistleblower remedies were not available in the administrative action.

Appeal by plaintiff from order entered 27 September 2007 by Judge Howard E. Manning, Jr. in Wake County Superior Court. Heard in the Court of Appeals 20 August 2008.

Bailey & Dixon, L.L.P., by J. Heydt Philbeck and G. Lawrence Reeves, for plaintiff-appellant.

Attorney General Roy Cooper, by Special Deputy Attorney General Hal F. Askins and Assistant Attorney General Ashby T. Ray, for defendant-appellees.

TYSON, Judge.

Reginald Newberne ("plaintiff") appeals from order entered, which: (1) granted the Department of Crime Control and Public Safety's, *et al.*, (collectively, "defendants") motion for summary judgment and (2) denied plaintiff's motion to reconsider. We reverse and remand.

I. Background

On 9 April 2002, plaintiff filed a complaint against defendants and alleged a claim of retaliation pursuant to N.C. Gen. Stat. § 126-84, *et*

seq. ("Whistleblower Act"). Plaintiff's complaint asserted "[d]efendants discharged [p]laintiff because [p]laintiff reported to his superiors . . . information . . . that supports a contention that [other] [t]roopers violated State or federal law . . . ." For a detailed discussion of the underlying facts, see this Court's previous opinion in *Newberne v. Crime Control & Public Safety*, 168 N.C. App. 87, 606 S.E.2d 742, *rev'd*, 359 N.C. 782, 618 S.E.2d 201 (2005).

On 26 November 2002, defendants answered plaintiff's complaint and moved to dismiss for plaintiff's failure to state a claim upon which relief can be granted. On 29 January 2003, the trial court entered its order, which granted defendants' motion to dismiss. Plaintiff appealed.

A divided panel of this Court affirmed the trial court's dismissal. *Id.* at 93, 606 S.E.2d at 746. Plaintiff appealed to our Supreme Court, which reversed this court's affirmance of the trial court's dismissal and mandated a remand to the trial court. *Newberne*, 359 N.C. at 800, 618 S.E.2d at 213.

On remand, defendant moved for summary judgment and the trial court conducted three hearings on defendants' motion. On 23 February 2007, the trial court continued the hearing on defendants' motion for summary judgment "to allow the Parties to handle pending administrative issues." On 6 July 2007, the trial court granted defendants' motion for summary judgment.

On 9 July 2007, plaintiff moved to reconsider summary judgment based on evidence acquired post-hearing. An amended motion was filed on 10 July 2007. Plaintiff asserted "a false statement of fact" was made to the trial court during the 6 July 2007 hearing. On 27 September 2007, plaintiff's motion to reconsider was heard. An order was entered, which granted defendants' motion for summary judgment and dismissed plaintiff's complaint with prejudice. The record does not show that plaintiff's motion to reconsider was formally denied. Plaintiff appeals.

II. Issues

Plaintiff argues the trial court erred when it: (1) granted defendants' motion for summary judgment and (2) denied plaintiff's motion to reconsider.

III. Standard of Review

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

> affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. The party moving for summary judgment ultimately has the burden of establishing the lack of any triable issue of fact.
>
> A defendant may show entitlement to summary judgment by (1) proving that an essential element of the plaintiff's case is 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 for Summary Judgment

Plaintiff argues the trial court erred when it granted defendants' motion for summary judgment "on the grounds of 'estoppel by benefit' when affidavits and transcripts containing admissible evidence showed that there existed genuine issues of material fact . . . ." We agree.

A. Estoppel by Benefit

In its order entered 27 September 2007, the trial court stated that it:

> is of the opinion that the Plaintiff, having previously entered into an agreement with Defendant Department of Crime Control and Public Safety (Department), to allow him to voluntarily resign from his employment with the Department in lieu of dismissal, in Return for which Plaintiff received back pay and benefits including retirement contributions and Law Enforcement 401K contributions, as well as payment to Plaintiff's attorney for attorney

> fees is estopped from accepting the benefit of that agreement which allowed him to resign and receive financial compensation and now disavowing his status of having voluntarily resigned in order to pursue an action based on wrongful dismissal.
>
> In other words, Plaintiff may not have his cake and eat it too. Defendants' Motion for Summary Judgment should be allowed.

The trial court erroneously entered summary judgment after finding plaintiff's entry into a settlement agreement on his Office of Administrative Hearings ("OAH") administrative action estopped him from pursuing his Whistleblower Act claim. As plaintiff correctly stated in his 9 April 2002 complaint:

> a. Had Plaintiff filed a petition for Contested Case Hearing for retaliation under N.C. Gen. Stat. Sec. 126-34.1[(a)](7), Plaintiff would have been deprived of his right to a trial by jury pursuant to N.C. Gen. Stat. Chapter 126, Article 14.
>
> b. Had Plaintiff filed a petition for Contested Case Hearing for retaliation under N.C. Gen. Stat. Sec. 126-34.1[(a)](7), Plaintiff would have been deprived of his right to sue any defendant individually.
>
> c. Had Plaintiff filed a petition for Contested Case Hearing for retaliation under N.C. Gen. Stat. Sec. 126-34.1[(a)](7), Plaintiff would have been deprived of his right to be awarded treble damages against individuals found to be in willful violation pursuant to N.C. Gen. Stat. Sec. 126-87.

The acceptance of the limited proceeds and recovery from the settlement of the OAH administrative action does not estop plaintiff from seeking recovery of damages under the Whistleblower Act, when plaintiff did not allege a Whistleblower Act claim in his OAH administrative action and such remedies were not recoverable in his OAH administrative action. *See* N.C. Gen. Stat. §§ 126-34.1(a)(7), -37(a), -87 (2001). The settlement agreement does not contain any release of a claim under the Whistleblower Act. Plaintiff correctly concedes however that "[a]ny amount in damages that [plaintiff] would receive upon proving retaliation could be offset by any amount that he received for back pay and benefits in settlement of the OAH administrative action."

B. *Prima Facie* Whistleblower Act Claim

Defendants argue that the trial court properly granted their motion for summary judgment because "[p]laintiff cannot, as a matter

of law, show that he suffered an adverse employment action within the scope of Article 14 of Chapter 126." We disagree.

In order to establish a claim under the Whistleblower Act, a plaintiff must plead and prove: "(1) that the plaintiff engaged in a protected activity, (2) that the defendant took adverse action against the plaintiff in his or her employment, and (3) that there is a causal connection between the protected activity and the adverse action taken against the plaintiff." *Newberne*, 359 N.C. at 788, 618 S.E.2d at 206.

Defendants do not dispute that plaintiff's employment with the Highway Patrol was terminated on 10 April 2001. Defendants assert however that plaintiff's subsequent reinstatement and resignation pursuant to the 24 January 2002 settlement agreement estops plaintiff from now arguing he was terminated. We disagree.

The 24 January 2002 settlement agreement stated, in pertinent part:

1. The Respondent agrees to reinstate the Petitioner and provide him back-pay and credit toward retirement, as well as annual leave from the date of dismissal (April 11, 2001 until January 8, 2002). The Respondent will make the standard contributions to the Petitioner's 401(k) and state retirement.

2. The Petitioner agrees to submit a letter of resignation to the Respondent which includes the following language: "I voluntarily resign my position with the North Carolina State Highway Patrol effective the close of workday January 8, 2002. I hereby waive any right to appeal this resignation to the State Personnel Commission."

3. After his resignation, Petitioner will also receive a paycheck for any accumulated vacation time. After his resignation is final, he can apply to have his retirement contributions returned to him and contact BB&T about his 401(k) contributions.

4. The Petitioner will take a voluntary dismissal of the contested case.

Plaintiff's acceptance of the settlement agreement and subsequent voluntary resignation from the Highway Patrol does not negate the fact that plaintiff's employment was terminated on 10 April 2002. Plaintiff's later reinstatement and subsequent resignation may mitigate any recovery to which he is entitled, but the question of damages

is to be determined by the finder of fact on remand. *See Williams v. Highway Commission*, 252 N.C. 514, 519, 114 S.E.2d 340, 343 (1960) ("The determination of the amount of damages is the province of the jury." (Citation omitted)). The trial court erred when it granted defendants' motion for summary judgment. The trial court further erred when it failed to enter a ruling on plaintiff's motion to reconsider.

V. Conclusion

The trial court erred when it granted defendants' motion for summary judgment and dismissed plaintiff's Whistleblower Act claim with prejudice. Plaintiff did not allege a Whistleblower Act claim in his OAH administrative action and did not release these claims in the settlement agreement. Claims and remedies available under the Whistleblower Act were not recoverable in his OAH administrative action. *See* N.C. Gen. Stat. §§ 126-34.1(a)(7), -37(a), -87. The trial court further erred when it failed to enter a ruling on plaintiff's motion to reconsider. The trial court's order, which granted defendants' motion for summary judgment, is reversed and this cause is remanded for proceedings not inconsistent with this opinion.

Reversed and Remanded.

Judges CALABRIA and ELMORE concur.

IN RE: ELECTION PROTEST OF ATCHISON

No. COA08-247

(Filed 16 September 2008)

Elections— town council—irregularity—new election among all candidates

The trial court correctly ordered a new election among all of the original candidates for a town council election where there were no leading vote getters who would not have been affected by the voting irregularity.

Appeal by State Board of Elections from orders entered 7 and 13 February 2008 by Judge Robert H. Hobgood in Wake County Superior Court. Heard in the Court of Appeals 22 May 2008.

Attorney General Roy Cooper, by Special Deputy Attorney General Susan Kelly Nichols and Special Deputy Attorney General Karen E. Long, for the State Board of Elections.

Tharrington Smith, L.L.P., by Kenneth A. Soo and Adam Mitchell, for petitioner-appellee.

BRYANT, Judge.

The State Board of Elections (State Board) appeals from orders entered by Judge Robert H. Hobgood in Wake County Superior Court ordering a new election for two seats on the Clayton Town Council. The orders specified that all candidates listed on the official ballot in the original election were to be listed in the same order on the official ballot in the new election.

On 6 November 2007, five candidates ran for two seats on the Clayton Town Council. After the election, the Johnston County Board of Elections certified the vote totals as follows:

1. Alex Harding	527 votes
2. Art Holder	516 votes
3. R.S. (Butch) Lawter, Jr.	513 votes
4. Alexander R. Atchison	457 votes
5. Michael Starks	124 votes
6. Write-in	4 votes

On 15 November 2007, Alexander R. Atchison and Robert S. (Butch) Lawter, Jr., two candidates for seats on the Clayton Town Council, filed election protests with the Johnston County Board of Elections (Johnston Board). The protesting candidates alleged non-city residents who were ineligible to vote voted in the Town of Clayton municipal election and city residents who were eligible to vote in the municipal election were given non-city ballots. Atchison asked that a new election be held listing all original candidates for Town Council on the ballot. Lawter asked that a new election be held listing only those candidates who could have been affected by the voting irregularity. On 20 November 2007, the Johnston Board conducted a hearing on the matter.

After the 20 November 2007 hearing, the Johnston Board issued a decision in which it found that twenty individuals were given incorrect ballots. Eighteen voters, who did not reside within the Town of Clayton, were given ballots for the town's municipal election, and two voters, who were residents of the Town of Clayton, were not given the

option to vote in the municipality's election. The Johnston Board further found that the twenty incorrect ballots were sufficient to cast doubt on the outcome of the election. For these reasons the Johnston Board concluded and therefore ordered the protests and the decision of the Johnston Board be sent to the State Board for further action.

The matter came before the State Board on 19 December 2007. After a review of the Johnston Board's decision, the State Board incorporated the findings of the Johnston Board and made the additional finding that the twenty-vote irregularity was sufficient to cast doubt on the election results between Art Holder and R.S. Lawter, Jr. The State Board ordered that a new election be held but only between candidates Holder and Lawter. Atchison appealed to Wake County Superior Court.

In Atchison's appeal, he asked that the court order a new election for the Clayton Town Council including the original candidates on the official ballot or in the alternative a new election including the top three vote getters (i.e., Alex Harding, Art Holder, and R.S. Lawter, Jr.). On 7 February 2008, an order was entered in Wake County Superior Court affirming the State Board's order that a new election be held for the Clayton Town Council, but reversing that portion of the order which limited the new election to candidates Art Holder and Robert Lawter, Jr. Wake County Superior Court remanded the matter to the State Board with instructions that all candidates listed on the official ballot for the original election be listed in the same order on the official ballot for the new election. The State Board filed a Motion for Reconsideration or in the alternative a Motion to Stay. On 13 February 2008, Wake County Superior Court entered an order which denied both motions. The State Board appealed to this Court.

On appeal, the State Board raises only one issue—whether the trial court erred by requiring a new election among all original candidates for Clayton Town Council. The State Board argues that Wake County Superior Court misinterpreted the provisions of N.C. Gen. Stat. § 163-182.13, entitled "New Elections," under Article 15A, "Counting Official Ballots, Canvassing Votes, Hearing Protests, and Certifying Results."

In its brief, the State Board interprets North Carolina General Statute section 163-182.13(e)(2) to mean that where the State Board orders a new election in a multi-seat race, the State Board may limit the candidates on the new official ballot to those candidates on the

original official ballot whose potential to win the election could have been affected by the voting irregularities.

"Although the interpretation of a statute by an agency created to administer that statute is traditionally accorded some deference by appellate courts, those interpretations are not binding." *North Carolina Sav. & Loan League v. N.C. Credit Union Comm.*, 302 N.C. 458, 466, 276 S.E.2d 404, 410 (1981). And, "[w]hen the issue on appeal is whether a state agency erred in interpreting a statutory term, an appellate court may freely substitute its judgment for that of the agency and employ de novo review." *Id.* at 465, 276 S.E.2d at 410 (citation omitted). "When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required." *Houston v. Town of Chapel Hill*, 177 N.C. App. 739, 743, 630 S.E.2d 249, 253 (2006) (citation omitted).

Under North Carolina General Statutes section 163-182.13,

> (a) When State Board May Order New Election.—The State Board of Elections may order a new election, upon agreement of at least four of its members, in the case of any one or more of the following:
>
> (1) Ineligible voters sufficient in number to change the outcome of the election were allowed to vote in the election, and it is not possible from examination of the official ballots to determine how those ineligible voters voted and to correct the totals.
>
> (2) Eligible voters sufficient in number to change the outcome of the election were improperly prevented from voting.
>
> . . .
>
> (e) Which Candidates to Be on Official Ballot.—All the candidates who were listed on the official ballot in the original election shall be listed in the same order on the official ballot for the new election, except in either of the following:
>
> . . .
>
> (2) If the election is for a multiseat office, and the irregularities could not have affected the election of one or more of the leading vote getters, the new election, upon agreement of at least four members of the State Board, may be held among only those

> remaining candidates whose election could have been affected by the irregularities.

N.C.G.S. § 163-182.13 (2007).

Pursuant to the provisions under N.C.G.S. § 163-182.13(a), because the removal of eighteen unqualified votes and the addition of two qualified votes could change the outcome of the election, the State Board may order a new election. *Id.*

If a new election is ordered, N.C.G.S. § 163-182.13(e) governs which candidate names are to be included on the new official ballot. *Id.* Presumptively, all candidates included on the previous official ballot are to be included on the new election official ballot, with some exceptions. *See Id.* Under N.C.G.S. § 163-182.13(e)(2), one such exception states as follows:

> If the election is for a multiseat office, and the irregularities could not have affected the election of one or more of the leading vote getters, the new election, upon agreement of at least four members of the State Board, may be held among only those remaining candidates whose election could have been affected by the irregularities.

Id.

Here, in the Clayton Town Council election, eighteen unqualified voters were allowed to vote and two qualified voters were denied the opportunity. The vote tabulation indicates that though the two highest vote getters won a seat on the Clayton Town Council the three leading vote getters were within eighteen votes of each other. We hold there were no leading vote getters who could not have been affected by the voting irregularity. Therefore, under N.C.G.S. § 163-182.13(e), "[a]ll the candidates who were listed on the official ballot in the original election shall be listed in the same order on the official ballot for the new election . . . ." *Id.*[1] Accordingly, we affirm the orders entered by the Wake County Superior Court.

---

1. We note that on 2 August 2008 our Governor of North Carolina signed Senate Bill 1263 creating Session Law 2008-150, "an act to clarify the new election statute as it applies to multiseat races." This act amended N.C.G.S. § 163-182.13(e).

> Section 2.(a) G.S. 163-182.13(e) reads as rewritten:
>
> (e) Which Candidates to Be on Official Ballot.—All the candidates who were listed on the official ballot in the original election shall be listed in the same order on the official ballot for the new election, except in either of the following:
>
> . . .

Affirmed.

Judges TYSON and STEPHENS concur.

MICHAEL W. PATRICK, GUARDIAN *AD LITEM* AND GUARDIAN OF THE ESTATE OF J.D., MINOR CHILD, PLAINTIFF v. NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DEFENDANT

No. COA07-1515

(Filed 16 September 2008)

Immunity; Tort Claims Act— public official immunity—failure to properly investigate suspected child abuse—failure to implement adequate policies and procedures for investigating reports of suspected abuse

The Industrial Commission did not err by denying defendant Department of Health and Human Services' (DHHS) motion to dismiss an action brought by a minor through her guardian ad litem under the North Carolina State Tort Claims Act for failure to properly investigate two reports of suspected child sexual abuse and negligence in failing to implement adequate policies and procedures for investigating reports of suspected abuse, even though DHHS asserted that plaintiff's claim was barred by public official immunity, because: (1) public official immunity only applies to claims brought against public officials in their individual capaci-

---

(2) If the election is for a multiseat office, and the irregularities could not have affected the election of one or more of the [DELETED—"leading vote getters,"] [ADDED—"candidates,"] the new election, upon agreement of at least four members of the State Board, may be held among only those [DELETED—"remaining"] candidates whose election could have been affected by the irregularities.

SECTION 2.(b) This section is effective when it becomes law.

Act of Aug. 2, 2008, sec. 2.(a) & (b), 2008 N.C. Sess. Laws 150 (clarifying the new election statute as it applies to multiseat races).

However, "[i]t is a well established principal [sic] of law in the State that a statute is presumed to have a prospective effect only and should not be construed to have a retroactive application unless such an intent is clearly expressed or arises by necessay implication from the terms of the legislation." *Springer Eubank Co. v. Four County Elec. Membr. Corp.*, 142 N.C. App. 496, 499, 543 S.E.2d 197, 200 (2001) (citation omitted). Because the amendments to N.C.G.S. § 163-182.13(e)(2) became effective 2 August 2008 and the session law fails to indicate they are to be applied retroactively, we deem the amendments inapplicable to the instant case.

ties, and the Tort Claims Act only confers jurisdiction in the Industrial Commission over claims brought against State agencies; (2) plaintiff's action in the instant case, although based on the alleged negligence of six individuals, was brought in the Industrial Commission against DHHS, and not in superior court against the six in their individual capacities; and (3) contrary to DHHS' interpretation, the pertinent language in the Tort Claims Act merely served to effectuate one of the Tort Claims Act's two purposes of waiving sovereign immunity.

Appeal by Defendant from order entered 21 September 2007 by the North Carolina Industrial Commission. Heard in the Court of Appeals 21 August 2008.

Holtkamp Law Firm, by Lynne M. Holtkamp, for Plaintiff-Appellee.

Attorney General Roy Cooper, by Assistant Attorney General Tina L. Hlabse, for Defendant-Appellant.

STEPHENS, Judge.

Defendant North Carolina Department of Health and Human Services ("DHHS") appeals the North Carolina Industrial Commission's order denying DHHS's motion to dismiss an action brought by J.D., through her guardian *ad litem* Michael Patrick ("Plaintiff"), pursuant to the North Carolina State Tort Claims Act, N.C. Gen. Stat. §§ 143-291 to -300.1A (2007). DHHS asserts that Plaintiff's claim is barred by public official immunity. We disagree and affirm the Industrial Commission's order.

I. BACKGROUND

On 25 August 2006, Plaintiff filed an affidavit of claim in the Industrial Commission pursuant to the Tort Claims Act. Because this appeal is before us on DHHS's motion to dismiss, we treat the factual allegations in Plaintiff's affidavit as true. *Hunt v. N.C. Dep't of Labor*, 348 N.C. 192, 499 S.E.2d 747 (1998). In the affidavit, Plaintiff alleged that on 23 August 2001, a physician reported to Wake County Department of Social Services ("DSS") social worker John Godwin ("Godwin") a case of suspected child sexual abuse. At that time, Maria Spaulding ("Spaulding") was DSS's director, and John Webster ("Webster") and V. Anderson King ("King") were DSS supervisors.

According to the physician, James McDaniel Webb ("Webb") contacted the physician's office seeking to be castrated because Webb was having inappropriate sexual thoughts about J.D., a twelve-year-old girl. The physician gave Godwin J.D.'s and Webb's names and Webb's address and telephone number. On 24 August 2001, DSS opened an investigation regarding the physician's report and reported the matter to the Fuquay-Varina police department, "which was in fact the wrong police jurisdiction." On 25 August 2001, DSS discovered that it had contacted the wrong police department, but did not contact the proper authorities. On 26 August 2001, Godwin conducted a home visit and interviewed Webb and J.D. Godwin learned that Webb was single and did not have legal custody of J.D. Webb told Godwin that he was in the process of adopting J.D. Godwin did not report his findings to Lori Bryant ("Bryant"), a DSS social worker assigned to the case. On 28 August 2001, a second physician contacted DHHS caseworker Gwen Horton ("Horton") concerning suspected sexual abuse of J.D. by Webb. Horton provided the information she received from the physician to DSS. In January 2002, DSS closed its investigation as unsubstantiated. From October 2001 through January 2003, Webb repeatedly sexually assaulted J.D. In January 2003, Webb was arrested and charged with numerous counts of sexual assault.

In the affidavit, Plaintiff asserted that DHHS was negligent "through its agents and employees" in failing to properly investigate the two reports of suspected child abuse and that DHHS was negligent in failing to implement adequate policies and procedures for the investigation of reports of suspected abuse.[1] On 21 November 2006, DHHS filed its motion to dismiss based on public official immunity. On or about 13 March 2007, Deputy Commissioner George T. Glenn, II, of the Industrial Commission, denied DHHS's motion. DHHS appealed to the Full Commission. In an order filed 21 September 2007, the Full Commission affirmed Deputy Commissioner Glenn's order. DHHS appealed the Full Commission's order to this Court. *See Summey v. Barker*, 142 N.C. App. 688, 689, 544 S.E.2d 262, 264 (2001) ("Orders denying dispositive motions based on public official's immunity affect a substantial right and are immediately appealable.") (citation omitted).

---

1. On the same day Plaintiff filed the affidavit in the Industrial Commission, Plaintiff also filed a complaint against DSS, Spaulding, Webster, and King in Wake County Superior Court on similar allegations. In *Patrick v. Wake Cty. Dep't of Human Servs.*, 188 N.C. App. 592, 655 S.E.2d 920 (2008), this Court affirmed the superior court's grant of summary judgment in favor of the DSS defendants.

II. ANALYSIS

The sole issue presented by this appeal is whether the Full Commission erred when it concluded that public official immunity does not bar Plaintiff's claim.

> The essence of the doctrine of public official immunity is that public officials engaged in the performance of their governmental duties involving the exercise of judgment and discretion, and acting within the scope of their authority, may not be held liable for such actions, in the absence of malice or corruption.

Price v. Davis, 132 N.C. App. 556, 562, 512 S.E.2d 783, 787 (1999) (citation omitted); *Meyer v. Walls*, 347 N.C. 97, 489 S.E.2d 880 (1997). Under the Tort Claims Act, "[o]nly actions against state departments, institutions, or state agencies are authorized." Charles E. Daye & Mark W. Morris, *North Carolina Law of Torts* § 19.43.1.1, at 358 (2d ed. 1999). *See also* N.C. Gen. Stat. § 143-291(a) (2007) ("The North Carolina Industrial Commission is hereby constituted a court for the purpose of hearing and passing upon tort claims against the State Board of Education, the Board of Transportation, and all other departments, institutions and agencies of the State."); *Meyer*, 347 N.C. at 105, 489 S.E.2d at 884 ("[T]he Tort Claims Act does not confer jurisdiction in the Industrial Commission over a claim against an employee of a state agency."). Because public official immunity only applies to claims brought against public officials in their individual capacities, and because the Tort Claims Act only confers jurisdiction in the Industrial Commission over claims brought against State agencies, the doctrine of public official immunity does not bar Plaintiff's claim in this case.

Plaintiff's claim in this case is factually indistinguishable from the plaintiff's claim in *Gammons v. N.C. Dep't of Human Res.*, 344 N.C. 51, 472 S.E.2d 722 (1996). In *Gammons*, the plaintiff filed an affidavit in the Industrial Commission pursuant to the Tort Claims Act alleging that DHHS—then known as the Department of Human Resources—failed "to properly supervise the Cleveland County Department of Social Services in the provision of child protective services." *Id.* at 52, 472 S.E.2d at 722. DHHS moved to dismiss the plaintiff's claim on the ground that neither Cleveland County nor its Department of Social Services were agents of DHHS. This Court affirmed the Commission's denial of DHHS's motion to dismiss. The Supreme Court affirmed this Court, stating that

> there exists a sufficient agency relationship between [DHHS] and the Cleveland County Director of Social Services and his staff such that the doctrine of *respondeat superior* is implicated. It follows therefore that because [DHHS] may be liable, the Industrial Commission has jurisdiction under the Tort Claims Act to determine [DHHS's] liability for alleged negligence of the Cleveland County Director of Social Services and his staff while acting within the scope of their obligation to assure that the county's citizens are "properly protected and minimally cared for when those citizens are dependent upon others[.]"

Id. at 64, 472 S.E.2d at 729 (citation omitted). Although the Supreme Court did not discuss the doctrine of public official immunity in *Gammons*, we find the Court's reasoning instructive in reaching the proper outcome in this case.

We do not, however, find instructive the cases principally relied upon by DHHS in its brief to this Court: *Hobbs v. N.C. Dep't of Human Res.*, 135 N.C. App. 412, 520 S.E.2d 595 (1999), and *Collins v. N.C. Parole Comm'n*, 344 N.C. 179, 473 S.E.2d 1 (1996), *aff'g on other grounds* 118 N.C. App. 544, 456 S.E.2d 333 (1995). The plaintiff in *Hobbs* filed a complaint in Wake County Superior Court against, *inter alia*, six county social workers in their individual capacities. This Court held that county social workers are public officials and thus " 'cannot be held individually liable for damages caused by mere negligence in the performance of their governmental or discretionary duties[.]' " *Hobbs*, 135 N.C. App. at 422, 520 S.E.2d at 603 (quoting *Meyer*, 347 N.C. at 112, 489 S.E.2d at 888). Plaintiff's action in the case at bar, although based on the alleged negligence of Spaulding, Webster, King, Godwin, Bryant, and Horton, was brought in the Industrial Commission against DHHS, not in superior court against Spaulding, Webster, King, Godwin, Bryant, and Horton in their individual capacities. DHHS's reliance on *Hobbs* is misplaced.

In *Collins*, the plaintiff brought an action in the Industrial Commission against the North Carolina Parole Commission and three of its former members. Plaintiff alleged that the former members were grossly negligent in granting parole to an inmate, Karl DeGregory, and in supervising DeGregory while he was on parole. The plaintiff further alleged that while DeGregory was on parole, he entered plaintiff's home, shot plaintiff, abducted and shot plaintiff's wife to death, and killed himself. The Industrial Commission dismissed plaintiff's claims, concluding that (1) plaintiff did not prove that the Parole Commission was negligent in placing DeGregory on

parole; (2) as public officials, the former members of the Parole Commission were immune from suit for negligence for actions taken in the course of their official capacities; and (3) Parole Commission employees were not negligent in supervising DeGregory while he was on parole. This Court affirmed the Industrial Commission's decision on the ground that the Tort Claims Act waived the State's sovereign immunity only for ordinary negligence, and plaintiff alleged more than ordinary negligence. 118 N.C. App. 544, 456 S.E.2d 333.

The Supreme Court affirmed this Court's decision on other grounds. In a concise opinion, the Supreme Court only addressed the Industrial Commission's ruling that, as public officials, the former members of the Parole Commission were immune from suit. The Court stated that "[t]he defendants were undoubtedly acting within the scope of their official authority when they granted parole to DeGregory and refused to revoke his parole[,]" 344 N.C. at 183, 473 S.E.2d at 3, invoked the doctrine of public official immunity, and concluded that the Industrial Commission properly dismissed plaintiff's claim. The Supreme Court in *Collins* did not hold, as DHHS suggests, that no action may be brought under the Tort Claims Act against DHHS on allegations that a county department of social services, through its social workers, negligently failed to investigate reports of suspected child abuse or failed to implement adequate policies and procedures for the investigation of such reports.

Finally, we find DHHS's interpretation of the language of the Tort Claims Act unavailing. Pursuant to the Act,

> [t]he Industrial Commission shall determine whether or not each individual claim arose as a result of the negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, under circumstances where the State of North Carolina, *if a private person*, would be liable to the claimant in accordance with the laws of North Carolina.

N.C. Gen. Stat. § 143-291(a) (emphasis added). In other words, "[t]he state may be liable if, under the circumstances, a private person would be liable." Daye & Morris, *North Carolina Law of Torts* § 19.43.1.1.2, at 361. DHHS, however, interprets the above-emphasized language to mean that "since [Spaulding, Webster, King, Godwin, Bryant, and Horton] cannot be sued directly (as private persons), the State of North Carolina cannot be sued based on allegations of their negligence." DHHS misinterprets the statute. The

emphasized language merely serves to effectuate one of the Tort Claims Act's two purposes: waiving sovereign immunity. *See Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 293 S.E.2d 182 (1982) (stating the two effects of the Tort Claims Act).

Because the doctrine of public official immunity does not apply to the case at bar, the order of the Industrial Commission is affirmed.

AFFIRMED.

Judges STEELMAN and GEER concur.

STATE OF NORTH CAROLINA v. JEREMY PAUL WEBB

No. COA08-198

(Filed 16 September 2008)

Possession of Stolen Property— felony possession of stolen goods—motion to dismiss—sufficiency of evidence—actual knowledge—reasonable belief

The trial court erred by denying defendant's motion to dismiss the charge of felony possession of stolen goods because: (1) the State failed to offer any direct evidence tending to show that defendant had actual knowledge the pertinent property was stolen; (2) the State failed to present any evidence tending to show that defendant had reasonable grounds to believe the property was stolen; (3) the State's own witness testified that he stole the items alone, never told defendant they were stolen, actively concealed the property from defendant so that he would not get kicked out of defendant's apartment, and told defendant the property belonged to him whenever defendant or defendant's wife questioned him; and (4) viewed in the light most favorable to the State, the facts, including the number and type of stolen items discovered inside defendant's apartment, that some of the items were found in plain view, and that defendant gave a false name when first questioned by police only raised a mere suspicion or conjecture that defendant possessed the requisite knowledge.

Appeal by defendant from judgment entered 29 August 2007 by Judge James W. Morgan in Catawba County Superior Court. Heard in the Court of Appeals 27 August 2008.

Attorney General Roy Cooper, by Assistant Attorney General David P. Brenskelle, for the State.

Jarvis John Edgerton, IV, for defendant-appellant.

TYSON, Judge.

Jeremy Paul Webb ("defendant") appeals from judgment entered after a jury found him to be guilty of: (1) felony possession of stolen goods pursuant to N.C. Gen. Stat. § 14-71.1 and (2) attaining the status of habitual felon pursuant to N.C. Gen. Stat. § 14-7.1. We reverse.

I. Background

On 24 January 2006, Lieutenant Rick Coffey ("Lieutenant Coffey") of the Long View Police department received a call from the Hickory Pawn and Gun to report that Christopher Garrett ("Garrett") had attempted to pawn an item previously reported as stolen. Officers determined that Garrett currently resided with defendant and arrested him on outstanding warrants on 26 January 2006. Garrett confessed to committing two burglaries and informed the officers that some of the stolen items were stored in defendant's apartment.

Garrett told police he had moved into defendant's apartment earlier that month and had resided there ever since. Garrett stated that he had hidden the items obtained from the burglaries in various locations within defendant's apartment. Garrett also stated that he feared being kicked out of the apartment if defendant found out about the stolen property. When defendant or defendant's wife asked about the property, Garrett replied that some of the property was his and other property had been given to him as payment. Police obtained a search warrant for defendant's apartment.

Sergeant Michael Ford ("Sergeant Ford") of the Long View Police Department arrived at defendant's apartment prior to the issuance of the search warrant and informed defendant that officers were going to search his apartment. Defendant offered to go inside and get whatever the officers wanted. Sergeant Ford declined defendant's offer and awaited the arrival of the officers with the search warrant. Defendant left his apartment to go pick up his wife and children. Defendant returned, was presented with the search warrant for his apartment, and was asked to produce his driver's license. Defendant stated that he had lost his driver's license and that his name was "James Conway." Defendant disclosed his real name after the officers told him they were going to contact his landlord to verify his identity.

Officers found a variety of property stolen by Garrett inside of defendant's apartment. Stolen property was found inside duffel bags hidden within bathroom cabinets, inside closets, underneath or behind a couch, and inside of and next to a green storage container underneath the kitchen table.

Defendant was indicted for possession of stolen goods and attaining habitual felon status on 2 April 2007. Defendant's trial began 27 August 2007. Defendant moved to dismiss at the close of the State's evidence and at the close of all the evidence. The trial court denied his motion. Defendant did not testify or present any evidence.

On 29 August 2007, the jury found defendant to be guilty of "possession of property . . . stolen pursuant to a breaking or entering" and attaining the status of habitual felon. The trial court determined defendant was a prior record level V offender and sentenced him to a minimum term of 128 months and a maximum term of 163 months incarceration. Defendant appeals.

II. Issue

Defendant argues the trial court erred when it denied his motion to dismiss due to insufficiency of evidence.

III. 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).

IV. Motion to Dismiss

Defendant argues the trial court erred when it denied his motion to dismiss because the State "failed to tender substantial evidence that [defendant] was aware the items . . . Garrett brought into his house were stolen." We agree.

"The essential elements of possession of stolen property are: (1) possession of personal property; (2) which has been stolen; (3) the possessor knowing or having reasonable grounds to believe the property to have been stolen; and (4) the possessor acting with a dishonest purpose." *State v. Perry*, 305 N.C. 225, 233, 287 S.E.2d 810, 815 (1982) (citations and footnote omitted). This Court has stated, "[w]hether the defendant knew or had reasonable grounds to believe that the [property was] stolen must necessarily be proved through inferences drawn from the evidence." *State v. Brown*, 85 N.C. App. 583, 589, 355 S.E.2d 225, 229 (citation omitted), *disc. rev. denied*, 320 N.C. 172, 358 S.E.2d 57 (1987).

Here, the State has failed to offer any direct evidence which tended to show defendant had actual knowledge the property was stolen. The State also failed to present any evidence which tended to show defendant had reasonable grounds to believe that the property was stolen. The State's own witness, Garrett, testified that he: (1) stole the items alone; (2) never told defendant they were stolen; (3) actively concealed the property from defendant so that he would not get kicked out of defendant's apartment; and (4) told defendant the property belonged to him whenever defendant or defendant's wife questioned him.

In *State v. Bizzell*, this Court reversed the defendant's conviction of non-felonious possession of stolen property for lack of evidence which tended to establish the defendant's guilty knowledge. 53 N.C. App. 450, 456, 281 S.E.2d 57, 61 (1981).

> The key evidence relied upon by the State to show the requisite knowledge of the defendant was that (1) he had established a part-time residence at the mobile home where the goods were found; (2) he visited the robbery victim's home several days prior to the robbery and had an opportunity to know what valuable goods were there; (3) he told Margie Lewis that he was helping a friend move and asked if he could store some of his friend's possessions in their mobile home; (4) he never identified the friend or made an effort to return the goods to the friend; (5) he told Margie Lewis not to box the clothes for storage but rather to hang them in the closet; and (6) he was wearing an article of the stolen clothing at the time of his arrest.

Id. at 454-55, 281 S.E.2d at 60. This Court held that "[w]hile the State's evidence in this case may beget suspicion in imaginative minds, this is not enough to support a conviction for possession of

stolen property." *Id.* at 456, 281 S.E.2d at 61 (internal citation omitted). We find the evidence held to be insufficient in *Bizzell* substantially greater than the evidence in the case at bar. 53 N.C. App. at 459, 281 S.E.2d at 61.

In *State v. Allen*, this Court reversed the defendant's conviction of felonious possession of stolen property. 79 N.C. App. 280, 285, 339 S.E.2d 76, 79, *aff'd per curium*, 317 N.C. 329, 344 S.E.2d 789 (1986). This Court stated "[the State's evidence] g[ave] rise to a suspicion that [the] defendant possessed the requisite knowledge; however, the[] facts just as reasonably lead to an inference that [the] defendant had no knowledge that he was transporting stolen property. Conjecture, not reasonable inference of guilt, [was] raised." *Id.* at 282-83, 339 S.E.2d at 78. This Court held "[the] evidence [was] not sufficient to conclude that [the] defendant had reasonable grounds to believe the property was stolen. Taken together the[] facts [were] simply too tenuous to establish the element of knowledge sufficiently to take the case to the jury." *Id.* at 283-84, 339 S.E.2d at 78.

> In *State v. Kelly*, 39 N.C. App. 246, 249 S.E.2d 832 (1978), this Court upheld a possession of stolen property conviction when guilty knowledge was challenged. In that case, the defendant's behavior was sufficiently incriminating to bridge the gap between suspicion and a reasonable inference of guilt. In *Kelly,* police officers went to the home of the defendant to arrest a third party. No one answered. The police came upon property in the backyard, later determined to be stolen. When police returned the next day with a search warrant, [the] defendant was found "hiding in the bushes behind the shed" in the backyard, squatting in a clump of honeysuckle with his face to the ground.
>
> Other cases upholding convictions when knowledge was at issue have contained some evidence of incriminating behavior on the part of the accused. In *State v. Taylor*, 64 N.C. App. 165, 307 S.E.2d 173 (1983), [*aff'd in part and rev'd in part on other grounds*, 311 N.C. 380, 317 S.E.2d 369 (1984),] the defendant took a stolen gun out of his coat and surreptitiously threw it into some bushes when he was approached by a man who simply yelled at him. In *State v. Haskins*, 60 N.C. App. 199, 298 S.E.2d 188 (1982), the defendant and his companion, when attempting to sell stolen guns for less than their true value, gave inconsistent stories about how the defendant had obtained the guns.

Id. at 284-85, 339 S.E.2d at 79.

The State contends defendant's knowledge that the property was stolen may be inferred from the: (1) number and type of stolen items discovered inside defendant's apartment; (2) fact that some of the items were found in plain view; and (3) fact that defendant gave a false name when first questioned by the police. Viewed in the light most favorable to the State, these facts only raise a mere suspicion or conjecture that defendant possessed the requisite knowledge.

"When the evidence most favorable to the State is sufficient only to raise a suspicion or conjecture that the accused was the perpetrator of the crime charged in the indictment, the motion for judgment . . . of nonsuit should be allowed." *State v. Poole*, 285 N.C. 108, 119, 203 S.E.2d 786, 793 (1974) (citation omitted). The trial court erred when it denied defendant's motion to dismiss. *Id.* The trial court's judgment is reversed.

V. Conclusion

The State failed to present substantial evidence which tended to show or to raise an inference that defendant knew or had reasonable grounds to believe that the property found in his apartment was stolen. *Perry*, 305 N.C. at 233, 287 S.E.2d at 815. The trial court erred when it denied defendant's motion to dismiss. *Wood*, 174 N.C. App. at 795, 622 S.E.2d at 123. We reverse the trial court's judgment.

Reversed.

Judges CALABRIA and ELMORE concur.

STATE OF NORTH CAROLINA v. CASSIUS M. BUNCH

No. COA08-91

(Filed 16 September 2008)

1. Conflict of Interest— failure to hold evidentiary hearing— failure to bring conflict to trial court's attention—attorney for State later acts as defense counsel

The trial court did not commit reversible error in a probation violation case by failing to inquire into a potential conflict of interest where an attorney's name appears as the attorney for the State on the judgment suspending defendant's sentence of 15 to 18 months active time and imposing 24 months supervised proba-

tion, and then also as the attorney for defendant on the judgment and commitment upon revocation of probation, because: (1) although a failure to hold an evidentiary hearing concerning a potential conflict of interest is reversible error, the Court of Appeals has not held that a conviction may be reversed based on conflicts not brought to the trial court's attention; (2) initially the onus is on counsel to determine whether a conflict of interest exists, and consequently decide whether the representation may be undertaken despite the existence of a conflict; (3) the trial court was not aware of defense counsel's former involvement in the case; and (4) although defendant asserts the trial court had a duty to inquire about a conflict of interest, he presented no direct authority describing a duty on the court to inquire about potential conflicts of interest where the court has no knowledge of the potential conflict.

2. Conflict of Interest— collateral attack—failure to demonstrate actual conflict of interest adversely affected lawyer's performance—attorney for State later acts as defense counsel

An alleged conflict of interest in a probation violation case did not affect defense counsel's representation, even though defendant contends the original judgment should have been challenged as no plea transcript existed showing that defendant knowingly and voluntarily pled guilty to the original charge, because: (1) even assuming arguendo that this defense was not raised due to the unsubstantiated conflict of interest claimed by defendant, this type of collateral attack is expressly prohibited when defendant failed to object to a conflict of interest at trial and failed to demonstrate that an actual conflict of interest adversely affected his lawyer's performance; and (2) defendant offered no evidence of a conflict of interest outside of the pertinent attorney's status as a prosecutor more than two years prior to her representation of defendant in the instant case.

Appeal by defendant from judgment entered 7 September 2007 by Judge Thomas D. Haigwood in Hertford County Superior Court. Heard in the Court of Appeals 20 August 2008.

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

Bryan Gates for defendant-appellant.

BRYANT, Judge.

Cassius Bunch (defendant) appeals from a judgment revoking his probation as a result of testing positive for cocaine, violating curfew, failing to pay court-ordered costs, refusing to appear at day reporting center classes, and leaving the court's jurisdiction without making his whereabouts known. We affirm.

Facts

Defendant pled guilty to sale or delivery of cocaine on 11 February 2004, and was given a suspended sentence of fifteen to eighteen months imprisonment in return for satisfying the terms of his probation for twenty-four months. The prosecuting attorney was Vershenia B. Moody. While on probation, probation violation reports were subsequently filed against defendant on 27 May 2005, 14 June 2005, 27 October 2006 and 2 March 2007. Defendant admitted to the violations in the first two hearings and each time defendant was continued on probation. Defendant's probationary period was extended two more years. Also on the October 2006 probation violation report, the State alleged that defendant tested positive for cocaine and failed to pay court cost, but the record does not indicate a hearing was ever held.

A fourth violation report was filed on 2 March 2007, with an addendum filed on 30 July 2007, which alleged that defendant: (1) tested positive for cocaine, (2) violated curfew, (3) failed to pay court-ordered costs, (4) refused to appear at day reporting center classes, and (5) left the court's jurisdiction without making his whereabouts known. Defendant was subsequently arrested and presented to the court for his probation violation hearing. The lower court appointed then defense attorney Vershenia Moody to represent defendant. At the probation violation hearing on 7 September 2007, defendant admitted to the probation violation, and the lower court activated his suspended sentence. Defendant appeals.

Defendant raises three issues on appeal: (I) whether the trial court erred in failing to inquire about potential conflicts of interest where Vershenia Moody represented the State at defendant's plea hearing and then represented defendant during the probation violation hearing; and (II) & (III) whether Moody's alleged conflict of interest adversely affected her representation of defendant.

Analysis

I

[1] Defendant argues the trial court committed reversible error by failing to inquire into a potential conflict of interest where Vershenia Moody's name appears as the attorney for the State on the judgment suspending defendant's sentence of 15 to 18 months active time and imposing 24 months supervised probation and then as the attorney for defendant on the judgment and commitment upon revocation of probation. We disagree.

Although we have held that a failure to hold an evidentiary hearing concerning a potential conflict is reversible error, we have not held that a conviction may be reversed based on conflicts not brought to the trial court's attention. *See State v. James*, 111 N.C. App. 785, 791, 433 S.E.2d 755, 758 (1993) ("the practice should be that the trial judge inquire into an attorney's multiple representation *once made aware of this fact*") (emphasis added); *see also State v. Mims*, 180 N.C. App. 403, 409, 637 S.E.2d 244, 248 (2006) ("when a trial court is made aware of a possible conflict of interest, the trial court must take control of the situation") (citation and quotations omitted). So initially, the onus is on counsel to "determine whether a conflict of interest exists," and consequently "decide whether the representation may be undertaken despite the existence of a conflict." N.C. Rules of Professional Conduct, Rule 1.7 Comment 2 (2008).

Here, it is clear the trial court was not aware of defense counsel's former involvement in the case. Defendant asserts the trial court had a duty to inquire about a conflict of interest but presents no direct authority describing a duty of the court to inquire about potential conflicts of interest where the court has no knowledge of the potential conflict. We hold the trial court need not be burdened with counsel's responsibility to identify potential conflicts, and we decline to reverse defendant's conviction for errors occurring outside the scope of the court's duty. Accordingly, defendant's assignment of error is overruled.

II

[2] Defendant also argues that the alleged conflict of interest affected counsel's representation because the original judgment should have been challenged as no plea transcript exists showing that defendant knowingly and voluntarily pled guilty to the original charge. We disagree.

Even if we assume that this defense was not raised due to the unsubstantiated conflict of interest claimed by defendant, it remains that this type of collateral attack is expressly prohibited. *See State v. Holmes*, 361 N.C. 410, 413, 646 S.E.2d 353, 355 (2007) ("by failing to appeal from the original judgment . . . the defendant waived any challenge to that judgment and thus could not attack it in the appeal of a subsequent order activating her sentence"). "When a defendant fails to object to a conflict of interest at trial, a defendant must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Mims*, 180 N.C. App. at 409, 637 S.E.2d at 248 (citations and quotations omitted).

Defendant offers no evidence of a conflict of interest outside of Moody's status as a prosecutor more than two years prior to her representation of defendant in the instant case. However, assuming *arguendo* that a conflict of interest did exist, defendant fails to show how counsel's performance at his probation violation hearing was adversely affected.

The record reflects that the 7 September 2007 hearing was defendant's third probation violation hearing on his fourth violation report. The hearing was originally scheduled for 4 September 2007. Defendant's probation officer testified that a surveillance officer attempted to serve defendant with a violation report, defendant ran from the officer and later failed to be present for a hearing in July. Defendant was arrested and presented before the court for the hearing on 7 September. The probation officer recommended that defendant's probation be revoked. Attorney Moody addressed the court in defendant's defense and argued that there was mis-communication between the probation department and defendant as to a change in defendant's residence, that defendant had attended some classes at the Day Reporting Center but had transportation issues, and that defendant turned himself in to the Ahoskie Police Department. Defendant was then given an opportunity to address the court during which he acknowledged that he suffered from a drug addiction but that he was working.

Defendant maintains that this representation was inadequate, yet offers no evidence of adverse effects based on the performance of his appointed counsel. Accordingly, defendant's assignment of error is overruled.

Affirmed.

Judges JACKSON and ARROWOOD concur.

IN RE D.M.

[192 N.C. App. 729 (2008)]

IN THE MATTER OF: D.M.

No. COA08-175

(Filed 16 September 2008)

Juveniles— post-release supervision—revocation

The trial court's revocation of a juvenile's post-release supervision was proper based upon its finding that defendant had failed to comply with the conditions of his release. The findings and conclusions contained in a dispositional order pursuant to N.C.G.S. § 7B-2512 are not applicable here. The trial court must only determine by the greater weight of the evidence that the juvenile violated the terms of post-release supervision; once post-release supervision is revoked, return to the Youth Development Center is mandated by statute.

Appeal by defendant from order entered 5 October 2007 by Judge Paul A. Hardison in Sampson County District Court. Heard in the Court of Appeals 27 August 2008.

Attorney General Roy Cooper, by Assistant Attorney General Jacqueline A. Tope, for the State.

Richard E. Jester, for defendant-appellant.

TYSON, Judge.

D.M. ("defendant"), a juvenile, appeals an order entered, which found defendant to be in violation of his probation and revoked his post-release supervision. We affirm.

I. Background

On 6 July 2006, defendant pleaded guilty to one count of injury to personal property and one count of misdemeanor assault with a deadly weapon in exchange for the dismissal of fifteen other pending charges. The trial court entered a Juvenile Level 1 and 2 dispositional order adjudicating defendant to be delinquent. Defendant was placed on six months house arrest, followed by twelve months of supervised probation. Defendant was also ordered to pay restitution in the amount of $500.00 and to be confined to an approved detention facility on an intermittent basis for a period of 14 days.

On 19 January 2007, the State filed a Motion for Review based upon: (1) defendant's failure to cooperate with the Restitution

Program; (2) defendant's suspension from Northside High School for failing to follow directions and other disrespectful behavior towards the faculty; and (3) defendant's mother's report, which stated defendant "was beyond her physical control." On 10 April 2007, the trial court entered a Juvenile Level 3 dispositional order that committed defendant to the Department of Juvenile Justice and Delinquency Prevention for placement in the Youth Development Center ("YDC") for a period of at least six months.

On 8 August 2007, defendant was released from the YDC program and was placed on post-release supervision. The trial court imposed the following conditions upon defendant's release: (1) defendant was required to reside in the First and Ten Group Home in Roxboro, North Carolina and follow all of the facility's rules and regulations and (2) defendant was prohibited from associating with any gang members or engaging in gang-related activity. On 13 August 2007, the State filed a second Motion for Review based upon defendant's failure to comply with the preceding conditions and sought the revocation of defendant's post-release supervision. The State also filed a Motion and Order to Show Cause alleging defendant's parents had "disturbed the Group Home placement of [the] juvenile[]" and that "[b]oth parents refuse[d] to follow juvenile [post-release supervision] terms and Group home rules."

On 3 October 2007, the trial court held a hearing on both motions. Anita Melvin ("Melvin"), an employee of the First and Ten Group Home, testified that defendant was informed of the rules and regulations of the facility and consistently violated such rules. Melvin testified defendant used profanity, constantly interrupted conversations during group sessions, and was disrespectful to members of the staff. The trial court subsequently revoked defendant's post-release supervision and ordered him to be recommitted to the YDC. Defendant appeals.

II. Issue

Defendant argues the trial court erred by finding he violated the terms of his post-release supervision.

III. Revocation of Post-Release Supervision

N.C. Gen. Stat. § 7B-2516 (2007) provides, in relevant part:

> (b) If the court determines by the greater weight of the evidence that the juvenile has violated the terms of post-release supervi-

> sion, the court *may* revoke the post-release supervision or make any other disposition authorized by this Subchapter.
>
> (c) If the court revokes post-release supervision, the juvenile *shall* be returned to the Department for placement in a youth development center for an indefinite term of at least 90 days . . . .

(Emphasis supplied). Defendant argues that because no North Carolina case has interpreted N.C. Gen. Stat. § 7B-2516, this Court should look to "Adult probation cases and statutes" for guidance. Defendant cites N.C. Gen. Stat. § 15A-1345(e) in support of his contention that the trial court was required to make findings of fact to support its decision and a summary record of the proceedings. We disagree.

Although defendant correctly states that N.C. Gen. Stat. § 7B-2516 has yet to be interpreted, this Court analyzed a similar juvenile statute in *In the Matter of Baxley*, 74 N.C. App. 527, 328 S.E.2d 831, *disc. rev. denied*, 314 N.C. 330, 333 S.E.2d 483 (1985). In *Baxley*, the juvenile was committed to the Division of Youth Services for an indefinite term not to exceed his eighteenth birthday based upon admitted violations of N.C. Gen. Stat. §§ 14-51, 14-72, and 90-95(a)(3). 74 N.C. App. at 528, 328 S.E.2d at 832. The juvenile was placed on conditional release approximately one and a half years later and was ordered to attend school regularly as required by law. *Id.*

The State subsequently filed a Motion for Review based upon allegations that the juvenile had violated his conditional release by fighting and being absent from school. *Id.* The trial court revoked the juvenile's conditional release and ordered him to be recommitted to the Division of Youth Services. *Id.* at 528-29, 328 S.E.2d at 832.

The juvenile appealed the trial court's order and argued, *inter alia*, "that the juvenile judge erred by making insufficient findings of fact to support an order recommitting him to the Division of Youth Services." *Id.* at 529, 328 S.E.2d at 832. This Court held that the trial court's findings that the juvenile had violated the conditions of his release were sufficient to support its order and stated:

> a conditional release from the Division of Youth Services is not the same as probation or final discharge. A juvenile on conditional release is still technically subject to the original order committing him to the Division of Youth Services, which is the basis of whatever restrictions on his activity might be deemed

> appropriate as "aftercare supervision," G.S. 7A-655. When a juvenile judge revokes a conditional release, *the previous order provides authority for recommittal to the Division of Youth Services; no new order with the findings required by G.S. 7A-652 is necessary.*

Id. at 530, 328 S.E.2d at 833 (emphasis supplied). The reasoning and holding of *Baxley* is particularly instructive based upon the virtually identical language contained within the previous statute and the controlling statute here. *See* N.C. Gen. Stat. § 7A-656 (1981) ("If the judge determines that the juvenile has violated the terms of his conditional release, the judge may revoke the conditional release or make any other disposition authorized by this Subchapter."); *compare* N.C. Gen. Stat. § 7B-2516(b) ("If the court determines by the greater weight of the evidence that the juvenile has violated the terms of post-release supervision, the court may revoke the post-release supervision or make any other disposition authorized by this Subchapter.").

Because "a conditional release from the [Department of Juvenile Justice and Delinquency Prevention] is not the same as probation or final discharge[,]" the requisite findings and conclusions contained in a dispositional order pursuant to N.C. Gen. Stat. § 7B-2512 are not applicable here. *Baxley*, 74 N.C. App. at 530, 328 S.E.2d at 833. Under the plain language of the statute, the trial court must only determine "by the greater weight of the evidence that the juvenile has violated the terms of post-release supervision" in order to revoke the juvenile's post-release supervision. N.C. Gen. Stat. § 7B-2516(b). The statute further provides that if post-release supervision is revoked, the juvenile "shall" be returned to the YDC. N.C. Gen. Stat. § 7B-2516(c).

Here, the trial court found that defendant violated the conditions of his release based upon his failure to comply with the rules and regulations of the First and Ten Group Home. The trial court further found that "these violations [were] without just cause or legal dispute[]" and recommitted defendant to YDC. These findings are sufficient to support the trial court's revocation of defendant's post-release supervision. N.C. Gen. Stat. § 7B-2516; *Baxley*, 74 N.C. App. at 530, 328 S.E.2d at 833. Once defendant's post-release supervision was revoked, return to the YDC is mandated by statute. N.C. Gen. Stat. § 7B-2516(c). This assignment of error is overruled.

IV. Conclusion

The trial court's revocation of defendant's post-release supervision was proper based upon its finding that defendant had failed to comply with the conditions of his release. The trial court's order is affirmed.

Affirmed.

Judges CALABRIA and ELMORE concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 16 SEPTEMBER 2008

ARCHIE v. LIPSITZ No. 07-1422	Rowan (07CVS1022)	Affirmed
BROWN v. BROWN No. 07-1475	Buncombe (05CVD5041)	Affirmed
CACV OF COLORADO, LLC v. WELLS No. 08-195	Brunswick (06CVD1810)	Affirmed in part, dismissed in part
IN RE D.I.M. No. 08-493	Wake (07JT48)	Affirmed
IN RE J.A., K.A., D.A. No. 08-486	Macon (05JA10) (05JA75-76)	Affirmed
IN RE M.A.A., I.A.A. No. 08-492	Randolph (05JT84) (07JT27)	Affirmed
IN RE N.M.T. No. 08-465	Mecklenburg (06JA1028)	Reversed
IN RE S.T. No. 08-448	Stanly (07JA75)	Vacated
LOCKLAR v. BROKERS, INC. No. 08-154	Davidson (03CVS1504)	Affirmed
MELTON-RIDDLE FUNERAL HOME, INC. v. N.C. BD. OF FUNERAL SERV. No. 08-205	Wake (07CVS1888)	Affirmed
REALTY WORLD PROF'LS, INC. v. TILLERY TRADITION, INC. No. 07-501	Mecklenburg (06CVS5087)	Affirmed
STATE v. DALE No. 08-180	Franklin (06CRS51592)	No error
STATE v. MOSES No. 07-853	Forsyth (05CRS57750)	Judgment arrested
STATE ex rel. ROSS v. OVERCASH No. 08-127	Cabarrus (07CVS456)	Affirmed

HEADNOTE INDEX

WORD AND PHRASE INDEX

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

APPEAL AND ERROR—Continued

APPEAL AND ERROR—Continued

need to decide whether the district court had exclusive jurisdiction over appeals from decisions by local boards of health where the dog had been returned home by the time the case was transferred to superior court. **In re Kitchin v. Halifax Cty., 559.**

Nonjurisdictional appellate rules violations—sanctions—dismissal of assignments of error—double printing costs—Although defendant's numerous and uncorrected nonjurisdictional appellate rules violations in a breach of contract case (including failure to direct the attention of the appellate court to the particular error with clear and specific record or transcript references as required by N.C. R. App. P. 10(c)(1), failure to state the grounds for appellate review as required by N.C. R. App. P. 28(b)(4), failure to reference any assignments of error pertinent to the questions presented as required by N.C. R. App. P. 28(b)(6), and failure to state the applicable standard of review for each question presented as required by N.C. R. App. P. 28(b)(6)), coupled with his overly broad assignments of error numbered 1 and 2 that failed to be confined to a single issue of law as required by N.C. R. App. P. 10(c)(1), rose to the level of a substantial failure or gross violation, the errors were not so egregious as to warrant dismissal of defendant's appeal in its entirety. As a lesser sanction, defendant's assignments of error numbered 1 and 2 were dismissed, and in the exercise of its discretion, the Court of Appeals ordered defendant's attorney to pay double the printing costs of the appeal under N.C. R. App. P. 34(b). **Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co., 114.**

Preservation of issues—assignment of error—argument and citation of authority—requirements—The question of whether a lab tech's absence at trial violated defendant's right to confrontation was beyond the scope of the review where defendant did not assign error to the issue. Moreover, defendant's argument that a trooper's testimony about a lab tech's qualifications was hearsay was not supported by argument or citation of authority. **State v. Hinchman, 657.**

Preservation of issues—failure to object to constitutional issue at trial—Article I, Section 24 right to unanimous jury—Although the State contends defendant did not preserve his argument for appeal regarding the trial court's unrecorded bench conferences with the jury foreperson at trial based on his failure to object to the trial court's unrecorded conversations, defendant is entitled to appellate review of this constitutional argument because, although our appellate courts generally do not review constitutional arguments for the first time on appeal, our Supreme Court has previously recognized an exception to this rule where a defendant alleges a violation of Article I, Section 24 regarding defendant's right to trial by a jury of twelve. **State v. Wilson, 359.**

Preservation of issues—failure to raise constitutional issue at trial—Defendant's assignment of error regarding the Full Faith and Credit Clause of the United States Constitution was waived based on a failure to raise it at trial. **Muchmore v. Trask, 635.**

Preservation of issues—question not raised at trial—Plaintiffs did not preserve for appellate review the question of whether they were entitled to attorney fees where the contention was not raised at trial. **In re Kitchin v. Halifax Cty., 559.**

ASSOCIATIONS—Continued

lenge, by appropriate pleading, plaintiff homeowners association's power to impose the disputed assessment because: (1) while it is possible that N.C.G.S. § 55A-3-04 foreclosed defendants' argument regarding the validity of plaintiff's corporate actions, it did not prohibit defendants from challenging the underlying validity of the restrictive covenants as a matter of contract law; and (2) although homeowners in previous cases have challenged assessments by bringing injunctive actions and arguing that such assessments were ultra vires, the Court of Appeals has also previously allowed parties to assert a defensive challenge to the validity of assessment-related restrictive covenants without bringing a separate ultra vires action. **Willow Bend Homeowners Ass'n v. Robinson, 405.**

Homeowners association—power to impose assessment—welfare covenant—assessment of attorney fees—nonmaintenance expenditure—The trial court did not err by concluding as an alternative basis for judgment in plaintiff homeowners association's favor that a restrictive covenant allowing plaintiff to levy assessments "to promote the . . . welfare of residents" was not vague as to the right of plaintiff to assess attorney fees against its members which are incurred by plaintiff in defending itself and its members against claims brought against plaintiff. **Willow Bend Homeowners Ass'n v. Robinson, 405.**

Mandatory attorney fees—lien for assessments—The trial court did not err by denying plaintiff homeowners association's motion for attorney fees under the liens for assessments section of the North Carolina Planned Community Act (PCA) in N.C.G.S. § 47F-3-116(e) because the type of action created by this statute is not one in which a homeowner association sues on the underlying debt created by a homeowner's failure to pay an assessment, but instead the action created is one in which a homeowners association forecloses on a lien created under N.C.G.S. § 47F-3-116(a) for unpaid assessments, and in the instant case plaintiff has not sought to foreclose on a lien, but instead sued on the underlying debt owed by defendants. **Willow Bend Homeowners Ass'n v. Robinson, 405.**

AUTOMOBILES

Improper instruction—family purpose doctrine—new trial—The trial court erred in a negligence case arising out of an automobile accident by incorrectly instructing the jury regarding the family purpose doctrine, and defendant is entitled to a new trial because: (1) plaintiff sought to recover damages from defendant based on the doctrine of respondeat superior; (2) the trial court provided an altered version of the family purpose doctrine which extended the doctrine to cover company-owned vehicles and removed the requirement that the vehicle be provided for family use, thus failing to align with either traditional notions of liability under the doctrine of respondeat superior or the exceptional liability provided under the family purpose doctrine; and (3) the instruction constituted a misstatement of the law and likely misled the jury in its determination of defendant's liability. **Jackson v. Carland, 432.**

BURGLARY AND UNLAWFUL BREAKING OR ENTERING

Sufficiency of evidence—tool shed—There was sufficient evidence of breaking or entering and larceny by the former employee of a siding company who was accused of breaking into a shed where equipment was stored and taking equipment therefrom. **State v. Milligan, 677.**

CONSTITUTIONAL LAW

CONSTITUTIONAL LAW—Continued

IMMUNITY—Continued

animal control facility and an employee of the county health department in their individual capacities in an action arising from the quarantine of a dog. Although these two defendants were public employees rather than officers, there were no issues of material fact, plaintiffs offered only cursory legal support for the arguments, and plaintiffs did not address how the evidence supports the elements of each of their claims. **In re Kitchin v. Halifax Cty., 559.**

Governmental—quarantine of dog—officials—summary judgment—The trial court did not err by granting summary judgment for two of the defendants in their individual capacities based on governmental immunity in an action rising from the quarantine of a dog. One was the director of the county health department, the other the Animal Control Lead Officer; both positions were created by statute, exercised a portion of sovereign power, and exercised discretion. The allegations pertained to the performance of their official duties and did not allege corruption or actions beyond the scope of their duties. **In re Kitchin v. Halifax Cty., 559.**

Official capacity—home assessment performed by Department of Social Services—public duty doctrine inapplicable—The trial court did not err in a wrongful death action, alleging negligence of a county department of social services (DSS), by denying defendants' motion to dismiss plaintiff's complaint against them in their official capacities based on the public duty doctrine because the home assessment performed by DSS that is required by N.C.G.S. § 7B-302 is different from the mandatory statutory requirements of state agencies to protect the public in general and law enforcement departments who exercise a general duty to protect the public at large, and thus the public duty doctrine did not cover defendants. **Christmas v. Cabarrus Cty., 227.**

Public official immunity—failure to properly investigate suspected child abuse—failure to implement adequate policies and procedures for investigating reports of suspected abuse—The Industrial Commission did not err by denying defendant Department of Health and Human Services' (DHHS) motion to dismiss an action brought by a minor through her guardian ad litem under the North Carolina State Tort Claims Act for failure to properly investigate two reports of suspected child sexual abuse and negligence in failing to implement adequate policies and procedures for investigating reports of suspected abuse, even though DHHS asserted that plaintiff's claim was barred by public official immunity, because public official immunity only applies to claims brought against public officials in their individual capacities, and the Tort Claims Act only confers jurisdiction in the Industrial Commission over claims brought against State agencies; and plaintiff's action in the instant case, although based on the alleged negligence of six individuals, was brought in the Industrial Commission against DHHS, and not in superior court against the six in their individual capacities. **Patrick v. N.C. Dep't of Health & Human Servs., 713.**

Sovereign—implied indemnity claim—The trial court erred by denying the State's motion to dismiss an insurance provider's implied-in-law indemnity crossclaim based on sovereign immunity in an action arising from changes in the long term care plan offered to state employees. The insurer's claim was based only on indemnity implied-in-law, but the State waives sovereign immunity only when it expressly enters into a valid contract. **Carl v. State, 544.**

PUBLIC OFFICERS AND EMPLOYEES—Continued

impact of the publicity on NCDENR was neutral and not negative, that there was no lasting negative effect from the conduct giving rise to the fishing tickets, and that there was no adverse impact on impairment of petitioners' ability to do their jobs. **Kelly v. N.C. Dep't of Env't & Natural Res., 129.**

Fishing tickets—not conduct unbecoming—The trial court did not err by concluding that petitioners had not engaged in unacceptable personal conduct unbecoming a state employee where they had received fishing citations. The trial court made findings relating to each of the relevant factors and properly concluded that a rational nexus did not exist between the off-duty criminal activity giving rise to the fishing tickets and the potential adverse impact on petitioners' future ability to perform for the agency. **Kelly v. N.C. Dep't of Env't & Natural Res., 129.**

Whistleblower claims—prior administrative settlement—Summary judgment for defendants on a Whistleblower claim was reversed where plaintiff, a Highway Patrol trooper, had accepted the benefits of a settlement of a prior administrative action. Plaintiff did not allege Whistleblower claims in the administrative proceeding, the settlement did not contain a release, and Whistleblower remedies were not available in the administrative action. **Newberne v. N.C. Dep't of Crime Control & Pub. Safety, 703.**

Wrongful suspension—interest on back pay award—The trial court erred by awarding prejudgment and postjudgment interest on back pay awards for state employees wrongfully suspended. The State Personnel Commission rules specifically provide that the State shall not be required to pay interest on any back pay award. **Kelly v. N.C. Dep't of Env't & Natural Res., 129.**

SEARCH AND SEIZURE

Driver license checkpoint—motion to suppress—primary programmatic purpose—reasonableness—The trial court erred in a driving while impaired and driving while license revoked case by denying defendant's motion to suppress evidence obtained at a driver license checkpoint without making findings of fact as to the primary purpose and reasonableness of the checkpoint. **State v. Gabriel, 517.**

Traffic stop—warrantless search—motion to suppress—sufficiency of evidence—odor of marijuana—The trial court did not err in a possession of a firearm by a felon case by denying defendant's motion to suppress evidence obtained following a stop of his vehicle because an officer possessed reasonable suspicion to believe that defendant was operating his vehicle with an improper registration tag, and probable cause existed for a warrantless search of the vehicle when the officer detected the odor of marijuana emanating from defendant's vehicle as he approached it. **State v. Smith, 690.**

Warrantless search of shared dwelling—express refusal of consent by physically present resident—motion to suppress evidence—error not harmless beyond reasonable doubt—The trial court erred in a trafficking by possessing 100 or more but less than 500 dosage units of methylenedioxyamphetamine (MDA) and sale of Schedule I substance (MDA) case by denying defendant's motion to suppress evidence seized from his apartment when defendant refused consent but his wife agreed to allow the search to proceed. **State v. McDougald, 253.**

TERMINATION OF PARENTAL RIGHTS—Continued

pertinent findings of fact were supported by the testimony of the social worker at the termination proceeding and were not based on the prior orders; and (4) the findings were based on clear, cogent, and convincing evidence and support the trial court's conclusions of law that sufficient grounds existed to terminate respondent's parental rights to the juvenile based on a history of neglect and probability of repetition of the neglect. **In re S.D.J., 478.**

Jurisdiction—summons not signed, dated, or stamped—The trial court did not have jurisdiction to terminate parental rights where it lacked jurisdiction over the underlying juvenile file. The summonses were not signed or dated by the clerk of court, and did not contain an official stamp indicating their status as having been filed. **In re K.J.L., 272.**

Neglect—failure to make independent determination at time of hearing—oral testimony required—The trial court erred in a termination of parental rights case by failing to make an independent determination that neglect existed at the time of the termination hearing because allowing our courts to rely solely on documentary evidence would obviate the need for a termination hearing, thus conflicting with the court's duty to hear the evidence, and in the instant case the trial court entered an order based solely on the written reports of DSS and the guardian ad litem, prior court orders, and oral arguments by the attorneys involved in the case without the additional necessary oral testimony of witnesses. **In re A.M., J.M., 538.**

Neglect—sufficiency of findings of fact—The trial court did not err by concluding that grounds existed to terminate respondent mother's parental rights based on neglect because the trial court's findings were supported by evidence presented at the hearing and were sufficient to establish a history of neglect and the probability of future neglect. **In re S.D.J., 478.**

Subject matter jurisdiction—failure to issue summons in name of juvenile—The trial court did not err in a termination of parental rights case by concluding it had subject matter jurisdiction over the proceeding because: (1) even though the record before the Court of Appeals contained no summons issued to the juvenile naming the juvenile as a respondent in this matter, the captions of the summonses naming the parents as respondents state the name of the juvenile, and the guardians ad litem for the juvenile certified that they accepted service of the petition on the juvenile's behalf; and (2) there was no indication in the record that respondent was prejudiced in any way by petitioner's failure to properly issue a summons directed to and naming the juvenile as a respondent in this matter. **In re S.D.J., 478.**

Subject matter jurisdiction—failure to issue summonses in names of juveniles—caption of summons—The trial court had subject matter jurisdiction in a termination of parental rights case even though no summonses were issued in the juveniles' names as required by N.C.G.S. § 7B-1106(a)(5) because: (1) service on the guardian ad litem constitutes service on the juvenile, which is sufficient to establish subject matter jurisdiction when combined with naming the juvenile in the caption of the summons; and (2) in the instant case, the captions of the summonses naming the parents as respondents state the names of the juveniles, and the guardian ad litem for the juveniles certified that she accepted service of the petition on the juveniles' behalf. **In re N.C.H., G.D.H., D.G.H., 445.**

WORKERS' COMPENSATION—Continued

WORKERS' COMPENSATION—Continued

WORKERS' COMPENSATION—Continued

Lawn care services—not a reasonable medical expense—The Industrial Commission did not err in a workers' compensation case by denying lawn care services to plaintiff despite the inclusion of such services in a life care plan as a reasonable medical expense. The conclusion that the lawn care services were an ordinary expense of life not included in medical compensation was supported by the findings, and defendants are not necessarily required to pay for each item mentioned in the life care plan. **Scarboro v. Emery Worldwide Freight Corp., 488.**

Life care plan—reasonable rehabilitative service—The Industrial Commission's decision in a workers' compensation case that a life care plan was a reasonable rehabilitative service was supported by a physician's opinion that the plan was medically necessary for plaintiff. **Scarboro v. Emery Worldwide Freight Corp., 488.**

Occupational disease—synovitis in wrist—trauma in employment—The Industrial Commission did not err in a workers' compensation case by its finding of fact that plaintiff employee's synovitis in his wrist was not compensable as an injury by accident because: (1) although plaintiff contends the Commission misapprehended the law since synovitis is a listed occupational disease that did not require plaintiff to show his job placed him at an increased risk for developing the disease, the Commission found that there was no medical evidence of record that plaintiff's employment with defendant employer exposed him to an increased risk of developing a partial scapholunate ligament tear, a disease which was not included on the occupational disease list and for which plaintiff was required to prove it was due to causes and conditions which were characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of employment; (2) N.C.G.S. § 97-53(20) required plaintiff to show that the synovitis was caused by trauma in employment, meaning a series of events in employment occurring regularly, or at frequent intervals, over an extended period of time and culminating in the condition technically known as synovitis; (3) a doctor who examined plaintiff testified that a scapholunate ligament tear normally is caused by an acute injury and not by a repetitive process, and that the synovitis was probably the result of the ligament tear; and (4) although the evidence showed plaintiff's synovitis did result from the tear, the tear was not caused by plaintiff's employment. **Lanier v. Eddie Romanelle's, 166.**

Occupational disease—ulnar neuropathy—no showing of increased risk—The Industrial Commission did not err in a workers' compensation case by failing to conclude that plaintiff employee's ulnar neuropathy in his elbow was an occupational disease under N.C.G.S. § 97-53(13) because there was no evidence that plaintiff was exposed to an increased risk of developing ulnar neuropathy in his job as a sauté cook to a far greater degree and in a wholly different manner than is the public generally. **Lanier v. Eddie Romanelle's, 166.**

Post-injury employment—new employer—not make-work—Plaintiff did not show that the Industrial Commission misapplied the law in a worker's compensation case or that its findings were not based on competent evidence where plaintiff contended that the Commission erred by concluding that she was not entitled to benefits under N.C.G.S. § 97-29. Plaintiff argued that her post-injury job was so modified as to constitute make-work, but plaintiff was hired after her injury by a

WORD AND PHRASE INDEX